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Community Benefits Agreements in a Union City: How the Structure of CBAs May Result in Inefficient, Unfair Land Use Decisions

Steven M. Seigel*

Community benefits agreements (CBAs) are hailed by land use reform advocates as an effective, flexible, inclusive tool for making land use decision-making processes more responsive to traditionally underserved communities. Using the power of community organizing to gain leverage over developers as they navigate zoning and other regulatory chokepoints, CBAs allow traditionally disorganized residents and businesses to extract benefits and conditions directly from developers. This value capture process, reformists argue, helps reduce the negative impact of diffuse economic and social externalities that either cannot or will not be mitigated by the traditional land use regulatory apparatus.

The reformist narrative, however, fails to account for the overriding strength of one particular subset of participating interest groups—that of organized labor—in leading the charge for community benefits. Those interests, this paper argues, often wield disproportionate power in the informal negotiations underlying the formation of a CBA, and have structured CBAs so as to avoid the preemptive effects of federal labor law. In so doing, labor’s preeminent interests may undermine the very goals of efficiency, inclusion, and equity in distribution of developers’ rents that CBAs purport to advance.

This paper evaluates this claim by telling the story of one particular deal in New Haven: a CBA negotiated in advance of a public land sale to an independent charter school management organization. By analyzing the deal against both the historical development of CBAs and the normative criteria against which scholars have evaluated other land use controls, this paper aims to shed light on whether the structural incentives built into CBAs may underserve interests that the existing regulatory regime is designed to protect.

* J.D. Yale Law School, 2014; B.A. Williams College, 2004. This paper was written as part of Prof. Robert C. Ellickson’s seminar, the Urban Legal History of New Haven, in the spring of 2013.
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Introduction

For over 40 years, the Martin Luther King Elementary School sat on a flat, 5.6-acre plot of land on the West side of Dixwell Avenue in New Haven’s Newhallville neighborhood.\(^1\) Squat and rectangular, the school was but one example of the functionalist preference in 1960s school design, the unbroken lines of a solid brick façade interrupted only by a thick rainbow stripe upon which black and white portraits of historic black leaders are framed by circles of fading white paint.

Originally constructed in 1968,\(^2\) but unoccupied for years, the school has been called an “eyesore” by one of Newhallville’s two alderwomen, Brenda Foskey-Cyrus,\(^3\) taking its place alongside numerous other shuttered public and commercial institutions along the main avenue of the once-vibrant “Harlem of New Haven.”\(^4\) Gone is the Q-House community center, a mere half mile south on Dixwell Avenue from the MLK School.\(^5\) Gone, too, is Bob’s Market, a formerly vibrant marketplace and community gathering point, which stood less than two blocks from MLK’s front doors but closed in the 1980s.\(^6\) Newhallville’s grand avenue, instead, has become an epicenter of violence in the city. Crime data from 2000-2009 shows Newhallville suffered the largest absolute number of violent crimes during that period, and ranked seventh out of New Haven’s 29 census tracts for violent crime per capita.\(^7\)

Well over ten years ago, the City of New Haven viewed school construction projects as one critical method of promoting neighborhood

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7. MARIO GARCIA, NEW HAVEN PUBLIC HEALTH DEPARTMENT, CREATING A HEALTHY AND SAFE CITY: THE IMPACT OF VIOLENCE IN NEW HAVEN app. 4, at 2 (2011). The data show that during the 2000-2009 period, 1,412 violent crimes were reported in Newhallville, which maps onto only one census tract (1415). *Id.* Although other neighborhoods such as The Hill and Fair Haven revealed greater incidence of violent crime in total, those neighborhoods comprised multiple census tracts. *Id.*
revitalization, singling out several schools in Newhallville along the Dixwell Avenue corridor for renovation or demolition and new construction. A decade later in 2012, another school revitalization opportunity was presented to the neighborhood in the form of Achievement First—a not-for-profit, New Haven-based charter school network. Seeking to alleviate space constraints and improve the facilities of its Amistad High School in the Hill neighborhood across town, Achievement First saw promise in constructing a new school on the City-owned plot where MLK then stood. A new facility at 580 Dixwell would meet the needs of its growing student body while maintaining the school’s ties to underserved, economically-depressed neighborhoods within New Haven’s borders. By the end of 2013, the MLK

8. See CITY OF NEW HAVEN, CITY PLAN DEPARTMENT, COMPREHENSIVE PLAN, SECTION IV-HOUSING AND NEIGHBORHOOD PLANNING 15-16 (2002). The plan specifically identifies Newhallville’s Jackie Robinson School and Lincoln-Basset School—both a stones’ throw from 580 Dixwell Avenue—as key targets for revitalization, noting that “[a]s a city of neighborhoods, each residential area has distinct qualities that form a foundation for redevelopment. In particular, the school construction program provides an unparalleled opportunity to link neighborhood revitalization with the public school system.” Id.
School had been reduced to a pile of rubble, to be replaced shortly with a brand new, independently-owned and operated $35-million high school that will serve 550 students: the new, improved, Amistad Academy, funded entirely by state grants and private donations.9

But the road to redevelopment for Amistad Academy was not free of speed bumps. And the deceptively simple act of buying the parcel at 580 Dixwell revealed a host of treacherous political and legislative shoals, each of which threatened to scuttle the deal from the outset unless Achievement First was willing to relinquish substantial control over not only its use of the land, but also of the way in which it chose to operate its own school.

The negotiations that ultimately allowed Achievement First to build at 580 Dixwell tell a complex story of influence politics in which a particular subset of interest groups used community-organizing power to influence local government regulatory decisions and gain concessions from the developer. This process underscores the ascendant authority of organized labor in New Haven and highlights the waning influence of the once-dominant political force of the Dixwell clergy. More significantly, the outcome of the negotiations, crystalizing into one of New Haven’s most recent iterations of a community benefits agreement (CBA), offers lessons that illustrate both the potential benefits and tangible downsides of informal land use power-brokerage—negotiations that technically take place outside the narrow confines of “formal” land use regulatory processes, but which nevertheless control both the means and the ends of local land use debates.

This article sets out to tell the story of the negotiations surrounding the sale of 580 Dixwell. And in so doing it aims to describe and critique the emerging complexities surrounding the use of CBAs, both in New Haven and elsewhere across the country. Community groups have increasingly promoted the use of CBAs as a tool to force developers to internalize negative externalities that are not accounted for in local land use decision processes. Yet the current literature (and the cases studied therein) fail to accurately describe the CBA as a tool intentionally created by, and structured specifically to be useful for, a particular special interest: organized labor.10 Furthermore, the literature fails to

9. See discussion infra Part III.

10. The majority of the literature surrounding CBAs depicts organized labor as merely one group among many potential interest groups, including environmentalists, religious groups, housing advocates, anti-poverty advocates, and low-income residential and commercial neighbors. See, e.g., Patricia E. Salkin & Amy Lavine, Understanding Community Benefits Agreements: Equitable Development, Social Justice
evaluate the appropriateness of CBAs against the context of specific variables particular to a given land use decision—such as the type of land use action at issue and the identities of the parties in interest. Thus, while CBAs may yield clear advantages for communities seeking to make commercial redevelopment decisions more responsive to local needs, CBAs may also result in deleterious consequences, such as under protecting interests traditionally served by land use controls, or making more costly the provision of public or quasi-public goods.

In addition, because CBAs are negotiated in the shadow of government, free from the strictures of mandatory public oversight, important questions of transparency and representation must be addressed. Unions’ intentional strategy of using CBAs to evade the strictures of a highly preclusive federal labor law regime, for instance, raises the specter that unions’ advantages in community organizing may overwhelm a process aimed at resolving local issues—not because labor has any vested interest in the land-related impacts of the development itself, but because the process serves the instrumental end of circumventing federal labor law. The prevalence of labor interests that infused the Newhallville CBA negotiation reflects the muscular political power of new, union-affiliated politicians in New Haven, and perhaps suggests a need for enhanced scrutiny when the boundaries between private negotiations and public approval processes begin to dissolve.

The paper proceeds in five parts. Part I describes community benefits agreements generally and provides a historical account of their emergence, situating the CBA as one tool designed to serve the objectives of a progressive urban movement. Part II portrays the rise of CBAs within New Haven, set against the shifting dynamics of political power as it transitioned from machine politicians to an emergent class of labor-backed legislators. Part III tells the story of the CBA negotiated as part of the City of New Haven’s sale of the Martin Luther King School to Achievement First. Part IV undertakes a normative

and Other Considerations for Developers, Municipalities and Community Organizations, 26 UCLA J. ENV. L. & POL’y 291, 305 (2008). One scholar, Benjamin Sachs, has recognized CBAs as one of several tools that labor may rely on to undertake what he describes as “tripartite lawmaking,” allowing labor interests to gain leverage and influence labor policy without running afoul of federal labor laws. See discussion infra Part IV.C.2; infra note 134. Sachs analyzes the CBA from the perspective of what role it can play in crafting labor law at the local level. Although Sachs describes some of the collateral risks associated with this private ordering—as occurs with CBAs—his analysis is circumscribed, reserving for future study how severe these risks might be. This paper uses Sachs’ analysis to show that CBAs are structured peculiarly with labor interests in mind. See discussion infra Part IV.C.
evaluation of this particular CBA, offering observations applicable to the use of CBAs more generally. Part V concludes.

I. Income Inequality, the New Accountable Development Movement, and the Emergence of Community Benefits Agreements

The history of contemporary, progressive economic advocacy movements helps elucidate the redistributive impulses underlying community benefits agreements. Situating the emergence of CBAs within this broader movement helps identify the social and economic forces that prompted this innovation, and reveals the CBA as less of a tool designed to re-shape land use regulation than as one of several tactics aimed at achieving broader social and economic outcomes.

A. Income Inequality and the Accountable Development Movement

Localized income inequality is a modern fact of life in Connecticut. Once one of the most egalitarian states in the country (in terms of income distribution), over the past thirty years Connecticut is now at the leading edge of income disparity in the United States, despite the fact that Connecticut’s per capita income is one of the highest in the United States. By reference to the Gini coefficient, which provides a rough measure of the inequality of income distribution, Connecticut is second only to New York as the most unequal state, based on 2011 census estimates. A joint study by the Connecticut Voices for Children and Connecticut Association for Human Services reports that, over


12. See Bettina H. Aten et al., Real Personal Income and Regional Price Parities for States and Metropolitan Areas 2007-2011, in U.S. DEPARTMENT OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS, SURVEY OF CURRENT BUSINESS 91 (2013). Part of the disparity may be attributable to the rise of New York City commuter communities along the “gold coast” of southern Connecticut, such as Greenwich, Stamford, Westport and New Canaan, as well with the growing investment industry situated outside of Wall Street. See Osman Klic, Quinnipiac University School of Business, Alternative Investment Institute, State of Connecticut and the Hedge Fund Industry (2013); Kenneth R. Gosselin, Gold Coast Slips But Maintains Huge National Wealth Lead, HARTFORD COURANT (Aug. 9, 2010).

13. The Gini coefficient is a statistical measure, a ratio, wherein the larger the numeral the greater the income inequality among the residents of a nation, political subdivision or discrete political-geographical area. GINI Index, THE WORLD BANK, http://data.worldbank.org/indicator/SI.POV.GINI (last visited May 23, 2014).

the past thirty years, Connecticut’s income disparity has increased at a rate faster than any other state in the country.15

Within New Haven, wealth and income inequality are pervasive and tangible at the neighborhood level.16 The city comprises a hodge-podge

15. Id. at 8.
16. Income inequality in New Haven is by no means a modern phenomenon; rich and poor neighborhoods within the city have existed for centuries. For instance, Floyd Shumway and Richard Hegel contrast the aristocratic quality of Hillhouse Avenue with the working class neighborhoods that sprung up around the Orange Street axis. See, e.g., Floyd Shumway & Richard Hegel, New Haven in 1884, 30 J. NEW HAVEN COL. HIST. SOC’Y 1 (No. 2, Winter 1984). New Haven historian and urban scholar Douglas Rae also describes the distribution of low-wage workers in New Haven during the early twentieth century. See DOUGLAS W. RAE, CITY: URBANISM AND ITS END 120-27 (2003).
of higher, middle, and lower income neighborhoods, reflecting a national trend of urban disequilibrium that has varyingly been attributed to the effects of a globalized economy on urban environments, increasing stratification of income returns among high- and low-skilled workforces, and the attraction of unskilled immigrant workforce to urban economies. Wealth disparity in Connecticut writ large is highly correlated with the demographic profiles of state residents, and income disparity among white and minority families in New Haven appears to follow this trend.

Although academics and policymakers tend to agree that national economic inequality has the potential to yield deleterious effects,
some disagreement remains regarding the effects of localized inequality. Nevertheless, many progressive advocates reject a pure wealth-maximizing approach to economics, and view income inequality (whether local or national) as unambiguously harmful, advocating a range of social policies to equalize wealth and reduce the gap between rich and poor. While academics have noted the challenges associated with redistributive economic policies at the local level—namely, that the ease of migration of both individuals and firms in local economies (i.e., suburban flight and “mobile capital”) places practical limits on local governments attempting to implement redistributive or progressive policies—reformists have continued to seek out both formal and informal tools that help reduce the income gap in local communities.

Although the American anti-poverty movement has existed since at least the 1960s, a new wave of activism began in the 1990s to address poverty through wage reforms. Beginning with a grassroots campaign to pass a living wage bill in Baltimore, Maryland in 1994, a broad coalition of union locals, church congregations, affordable


22. See, e.g., Richard H. McAdams, Economic Costs of Inequality 2010 U. CHI. LEGAL F. 23 (2010); Clayton P. Gillette, Local Redistribution, Living Wage Ordinances, and Judicial Intervention, 101 NW. U.L. REV. 1057, 1058 (2007); Kristin Forbes, A Reassessment of the Relationship Between Inequality and Growth, 90 AM. ECON. REV. 869 (2000); Glaeser, supra note 18, at 7 (describing studies suggesting that local income inequality might benefit the poor by offering good employers, strong role-models, or encouraging the wealthy to contribute more to low income causes as a result of geographic proximity).


25. See Richard Schragger, Reviving Urban Liberalism, 7 HARV. L. & POL’Y REV. 901, 916, 925 (2013) (describing local ordinances that create effective bans on big box retailers as one mechanism of shifting power to low wage earners); RESOURCES, PARTNERSHIP FOR WORKING FAMILIES, http://www.forworkingfamilies.org/resources/tools (last visited May 23, 2014) (listing tools that advocacy groups have used to develop “strong and equitable urban economies”).

housing advocates, and other progressive nonprofits began a targeted campaign of economic and social justice reforms at the local level.27 Eschewing the glacial pace of federal or international policy changes, and decidedly pessimistic about the prospects of achieving reform through collective bargaining,28 activists leveraged networks of community organizers and grassroots groups to initiate a nation-wide movement of localized change—all designed to secure greater opportunities, amenities, and subsidies for local, low-income residents and employers.29

Particular areas of local politics proved receptive to these advocacy efforts—specifically, advocacy aimed at leveraging the power of local government as an instrument for regulating private capital and the workers employed thereby.30 One of the more salient tools for achieving this goal—the community benefits agreement—has recently emerged as a favored tool used by advocates to achieve site- or employer-specific redistributive policies in local communities. Coupling redistributive economic policy objectives with a reformist vision for more participatory local redevelopment politics, the “New Accountable Development Movement” has led the charge in promoting the use of CBAs to achieve two primary goals: (1) achieving the equitable redistribution of resources by regulating wages and employment policies on an employer-by-employer basis; and (2) giving greater voice and influence to marginalized or politically disadvantaged community-members in shaping the (re)development dialogue—as it pertains to both the economic and physical consequences of a given redevelopment project.31


28. See, e.g., Benjamin I. Sachs, Labor Law Renewal, 1 HARV. L. & POL’Y REV. 375 (2007) (describing the decentralization of labor law due, in part, to the inefficacy of federal labor law and policy); Chris Tilly, Living Wage Laws in the United States: The Dynamics of a Growing Movement, in THREATS AND OPPORTUNITIES IN CONTENTIOUS POLITICS (Maria Kousis & Charles Tilly, eds., 2005) (“Crippled by employer resistance that rendered the National Labor Relations Act largely ineffective, unions were losing most organizing drives. . . To many, local government appeared to offer the most promising opportunities for pro-worker action.”).

29. See supra note 25.


31. See Parks & Warren, supra note 27, at 89; Scott L. Cummings, Mobilization Lawyering: Community Economic Development in the Figueroa Corridor, 17
B. Anatomy of a CBA

At its most basic, a CBA is nothing more than a contract, the purpose of which is to guarantee local (and vocal) political support for—or a promise not to oppose—a developer’s proposed land use plan as it wends its way through the local land use regulatory process. To one side of the contract sits the developer—typically a large, commercial developer, backed by private capital. To the other sits, in theory, the “community”—though in practice this “community” tends to comprise a coalition of local grassroots organizations, which is frequently organized by labor-affiliate groups with substantial experience in grassroots coalition-building. The agreement normally contains a set of conditions that the developer will agree to in advance of official municipal regulatory decision-points like zoning approvals, land sales, or the allocation of municipal subsidies.

In exchange for these concessions, the community, in turn, agrees to either support, or eschew opposition to, the proposed project. Although the public hearing processes (and the court of public opinion more broadly) associated with land use regulation have almost always offered members of the affected community a chance to register their opinion of a given project, the CBA provides strength in numbers. It leverages the power of community organizing to secure a specific set of commitments that may or may not be possible to extract by individuals participating as individuals in land use processes.

1. COMMON TYPES OF BENEFITS

Although the coalition of interested parties may vary from project to project, a relatively common set of conditions appear in many


33. In the case of the Newhallville CBA, this organization took the form of the Connecticut Center for a New Economy (CCNE). See infra Part II. The organization that led the charge for the first recorded CBA was the Los Angeles Alliance for a New Economy (LAANE). See Salkin & Lavine, supra note 10, at 30. The Atlantic Yards CBA in Brooklyn, NY, was negotiated largely by the New York chapter of the now-defunct Association of Community Organizations for Reform Now (ACORN), alongside the Brooklyn United for Innovative Local Development (BUILD) and the Downtown Brooklyn Advisory and Oversight Committee (DBAOC). See Been, supra note 32, at 23.

34. E.g., Been, supra note 32, at 5; see Foster & Glick, supra note 31, at 2010.

35. See Parks & Warren, supra note 27, at 90; Salkin & Lavine, supra note 10, at 295-96.
of the most well-documented CBA processes. One grouping of conditions concerns the hiring and employment policies of either the developer’s construction contractors or the businesses arising out of the development. For the permanent businesses, this may include prevailing or living wage requirements, card check and neutrality agreements, mandatory benefits programs, diversity

36. As an example, Murtaza Baxamusa’s doctoral dissertation groups the benefits that were the subject of the Ballpark Village CBA in San Diego into three distinct categories: “Environmental”; “Housing & Neighborhood”; and “Economic & Employment.” Murtaza Hatim Baxamusa, Beyond the Limits to Planning for Equity: The Emergence of Community Benefits Agreements as Empowerment Models in Participatory Processes 105 (May 2008) (unpublished Ph.D. dissertation University of Southern California) (on file with author); see also Thomas A. Musil, The Sleeping Giant: Community Benefit Agreements and Urban Development, 44 URB. LAW. 827, 831 (2012) (categorizing four distinct types of “community goals” negotiated in the CBA process).

37. Gates-Cherokee CBA (Denver, CO) (“a[n unprecedented agreement to pay prevailing wages”); Dearborn Street CBA (Seattle, WA); Ballpark Village CBA (San Diego, CA) (“the hourly wage rates and Health Benefits Rate shall be upwardly adjusted each July 1 to reflect the change in the Consumer Price Index”); CIM Project CBA (San Jose, CA) (“Apply the living wage provisions set forth in the City’s Living Wage Policy to grocery stores over 10,000 square feet, department stores with food service, and hotels.”). The Partnership for Working Families website maintains a relatively thorough compilation of CBAs currently in effect. See Policy & Tools: Community Benefits Agreements and Policies In Effect, PARTNERSHIP FOR WORKING FAMILIES, http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect (last visited May 23, 2014); see also THE PUBLIC LAW CENTER, SUMMARY AND INDEX OF COMMUNITY BENEFIT AGREEMENTS (2011) [hereinafter: SUMMARY OF CBAS]. Unless otherwise noted, all provisions of the CBAs referred to in this section are documented on the Partnership for Working Families website.

38. “Card check” is a method of certifying a union that bypasses the typical secret-ballot election process overseen by the National Labor Relations Board. Under card check, unions rely on union “authorization” cards that an employee signs signaling his or her consent to union representation. See Paul C. Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1806 (1983). Once the union secures a majority of card signatures from the targeted workforce, the union is automatically certified. Id. Neutrality agreements are commitments by the employer to remain neutral during a union organizing campaign. Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms, 90 IOWA L. REV. 819, 821 (2005). CBAs that have provided some form of either or both types of agreements include: Hill District CBA (Pittsburgh, PA); Yale-New Haven Hospital CBA (New Haven, CT); Bayview Hunters Point CBA (San Francisco, CA) (“require any Hotel or Restaurant Project . . . to comply with the provisions of the San Francisco Administrative Code Section 23.50 to 23.56 [the ‘City Card Check Policy’]”); Sugar House CBA (Philadelphia, PA), see SUMMARY OF CBAS, supra note 37, at 30. The neutrality and card check agreement was not included as a formal element of the CBA in the case of Yale-New Haven. See infra note 336. The Dearborn Street CBA (Seattle, WA) also included labor neutrality and card check; but presumably is not included on the Partnership for Working Families website because the project went bankrupt. A copy of the document, however, is available at: http://juliangross.net/docs/CBA/Dearborn_Street_Agreement.pdf.

39. Staples Center CBA (Los Angeles, CA); NoHo Commons CBA (Los Angeles, CA); Lorenzo Project CBA (Los Angeles, CA) (“provide for a coordinated effort
quotas, or local hire provisions such as hiring quotas for a particular geographic or economically-disadvantaged group. The developer’s own contractors may also be held to similar requirements, and CBAs have frequently demanded that developers comply with state or municipal “responsible contracting” laws and ordinances—normally applicable only to public sector contractors—which prohibit developers from contracting with businesses that have previously violated public works, labor, or occupational health and safety laws.

A second set of conditions are analogous to those required for developers to secure certain land use approvals or permits—such as bid requirements for city-issued RFPs for land sales, impact fees, or concessions granted as part of a conditional zoning scheme. These conditions traditionally address concerns of local residents or area businesses that may be affected by a new, large development in the area. For instance, with regards to housing, a CBA may include agreements to provide a set number of affordable-, family-, or senior-housing units. Alternately, a developer might commit to providing permanent, affordable housing in the nearby area to low-income
residents displaced by the development.\textsuperscript{45} Local small businesses might also receive set-asides for a certain percentage of the resulting retail space,\textsuperscript{46} or rental subsidies to help defray the cost of relocation.\textsuperscript{47} Additionally, agreements may require commitments from the developer to provide—or make good faith efforts to secure—specific amenities or community services, such as grocery stores,\textsuperscript{48} child-care centers,\textsuperscript{49} parks,\textsuperscript{50} schools,\textsuperscript{51} or community centers.\textsuperscript{52} These facilities may be provided directly by the developer, or may come in the form of grants or assistance to public entities or local community groups.\textsuperscript{53} Additionally, some CBAs have secured benefits that appear identical to those that might be required as part of a conditional use permit, such as funds to assist in creating additional

\begin{footnotesize}
\begin{enumerate}
\item[45.] Staples Center CBA (Los Angeles, CA) ("The Developer agrees to meet and confer with the Coalition, City Councilmembers, Agency board and staff, and other City staff in effort to seek and obtain permanent affordable housing for families relocated in connection with the development of the STAPLES Center.").
\item[46.] CIM Project CBA (San Jose, CA); Atlantic Yards CBA (New York, NY).
\item[47.] Dearborn Street CBA (Seattle, WA) (see supra note 38) ("Offer below-market rents on 5,000 square feet of space in the project to community nonprofits . . .").
\item[48.] Ballpark Village CBA (San Diego, CA) ("Developer shall use diligent, good-faith efforts to cause the leasing of the space (the ‘Grocery Store Space’) within the Project intended for the purpose of a grocery store . . ."); Hill District CBA (Pittsburgh, PA) ("The Public Entities and the URA will use diligent good faith efforts to establish within the Hill District a crockery store, pursuant to the Hill District Master Plan and/or public participation process.").
\item[49.] CIM Project CBA (San Jose, CA) ("The developer should work with City staff and other specialists in the childcare field to determine whether childcare is a viable opportunity for the project.").
\item[50.] Staples Center CBA (Los Angeles, CA) ("Following the completion of the needs assessment, the Developer shall fund or cause to be privately funded at least one million dollars ($1,000,000) for the creation or improvement of one or more parks and recreation facilities . . ."); The Gateway Center at Bronx Terminal Market CBA (New York, NY) (see \textit{Summary of CBAs}, supra note 37, at 22).
\item[51.] Atlantic Yards CBA (New York, NY) ("Benefits within this Agreement are organized into eight categories . . . (8) educational and related services").
\item[52.] Marlton Square CBA (Los Angeles, CA) ("The Developer shall dedicate at least 1.8 acres at the Site for a facility to be used for community services . . ."); Dearborn Street CBA (see supra note 38) ("Contribute $200,000 for design of a community center in little Saigon"); Minneapolis Digital Inclusion CBA (Minneapolis, MN) (see \textit{Summary of CBAs}, supra note 37, at 19) ("CBAs need not be limited to physical developments. The agreement was made in relation to the creation of a city-wide wi-fi network . . .").
\item[53.] Kingsbridge Armory CBA (New York, NY); Yale-New Haven CBA (New Haven, CT) ("The purpose of this Community Benefits Program for the Kingsbridge National Ice Center in the Kingsbridge Armory on West Kingsbridge Road in the Northwest Bronx is to provide for a coordinated effort between the Coalition and Developer to maximize the benefits of the Project to the Northwest Bronx community and for the community to support the Project."); Columbia Expansion CBA (New York, NY) (see \textit{Summary of CBAs}, supra note 37, at 26).
\end{enumerate}
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parking for residents,\textsuperscript{54} or a commitment of funds to help the city create a residential permit parking program.\textsuperscript{55}

A third set of conditions relate to what I will call “tertiary” or “hook” benefits: conditions which neither directly mitigate the effect of a given development on area businesses or residence, nor serve the redistributive economic policy goals of wage and employment commitments. These benefits help to broaden the coalition of interest groups by sharing value captured by the CBA process to potentially agnostic organizations. They take a variety of forms, from environmental guarantees that extend beyond basic remediation requirements (such as LEED certification for new construction\textsuperscript{56} or other green building requirements,\textsuperscript{57} limitations on diesel vehicle idling,\textsuperscript{58} or more extensive remediation standards\textsuperscript{59}) to policies aimed at excluding specific types of businesses (such as permanent bans on leases to payday lenders and pawn shops).\textsuperscript{60} Many CBAs also include cash grants or other financial commitments to support a hodge-podge of social causes: guaranteeing funding for social outreach coordinators to address the problems of asthma and uninsured children,\textsuperscript{61} contributing to urban youth development programs,\textsuperscript{62} funding for economic impact studies or master planning processes,\textsuperscript{63} or funding to finance neighborhood improvement projects.\textsuperscript{64} One CBA even contained a commitment by the developer

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\item \textsuperscript{54} Peninsula Compost Company CBA (Wilmington, DE) (\textit{see Summary of CBAs supra} note 36, at 37).
\item \textsuperscript{55} Staples Center CBA (Los Angeles, CA); Hollywood and Highlands CBA (Los Angeles, CA) (“The Developer shall assist the Coalition with the establishment of a residential permit parking program as set forth below.”).
\item \textsuperscript{56} Ballpark Village CBA (San Diego, CA); Hill District CBA (Pittsburgh, PA) (“The Parties hereby acknowledge that the New Arena Development Agreement provides that a LEED Certification Plan will be prepared in connection with the construction of the New Arena.”).
\item \textsuperscript{57} LAX Airport CBA (Los Angeles, CA); Atlantic Yards CBA (New York, NY); Harrison Neighborhood CBA (Minneapolis, MN) (\textit{see Summary of CBAs, supra} note 37, at 43).
\item \textsuperscript{58} Ballpark Village CBA (San Diego, CA) (“Developer shall ensure that trucks on or near the Site for purposes of construction of the Project comply with the California Air Resources Board’s heavy-duty diesel idling control measure regarding truck idling.”).
\item \textsuperscript{59} LAX Airport CBA (Los Angeles, CA); SunQuest CBA (Los Angeles, CA); Atlantic Yards CBA (New York, NY).
\item \textsuperscript{60} Dearborn Street CBA (Seattle, WA). \textit{See supra} note 38.
\item \textsuperscript{61} Yale-New Haven CBA (New Haven, CT).
\item \textsuperscript{62} Yale New Haven CBA (New Haven, CT); Newhallville-Amistad CBA. \textit{See discussion infra} Part III.
\item \textsuperscript{63} Hill District CBA (Pittsburgh, PA); Ballpark Village (San Jose, CA).
\item \textsuperscript{64} Sunquest CBA (Los Angeles, CA).
\end{itemize}
not to oppose an anti-formula retail ordinance (otherwise known as an anti-big-box or anti-Wal-Mart ordinance).  

2. PUBLIC AND PRIVATE CBAS

CBAs are by definition non-governmental contracts; the developer is one party and an unspecified group of actors—typically a coalition—constitutes the other. These “private” CBAs stand conceptually in contrast with “public” CBAs, which one scholar has defined as “community benefits commitments set forth solely in a development agreement, but resulting from a broadly inclusive, focused process.” This binary distinction between “private” and “public” CBAs belies many of the peculiarities involved from agreement to agreement, and does not reflect the myriad ways in which government may be involved in their formulation.

Nevertheless, CBA proponents have broadcast a clear preference for “private” CBAs, going so far as to exclude from the definition any agreement that involves government ratification. The concern with whether the agreement is “public” or “private” stems from three impulses: control over enforcement; concerns about voidability based on unconstitutional exactions; and concerns about the preemptive force of federal labor law.

First, proponents advocate for private CBAs as a way to ensure that the commitments may be enforced by its beneficiaries, rather than relying on the local government to police the contours of the document.

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65. Dearborn Street CBA (Seattle, WA) (“Developer shall not oppose a “formula retail” ordinance or similar zoning legislation by City Council . . . which would prohibit follow-on big box, national chain retail development in the area . . .”). See supra note 38.


67. In the case of the Newhallville-Amistad CBA, two members of the New Haven Board of Aldermen were included as signatories to the final agreement. It is not clear, however, whether they signed the agreement in their official or individual capacity.

68. See, e.g., Gross, supra note 66, at 45; David A. Marcello, Community Benefit Agreements: New Vehicle for Investment in America’s Neighborhoods, 39 Urb. Law. 657, 660-61 (2007) (contrasting CBAs with development agreements, which he labels as public-private partnerships, and noting that “CBAs . . . are negotiated and executed directly between community representatives and a developer; by contrast, community members are frequently nowhere to be found in the bilateral PPP negotiations between a developer and a municipal entity.”).

69. See Gross, supra note 66, at 46.
One of the largest organizers of CBAs, the Los Angeles Alliance for a New Economy (LAANE), proposed shifting to a wholly private CBA model after noting dissatisfaction with the development agreement model. Because these “public” benefits were negotiated directly between the developer and the city, beneficiary groups were unable to resort to court enforcement when the city proved either unable or unwilling to satisfactorily enforce the contract. Furthermore, as one CBA scholar has observed, once the developer clears any regulatory approval processes with the support of a community coalition, the coalition’s influence is substantially diminished. The city’s desire to maintain cooperative relationships with large developers, combined with high turnover in both elected and civil service, reduces the city’s incentives to exact strict enforcement. In addition, when beneficiary groups are not included as signatories, local governments may have the prerogative to modify the development agreement later in time with the consent of the developer, bypassing the wishes of the beneficiary groups.

Second, CBA advocates remain concerned that public ratification of the agreement may render the agreement vulnerable to attack as an unconstitutional exaction. Although encouraging participation of democratically elected officials may bolster the accountability and legitimacy of the negotiation process, by excluding government officials entirely, the negotiating coalition may secure a broader range of benefits that will not risk triggering constitutional scrutiny.

70. Cummings, supra note 31, at 319.
72. Id.
74. See Been, supra note 32, at 27-28. Been observes that, depending on the specific structure of the CBA and the degree of involvement by government officials, CBAs could be declared unconstitutional based on the existing constitutional doctrine. The implications of these doctrines—crystallized in Nollan v. California Coastal Commission, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994)—are discussed in Part IV.B infra. See infra note 293 and accompanying text; see also Michael L. Nadler, The Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem, 43 Urb. Law. 587, 605 (2011) (proposing that courts use the state action doctrine to determine whether a CBA should be shielded from scrutiny under Nollan and Dolan).
75. See Nadler, supra note 74, at 625 (“communities [face an] unappealing choice between having their interests represented by government officials who can be held accountable via the democratic process but whose participation will require all of the community benefits to comply with the “essential nexus” and “rough proportionality” tests, or excluding such officials from the negotiation process in the hopes that the potential for community benefits that would be excluded by Nollan and Dolan outweighs the risks of having negotiators who do not answer directly to the community”).
Third, where the negotiations involve labor-related commitments like neutrality and card check agreements, the "private" nature of the contract is essential to avoid the preemptive force of federal labor law.76 Under federal labor law, district courts are able to enforce contracts in which unions and employers agree to specific provisions that would otherwise be governed by federal statutes—including agreements by the developer to remain neutral during union organizing campaigns, and provisions through which the employer will automatically recognize the union (without a secret ballot vote) if the union shows that a majority of employees have signed cards agreeing to be represented by the union.77 However, these agreements must be private; local government involvement in shaping the rules governing union organizing is precluded by federal labor law.78

These three impulses provide a strong incentive for negotiating coalitions to prioritize private agreements over the model envisioned by development agreements and similar public-private partnerships.

C. The Emergence of CBAs and the Role of Labor-Related Advocacy

Although most scholars cite the 2001 Los Angeles Staples Center agreement as the Magna Carta of the modern CBA movement,79 gathering broad interest group constituencies to exact promises from large urban employers is not new. Beginning in Los Angeles in the 1980s, labor groups devised innovative strategies designed to apply pressure outside of the confines of the National Labor Relations Act.80

One of the first iterations of the modern labor-community alliance—the Labor/Community Coalition to Keep GM Van Nuys Open—formed in response to a threatened plant shutdown by General Motors in the Van Nuys neighborhood of Los Angeles in 1981.81 The United Auto Workers (UAW) Local 645 sought partnerships with a variety of grassroots organizations, churches, academics, and activists—particularly in

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76. See discussion infra Part IV.C.2.
77. See, e.g., Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 565 (2d Cir. 1993); Georgetown Hotel v. NLRB, 835 F.2d 1467, 1470-71 (D.C. Cir.1987).
78. See discussion infra Part IV.C.2.
the Latino community (many of whom worked at the plant)—to express vocal opposition to the closing and threaten a boycott if the plans went through. The initial Coalition solidified into a permanent organization, the Labor/Community Strategy Center (LCSC), which organized events and demonstrations throughout the 1980s to maintain pressure on GM, managing to keep the plant open for 10 years longer than the closing date announced by GM.

The Van Nuys strategy served as a model in the 1990s, when the dwindling manufacturing base and increasing tendency of corporations to source cheap labor from abroad convinced advocates to re-think the targets of organizing efforts, honing in on industries and sectors that were less likely to withdraw from the local economy. Two leaders within the Hotel Employees and Restaurant Employees Union (HERE) helped form a new organization called the Tourism Industry Development Council (TIDC)—a labor/community coalition that advocated for benefits ranging from employer-specific advocacy to lobbying for a municipal living wage ordinance. In contrast with the Van Nuys strategy of the 1980s, TIDC focused its organizing efforts on so-called “sticky” industries—i.e., sectors in which it was difficult, if not impossible, to outsource labor inputs or automate work functions: retail stores, hotels, restaurants, hospitals, construction, and janitorial services.

After changing its name to the Los Angeles Alliance for a New Economy (LAANE) in the late 1990s, the group set its sights on large urban development projects, leveraging the influence of its organizing capacity to secure concessions from private developers across the city in exchange for support in public permitting processes. For instance, in exchange for support from its 60-member coalition, LAANE helped Universal Studies secure construction and zoning permits before

84. See Katherine V.W. Stone, Globalization and the Middle Class, UCLA Institute for Research on Labor and Employment, Working Paper (December 2012); Schragger, supra note 24, at 484 (noting that “[w]hile potentially painful, plant closings, the movement of manufacturing to the South or overseas, the movement of persons out of old, cold cities to new, warm ones, or out of cities into suburbs, are unavoidable consequences of relatively open economic markets”).
86. See Stone, Globalization, supra note 84, at 20-21.
the Los Angeles City Council and the County Board of Supervisors.\footnote{87} In return, LAANE secured an agreement that all jobs would comply with the city’s living wage ordinance.\footnote{88} A similar negotiating tactic helped LAANE secure analogous concessions from TrizecHahn Development Corporation in its redevelopment of eight and a half acres at the corner of Hollywood Boulevard and Highland Avenue.\footnote{89}

By the time the first “private” CBAs arrived on the scene in 2001,\footnote{90} LAANE had already developed clear strategies for gaining leverage in land use regulatory controls—LAANE, would serve as the behind-the-scenes coordinator, generating momentum for and organizing grassroots, geographically-specific coalitions that would ultimately serve as the lead negotiators with the private developers. In the case of the Staples Center CBA, for instance, LAANE led the process of gathering the lead negotiating coalition. Working with HERE Local 11 and another prominent economic justice advocacy group,\footnote{91} LAANE built a 30-member coalition, called the Figueroa Corridor Coalition for Economic Justice, to oversee negotiations.\footnote{92}

This strategy—of creating issue-specific coalitions—served as the model for new organizing efforts in the rest of the country. And it set the foundation for the emergence of CBAs in New Haven when a nascent labor affiliate group, the Connecticut Center for a New Economy (CCNE), began—with help from LAANE\footnote{93}—its efforts to...
organize Yale New Haven Hospital. The history of CBAs will be discussed in greater depth below. But to fully appreciate the merger of community organizing with traditional land use regulation, it is important to explore the unique political and legal background of urban redevelopment and labor in New Haven.

II. Politics and Urban Land Use in New Haven

Although CBAs are a phenomenon of recent vintage, the issue of community engagement in (and the struggle for control over) urban redevelopment has been a longstanding and contentious concern in modern New Haven, sitting at the confluence of two major trends in its urban history. First, the indignities suffered by disempowered minority residents, many of whom who were systematically excluded from participation in the urban renewal process, led to a rising demand for greater community engagement in the politics and policy-making of urban land use, economic development, and poverty reduction. Second, the rise of Yale as the leading employer of a deindustrializing town offered a larger target for once-dormant union organizers. The renewed growth of the labor movement in New Haven throughout the 1980s and 1990s was propelled, in part, by the expansion of the collective bargaining agenda to include a broader platform of activism that incorporated the concerns of non-union employees and local residents. This so-called “social movement unionism” resulted not only in resounding wins for the labor movement across a range of employment sectors, but also culminated in the infusion of labor-backed political candidates into the New Haven Board of Alderman.


A. Urban Renewal and Its Backlash

Beginning in the 1950s, New Haven experienced a conflation of social and economic trends that were in no ways unique in urban centers across the United States: deindustrialization; white flight (spurred by the expansion of the interstate highway system and affordable mortgages for WWII veterans); the dilapidation of affordable housing stock; and the gradual erosion of the urban center. The suburban exodus of mostly white, middle class urban residents left city centers bereft of economic vitality, and urban poverty began to climb precipitously, spawning efforts at the local, state, and federal level to identify solutions to the problem of urban decline. The Housing Act of 1949, designed to “advance[] the growth, wealth, and security of the Nation,” offered federal subsidies to subnational governments to appropriate, demolish, and rebuild “slums and blighted areas” in order to make way for the redevelopment of urban communities and the expansion of public housing. Inevitably, slum clearance involved the displacement of large numbers of slum dwellers, most of whom, at the time, were non-white. Because the statutory grants gave substantial discretion to local authorities in deciding where, when, and how to proceed with urban renewal grants, minority residents had few opportunities to redress the myriad grievances arising out of implementation of federal urban renewal monies.

Urban Renewal in New Haven was no exception; under the auspices of Mayor Dick Lee, New Haven became the largest per-capita beneficiary of federal urban renewal dollars, carrying some seven large-scale clearance projects, and, in the process, displacing approximately 8,000 households. Local citizens, dissatisfied with the highly centralized process by which urban renewal projects were undertaken,
developed new models of grassroots civic participation, aiming to counteract the exclusion that engendered wide-spread resistance to New Haven’s urban redevelopment.105

B. Union-led Coalition-Building Takes Root

Proceeding in parallel, New Haven’s labor movement saw tremendous advantages in developing a more diverse, pro-poor coalition of community groups as it struggled to renegotiate union contract terms with the city’s largest employer: Yale University.106 HERE Local 34, representing clerical and technical workers, and Local 35, representing service and maintenance workers, had struggled to unionize Yale University workforces for decades.107 In 1985, with substantial support from Local 35, Local 34 signed its first contract with Yale after a 10-week strike.108 The following year both locals signed contracts through joint negotiations.109

A decade later, responding to the University’s attempts to reduce wages, cut benefits, and roll back union control,110 the Federation of University Employees (which included HERE Locals 34 and 35) initiated a strike in 1996, seeking to scuttle the University’s aggressive anti-labor proposals, including a commitment to refrain from subcontracting out to dining hall employees.111 After ten weeks of strikes, it

105. See Jackson, supra note 95, at 152-60. The distrust, frustration, and anger arising from socially dissociative policies was felt quite acutely in New Haven’s poorest neighborhoods. The riots in 1967 in New Haven’s Hill neighborhood illustrated and magnified this distrust, and underscored the need to shift tactics to develop a model of citizen participation that more accurately reflected the social fabric of the affected neighborhoods. Id. at 147-58; 152.


108. Id. at 367.


110. See Gordon Lafer, Land and Labor in the Post-Industrial University Town: Remaking Social Geography, 22 Pol. Geography 89, 110 (2003); Dorian T. Warren & Cathy Cohen, Organizing at the Intersection of Labor and Civil Rights: A Case Study of New Haven, 2 U. Pa. J. Lab. & Emp. L. 629, 640-41 (2000). Lafer recites numerous allegations of aggressive management-side labor practices, including workforce segmentation, limiting the hours a part-time employee could work so as to avoid contractually-mandated health benefits, and increasing the incidence of subcontracting and hiring of independent contractors. Warren and Cohen corroborate these allegations in their account of the 1996 negotiations, where the authors’ interviews contended that Yale planned to contract out 600 union jobs to a non-union subcontractor. Id. at 640.

became clear that “striking alone would not win [the] battle,” and that organized labor needed to find allies outside of the narrow class of concerned employees. A broader coalition of community advocates was needed.

Yet the historical insularity and racial hierarchies within New Haven’s union leadership presented a problem as locals 34 and 35 attempted to recruit broader support from New Haven residents. Although New Haven’s labor groups had long organized substantial portions of blue-collar workers, union leadership remained predominantly white, and had failed to forge relationships with the increasingly concentrated minority communities of New Haven. Faced with the prospect of enduring strikes, one of Local 34’s emerging organizers, Andrea van den Heever (then Cole), was tasked with building alliances between the union locals and grassroots community groups across the city. As a white South African émigré who had, during the 1980s, established herself as a bridge-builder during the anti-apartheid movement, van den Heever had garnered trust and support from diverse members of New Haven’s minority communities in organizing efforts during the 1980s. Van den Heever had partially exhausted her social capital with New Haven community groups during labor contract renegotiations in 1989 and 1992, during which she had managed to secure community support, but had, for a variety of reasons (including thin staffing and limited resources within the unions) failed to deliver reciprocal commitments.

During the 1996 strike, van den Heever worked to develop a more robust grassroots machine. Using a computerized mapping program, the unions identified union-members’ residences and established neighborhood

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113. See Williams & Smith, supra note 106, at 67-68.
114. See Rae, supra note 16, at 414.
117. See Warren & Cohen, supra note 110, at 639; Lang, supra note 94, at 1.
118. See Warren & Cohen, supra note 110, at 639-40 (noting that van den Heever encountered resentment due to the “absence of the union” during the periods between contract negotiations, and that a job training program conceptualized by the union to meet community needs had failed to address the true objectives of community-members, which was a jobs pipeline into Yale, which had historically hired few New Haven residents).
organizing committees that held meetings to draw out the narrative of the effect of a failed contract renegotiation. By asking union members to present their struggles before family, friends, neighbors, politicians, and members of the clergy, the locals identified a mechanism to ensure the struggles of individual workers resonated in the broader community context.\footnote{119. See id. at 641.}

Shifting from an internally focused organizing strategy towards an outward-facing, popular appeal proved critical. The union sought to situate employees within their neighborhoods and communities,\footnote{120. See id.} drawing strong support from powerful ecclesiastical, civic, and political groups such as the local chapter of the NAACP.\footnote{121. See Lafer, supra note 110, at 112.} A critical ally in this struggle—and a group that would reappear in a much different posture during the Newhallville controversy—was the Greater New Haven Clergy Association, led by the well-known and politically powerful Rev. Boise Kimber. In late November, Rev. Kimber released a vitriolic statement condemning Yale’s position;\footnote{122. See id. at 89 (“Yale has been engaged in a vicious attack on the working families in our community . . . this enormously wealthy and powerful institution will go to any lengths, break any law, in its effort to crush the will of . . . our fellow citizens.”).} in mid-December, the momentum of the movement against Yale had gone national, culminating in a 300-person demonstration attended by John Sweeney (then President of the AFL-CIO), the president of the New Haven NAACP, and the Secretary of the State of Connecticut.\footnote{123. Id. at 112; Warren & Cohen, supra note 110, at 641.} Before the end of the year, negotiations were complete, with Yale agreeing to forego its plan to subcontract dining hall employees.\footnote{124. See Rabinovitz, supra note 111.}

From that point on, van den Heever’s innovation of building reciprocal labor-community partnerships would become a centerpiece of labor organizing strategies in New Haven. Drawing on lessons from the 1996 Yale campaign, in 1997 and 1998 van den Heever played a key role in organizing community resistance to help enforce a neutrality agreement embedded in a development between the City and prominent real estate developer David Cordish.\footnote{125. See Warren & Cohen, supra note 110, at 643-53. Cordish sought to renovate the faded, defunct, and then-bankrupt Park Plaza hotel in downtown New Haven, promising to create 250 jobs and generate a quarter million dollars in taxes per year in exchange for a $17 million redevelopment subsidy. See Joseph Blocher, Note, Private Business as Public Good: Hotel Development and Kelo, 24 YALE L. & POL’Y REV. 363, 387 (2006). HERE Local 217, which formerly represented workers at the Park Plaza, held a seat at the table during the initial negotiations with New}
both campaigns led van den Heever in 2000 to institutionalize the labor-community partnership model in the form of the Connecticut Center for a New Economy (CCNE), which was established as a permanent adjunct organization to UNITE-HERE local affiliates in downtown New Haven. In its mission statement, CCNE broadly aspires to reduce income inequality, build power, and combat economic, social, and racial injustice in Connecticut; however, an article co-written by the chairwoman of CCNE’s board of Directors states clearly that CCNE’s primary objective is to reduce income inequality in New Haven and, more recently, Hartford.

Haven and Cordish, and had sought several commitments from Cordish—such as a neutrality agreement and a local jobs training program—that the union believed were in the interests of both future workers and the community at large. See Warren & Cohen, supra note 110, at 645. Non-labor activists such as the NAACP, however, took note of a clause within the development agreement that committed the city to relocate several bus routes near the new hotel. Perceiving the rerouting as grounded in racist and classist motives—namely, to buffer out lower class residents from the hotel’s immediate vicinity—local community groups mobilized without the support of the unions. Id. at 646. Worried that vocal support of the community movement’s fight over the bus routes might jeopardize the neutrality agreement with the hotel, Local 271 remained conspicuously absent from the dialogue, instead waiting until city reached a compromise agreement with Cordish, and only thereafter diving in to form a collaborative coalition to direct the implementation of the jobs training program to ensure it met community expectations. Id. Nevertheless, labor’s concerted support to leverage its negotiating power over the training program yielded great benefits when the hotel attempted to evade its prior commitment to guarantee a neutrality agreement. Id. at 650. Local 217 managed to garner broad community support for the neutrality agreement, forming a powerful coalition that used a number of political levers—from protests and strikes to letter-writing campaigns—to wear down the hotel’s resistance to union organizing. After an eight-month battle, the hotel and Local 217 settled, with the union granting a no-strike/no-lockout commitment in exchange for the hotel’s implementation of the neutrality agreement. Id. at 651-52.


128. CCNE and Locals 34 and 35 reside in the same office building at 425 College Street, New Haven. When the author visited CCNE to speak to its representatives, the door of CCNE was closed, with a sign on it reading “Deliver All Mail to CCNE to Second Floor Receptionist.” The second floor receptionist is the receptionist for UNITE-HERE Locals 34 and 35.


C. New Haven’s First Community Benefits Agreement

In 2004, CCNE had the opportunity to merge its unique approach to “social movement unionism” with the tactical innovation of CBA emerging out of its “sister organization” in Los Angeles, LAANE.131 Six years earlier, District 1199 of the New Haven Health Care Employees Union (now part of the SEIU umbrella) had begun a drive to organize approximately 1,800 hospital service employees in the Yale-New Haven Hospital.132 The union recognition and certification campaign was wholly governed by the standard organizing rules prescribed by the National Labor Relations Act (NLRA)—namely, obtaining the signatures of 30% of the potential workforce, followed by a majority vote for unionization in a secret ballot election overseen by the National Labor Relations Board (NLRB).133 For years, the organizing campaign had simmered between District 1199 and the hospital, turning into a bitter and acrimonious fight in the early 2000s.134

During the early months of 2004, after hearing whispers that the Hospital was planning to announce a new major development proposal, CCNE convened a community meeting at the Sacred Heart Church in the Hill neighborhood of the city that included organizers, church leaders, and labor-backed aldermen.135 CCNE realized it had an opportunity to use the city’s forthcoming permitting and zoning processes as leverage in its unionization campaign.136 Seeing a chance to organize a showing of community force against the hospital—and perhaps at Yale and its expansive land acquisition plans more generally—CCNE developed several concrete action plans to build a powerful campaign. Immediately after the meeting at the church, the attending alders introduced a non-binding resolution before the full Board that recognized and recommended community benefits agreements as a
sound tool for responsible development. In late May, CCNE flew in a member of LAANE from Los Angeles to make a presentation before the Board about the advantages of CBAs. The Board passed the resolution several weeks thereafter, including language stating that the City would “take [efforts by the developer to create a CBA] into account when considering projects for approval and presentation.”

In addition, beginning in June and continuing throughout the remainder of the year, CCNE began the process of building a cohesive coalition of neighborhood groups. Channeling her previous experience with the Omni Hotel and the 1996 Yale strike, van den Heever once again focused her efforts on recruiting powerful civic leaders, members of the clergy, and civil rights activists—a profile strikingly similar to the coalitions formed by HERE in the mid to late 1990s. The resulting coalition, called Community Organized for Responsible Development (CORD), set about going door-to-door in the target neighborhoods, conducting citizen surveys and aggregating common grievances.

Through this process, CORD developed a broad array of “community” demands that would need to be met, else the coalition would use its lobbying muscle to delay the permitting approvals the hospital needed to break ground in 2005. When the hospital finally made its formal announcement on November 30, 2004 that it planned to construct a $430 million cancer center in New Haven’s impoverished Hill neighborhood, CCNE was ready to hit the ground running.

CORD recognized that its success would hinge upon its ability to serve as a power broker for recurring and essential grievances of

137. Gopinath, supra note 131, at 19.
138. Id. at 13 n.52, 19 (noting that LAANE officer Roxana Tynan presented a history of LAANE’s organizing efforts at a public hearing before the New Haven Board of Aldermen on May 26, 2004).
139. CITY OF NEW HAVEN BD. OF ALDERMEN, RESOLUTION ENCOURAGING DEVELOPERS TO ENTER INTO COMMUNITY BENEFITS AGREEMENTS (July 6, 2004) (on file with author). See also Rhomberg & Simmons, supra note 113 at 161; Simmons & Luce, supra note 136, at 101.
140. Simmons & Luce, supra note 136, at 101. Drawing on an interview with one of CCNE’s lead organizers for the New-Haven CBA effort, the authors noted that CCNE organizing staff “used a power point that showed how coalition building worked in Los Angeles to bring churches, unions, housing groups, and others together.” Id. Many of the organizations that CCNE lobbied to join CORD had already participated with CCNE in other campaigns, and thus “it was a natural next step for most of these groups to join CORD, as they were already involved in CCNE.” Id.
141. Gopinath, supra note 131, at 19-20. Gopinath notes that 800 citizens were surveyed, representing approximately 10% of the total population of the Hill neighborhood in which the cancer center would be built. Id.
142. See id. at 21.
neighborhood residents. Parking and traffic patterns proved a recurring topic—with many local residents already angry over hospital staff occupying street parking spaces in residential zones—along with concerns over lead contamination from building demolition. Drawing from the 800 surveys it collected, CORD crafted a set of proposed benefits that would need to be met before CORD would give its seal of approval to the project. Some of the proposed benefits met the needs of neighboring residents (such as traffic and parking restrictions). Some were designed to garner broader support within the New Haven community (such as job training programs, local hiring commitments, and a program designed to grant affordable and free care to low income residents). And one provision—negotiated separately from the development agreement—was tailor-made for District 1199: an “Election Principles Agreement” that departed from the standard NLRA secret ballot election process and created an environment more hospitable to organizing efforts.

Over the course of a year and a half, CORD and the hospital did battle, with CORD growing its membership base and the hospital continuing to speak out against the coalition’s proposed demands. With echoes of the 1996 strike against Yale, CORD and CCNE cultivated a tremendously public collective action campaign against the hospital, mobilizing citizens and celebrities to stand in solidarity against a hospital administration that had been painted as anti-poor, anti-union, and anti-community. Ultimately, the hospital’s CEO Joseph Zaccagnino resigned, and the new hospital leadership entered negotiations with CORD, ultimately settling on a package of benefits—valued at $5 million—that included concessions for the community, the city, and the union.

D. From Grassroots to Control of City Hall

The unions’ success with the cancer center offered concrete proof that CCNE’s tactical approach—grassroots, neighborhood-focused organ-

144. Gopinath, supra note 131, at 20.
145. See Sachs, supra note 134, at 1178-79. The agreement included a series of rules that diverged from NLRA guidelines, including: (a) prohibitions on the hospital initiating one-on-one conversations with workers related to unionization; (b) providing organizers access to hospital property; (c) a commitment by both parties to disseminate only “accurate and factual information about their respective positions”; and (d) referring all disputes regarding organizing efforts to private arbitration, waiving any right to NLRB adjudication. Id.
146. See Gopinath, supra note 131, at 22.
147. Id. at 23.
nizing and broad based coalitions—could offer tangible results. The ensuing years allowed the unions to further test and refine their strategy. UNITE HERE leveraged its grassroots network in support of Barack Obama’s first presidential campaign in 2007 and 2008. In 2010, the Locals 34 and 35 reactivated its organizing team for the Connecticut gubernatorial race, delivering an astonishing turnout for Democratic candidate Dan Malloy. That year also marked the lowest margin by which incumbent Mayor John DeStefano won re-election.

The ascendant political prowess of the unions prompted labor to make an aggressive push to take city hall, displacing many of the alders who were perceived to be part of DeStefano’s political machine. In the 2011 democratic primaries for the Board of Aldermen, the unions endorsed a slate of new aldermanic candidates but refused to make a mayoral endorsement, notwithstanding DeStefano’s historical support for organized labor. Due in part to a crowded field of mayoral challengers, DeStefano was less able to lend support to the candidates he favored for the Board. The union-backed candidates won 17 out of 18 contested races, allowing them to form a supermajority sufficient to override a mayoral veto. And despite an attempt to upset union dominance in 2013, Labor once again solidified its primacy in aldermanic politics, cementing in place its “supermajority”

153. DeFiesta, supra note 148.
powers for another two years.\textsuperscript{156} Two of the union-backed alders—Brenda Foskey-Cyrus (Ward 21) and Delphine Clyburn (Ward 20)—came to play a central role as the drama over 580 Dixwell unfolded.

\section*{III. The Fight over 580 Dixwell Avenue}

On December 17, 2012 the Board of Alderman unanimously agreed to sell the parcel of land known as 580 Dixwell Avenue to Achievement First\textsuperscript{157} for a purchase price of $1.5 million.\textsuperscript{158} In many ways, the story of 580 Dixwell—known best as the site of the Martin Luther King School—begins in 1995, when Mayor John DeStefano leveraged substantial quantities of state aid to rebuild New Haven’s public schools. For nearly twenty-five years, not a single school in New Haven had been built, rebuilt, or significantly renovated.\textsuperscript{159} With support from a major influx of state grants for school construction,\textsuperscript{160} Mayor DeStefano developed a school construction plan that aimed to demolish and reconstruct or renovate all of New Haven’s public schools—topping up funding shortfalls with proceeds from the sale of the city’s delinquent tax liens.\textsuperscript{161} The MLK School, however intact,


\textsuperscript{157} Shahid Abdul-Karim, \textit{Alternate Sites Eyed for New Haven High School}, \textit{NEW HAVEN REG.}, Dec. 4, 2012, http://www.nhregister.com/general-news/20121204/alternate-sites-eyed-for-new-haven-high-school. The parcel was sold to Elm City College Preparatory, Inc. (ECCP), which operates as a distinct legal entity under the aegis of Achievement First, a charter-school management organization based in New Haven, CT. \textit{Id.}

\textsuperscript{158} CITY OF NEW HAVEN, BOARD OF ALDERMAN, ORDER AUTHORIZING THE MAYOR OF THE CITY OF NEW HAVEN TO EXECUTE AND DELIVER A QUIT CLAIM DEED, LAND DISPOSITION AGREEMENT, AND ANY AND ALL OTHER DOCUMENTS NECESSARY TO SELL THE PROPERTY KNOWN AS 580 DIXWELL AVENUE, NEW HAVEN, CT TO ELM CITY COLLEGE PREPARATORY, INC., Order No. LM-2012-0318 (Dec. 17, 2012) [hereinafter 580 DIXWELL LAND DISPOSITION AGREEMENT].

\textsuperscript{159} See Melinda Tuhus, \textit{The View From: New Haven: Schools Looking for Spot on Renovation List}, \textit{N.Y. TIMES}, Nov. 16, 1997, http://www.nytimes.com/1997/11/16/nyregion/the-view-from-new-haven-schools-looking-for-spot-on-renovation-list.html (“A survey conducted by the New Haven Board of Education found that of its 42 school buildings, 73 percent are at least 25 years old, and 41 percent are more than 50 years old.”).

\textsuperscript{160} Prompted by the landmark 1996 Connecticut school desegregation case, \textit{Sheff v. O’Neill}, 238 Conn. 1, 678 A.2d 1267 (1996), and a subsequent settlement agreement prompted by a second lawsuit by the plaintiffs in 200, the state undertook the responsibility for financing 95% of the costs of new magnet school construction across the state. \textit{See, e.g., OFFICE OF LEGISLATIVE RESEARCH, STATE FUNDING FOR INTERDISTRICT MAGNET SCHOOLS, Rep. No. 2010-R-0399} (Oct. 5, 2010). New Haven schools are “non-Sheff” schools because they do not fall into the regions covered by the settlement agreement. \textit{Id.}

\textsuperscript{161} See Tuhus, supra note 159.
would not see the benefits of school construction financing, and in 2010 the school closed its doors permanently.\textsuperscript{162}

By the end of 2012, Mayor DeStefano’s $1.5 billion program had touched forty schools throughout New Haven, with an additional six in the pipeline.\textsuperscript{163} The physical achievements of the program were undeniably impressive, but the guts of an underperforming public school system remained, offering poor performance across a range of school metrics, from high dropout and low graduation rates\textsuperscript{164} to major deficiencies in substantive educational metrics.\textsuperscript{165} In 2009, the Mayor kicked off a new school reform initiative aiming to close the achievement gap between New Haven Public Schools (NHPS) and public schools across the rest of the state.

Ten years earlier, owing in part to the 1996 passage of a charter school enabling act in the state legislature,\textsuperscript{166} Amistad Academy was founded as one of the first public charter schools in New Haven.\textsuperscript{167} The founders went on to create Achievement First in 2003 as a separate 501(c)(3) charter management organization dedicated to creating high-performing public schools in Connecticut and, eventually, New York and Rhode Island. Four Achievement First schools were operational in New Haven by 2006, with consistently high enrollment demands from area parents.\textsuperscript{168} By 2012, Achievement First’s high school, Amistad Academy, had over 300 students, and desperately needed new space to accommodate current students and offer spaces to new students rising through the organization’s lower and middle schools.\textsuperscript{169} In addition, its current location lacked sports facilities, an essential ingredient for the school’s future expansion plans.\textsuperscript{170}

\textsuperscript{162} See Bailey, supra note 1.
\textsuperscript{163} See City of New Haven, Citywide School Building Committee, Citywide School Construction Program Comprehensive Facilities Plan Update 3-5 (March 8, 2012).
\textsuperscript{167} About Us, Achievement First (Nov. 11, 2013), http://www.achievementfirst.org/about-us/history/.
\textsuperscript{169} See Bailey, supra note 1 (a spokesperson for Achievement First declared, “[w]e’ve been busting at the seams” at the Prince Street site).
\textsuperscript{170} See Interview with Reshma Singh, Vice President of External Relations, Achievement First (Apr. 24, 2013) (on file with author).
Several years prior to the controversy at 580 Dixwell, Achievement First narrowly escaped a similar neighborhood battle when it undertook to consolidate its elementary and middle schools into the recently shuttered Timothy Dwight Elementary School. The school had closed in the spring of 2008, and immediately thereafter the Board of Education transferred the property to the city to determine its ultimate disposition. By November, the city announced its intention to sell the property, and in early 2009 news reports surfaced indicating that Achievement First had entered negotiations with the city to purchase the school.

Dwight residents and community leaders were taken by surprise. Before the school had closed, Dwight residents believed they would have an opportunity to convert the school into a local community center. Alarmed by the city’s change of heart and the swiftness with which it entered negotiations with Achievement First, two local leaders (Florita Gillespie, the neighborhood’s management team leader, and Dwight alderwoman Gina Calder) publicly contemplated a lawsuit to scuttle the deal. Although a lawsuit was never filed, Gillespie and Calder used

173. See MacMillan, supra note 171.
174. Id.
175. When, in 2007, the New Haven Board of Education revealed that the Dwight School would close and all students would be transferred to the Augusta Lewis Troup School several blocks to the west, community leaders in Dwight hoped they would have time to devise a plan to convert the school into a community center. Because New Haven School Superintendent Reginald Mayo indicated that the Dwight building would remain open and would be used as a swing space for NHPS, neighborhood leaders believed they had time to develop proposals and secure financing for the project. See Paul Bass, 102 Layoffs Loom, NEW HAVEN INDEP., May 8, 2008, http://www.newhavenindependent.org/index.php/archives/entry/102_layoffs_loom/; Nick Vinocur, Dwight Architects Forecast Green Future, NEW HAVEN INDEP., Jul. 30, 2007, http://www.newhavenindependent.org/index.php/archives/entry/dwight_architects_forecast_green_future/.
176. Due in part to the complicated proprietary history of the Dwight School, the claim was not unfounded. A local community development corporation had helped renovate the Dwight School in the late 1990s. With assistance from a substantial federal grant, the CDC in partnership with Yale University used the federal funds to construct a 500-person auditorium that served both school and community needs. See Yale University, Yale Bulletin & Calendar, Yale, City and Neighborhood Collaborate to Create Addition for Dwight School (May 4, 2001). The CDC subsequently gifted the school to the New Haven Board of Education, contingent upon the community’s ability to use the auditorium and the Dwight Neighborhood Management Team’s access to offices in the new addition. See MacMillan, supra note 171.
their leverage to guarantee residents’ access to the facilities for community events. More controversially, they successfully secured a commitment from Achievement First that some neighborhood children would be given priority in the student placement lottery, requiring the school to secure a legislative modification to change its admissions policies.177

The same year that Achievement First negotiated the purchase of the Dwight School, it initiated a search for a new location for its Amistad High School. In addition to its space constraints, the school was divided between two buildings and split across a busy New Haven street.178 As part of its search, Achievement First identified several key criteria for its permanent home, including sufficient acreage to house approximately 75,000 square feet of building space, adequate parking for staff, faculty, and visitors, and a sports field.179 In addition, the site had to meet all architectural, engineering and education space specifications and site eligibility criteria for Connecticut school construction grants.180

In 2010, the state made permanent the “charter school facility grant” program, which provides financial assistance for charter school capital projects.181 In years prior, charters had been limited to school financing of up to $500,000, and only recently had the state piloted the elimination of the $500,000 cap on facilities grants.182 In 2011, contingent upon meeting the eligibility criteria and submission of a final grant application, the state legislature conditionally approved a state grant of $24 million, totaling 68.93% of the $35 million total that Achievement First anticipated spending on the project.183 The remaining $11 million would be the responsibility of Achievement First, which planned to secure private donations to make up the deficit.184

177. At the time, such a concession appeared impossible; Achievement First CEO Dacia Toll told concerned neighbors that the city dictated the admissions policies for charter schools, and that at that time geographic preferences were not included in the admissions policies. Id. However, the school lobbied the Connecticut state legislature to pass legislation designating Amistad as a “neighborhood” school, which would allow them to take geographic preference into account. See Alan Appel, Amistad Tries to Do Better By Dwight, NEW HAVEN INDEP., Jan. 11, 2012, http://www.newhavenindependent.org/index.php/archives/entry/amistad_launches_local_recruitment_drive/.

178. Interview with Reshma Singh, supra note 170.

179. Id.

180. See CONN. GEN. STAT. § 10-283(a)-(d) (2009).


182. See LOCAL INITIATIVES SUPPORT CORPORATION, 2010 CHARTER SCHOOL FACILITY FINANCE LANDSCAPE 34 (June 2010).


184. See 580 DIXWELL LAND DISPOSITION AGREEMENT, ATTACHMENT B, supra note 158 (detailing the financing of the project, along with a development schedule, breakdown of costs, and the proposed rehabilitation plan).
Achievement First considered numerous sites, but the MLK School fit the necessary criteria and offered a central location for area students, as many as 27% of whom lived in the Newhallville/Dixwell community. On April 30, 2012, Mayor DeStefano sent a letter to Achievement First CEO, Dacia Toll, indicating the Mayor’s intent to work with Achievement First to negotiate a price and, with final ratification by the Board of Alderman, sell the parcel.

Dispositions of public property in New Haven, including surplus school property, typically follow one of four processes overseen by the city’s Livable City Initiative: (a) by development competition; (b) by programmatic disposition; (c) by negotiated sale; or (d) by general disposition. The delegated function of land disposition offers the city an expedited mechanism for tackling a range of land disposition procedures, ranging from the minimally contentious (such as the sale of sliver lots and adjacent tax foreclosures) to the highly visible and frequently controversial development agreements, some of which involve subsidized sales and tax abatements. The Board of Alderman initiated the sale of 580 Dixwell through the Livable City Initiative, but determined the land disposition approval would occur instead by general municipal ordinance later in 2012, bypassing the strictures of the City’s Land Disposition Guidelines and reverting to

185. The sites considered included: 34 Level Street; 240 Winthrop Avenue; 280 Goffe Street; 26 & 36 River Street; 49 Prince & 22 Gold Street; 169 Davenport; 915 Ella Grasso Boulevard; 130 Leeder Hill Road, Hamden; Blake Street Center; State Street Star Supply Co.; 91 Shelton Avenue; and 370 James Street.

186. Interview with Reshma Singh, supra note 170.

187. See NEW HAVEN, CONN., CODE OF ORDINANCES, tit. III, art. IV, § 21-9; 21-22 (“The bureau is authorized to engage in . . . (2) acquisition and disposition of real estate, on behalf of the City of New Haven, by all methods permitted by law [. . . .] Property so acquired shall be disposed of in accordance with the land disposition guidelines approved by the board of aldermen on December 1, 1997, as amended from time to time, and in a manner consistent with applicable law.”).

188. CITY OF NEW HAVEN, BOARD OF ALDERMAN, GUIDELINES FOR THE DISPOSITION OF CITY OWNED PROPERTY 3 (2009) (on file with author). A development competition is typically reserved for parcels that “are of significant public and/or neighborhood interest” and thus warrant competitive sale processes. Id. at 4. Programmatic dispositions are used for properties acquired by the City through a “Board of Aldermen-approved Redevelopment Plan and/or Municipal Development Plan.” Id. at 5. Negotiated sales—the process used for the sale of 580 Dixwell—are used for properties acquired through tax or mortgage foreclosure or surplus property, such as properties transferred to the city by the Board of Education. See id. And finally, general disposition refers to all other disposition agreements not falling into the above three categories. Id. at 6.

the City’s standard, chartered procedure for enacting ordinances and resolutions.190

Under this process, the proposed disposition agreement was first to be drafted by the Livable City Initiative. Second, the City Plan Commission would offer its advisory approval of the proposed agreement (in this case, the “Order Authorizing the Mayor of the City of New Haven to Execute and Deliver a Quit Claim Deed, Land Disposition Agreement, and Any and All Other Documents Necessary to Sell the Property Known as 580 Dixwell Avenue”) and forward it to the Board for its consideration as an ordinance. Third, upon receipt of the agreement, the board would forward the proposal to the relevant subcommittee—here, the Community Development Committee (CDC)—for public hearing and committee approval. Presuming at least a majority approval by the voting members of the CDC, the matter would be then forwarded to the full Board for a “first reading” of the ordinance, a “second reading,” and then a final vote.191 Following aldermanic approval, the mayor may then execute the contract of sale with the purchaser.192

Following the Mayor’s letter of intent guaranteeing exclusivity of negotiations,193 Achievement First and the city’s Livable City Initiative agreed to a negotiation process to arrive at the final sale price.194 Achievement First and the city would each commission an appraisal to value the land. Achievement First would then prepare an environmental due diligence report and commission several environmental studies to project the costs of any necessary environmental remediation. This included asbestos removal, and, because the parcel housed a gas station from the 1920s to the 1950s, the site would need to be cleared of any remaining toxins, such as polychlorinated biphenyl (PCB).195 The final price would result from the highest appraisal, less an aggregate estimate of all environmental remediation costs.196

190. Interview with John Ward, Economic Development Counsel, City of New Haven (Oct. 7, 2013); see NEW HAVEN, CONN., CODE OF ORDINANCES, tit. 1, art. IX., § 41 (Municode 2013).
191. See id.
192. See GUIDELINES FOR THE DISPOSITION OF CITY OWNED PROPERTY, supra note 188, at 6.
194. Testimony of Erik Johnson, Director, Livable City Initiative, CITY OF NEW HAVEN, BOARD OF ALDERMAN, HEARING (Dec 17, 2012) (audio on file with author).
195. See Bailey, supra note 1.
196. See Testimony of Erik Johnson, supra note 194.
After completing the three independent appraisals (two paid for by Achievement First, one by the City), two independent estimates of PCB removal (paid for by Achievement First), and two assessments for asbestos removal (paid for by Achievement First), the final breakdown of the sales price was proposed as follows:197

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest appraised value</td>
<td>$2,135,000</td>
</tr>
<tr>
<td>Estimated cost of PCB removal</td>
<td>($555,000)</td>
</tr>
<tr>
<td>Estimated cost of Asbestos removal</td>
<td>($80,000)</td>
</tr>
<tr>
<td><strong>Final sale price</strong></td>
<td><strong>$1,500,000</strong></td>
</tr>
</tbody>
</table>

The negotiations proceeded smoothly as they wended their way through the technocratic processes overseen by the Livable City Initiative and the Office of the City Plan. The Livable City Initiative adopted the proposed budget into its recommendation of sale,198 which the City Plan Commission approved unanimously.199

The parallel processes before the Board of Alderman, however, took a different turn when Achievement First sought political support for its proposal. In approaching the Newhallville negotiations, Achievement First benefitted from its experience in negotiating its move to the Dwight school. Community access to space and geographic preferences for neighborhood youth proved crucial in the former deal, and it was predictable that analogous requests would issue from the community once again.200

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197. Email from Reshma Singh, Vice President of External Relations, Achievement First (Apr. 29, 2013). Ultimately, three appraisals were commissioned—the city’s appraised value was the highest, coming in at $2,135,000 (the Estrada appraisal). Those commissioned by Achievement First were substantially lower, at $1,850,000 (the Amodio appraisal) and $1,700,000 (the Michaud appraisal) respectively. In addition, two separate firms provided independent cost estimates of the PCB removal, and Achievement First obtained a separate cost estimate for asbestos removal: First PCB cost estimate $840,000 (prepared by ALTA Environmental). Second PCB cost estimate: between $400,000 and $500,000 (prepared by Fuss & O’Neill). Asbestos abatement estimate shows total cost at $79,470 (memorandum from Northstar to Alta Environmental).


199. Karyn Gilvarg, Executive Director of the City Plan Department formally adopted an advisory approval, recommending the City Plan Commission approve the land disposition agreement based on the $1.5 million purchase price negotiated by the Livable City Initiative. See [City of New Haven, City Plan Commission Advisory Report RE: 580 Dixwell Avenue (Oct. 17, 2012)](http://www.newhavenindependent.org/index.php/archives/entry/wrecking_ball_headed_for_mlk_school/).

200. [See supra notes 175-80.](http://www.newhavenindependent.org/index.php/archives/entry/wrecking_ball_headed_for_mlk_school/)
But the Dwight deal was different. For starters, because the Dwight school was an elementary school; not only was it feasible for Achievement First to modify its admission lottery through legislation, but it also made sense operationally.\(^ \text{201} \) Achievement First’s high school, in contrast, was built grade by grade, filling its upper levels each year with students who had already been schooled in Achievement First’s curriculum and pedagogical method. The school wanted its high school students to have passed through its lower level “feeder schools” as a prerequisite.\(^ \text{202} \) In addition, it would have to amend its working agreement with New Haven Public Schools—which runs the lottery for charter admissions on behalf of Achievement First.\(^ \text{203} \)

More significantly, the Dwight deal took place in 2009, two years before the political balance of the Board had shifted. Both of Newhallville’s alders—Brenda Foskey-Cyrus (Ward 21) and Delphine Clyburn (Ward 20)—formed part of the union-backed slate elected to the Board in 2011.\(^ \text{204} \) Delphine Clyburn, a group home worker, worked as a steward of Service Employees International Union (SEIU) Local 1199.\(^ \text{205} \) Brenda Foskey-Cyrus was not affiliated with the unions directly, but received financial support for her election in 2011.\(^ \text{206} \) Both alderwomen defeated candidates endorsed by DeStefano and backed by Rev. Boise Kimber.\(^ \text{207} \) And both alders’ support would be essential in guaranteeing a “yes” vote on the sale before the full Board.\(^ \text{208} \) Foskey-Cyrus chaired the Board of Aldermen’s CDC,

\(^ {201} \) See id.
\(^ {202} \) See Interview with Reshma Singh, supra note 170.
\(^ {203} \) See id.
whose approval was required before the matter could come before the full Board for a vote.\textsuperscript{209} And because the school’s future neighbors on the northern side of West Hazel Street fell within Ward 20, Aldermanwoman’s Clyburn support was critical, too.

Achievement First made the first move in early 2012, reaching out to the alders to let them know of their intentions and establish a channel of communication.\textsuperscript{210} At that point the alders began canvassing the neighborhood. Over the course of the summer, Ms. Foskey-Cyrus contends that she went door to door to discuss the proposed sale and collect any concerns of neighborhood landowners.\textsuperscript{211} Once she “got a feel for the way the neighbors responded,” she began discussing the matter with her fellow alders on the CDC, and brought the matter to the attention of Newhallville’s community management team (CMT)—a volunteer organization that gathers voices from area residents and businesses.\textsuperscript{212}

Negotiations remained fluid throughout October and November. Achievement First had clearly garnered sufficient trust from the alders that they were willing to support them through their first administrative hurdle. On October 17, the alders endorsed the plan as it came before the City Plan Commission, which unanimously approved the proposal.\textsuperscript{213} But between that approval and Achievement First’s second administrative hurdle—a request for a special exception before the Board of Zoning appeals—the tenor of the conversation shifted.

Throughout October, Achievement First attempted to schedule meetings with the alders for the purpose of discussing the deal and addressing concerns of the constituents of Wards 20 and 21.\textsuperscript{214} The meetings were intended to serve as broad forums for consolidating


\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{Id.}

\textsuperscript{212} The CMT’s monthly meetings offer a regular, open forum for soliciting local input on pressing issues within the neighborhood, such as policing updates and land developments. \textit{See Newhallville Community Management Team}, http://newhallvillecmt.blogspot.com/ (last visited May 23, 2013).


\textsuperscript{214} Interview with Reshma Singh, \textit{supra} note 170.
neighborhood input, but numerous unidentified individuals arrived at the meeting with no introduction of who they were, why they were there, or whom they represented: they “just showed up.”

From these meetings it became clear that student slots and community access were not the only sticking points for negotiated benefits.

In response, Achievement First made a highly public announcement at the end of the month, staking out a position for what benefits it portrayed to be fair, practicable, and responsive to community input. Based on questions posed to Achievement First by community members at a CMT meeting on October 23, Achievement First prepared a public response that included a summary of its proposed benefits: (a) community access to indoor facilities and the athletic field; (b) a commitment that the $35 million construction program would meet hiring quotas for employing local, minority and female workers; and (c) approximately 11,000 hours of community service per year by Amistad students—much of which would be in service of the local community.

Striking what could be perceived as an indignant note, the release stated that the revitalization of the MLK School is, in and of itself, a community benefit that “will beautify the block, reduce criminal activity on the property, and provide a safe space for community use.” Furthermore, 313 students who attended Achievement First schools in New Haven live in Wards 20 and 21, and “[h]aving their school so close to home is a benefit for those students and their families.” Notably absent from this proposal were any references to geographic preferences for neighborhood students, as well as any mention of a labor neutrality and card check agreement for certain segments of the staff.

Shortly thereafter, on November 13 Achievement First appeared before the Board of Zoning Appeals, but this time they received considerably less enthusiasm from the alders. Achievement First sought a special exception for a reduced number of parking spaces (138 spaces were required by zoning; Achievement First sought to reduce that figure to

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215. Id.
216. The author was unable to confirm the content of the provisions proposed at these informal meetings.
217. See Achievement First, AF Responses to Community Questions Received on October 23, 2012 Newhallville Management Team Meeting (Oct. 25, 2012) (on file with author).
218. Id.
219. Id.
220. See City of New Haven, Board of Zoning Appeals, Agenda 1471 (Nov. 13, 2012).
100), as well as several variances for exterior signage and the construction of a three story building in a RM-2 zone, which only permits one story school construction as of right.\textsuperscript{221} During the hearing, one member of the BZA asked Achievement First directly about the community benefits agreement; Achievement First responded that they were “moving along in good faith.”\textsuperscript{222} The alders, though present at the hearing (sitting at the back of the room), remained substantially more circumspect than in the presentation before the City Plan Commission: neither testified before the BZA on Achievement First’s behalf.\textsuperscript{223}

Just as the public displays between the alders and Achievement First were cooling, a new stumbling block appeared in the path of the school in the form of the New Haven Clergy. Rev. Boise Kimber, former president of the Greater New Haven Clergy Association (a coalition partner of CCNE in its fight over the Yale-New Haven Cancer Center), along with GNHCA’s current President, Rev. James Newman, publicly attacked Achievement First, the two alders, and members of the negotiating committee for a negotiation process that the two alleged was both closed and lacking in transparency.\textsuperscript{224} Both individuals led congregations in the immediate vicinity of the school: Rev. Kimber’s New Cavalry Baptist Church sat directly across Dixwell Avenue from the MLK plot; Rev. Newman served as the pastor at the New Freedom Missionary Baptist Church at 280 Starr Street, one block to the east of 580 Dixwell.\textsuperscript{225}

Reverends Kimber and Newman attended the November 13 hearings at the BZA, along with several congregants, to address concerns related specifically to the traffic- and parking-related impacts of the project.\textsuperscript{226} In addition to those practical complaints, Kimber asserted

\begin{itemize}
\item \textsuperscript{221} See City Plan Comm’N Advisory Rep., supra note 213; New Haven, Conn., Zoning Ordinance, art. III, § 14 (Municode 2013).
\item \textsuperscript{223} Id. Both alders declined to comment specifically on the matter. Id. Delphine Clyburn noted, however: “[w]e came to listen tonight.” Id. The BZA approved the parking exception, conditional on the prohibition of student parking, see City Plan Comm’N Advisory Rep., supra note 213 at 2, and referred the remaining variance requests to the City Plan Commission for further review.
\item \textsuperscript{225} See Pamela McLoughlin, New Leader of Greater New Haven Clergy Association Looks to Make Positive Changes, New Haven Register (Jan. 28, 2012).
\item \textsuperscript{226} See MacMillan, supra note 222.
\end{itemize}
that neither Achievement First nor the alders had consulted him, and
that, given the size of the project, their failure to reach out to the af-
affected residents and churches should be cause for concern.\textsuperscript{227} The
GNHCA’s objections to the purported lack of transparency and a fail-
ure of the ostensibly collaborative negotiation process to proactively
solicit input from those most affected by the project became a sticking
point for the pastors.\textsuperscript{228}

At this point, public information related to the scope of the CBA
came to a standstill. Media reported four public sticking points, but
no drafts of the CBA had been circulated.\textsuperscript{229} The reported sticking
points were: (1) wage-related provisions for workers; (2) a labor neu-
trality and card-check agreement; (3) a commitment by Achievement
First to invest in Newhallville youth enrichment programs; and (4) en-
rollment slots for neighborhood students.\textsuperscript{230}

No information on the deal became public until the next meeting be-
fore the CDC on November 29. At that meeting, Achievement First
offered a series of commitments that extended past its October pro-
posal. In addition to diversity quotas for the construction labor,

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Figure_3}
\caption{Location of Churches in Relation to 580 Dixwell}
\end{figure}


\textsuperscript{227.} See \textsc{City Plan Comm’n Advisory Rep.}, supra note 213, at 1 (Nov. 20, 2012).
\textsuperscript{228.} Interview with Rev. James Newman, President, Greater New Haven Clergy
\textsuperscript{229.} See MacMillan, supra note 222.
\textsuperscript{230.} \textit{Id.}
Achievement First committed to working with the City’s Commission on Equal Opportunity to increase the diversity of its permanent workforce.\(^{231}\) It also proposed a partnership with New Haven Works, a non-profit jobs training, workforce development, and certification organization built with emphatic support by local unions.\(^{232}\)

The alders’ comments remained vague and non-committal, suggesting through their emphasis on good neighborhood jobs that a final deal had yet to arrive.\(^{233}\) Reverends Kimber and Newman also testified, accusing the alderwomen of failing to notify them of the community meetings, and reiterating concerns about the lack of transparency and exclusion from the meetings.\(^{234}\) On motion by Ms. Foskey-Cyrus, the CDC unanimously approved the disposition agreement, setting the stage for a “first reading” before the full Board on December 3.\(^{235}\)

But by the time December 3 rolled around something had gone awry. Instead of placing the matter before the Board for consideration, Ms. Foskey-Cyrus—with minimal explanation—moved to send the project back to the CDC.\(^{236}\) “We are still negotiating a community benefits agreement with Achievement First,” she noted; the deal had not been finalized. Her justification for re-committing the matter to the CDC was reportedly related to the price set by the Livable City Initiative—specifically, a differential of $1.3 million between the $1.5 million sales price arrived at by LCI and the 2011 assessed value of $2.8 million. People wanted to know “why LCI came up with an assessment different that the property developer says it’s worth.”\(^{237}\) Though not noted by Ms. Foskey-Cyrus, the issue of the sales price differential had been explained repeatedly with both alders in attendance—including merely five days prior when it had been presented before the CDC on November 29.\(^{238}\) The

\(^{231}\). See CITY OF NEW HAVEN, BOARD OF ALDERMEN, COMMUNITY DEVELOPMENT COMMITTEE MEETING MINUTES (Nov. 29, 2012) [hereinafter CDC Nov. 29 Minutes].

\(^{232}\). Id.; see also Harold Meyerson, The New New Haven, The AMERICAN PROSPECT (May 23, 2013) (describing New Haven Works as a “small-scale version of the successful employer-funded job-training and certification program that UNITE HERE runs for prospective hotel employees in Las Vegas.”).

\(^{233}\). CDC Nov. 29 Minutes, supra note 231.

\(^{234}\). Id.

\(^{235}\). Id.

\(^{236}\). Testimony of Alderwoman Brenda Foskey Cyrus, CITY OF NEW HAVEN, BOARD OF ALDERMAN, HEARING (Dec 3, 2012) [hereinafter Bd. of Aldermen Hearing Dec. 3] (on file with author).

\(^{237}\). Id.

\(^{238}\). CDC Nov. 29 Minutes, supra note 231, at 3 (documenting that Erik Johnson, Director of the Livable City Initiative, and other LCI staff discussed the appraisal process, explained why it did not rely on the $2.8 million tax assessment, and explained that the cost of environmental remediation would be deducted from the highest appraisal value).
Board approved the motion unanimously, and the matter was delayed until it reconvened on December 17.\textsuperscript{239}

Interpreting Foskey-Cyrus’s move as presenting an opening for additional community input, the following day Rev. Newman issued a press release commending the alderwomen for:

leading the Board of Aldermen to opening the […] sale to more transparency. Sending the proposed sales agreement back to the [CDC] for additional discussion will eventually lead to a better Community Benefits Agreement (CBA) that will benefit all parties involved; the neighbors in that community, the city administration, Achievement First, and most of all, the students who will attend that institution.\textsuperscript{240}

No doubt anticipating that the statement would help insure the clergy’s involvement in the final negotiation process, Rev. Newman articulated a set of requests that he contended were for the benefit of his congregants and local residents, set forth below.\textsuperscript{241}

\begin{table}[h]
<table>
<thead>
<tr>
<th>Benefits Proposed by the Greater New Haven Clergy Association</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. <strong>Residential Parking</strong>: due to increased parking demands on neighborhood, AF would agree to pay for permit parking for the next 30 years for all residents on streets bordering the school.</td>
</tr>
<tr>
<td>2. <strong>Timing of School Activities</strong>: AF would guarantee that school and after-school activities would be scheduled, monitored and supervised as to not interfere with the peace and tranquility of the neighbors.</td>
</tr>
<tr>
<td>3. <strong>Garbage Receptacles</strong>: AF would commit to installing stylish and neighborhood friendly garbage receptacles on the site.</td>
</tr>
<tr>
<td>4. <strong>Lighting</strong>: AF would guarantee that lighting as a result of the size and placement of the school will not interfere with the peace and tranquility of the neighbors.</td>
</tr>
<tr>
<td>5. <strong>Public Use of Facilities</strong>: AF would allow use of the school parking facilities on evening and weekends for community groups and businesses in the area, along with a written plan for how the use of the proposed sports field and community room is managed.</td>
</tr>
<tr>
<td>6. <strong>Privacy Fences</strong>: AF would offer to install privacy fences for all immediate neighbors.</td>
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Rev. Newman’s optimism proved illusory, however, as the negotiating committee convened a private, closed-door meeting on December 5.\textsuperscript{242}

\begin{itemize}
\item \textsuperscript{239} BD. OF ALDERMAN HEARING DEC. 3, supra note 236.
\item \textsuperscript{240} See Press Release, Greater New Haven Clergy Association (Dec. 4, 2012).
\item \textsuperscript{241} See id.
\end{itemize}
Included in the meeting, in addition to the alders and Achievement First, were CCNE and members of union locals (UNITE-HERE and AFSCME, the American Federation of State, County and Municipal Employees); the clergymen were not invited.243

Aware that the meeting was taking place at the Lincoln-Basset school, Rev. Newman attempted to join notwithstanding his lack of an invitation.244 Upon his arrival at the school, the pastor was barred from entry by another clergyman (and co-founder of both CCNE and CORD), Rev. Scott Marks.245 Several other individuals and a reporter were also barred from the meeting.246 Although Rev. Newman attempted to look through the window of the door to see who was in attendance, Rev. Marks blocked his view.247

Shortly after the December 5 closed-door session, Rev. Newman issued another press release, offering a stinging rebuke of the furtive negotiations from which he was excluded.248 Asserting that the “mystery behind all of the clandestine closed-to-the-public meetings is that the union funded Connecticut Center for a New Economy (CCNE),” Reverend Newman railed against what he called a “mugging” that served only to benefit the Achievement First and the union-backed aldermen, and once again demanded a transparent and open negotiating process.249

But the clergy’s protests, vociferous as they were, fell on deaf ears; the December 5 meeting marked the conclusive end of the community benefits agreement negotiations, even though the agreement had yet to be made public.250 On December 17, following brief remarks by the Livable City Initiative (once again addressing how the city arrived at the $1.5 million sales price), Achievement First, and Ms. Foskey-Cyrus, the matter was put to a vote—first before the CDC, which unanimously approved the agreement, and secondly before the full board, which also approved the LDA unanimously. The final copy of the “win win” com-

244. Interview with Rev. Newman, supra note 228.
245. Id.
246. Id.
247. Id. The author contacted Bob Proto, President of the New Haven Central Labor Council and UNITE-HERE Local 35 to determine if he was also present at the meeting. Proto did not respond to requests for comment.
249. Id. An independent news report by the New Haven Independent corroborates Mr. Newman’s assertion that the meeting included Achievement First, AFSCME, UNITE-HERE, CCNE, Foskey-Cyrus and Clyburn, and the members of the Newhallville management team. See Bass, supra note 242.
250. See id.
munity benefits agreement, as described by Ms. Foskey-Cyrus, was distributed publicly. With the exception of the request for community access, none of the benefits requested by Rev. Newman and the Greater New Haven Clergy Association were included in the final CBA:

<table>
<thead>
<tr>
<th>Final CBA as Approved and Incorporated into Final Land Disposition Agreement (LDA)</th>
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<tbody>
<tr>
<td>1. Permanent Jobs: AF agrees to partner with New Haven Works (NHW) to recruit, train, &amp; place New Haven residents into positions at AF schools (including, but not limited to the new high-school). Jobs program will last for five years.</td>
</tr>
<tr>
<td>2. Construction Jobs: AF commits to supervise its construction contractors and subcontractors to ensure compliance with state grant quota requirements for minorities, women, ex-felons, and local New Haven residents.</td>
</tr>
<tr>
<td>3. Student Access: A commitment of 10 spaces for new 9th grade students who have not attended AF feeder schools.</td>
</tr>
<tr>
<td>4. Staff Diversity, Recruitment, and Retention: A commitment to retaining, engaging, and promoting black, Latino, and multi-racial staff, as well as first-generation college graduates.</td>
</tr>
<tr>
<td>5. Community Access to Space: A commitment by Achievement First, once the final construction plans for the school are in place (including specific amenities), to provide a list of usable areas, which will include, at a minimum, the gym and athletic field. AF will also grant access to the Newhallville Management Team, the Ward 20 and 21 Political Committees (of any affiliation) and other eligible community organizations, and will remain a public polling location.</td>
</tr>
<tr>
<td>6. Murals: A commitment to establish a work of art “that pays tribute to civil rights leaders as the former MLK side does” that will be visible from the street.</td>
</tr>
<tr>
<td>7. General Provisions: (a) granting the City and the Board of Aldermen the right to request a court order requiring Achievement First to comply with the provisions of the CBA; (b) providing that CCNE will conduct annual performance reviews of Achievement First’s compliance with the agreement; and (c) a severability clause, providing that any provision is severable from the agreement if deemed void, invalid, or unenforceable by a court.</td>
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251. See 580 DIXWELL LAND DISPOSITION AGREEMENT, Exhibit B, supra note 158.

252. The CBA includes specific commitments by Achievement First to “tactical targets,” which include: “(a) 30% of finalist candidates identify as Black, Latino, Multi-racial, or first-generation college graduates at [AF] New Haven schools (teachers and leaders); (b) No difference in matriculation rate for Black and Latino candidates versus overall matriculation rate; (c) 5% increase over last year in applications from Black, Latino, and multi-racial teachers and leaders for 2013-2014 and an additional 5% increase for 2014-2015.” See 580 Dixwell Land Disposition Agreement, Exhibit B, supra note 158.
But the agreements signed in ink neglected to include two provisions, which were arguably two of the most contentious and costly commitments agreed to by Achievement First:

<table>
<thead>
<tr>
<th>Two Additional Agreements Not Included in or Incorporated into the LDA²⁵³</th>
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<tbody>
<tr>
<td><strong>8. Labor Neutrality and Card Check Agreement.</strong> Achievement First committed to a neutral organizing process, based on card-check recognition, for unionization of cafeteria and security workers.²⁵⁴</td>
</tr>
<tr>
<td><strong>9. Grant for Youth Enrichment Program.</strong> In a separate agreement, Achievement First committed to contribute $150,000 to support youth enrichment programs for the benefit of neighborhood youth, with funding allocation decisions to be made by a six-member committee (three members to be chosen by Achievement First, three chosen by alders Foskey-Cyrus and Clyburn). The Community Foundation For Greater New Haven serves as the fiduciary.²⁵⁵</td>
</tr>
</tbody>
</table>

Neither agreement was released publicly; neither was included—as was the “public” version of the CBA—in the final land disposition agreement signed by the Board.

In the wake of the negotiations, Rev. Newman dropped his promise to pursue alternative routes of dissent.²⁵⁶ When asked whether he had considered trying to negotiate his own CBA for his constituents, he said no, but added, “I’m hopeful that there will be some new alderman in this next election that will look more after the community.”²⁵⁷

IV. Normative Evaluation of Community Benefits Agreements

CBA proponents often highlight three salient features of CBAs that render them superior to the status quo of government-managed land use controls. First, because of its flexibility, a CBA permits a wider range of interests to influence the allocation of burdens and benefits.

²⁵³. Although the labor neutrality agreement and $150,000 cash grant were not included in the final CBA appended to the land disposition agreement, for purposes of simplicity, any references to the Newhallville CBA include all of the conditions negotiated during the meeting on December 3, 2012, which includes the labor agreement and the $150,000 grant for “youth enrichment.” See Thomas MacMillan, *It’s A Deal-& A Sale*, New Haven Indep., Dec. 18, 2012, http://www.newhavenindependent.org/index.php/archives/entry/mlk-amistad_community_benefits_deal_reached/
²⁵⁴. See id.
²⁵⁵. See id.
²⁵⁷. *Id.*
of land use decisions, and a wider range of solutions that can be crafted specifically to meet the needs of the interested participants. The decisional outcomes may thus yield a more efficient allocation of resources.258 A second stated advantage is that CBAs create a more deliberative, participatory process that gives a voice to traditionally disempowered community members.259 The participation afforded to citizens under a CBA, therefore, may be procedurally superior to the regulatory apparatus.260 A third advantage is that CBAs may also offer a more equitable distribution of the costs and benefits of a development project, particularly when the project takes place in a historically disadvantaged community.261

This section evaluates these claims against the normative standards of efficiency, procedural fairness, and distributive justice. Although each CBA is highly context dependent, I argue that the structural peculiarities of the CBA embed certain biases that may result in both inefficient and unfair outcomes. In addition, it is important to disaggregate the notion of “community,” identifying likely participants to determine whether there may be patterns of frequent winners and losers in the wake of a struggle over valuable concessions captured by the CBA process.

A. An Introductory Note on Land Sales

Before proceeding to a normative analysis of the Newhallville-Amistad CBA, a cautionary note is in order. Unlike most CBAs, the Newhallville-


260. Patricia E. Salkin & Amy Lavine, Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power, 18 J.L. & Pol’y 157, 213 (2009) (“When CBAs are negotiated by broad based, inclusive coalitions that are truly representative of community interests, and such agreements result in a community planning vision that dramatically differs from the existing traditional comprehensive plan and implementing regulations for the area, it indicates that existing governmental planning processes may be inadequate, and the most appropriate action for a local government to take may be to reform the way that it plans.”).

261. Id. (“A CBA that is negotiated by a historically disempowered community for a development that will have significant negative impacts will advance equity and fairness goals, rather than inhibit them.”)
Amistad CBA was negotiated as part of a public land disposition process, rather than as part of a land use regulation process like a zoning application or a development agreement. While both regimes deal with land in the abstract, the immediate goal of land sales and land use controls appear at first glance not to be intimately connected.

If the prototypical concern of land use regulation is the apportionment of power between private landowners and government bodies to determine how land should be used, a public land disposition serves only to complicate this analysis by adding additional fiscal and economic factors.

On one axis stands the role of the city as a guardian of the public fisc. By negotiating a sales price for a given asset, the city seeks to maximize the returns on investment that the public stands to gain by virtue of privatization or sale. In that sense it is no different from the disposition of other surplus property—used computers, excess machinery, and the like. But of course the sale of land is in no way like the sale of moveable property or an investment interest; to the contrary, urban land is a unique possession, encumbered both by the existing parameters that zoning laws will place on the buyer, and by the fact that privatization necessarily divests the city of some control over a formerly public space. As a result, the city does not act in a vacuum of wealth maximization alone; rather, the city must balance its fiscal interests against a wider range of social and other economic interests that may be advanced by choosing among a variety of potentially productive uses for the parcel.


263. See M.A. Qadeer, The Nature of Urban Land, 40 AM. J. OF ECON. & SOCIOLOGY 165, 167, 180 (1981) (arguing that urban land should be treated as a public good, and that disposition of public land must protect urban dwellers’ interests by paying particular attention to land’s social utility). Of course, not all publicly owned land or facilities are inherently “public,” in the sense of a community resource, useable by all. Parks, courthouses, and plazas may be thought of the quintessential public space, whereas schools, public transit systems, and subsidized housing may be thought of as semi-public, limiting or foreclosing access on terms established by government policy. Nevertheless, some theorists within the “right to the city” movement have proposed a broader conception of public land, focusing on both the fiscal value of land as a commodity as well as the communal values offered by the right to participate in decisionmaking over public land and the way that such decisions are shaped. See, e.g., David Harvey, Rebel Cities: From the Right to the City to the Urban Revolution (2012); Don Mitchell, The Right to the City: Social Justice And The Fight For Public Space (2003).

264. See Qadeer, supra note 263, at 174 (noting that urban land is both a “utility” good and a “commercial” good—uses which may conflict with each other, as the most socially useful result may not produce the highest profit and vice versa).
A second axis relates to the proposed use of the land as a function of both immediate and broader citywide interests. A multitude of uses may be possible (depending, of course, on the existing zoning code, market forces, and the availability of subsidies)—from private factories and industrial sites to mixed-use, commercial, and residential functions, to public or quasi-public uses like schools, public parks, and hospitals. The specifics of the proposed use will largely shape the public’s response, both in the immediate neighborhood (as the neighborhood residents will be most directly affected by a change in the status quo, whether positive or negative) and in the community at large. Zoning laws have traditionally been characterized as addressing the former set of interests, helping allocate the benefits and burdens of the proposed development and determine the extent to which changes in the status quo will require offsetting by the developer. As to both sets of interests, the city acts in a role most analogous to a site-specific city planner. By deciding which purchaser will be allowed to buy the relevant parcel contingent on the proposed use, the city may seek to maximize the net social benefits by balancing the interest of the immediate neighborhood, the city at large, and potentially even future taxpayers.265

New Haven is not anomalous in this regard, sitting at the intersection of these two axes by seeking to maximize both fiscal gain and social utility in disposing of public property. Structurally, and in the abstract, the city has delegated these responsibilities among various administrative and legislative bodies, including the Board of Education (recommending land for surplus status), the Livable City Initiative (overseeing negotiations on price); the City Plan Commission (providing advisory input on planning considerations); and the Board of Alderman (final ratification and approval).266


266. As an example of highly detailed, state-mandated planning requirements that require forward-looking assessments, Wyoming requires the any school district, prior to disposing of surplus school property, propose the disposition to a statewide School Facilities Department that will evaluate the proposed lease or sale in reference to each school district’s school facilities plan. See WYO. STAT. ANN. § 21-15-123 (West 2013).

267. See discussion supra Part III. Practically speaking, however, in the context of 580 Dixwell, the potential policy-based complexity of the process was truncated when the project was partially pre-ordained by Mayor DeStefano, who signaled his intent to sell the land to Amistad before the technocrats had a chance to review any concrete plans. See Abdul-Karim, supra note 193. While the sale of a public school plot to a privately-managed, non-profit charter school management organization appears a logical plan for the disposition of 580 Dixwell, DeStefano’s letter effectively delimited
The complexity of the land sale process—added, as it is, on top of an additional bundle of concerns associated with land regulation—may appear to underscore the uniqueness of the Newhallville-Amistad CBA in contrast with CBAs that have taken place in the context of development agreements or zoning applications. This might signal that the Newhallville deal is a poor vehicle for analyzing the normative contributions of the CBA instrument as a whole.

Conceding the differences between land disposition and land regulation, it would nevertheless be a mistake to view the two regimes as wholly distinct. Obviously, a city sells land with the expectation that it will be used for some purpose that differs from its present state. The participants in the land sale process invariably take into account the vagaries and peculiarities of the zoning scheme in advance of negotiating a land deal, anticipating that the property as sold will, with sufficient probability, be put to a use permitted by the existing zoning code.

Although each decision point seeks to advance a specific objective, the participants likely understand these decision points to be steps in the larger development enterprise, proceeding from point A (the status quo) to point B (a completed development project). It is reasonable to assume that both the developer and the community negotiators recognize that the CBA is a one-shot deal; if the CBA cannot guarantee support for the project throughout all stages of the land disposition and zoning process, it would be a worthless guarantee for the developer indeed. The possibility that a second, third, or fourth CBA might need to be negotiated with different interest groups in order to secure one particular component of an overall development project (such as a special exception or a construction permit) would dramatically decrease the predictability of the project from the outset. This, in turn, would undermine the value of the CBA for the developer, and would eliminate much of the leverage that community groups possess in extracting benefits at the outset. Without the ability to promise the developer a resounding voice of support for the project, a community coalition brings very little to the table that cannot be replicated by the developer itself.

As a result, the savvy community coalition will seek to interject at the decision point at which they have the greatest power of leverage, rather than picking and choosing among the various types of land use the city’s ability to consider issues beyond (a) price; and (b) the neighborhood-level changes associated with the new development.
decisions based on the substance of the issue in consideration.268 Ultimately, the fact that the Newhallville-Amistad CBA was negotiated in advance of the land sale, rather than in advance of zoning decisions taking place concurrent with the sale process, appears to be of limited consequence.

B. Allocative Efficiency

One method of evaluating the relative benefit of the CBA is to consider it in the context of economic efficiency—specifically, whether the deal resulted in an optimal development outcome for all parties involved. Land use regulations in their modern instantiations seek to resolve a particular problem posed by a theory of Coasian bargaining—namely, that the transaction costs and collective action failures associated with negotiating over the price of a proposed development project require some form of government participation to oversee the allocation of development rights.269 The “problem” that land use regulation seeks to solve is, at root, one of reducing the externalities associated with nuisance based on incompatible land uses.270 This theory has been challenged by numerous scholars, who question the validity of the underlying assumption regarding the value proposition of technocratic, political, or judicial oversight of land use transactions.271 And the

268. Julian Gross has proposed an elemental definition of CBAs under which a CBA must only, by definition, concern a “single development project.” Gross, supra note 66, at 40. Gross defines this atomistic, project-based focus in contrast with the idea of advocating for “single-issue policies that cover a range of projects.” Id. However, Gross excludes from his definition any requirement that the CBA be tied to a specific sub-approval within the overall land deal. Rather, the CBA covers the project as a whole.

269. See, e.g., William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 72 (1985) (defining zoning as a “collective community entitlement”) [hereinafter Fischel, Economics of Zoning Laws]; id. at 82-103 (examining the question of community entitlements and Coasian bargaining, managed through the zoning process, through the example of a pulp mill seeking to gain development rights in a given community).

270. See, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (“[T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”) (internal citations omitted); Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 2 (1960).

idea that the nuisance-reduction model remains a valid theoretical foundation for land use controls appears increasingly suspect, as more theorists have noted the rapidity with which the “safety valve” of variances and exceptions to neutral regulations have been employed in land use decisions.272 Nevertheless, the management theory of using local government to reduce transaction costs, maximize positive externalities, and reach optimal allocation of development rights may serve as a useful evaluative framework to determine whether the CBA as an instrument serves or detracts from such ends.273

Efficiency analysis, of course, presents innumerable challenges, not the least of which is the impossibility of quantifying with precision the multitude of costs and benefits achieved by a given decision (whether as felt by the developer, the neighbor, the community at large, or the city) in comparison with the status quo. Nevertheless, the negotiation itself offers hints at the relative weight of various preferences of many of the deal’s participants, allowing for a more careful examination of whether the deal as a whole represented an optimal outcome.274

The fact that the deal was signed at all would appear to weigh heavily in favor of the CBA as a negotiating tool.275 At least in theory—and according to its own representations—Achievement First made clear its willingness to consider other parcels, albeit only within New Haven.276 Land use and local government theorists have long considered the salience of “exit” as a key constraint on local government decisionmakers, with some theorists viewing mobility as a signal of dissatisfaction and willingness to invest in other local land markets.277 The inference to be drawn from a successfully negotiated

272. See Ellickson & Been, supra note 43, at 294-296 (citing research by Richard Babcock and Eric Steele, among others, who agree with the empirical observation but disagree as to its significance).

273. See Fischel, Economics of Zoning Laws, supra note 269; cf. Karkkainen, supra note 265, at 64-78.

274. This paper refers to efficiency in Kaldor-Hicks, rather than Pareto, terms. In other words, the tool may be deemed “efficient” for Kaldor-Hicks purposes if there is a net positive spread between benefits and costs. A Pareto efficient outcome, in contrast, would be defined by a scenario in which at least one party is made better off but no parties are made worse off as a result of the transaction. See Ellickson & Been, supra note 43, at 96 (noting economists’ preference for Pareto efficiency and recognizing that most policymakers defer to Kaldor-Hicks criteria, particularly when compensation for losers in a land use outcome is hard to arrange).

275. See Camacho, supra note 258, at 364 (“the very existence of the CBA itself is evidence that every party believed it was better off with an agreement than without one.”).

276. See supra note 185.

277. See Vicki Been, “Exit” As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473, 476 (1991) [here-
deal, then, is that the developer signaled a preference to pay all costs associated with the deal-making rather than picking up and moving elsewhere.

But the mere possibility of exit does not guarantee that signing a deal in fact signals the most preferential outcome. First, as previously noted, the proponents of CBAs have deliberately targeted their organizing efforts towards a specific subset of sectors—"sticky" industries—that by definition are geographically constrained. The Yale-New Haven Cancer Center CBA, for instance, evinced a deliberate choice on behalf of CCNE and its coalition partners to target an employer unable to benefit from interjurisdictional competition. It seems obvious, too, that part of the strategy of negotiating a CBA with Achievement First was the understanding that the developer was necessarily constrained in its choices. Achievement First was not hoping to start a new school in any of the surrounding suburban school districts; rather, it merely sought to resituate its flagship from one facility within New Haven to another. That it elected to pursue negotiations with the alderwomen and CCNE, rather than seek alternative sites, may simply have reflected a belief that they were likely to encounter a CBA regardless of which neighborhood they selected as their preferred site.

At the same time, however, even the threat of a potential exit may have tempered the negotiations from the other parties to the CBA, forcing alders and other community leaders to evaluate the ramifications of the deal falling through. When comparing the status quo and proposed uses from the perspective of neighbors and community-members, it is difficult to imagine a concentrated majority of voices preferring a defunct "eyesore" of a school (used only as a polling site) to a fully active one, even if there were no explicit provisions for community use. That the project would offer both short term and full time job opportunities, too—regardless of the prospect of a labor neutrality agreement—would likely have counseled the participating community members.

Inafter Exit] (summarizing arguments suggesting that a "primary source of discipline in the market" is a developer's ability to "buy" its services from other jurisdictions); WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 1-18 (2001) (arguing that because local government policies are capitalized into home values, local government decision-makers will craft policy choices that maximize homeowners' willingness to remain in their jurisdiction).

278. See discussion supra Part II.C.

against pushing negotiations with Achievement First to a breaking point.\footnote{280}

In addition, the possibility of exit should have weighed on the minds of the lead alderwomen, who would risk losing a buyer and foregoing the immediate fiscal gain of $1.5 million if Achievement First backed out of the deal. The threat of a failed deal, in other words, should temper the negotiations in the mind of a savvy politician, given the sizeable sums involved. Not only would she risk alienating the community members who viewed them as fair intermediaries; she may also risk losses in political clout among the Board and within the Mayor’s office, as both bodies indicated their interest in consummating the sale.

A structural aspect of CBAs also militates in favor of optimal resource allocation: the incentive placed on negotiating coalitions to gather substantial data on neighborhood preferences.\footnote{281} If outcomes can be optimized by reducing informational transaction costs—e.g., those costs associated with gathering information about the economic exchanges involved in a given deal—a process that improves information collection can ostensibly benefit allocative efficiency.\footnote{282} As one scholar has pointed out, to the extent land use regulation is intended to protect current home values and consumer surplus, the most effective way to capture such information for land use decision-makers is through direct participation by residents themselves.\footnote{283}

Without the substantial backing of a broad swath of the relevant community, a coalition seeking to negotiate a CBA with a developer lacks the necessary leverage to compel participation. This leverage requirement, in turn, depends on the ability of community organizers to mobilize diverse constituencies and coalesce a unified negotiating platform.\footnote{284} As Andrea van den Heever learned through her experience as a labor organizer in the 1990s, building and maintaining community coalitions requires a concerted and continuous effort by organizers to

\footnote{280. Although CBA proponents generally target “sticky” industries that are less likely to relocate to other jurisdictions, see discussion supra part II.C, there may nevertheless remain an element of intrajurisdictional competition among neighborhoods.}

\footnote{281. See Karkkainen, supra note 265, at 84 (arguing that an ideal, participatory model of zoning would decrease the disproportionate influence of the concentrated interest groups—in other words, the Olsonian paradigm—towards one that more closely approximates a “median voter” model that is ostensibly more representative of neighborhood preferences).}

\footnote{282. See Fischel, Economics of Zoning Laws, supra note 269, at 94.}

\footnote{283. Karkkainen, supra note 265, at 83-84.}

\footnote{284. See discussion, supra Parts II.B and II.C.}
not only establish relationships, but to offer promises of tangible benefits that will resonate with grassroots and community-based organizations. During the Yale-New Haven Cancer Center negotiations, CCNE assisted its community coalition (CORD) to develop and administer an extensive survey of neighborhood residents. Armed with personal digital assistants, CORD organizers conducted weeks of door-to-door interviews, collecting extensive survey data from approximately 800 area residents.

Similarly, alderwoman Foskey Cyrus conducted a more low tech, informal door-to-door survey during the course of the Newhallville-Amistad negotiations to get a “feel for the way the neighbors responded” to the proposed development. The process of proactively gathering and aggregating neighborhood preferences, therefore, may identify salient sources of aggravation or concern shared by large portions of the relevant community.

Expansive as the information collection process may be—motivated by the prospect of greater leverage—the process is in no way constrained to limit the information gathered to economic information. To the contrary, CBA negotiating coalitions have solicited neighborhood “preferences” relating to concerns that extend far beyond the standard trade-off inquiries related to land use concerns, such as impacts on home values, traffic, or the aesthetic impact of the proposed development. In the case of the CORD surveys in 2004, interviewers asked the survey participants not only about their views on standard nuisance-like impacts (e.g., traffic and parking), but also about their views on whether or not hospital employees should be unionized, as well as how they perceived the hospital’s medical debt collection practices. Likewise, given the Newhallville-Amistad provisions relating to labor neutrality and workforce development funding, one can

285. See id.
286. See Gopinath, supra note 131, at 19-20
287. Interview with Brenda Foskey-Cyrus, supra note 210.
288. Compare Fischel, Economics of Zoning Laws, supra note 269, at 83-86 (depicting economic valuations associated with a proposed development through the framework of nuisance), with Patricia E. Salkin & Amy Lavine, Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations, 26 UCLA J. Envtl., L. & Pol’y 291, 294 (2008) (noting that “[m]any CBA provisions are inspired by social justice concerns and desires of the coalition, including such things as: living-wage requirements, ‘first source’ (i.e. local) hiring and job training programs, minority hiring minimums, guarantees that developments will include low-income and affordable housing, environmental remediation requirements, and funding for community services and programs.”).
289. See Gopinath, supra note 131, at 19-20.
surmise that the organizers in Newhallville took a similarly expansive approach to gathering community preferences related to the ultimate outcome of the project.

It is useful in this regard to compare a CBA negotiating coalition’s freedom to carry out wide-ranging and expansive information-collection with the constraints imposed on other land use bodies. For instance, the information collection process in individualized land use decisions will typically be circumscribed by either the *ultra vires* principle or the constitutionally rooted exactions doctrine. The former limits the criteria that zoning and other administrative bodies may rely on when reaching a land use decision. The latter, often referred to as “nexus” and “proportionality” requirements, limit local governments’ imposition of exactions without a tight fit between the concessions required by the developer and the impacts caused by the development. Decisions made by legislative bodies are certainly less circumscribed (albeit not wholly unconstrained). And the coalitions negotiating CBAs—at this point at least—are wholly untethered from any judicial scrutiny to ensure the decision-making process adheres to criteria and standards elaborated in a given state’s enabling land use legislation.

These judicial constraints may properly be thought to restrict land use decision-makers not only in the substantive decisions that they...
reach, but also the information that they rely on to justify such decisions. In the context of CBA negotiations, the expansiveness of information collection may certainly allow a coalition to derive deep consensus on a set of issues from among a broader array of possible land-related concerns. But the effect of this consensus may very well frustrate and overwhelm landowners or property users who would be more acutely affected by a change in the status quo.

CBA observers have realized that the tool carries with it two primary risks in this regard that are effectively two sides of the same coin: first, that the tool may be exploited by developers, who may seek to confer benefits on a hand-picked (and persuasive) set of community groups while marginalizing project opponents; and second, that the negotiating coalition’s selected interests are not representative of the interests of the broader community. As related to allocative efficiency, however, these criticisms miss a more significant point, which is that because negotiating coalitions are unconstrained in their information collection process, they may very well capture points of agreement that are highly representative of the broader community, but drown out highly-valued preferences of a smaller subset of community members—typically those of adjacent property owners.

In this sense, then, the ultimate efficiency of the outcome (still speaking in Kaldor-Hicks terms) may turn on the ability of decision-makers to accurately capture the distinct variations in price that particular neighbors may feel about the project. A neighbor who is adjacent to the school, for instance, may view the change in the status quo as a decidedly negative outcome, absent remedial actions on the part of the city or the developer. The proposal offered by the Greater New Haven Clergy Association (GNHCA) fits the mold; all of the organization’s proposed conditions consisted of focused, specific requests that almost exclusively sought to remediate the disutility of the development on its proximate neighbors: parking demands; limits on the timing of school activities (so as to ensure the “peace and tranquility” of the

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294. See id. at 37.
295. See Been, supra note 32, at 23.
296. Note that this problem can be conceived of as the inverse of the standard “Olsonian” framework, under which concentrated interests groups, like adjacent neighbors, may overwhelm the preferences of more diffuse consumer groups who are less immediately affected by a given decision. See Mancur Olson, The Logic of Collective Action 1-18 (1965); Roderick J. Hills, Jr. & David N. Schleicher, Balancing the “Zoning Budget”, 62 Case W. Res. L. Rev. 81, 86 (2011) (defining proximally neighbors as the “paradigmatic ‘Olsonian interest group’”) [hereinafter Balancing the Zoning Budget].
neighborhood), additional garbage cans, limitations on lighting, privacy fences, and public access to school facilities.\(^{297}\) With the exception of public access, none of these requested conditions would inure to the benefit of the community outside of a very small geographic radius. In contrast, the CBA that was ultimately signed included no remedial measures for proximate neighbors, with almost all of the benefits flowing either to the wider Newhallville neighborhood or the community of New Haven at large.\(^{298}\)

Assuming, for a moment, that the GNHCA’s proposal accurately represents the preferences of all adjacent neighbors, the deal should go through only if (a) the developer is willing to compensate the neighbors for the disutility of the development (either by remediating the externalities or by offering a direct contribution as compensation); or (b) the utility gains felt by the broader neighbors outweigh the disutility experienced by the immediate neighbors. While it may be feasible for the developer to meet both sets of demands, the developer will likely seek to cabin its costs by preferring a deal that will maximize gains (reducing the risk of non-approval by ensuring the widest and most vocal support in favor of the project) with the lowest cost (e.g., the payments or contributions necessary to secure such support).

An optimistic take on the CBA is that it may help grease the wheels in bypassing the traditional Olsonian public choice concern over tyranny of the minority. Under the standard Olsonian model, a small, vocal, self-interested minority group has not only the wherewithal to protest an adverse land decision, but often succeeds in doing so, owing to the collective-action failures associated with gathering positive community voices within the broader community.\(^{299}\) The minoritarian preference may, in turn, result in inefficient outcomes.\(^{300}\) By remediying the collective action failure of the broader community, the CBA effectively counters the often-decisive influence of minority voices in forestalling efficient development outcomes.\(^{301}\)

\(^{297}\) See GNHCA Dec. 11 Press Release, supra note 248.

\(^{298}\) See 580 DIXWELL LAND DISPOSITION AGREEMENT, Exhibit B, supra note 158.

\(^{299}\) See, e.g., Hills & Schleicher, supra note 296, at 92 (illustrating the stereotypical differences between the well-situated homeowners and the “theoretical, distant” beneficiaries of development).


\(^{301}\) In the case of 580 Dixwell, if the GNHCA’s proposal serves to guide our understanding of the concentrated preferences of the minority, it may very well be that the “tyranny” of the majority may not have foreclosed development completely, but rather would have required particular compensation as a condition of support—compensation that, but for the CBA, may have been easily forthcoming from Achieve-
But if the more diffuse preferences of the broader community are priced at a minimal value and the adjacent neighbors’ preferences are priced high, it may well be the case that the CBA allows for approval of a project where total costs exceed total benefits.\textsuperscript{302} The developer would certainly be paying a price for receiving development approval, but the price paid would not accurately capture the marginal social costs of the development on those most directly affected by it.\textsuperscript{303} Contrary to the dysfunctional portrait of zoning decisions as being disproportionately controlled by the tyranny of a highly vocal, mobilized, and self-interested minority—which, due to NIMBYism or other reasons, tends to inhibit efficient outcomes by stifling development, or shift the social costs to more disorganized interest groups\textsuperscript{304}—the CBA process appears vulnerable to the criticism that it disproportionately drowns out such important voices, erasing what would otherwise be reasonable demands for compensation in the service of gaining rents for a more diffuse constituency of voters.

Several scholars who have studied direct voter participation in zoning processes have noted the challenges associated with weighting the preferences (influenced by the perceived costs) of different community constituencies in the zoning process. Nicolaus Tideman, for instance, proposed a vote-weighting system tied loosely to a given voter’s geographic proximity to a proposed development.\textsuperscript{305} Tideman proposed two possible methods of improving on the “majority rule” default option in land use regulation: (a) weighted voting (with weighting based on the projected discrepancy between the presumed benefits and presumed costs that each neighbor

\textsuperscript{302} Such an outcome would not satisfy even the minimal demands of Kaldor-Hicks efficiency, let alone the possibility of a Pareto-efficient outcome. The CBA, then, may be viewed as tool that has the potential to excessively enhance, rather than check, majoritarian bias in a given dispute. \textit{Cf. Neil K. Komesar, Law’s Limits: The Rule of Law and the Supply and Demands of Rights} 73 (2001).

\textsuperscript{303} See T. Nicolaus Tideman, \textit{Integrating Land-Value Taxation with the Internalization of Spatial Externalities}, 66 \textit{Law & Econ.} 341, 348-52 (1990) [hereinafter Integrating Land-Value Taxation]. Some have levied similar accusations over the participation of then-councilman Bill de Blasio in the multi-million dollar CBA negotiated as part of the Atlantic Yards development in Brooklyn, New York. One of the leaders of a community group opposed to the development expressed that de Blasio “never criticized the deeply flawed process that gifted a complete zoning override and 22 acres of valuable Brooklyn real estate to a single developer without any vote or any bidding process.” \textit{See also} Dana Rubenstein, \textit{Bill de Blasio, Development Pragmatist}, \textit{Capital} (Aug 30, 2013) (noting that the developer’s promise to provide union-construction jobs and 2,000 units of below-market housing was what secured de Blasio’s support, notwithstanding substantial neighborhood opposition to the project).

\textsuperscript{304} See, e.g., Hills & Schleicher, supra note 296, at 92-93; Karkkainen, supra note 265, at 56-57.

\textsuperscript{305} See \textit{Integrating Land Value Taxation}, supra note 303, at 353. Tideman proposes two possible methods of improving on the “majority rule” default option in land use regulation: (a) weighted voting (with weighting based on the projected discrepancy between the presumed benefits and presumed costs that each neighbor
recognized that when a broad community of individuals participates in site-specific land use decisions, there is a decided risk of inefficient outcomes when the majority of participants favor the use, but the adjacent landowners most acutely experience the costs of the project’s externalities with limited compensation based on the amenities produced by the project.\footnote{306}

In the case of the Newhallville-Amistad CBA, the process was designed specifically to draw out broad consensus on what types of benefits the project should offer, but with little regard to the immediate impact of the projects on those most likely to experience a discrepancy between, on one hand, the amenities produced by the project along with the benefits secured by the CBA, and on the other, the direct externalities experienced as a result of being located close to the school. Thus, while the CBA information collection process may be adept at capturing the most salient points of agreement among a large number of community members, it appears a poor vehicle for sorting and ranking the price preferences associated with both benefits and externalities. A community may appear unified in its support for demanding a living wage guarantee from a developer. But without pricing and aggregating that preference, and ranking it against the prices placed on the project’s disutility, the CBA process may bias widely-shared preferences (regardless of price) over narrow (but highly valued) preferences related to parking mitigation, use restrictions, or requirements that the school install and manage trash receptacles. In terms of transaction costs, this eases the costs associated with the former constituency, while increasing the friction associated with the latter.

Surely, the allegations levied by the GNHCA—that the group was physically barred from participation in the final negotiations\footnote{307}—only adds to the concern that the ultimate agreement may not have resulted in an efficient allocation of development rights. For although the incentives of the CBA require broad participation, the CBA is

\footnote{306. See id. at 350.}

\footnote{307. See GNHCA Dec. 11 Press Release, supra note 248.}
not effectively designed to assess, balance, or mediate between competing neighborhood preferences when only a fixed amount of benefits may be extracted from a developer. In the end, however, the GNHCA tempered its obstreperousness, and while Rev. Boise Kimber vocally registered his dissent during the final hearing before the Board of Alderman, the GNHCA—for whatever reason—decided not to seek additional concessions from Achievement First, either by attempting to negotiate a side-deal, or by seeking its very own CBA on behalf of a constituency not well-represented in the deal brokered by CCNE and the two Newhallville alderwomen.308

C. Procedural Fairness

For several weeks now we have been warning that the process to sell the vacant Martin Luther King School on Dixwell Avenue was an anti-democratic closed process that essentially shut out the people most affected by the sale, the neighbors who live adjacent to the site. [. . .] The mystery behind all of the clandestine closed-to-the-public meetings is that the union funded Connecticut Center for a New Economy (CCNE) has been running the show since the summer. Achievement First, the unions AFSCME and UNITE HERE, and Alderwomen Fosky-Cyrus and Clyburn were all there behind the closed and union guarded doors. There has been no sign of the neighbors.309

The anger and vitriol of the GNHCA in the wake of the December 5 meetings between Achievement First and the negotiating coalition pointedly captures the concern that many scholars have voiced regarding the possibility of process-based failures in the course of negotiating a CBA. Specifically, that the private nature of the agreement limits the ability of outside bodies to oversee and regulate on not only the “what” but the “how” of the negotiation process. That CBAs may, in practice, fail to adhere to the objective ideals of transparency, inclusiveness of participation, and representativeness in negotiations, has been one of the instrument’s most well documented criticisms.310 Julian Gross, a major champion of CBAs, has gone so far as to propose a definition of CBAs that “would limit its use to describing agreements that reflect the essential values of past CBAs: inclusiveness and accountability.”311

311. Gross, supra note 66, at 36. Gross writes that “encouraging careful use of the term CBA is much more than an abstract, academic effort. As is vividly illustrated by recent New York processes [e.g., the Bronx Terminal Market CBA, the Yankee
Although Gross proposes that any “agreement or document that does not replicate these key attributes . . . should not gain credibility from association with them,” the reality is that there exists, at this stage, no external mechanism to ensure that CBAs adequately adhere to these ideals. Nevertheless, champions of CBAs continue to extol their virtues as flexible, participatory, and inclusive land use devices that improve upon the government-run status quo.

Because CBAs (a) have been engineered specifically to avoid the preemptive force of the National Labor Relations Act, and, as a result (b) entrust private coalitions with the authority to enforce the agreement, they are uniquely situated to receive all the upside benefits of judicial review (contract enforcement) while avoiding any downside risk of judicial review (no process-based review of private contract negotiations). In short, linguistic constraints may, at this point, be the only method of ensuring CBAs are negotiated without derogating from the values guaranteed by an administrative process checked by judicial review. While CBAs may offer certain participatory advantages over the standard regulatory analogues, the Newhallville-Amistad CBA illustrates how process values may also be undermined by the methods through which negotiating committees gain and maintain leverage over developers.

1. PROCESS VALUES

Where a government, by its decision, seeks to impose land-related costs on property owners on a parcel-by-parcel basis, the Supreme Court has demanded certain minimum procedural guarantees to satisfy the demands of Constitutional due process. Two analogous property tax decisions in the early part of the 20th century framed the Court’s approach to procedural due process, articulating a framework through which procedural guarantees increase in inverse relationship with the granularity of a particular government decision-making process. In Londoner v. Denver, the Court held that due process entitled property owners dis-

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313. See, e.g., Marcello, supra note 68 (“CBA negotiations can restore a measure of balance [in the public planning process] by empowering the community to participate meaningfully in the planning process through a direct dialogue with developers”).

puting a particular tax assessment not only to notice and an opportunity to submit objections in writing, but also an opportunity to be heard in some form of individuated adjudicatory process.\(^{315}\) In contrast, where a tax assessment was levied equally upon all property owners within a municipality, as in *Bi-Metallic Investment Co. v. State Bd. of Equalization*,\(^{316}\) the due process clause did not furnish all individuals with a constitutional guarantee of a right to be heard in matters “in which all are equally concerned.”\(^{317}\)

Translating these rough contours of procedural due process\(^{318}\) into the particularities of land use regulation, scholars have understood several important interests to be buttressed by process-based requirements. In addition to helping facilitate an efficient outcome, process values also regard as significant the representational and dignitary interests of both landowners and interested neighbors.\(^{319}\) Process increases the political legitimacy of the body issuing the decision and increases the acceptability of the result by impressing upon citizens

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315. *Id.* at 385-86.
316. 239 U.S. 441 (1915).
317. *Id.* at 445. The Court in *Bi-Metallic* contrasts its decision in *Londoner*, noting that in that case “a relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing.” *Id.* at 446. Note that what process is due may shift depending on whether the decision-making is characterized as “legislative,” “adjudicative,” or “quasi-judicial” in character. *See Ellickson & Been*, supra note 43, at 358 (describing different jurisdictional approaches to extending cross-examination rights for participants in zoning hearings).
318. Over the ensuing century, the Court filled out the meat of the procedural due process analysis, identifying specific indicators that the Court viewed as suggestive of reasonable or reliable decision-making. At its core, this included “notice and opportunity for hearing appropriate to the nature of the case.” *Cleveland Bd. of Ed. v. Lemon*, 470 U.S. 532, 542 (1985) (“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’”) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The constitutional floor of due process appeared to require, at a minimum, adequate notice, *see Mathews v. Eldridge*, 424 U.S. 319, 348 (1976), appropriate timing of the hearing, *see Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and impartiality of the decision maker, *see Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). However, *Mathews* altered the method by which due process requirements would be evaluated by pitting the individual’s interest in a particular entitlement against the public interest in accurate adjudication and the administrative costs of such accuracy, along with the likelihood of erroneous deprivations of the given interest that might be effected with inadequate procedural guarantees. *Mathews*, 424 U.S. at 335.
319. *Developments in the Law—Zoning and Procedural Due Process*, 91 HARV. L. REV. 1502, 1505 (1978) (“The representational function . . . relates due process directly to the substantive rules of decision by promoting debate over the merits and correct interpretation of the rules themselves, [whereas . . .] the dignity function is not concerned with the individual’s right to argue for a different outcome in his particular case. Instead, participation is required because human dignity mandates consultation with an individual prior to taking any action vitally affecting his interests.”)
a sense that the decision has been achieved in a fair manner.\textsuperscript{320} In some circumstances, states have written specific procedural requirements into state and local zoning acts that exceed the constitutional floor of due process.\textsuperscript{321} And numerous local ordinances specify the procedures and criteria by which more flexible land use decisions—such as development agreements and conditional zoning schemes—are to be finalized.\textsuperscript{322}

Professors Mandelker and Tarlock argue that judicial review of the procedural guarantees present in any given decision may serve as a reliable criterion for gauging the “reasonableness” of that decision.\textsuperscript{323} Specifically, a “process-based approach” to judicial review of local land use decisions may help “ensure that decision makers do the two things that are most likely to suffer in community politics: careful consideration of the relationship between individual decisions and the future form and composition of the community and particular attention to voices most likely to be ignored in the representative government.”\textsuperscript{324} Where citizens perceive their interests are at stake, expressing those preferences—either directly in the form of testimony at hearings, or indirectly through the ballot box—is an act at the core of democratic processes.\textsuperscript{325}

Whether CBAs enhance, detract from, or otherwise furnish process values analogous to those provided under a government-supervised regulatory process may help inform the evaluation of CBAs as a tool designed to achieve responsible development outcomes.\textsuperscript{326} But before undertaking such an analysis, a brief discussion into federal labor law and the engineering of CBAs is in order.

\textsuperscript{321} See Ellickson & Been, supra note 43, at 358.
\textsuperscript{324} Id. In practice, many regulatory decisions are highly discretionary and frequently unpredictable, which has resulted in numerous calls for procedural reforms in state zoning legislation. See, e.g., Daniel R. Mandelker, \textit{Model Legislation for Land Use Decisions}, 35 Urb. Law. 635, 635 (2003).
\textsuperscript{325} See Been, supra note 32, at 21 (discussing the importance of democratic electoral politics as an important check on the accountability of local decision makers).
\textsuperscript{326} For an analysis of whether CBAs promote efficient land use decisions, see discussion supra Part IV.B.
2. LABOR LAW AND THE STRUCTURAL INCENTIVES OF CBAS

Two attributes of modern labor law—namely, an incredibly broad federal preemption scheme, and labor law’s sanctioning of (and willingness to enforce) private ordering between labor and management—have both motivated and made feasible several of the innovative leverage and bargaining strategies of the modern labor movement. The breadth of federal labor preemption as interpreted by the Supreme Court has effectively barred all but the most minute of state and municipal experimentation in the area of labor-management relations. Labor scholars have long condemned this state of affairs, noting that the expansiveness of federal preemption has curtailed progressive local solutions to a failed federal labor regime—a regime that insufficiently protects collective bargaining rights and, more recently, has failed to keep pace with the shifting dynamics of an increasingly knowledge-driven economy.

In response to these perceived failures, unions developed the concept of “comprehensive” or “corporate” campaigns, seeking to link


328. See Sachs, supra note 134, at 1164-69; Robert Rachal, Machinists Preemption Under the NLRA: A Powerful Tool to Protect an Employer’s Freedom to Bargain, 58 LA. L. REV. 1065, 1066-67 (1998). There are three primary zones of preemption under federal labor law. First, Garmon preemption grants exclusive jurisdiction to the National Labor Relations Board (NLRB) to hear disputes over “unfair labor practices” arising between labor and management. See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). Second, Machinists preemption is based on the presumption that Congress intended to leave the field of much of labor-management relations to the “free play of economic forces.” Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm., 427 U.S. 132, 140 (1976) (internal quotations and citations omitted). As such, the Court interpreted the NLRA to preempt states and local governments from regulating union activity. Third, federal common law displaces state law when federal courts interpret the contractual provisions of a collective bargaining agreement (or any other agreement falling under the auspices of § 301 of the LMRA). See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957); United Steelworkers of Am. v. Rawson, 495 U.S. 362, 368 (1990).

329. See Benjamin I. Sachs, Labor Law Renewal, 1 HARV. L. & POL’Y REV. 375, 376-77 (2007). Sachs describes the innovations of the modern labor movement as resulting from an inflexible, rigid, and ossified legal regime that blocks the traditional methods of collective bargaining. Id. at 377. One of the new forms of labor law, he argues, is through private negotiated agreements, id. at 380-82, which he believes are “[o]ften (inaccurately) grouped together under the moniker of ‘neutrality and card check agreements.’” Id. at 378.
particular union organizing goals with policy goals or reform objectives of interest to a broader community outside of the immediate workforce.330 The union first identifies ways in which a target employer might be subject to control by external regulatory forces—for instance, workplace safety issues, environmental compliance, or compliance with permitting or zoning laws. By forming alliances with a particular coalition of interested activists, the union exerts pressure on such regulatory bodies to increase scrutiny on the employer. As labor scholar James Brudney has observed, the union thus “either on its own or with its allies, seeks to exert regulatory pressure on the target company by advocating for or initiating agency action addressed to actual or reasonably believed company violations of federal occupational safety, environmental, or securities laws, and of state or local zoning laws.”331

To gain leverage, the labor groups make clear their willingness to abandon or relent in their advocacy efforts, contingent upon the employer’s willingness to participate in a private agreement with the union—typically requiring the employer to agree to a method of organizing that departs from the NLRA-sanctioned method of secret ballot elections supervised by the NRLB.332 Provided the pressure is suffi-

330. See, e.g., CHARLES R. PERRY, UNION CORPORATE CAMPAIGNS (1987); JASON WILLIAM COULTER, THE THEORY AND PRACTICE OF UNION CORPORATE CAMPAIGNS (1997) (unpublished dissertation); Charlotte Garden, Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech, 79 FORDHAM L. REV. 2617, 2621-23 (2011); Herbert R. Northrup & Charles H. Steen, Union “Corporate Campaigns” as Blackmail: The RICO Battle at Bayou Steel, 22 HARV. J.L. & PUB. POL’Y 771 (1999). Garden describes three particular ways in which these campaigns differ from traditional labor organizing tactics: “[f]irst, they move the locus of the dispute from the plant floor or the picket line out into the community and sometimes across state and national borders. Second, they involve both labor unions and other community, religious, and activist organizations and thus rally a broad base of support that goes beyond labor’s immediate constituency. Third, they move away from traditional labor rhetoric and include the concerns of the civil rights, environmental, and consumer protection movements, among others, which sometimes conveys the impression that those organizations—and not the labor union—are the driving force behind the various rallies, press releases, and other campaign events.” Garden, supra note 330, at 2622.


332. See Brudney, supra note 331, at 743-44 (observing that in addition to its advocacy and pressure strategies, “the union signals that the campaign need not continue if the company acquiesces to the union’s labor relations objectives—to enter a neutrality agreement setting ground rules for an organizing drive, to recognize the union once it has obtained a card majority, or to return to the table to bargain for an extension or modification of existing collective bargaining arrangements.”). Neutrality agreements—private agreements made between a union and the employer—generally stipulate (a) that the employer will remain “neutral” during a
cient to entice the employer to capitulate, any private agreement negotiated between the union and employer is binding and enforceable in federal court under section 301 of the Labor Management Relations Act (LMRA). Such agreements, however, must remain exclusively private—and any participation by a state or local government body in the agreement risks the possibility that, if litigated, the agreement may be preempted as an impermissible interference by state and local authorities on the exclusive field of federal labor law.

Community benefits agreements are merely one species within the broader genus of corporate campaigns. Motivated by a need to circumvent the ossified federal labor regime, unions focus on the chokepoint of land use permitting and rezoning processes, leveraging their ability to mobilize either mass support for or mass protest against an employer’s desired land use proposal to secure a collateral benefit: more favorable rules with which to engage in union organizing. From a union organizing campaign; (b) that the employer will refrain from demanding NLRB supervision of the campaign; and (c) that the employer will recognize the union if a simple majority of the union employees sign a card authorizing the union to negotiate on the employee’s behalf. Compare Brudney, supra note 331 (arguing in favor of neutrality and card check on both normative and legal grounds); and Benjamin I. Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing, 123 Harv. L. Rev. 655 (2010); with Cynthia Estlund, Freeing Employee Choice: The Case For Secrecy In Union Organizing And Voting, 123 Harv. L. Rev. Forum 10, 15-20 (2010) (elaborating on and discussing concerns raised by critics of card check that indicate the “cajoling” of individual employees at the moment of signing an authorization card may pose issues associated with employee’s freedom to choose whether or not to support union organizing efforts).


334. See supra note 328 and accompanying text. It is worth noting, too, that under recent NLRB precedent, a public charter may, like a private employer, be governed by the provisions of the NLRA and LMRA. See Chi. Math. & Sci. Acad. Charter Sch., Inc., 359 N.L.R.B. 41 (Dec. 14, 2012) (holding that a public charter school, operated by a charter management organization, was not a political subdivision or instrumentality under the NLRA). As such, the provisions of federal labor laws that sanction private ordering may apply with equal force to public charter schools. The precedential value of this decision, however, has been called into question by the D.C. Circuit’s recent opinion in Noel Canning v. N.L.R.B., 705 F.3d 490 (D.C. Cir. 2013) cert. granted, 133 S. Ct. 2861 (U.S. 2013).

335. See Sachs, supra note 134, at 1179-80 (describing community benefits agreements as “tripartite” labor lawmaking, through which unions leverage the “benefit” of a regulatory decision favorable to the employer in exchange for a private union-
structural perspective, CBA proponents have crafted the instrument to dodge the federal labor law preemption regime.

By making clear that one subset of the union’s conditions are a necessary predicate for union support (namely, a private agreement defining the rules of a particular union organizing effort), but excluding such sub-agreements from the four corners of the CBA itself, unions achieve two key objectives. First, the union-employer agreement enforceable under section 301 of the LMRA. Second, the agreement is not voidable on grounds of federal preemption. In addition, the growing trend of “private” CBAs (as opposed to rolling the negotiated benefits into public development agreements) enables the negotiating coalition, rather than the local government, to leverage the enforcement power of courts to police the agreements for any breach by the developer. Uniquely, a CBA enables a union to evade judicial review of the mechanisms used to negotiate a CBA, while nevertheless using the threat of judicial review—on behalf of the broad set of CBA beneficiaries—to ensure enforcement of the terms of the CBA itself.

3. THE NEWHALLVILLE-AMISTAD CBA AND PROCESS VALUES

The Newhallville-Amistad negotiations—along with the controversy that clouded the CBA’s conclusion—illustrate both the advantages and structural risks that CBAs may pose to “process-values.” Of course, many of the factors present in this particular negotiation are context dependent, such as the domination of labor-backed politicians in New Haven’s board of aldermen, and the fact that the alderwoman representing the affected ward also happened to serve as head of the relevant aldermanic subcommittee. Nevertheless, the shape and trajectory of the negotiations are sufficiently clear to eval-

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336. See Sachs, supra note 134, at 1203 n.260 (noting that, in the case of the Yale-New Haven Cancer Center agreement, the development agreement negotiated with the city “was silent with respect to the union-employer agreement on organizing rights,” and that, similarly, the Hollywood and Highland Development Agreement specifically enumerated the benefit commitments that would flow from developer to the community, but excluded any discussion of the negotiated card check and neutrality commitments).

337. See Meyerson, supra note 232; Paul Bass, For New Majority, Campaign’s Just Beginning, NEW HAVEN INDEP. (Nov. 25, 2011) (reporting that Brenda Foskey-Cyrus and Delphine Clyburn were two of eighteen successful candidates for aldermanic seats backed by UNITE-HERE locals 34 and 35).

338. See supra Part III.
uate whether, in fact, “the CBA negotiation process helps to address [the problems of seeking and responding to community input, particularly for marginalized communities] by providing a forum for many interests in an affected community to be addressed through real, substantive, detailed negotiations a process not remotely replicated in public hearings or through the media.”

From the perspective of community engagement, it can hardly be doubted that the additional meetings organized by the Newhallville alderwomen—in concert with CCNE and Achievement First—augmented the nominal notice and hearing requirements mandated by New Haven’s municipal charter for enacting municipal orders.

Over the six-month period leading up to the December 17, 2012 vote before the Board of Aldermen, alderwomen Foskey-Cyrus and Clyburn admirably canvassed the neighborhood, not only soliciting individual feedback on the nature of the project, but also encouraging individuals to show up to Community Management Team meetings in which the broad outlines of the CBA began to take shape. Because a coalition’s influence depends on its ability to gather and organize a broad swath of community voices, the proactive nature of these solicitations portends well for ensuring all potential adverse effects of the development are raised, aired, and discussed within a broader community of stakeholders—especially those voices not well represented by minoritarian special interests.

339. Gross, supra note 66, at 38 (noting that “laws concerning public notice and participation are sometimes poorly enforced, and official public hearings are often held during the workday”); see also Camacho, supra note 258, at 360 (discussing the inadequacy of the current “bilateral negotiation process” between developers and local governments, and its failure to legitimate land use decisions by involving a broader set of affected stakeholders).

340. See New Haven, Conn., Code of Ordinances, tit. 1, art. IX., § 41 (Municode 2013) (“All ordinances shall be submitted to the board of aldermen, referred to and reported by a suitable committee after public hearing, printed in the journal for a first reading, and enacted upon second reading which shall take place at least one week after the first reading. The second reading of ordinances cannot be waived or dispensed with. All other measures (resolutions, votes, orders) shall follow the same procedure for legislative action as ordinances, except that, upon unanimous consent, immediate action may be taken, or upon receipt of a special message from the mayor declaring that the measure is of an emergency nature and that immediate action is necessary, the second reading may take place upon the same day as the original reading, and the printing of the same dispensed with.”).

341. Interview with Reshma Singh, supra note 170; Foskey-Cyrus, supra note 210.

342. See, e.g., Gross, supra note 66, at 38; Frank, supra note 312, at 253-54.

343. See supra note 288 and accompanying text. But see Musil, supra note 36, at 847 (analyzing results of a survey of community members who had previously participated in a CBA between 2000 and 2010, noting that “[s]urvey participants did not demonstrate uniform ratings of how CBAs improve the development process” and
Nevertheless, several red flags were raised during the course of the negotiations over 580 Dixwell, casting doubt on the perceived fairness, representativeness, and transparency of the bargaining process. First and foremost, arguably one of the fundamental conditions proffered by labor interests was excluded from the agreement: the labor neutrality and card check agreement for security and cafeteria workers.\textsuperscript{344} As was the case with the Yale-New Haven Cancer Center CBA, a core concession required by labor interests to secure their support was eliminated from the document formalizing—for public consumption and comment—the scope of the agreement.\textsuperscript{345} The mere fact of its exclusion, even if motivated predominantly by the goal of avoiding NLRA pre-emption,\textsuperscript{346} undermines the claim that the CBA negotiation process either improves upon or replicates analogous transparency requirements demanded by governmental processes. To make matters worse, the school’s agreement to grant $150,000 in support of “youth enrichment” programs—arguably one of the costliest elements of the deal—was similarly excluded from the final, public LDA. Finally, public copies of the agreement were not available until December 17, well after the deal had been solidified among the negotiating parties.\textsuperscript{347}

From the perspective of transparency \textit{ex post}, unless a particular condition is included in the final CBA (which in this case was appended as an annex to the land disposition agreement), its existence is effectively written out of the public record. For CBAs that are sanctioned or otherwise approved by public officials, any such omission is problematic. Electoral consequences that may flow from a given alder’s vote on the land disposition agreement is likely to be evaluated only by what is in the record; deals that are only “informally” part of the CBA negotiations—existing merely in the penumbras of the final

\textsuperscript{344} See MacMillan, \textit{supra} note 253 (reporting that “custodial and cafeteria workers will be unionized” at the new school as part of the deal); Interview with Reshma Singh, \textit{supra} note 170 (confirming the existence of the neutrality and card check agreement); 580 DIXWELL LAND DISPOSITION AGREEMENT, \textit{supra} note 158 (the formal documents filed with the municipality make no mention of the neutrality and card check agreement).

\textsuperscript{345} See Sachs, \textit{supra} notes 134, 336.

\textsuperscript{346} See Sachs, \textit{supra} note 336.

\textsuperscript{347} See \textit{supra} notes 242-52.
product—provide no assistance for voters seeking to hold government officials to account for their policy choices.

Additionally, the disappearance of these conditions undermines transparency *ex ante* by making it appear that these conditions are not part of the comprehensive package. By making clear to the developer that these conditions are, in effect, the table ante necessary to begin negotiations, the interest groups supporting these conditions make them non-negotiable but hidden from view. Unlike the other benefits that are publicly documented, any debate over the inclusion or exclusion of these specific benefits in the final package is unlikely to be held in any truly public setting.

A second, and related, concern is the representativeness of the negotiating committee—both during the negotiations and after the fact. The final negotiating committee for the “public” elements of the CBA comprised eight signatories—two of whom were the alders from Ward 20 and 21, with the remainder consisting of individuals who were “members of the community.” News reports, however, indicated that other individuals who were not signatories to the agreement played a key role in the negotiations. For instance, Barbara Vereen, an organizer for UNITE-HERE Local 34 and volunteer for CCNE reported to media shortly after the final meeting on December 3, 2012, that she had been a continuous presence throughout the six months of negotiations. Yet her name is conspicuously absent from any of the public documents contained within the LDA. Additionally, while CCNE sought to minimize its role in negotiations, a CCNE staff member eventually confirmed in a written statement that CCNE was involved in the negotiations, but only because Achievement First refused to sign a CBA with an unincorporated organization. Whether or not...

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351. See Achievement First and Newhallville Are Showing Our City How Development Can Benefit Everyone, CONNECTICUT CENTER FOR A NEW ECONOMY (Dec. 19, 2012), http://www.ctneweconomy.org/2012/12/community-benefits-agreement-reached-between-achievement-first-and-newhallville-community/ (depicting the agreement as being negotiated between Achievement First and the “Newhallville community,” and reporting only that CCNE “will review the agreement annually and provide a written report to the parties”).

this justification was true at the time, neither CCNE (as a corporate entity) nor any member of CCNE was included as a signatory to the executed CBA appended to the disposition agreement.

Whether or not the negotiations were compromised by the participation of individuals with overt interests in a particular outcome, the omission of these individuals from the public record has clear risks. As has been noted by courts scrutinizing land use deal-making by public officials, where participants in a decision-making process purport to represent a broad community, the appearance of reciprocal benefits between negotiating parties conveys the abandonment of independent representation for a broader constituency.\(^{353}\) Furthermore, the decision to stay out of the public eye makes scrutiny of the process far more difficult; if the public signatories are not the ones responsible for the outcome, to whom are dissatisfied citizens supposed to complain?\(^{354}\)

entry/targets\_crash\_clergy\_rally/\). In a statement emailed to the New Haven Independent, Renae Reese, Director of CCNE, confirmed that:

the organizing committee members from Newhallville (called Newhallville Rising) approached the CT Center for a New Economy (CCNE) to be their partner in the process of negotiating a Community Benefits Agreement (CBA) with Achievement First. The reach out came because Achievement First indicated to Newhallville Rising that since they were an unincorporated group, Achievement First would not be able to sign a CBA with them but only with an incorporated organization. We have been at the table ever since. CCNE is a 501(c)(3) not-for-profit organization.

Id. 353. For example, the Supreme Court of North Carolina, in reviewing the practice of conditional or contract zoning, noted that such reciprocal bargains “[a]re objectionable because [they] represent[] an abandonment on the part of the zoning authority of its duty to exercise independent judgment in making zoning decisions.” Chrismon v. Guilford Cnty., 370 S.E.2d 579, 593 (N.C. 1988); see also Wegner, supra note 322.

354. Of course, a valid response to this concern is that the CBA need not be the only private agreement negotiated with the developer. Julian Gross notes that “the existence of a coalition trying to negotiate a CBA does not prevent other community interests or representatives from themselves making their views known, or even negotiating with the developer as well; there should be no official designation of certain groups as the only valid community representatives.” Gross, supra note 66, at 38. The assertion that other groups may simply negotiate on their own behalf, however, belies the contention that the CBA process is wholly representative of community interests. If the CBA is represented by only a subset of interests, the negotiating coalition should be transparent that such is the case. In addition, Gross’s contention ignores the collateral consequences of economic waste—i.e., the costs of developing a parallel negotiating infrastructure. Furthermore, he overlooks the structural disadvantages faced by such non-represented groups. If the value added by groups like CCNE and LAANE is to remedy the traditional collective action problems by furnishing a community organizing infrastructure, any non-represented group will be at a distinct advantage unless it is similarly armed with grassroots organizing capabilities. Thus, while dissatisfied groups are of course at liberty to pursue their own negotiations, without the grass-roots support necessary to offer a tangible benefit to developers, such attempts are likely to be unsuccessful.
Scholar Vicki Been has observed that, in part because they are private, CBAs have no mechanism to ensure that the signatories are representative of the impacted constituencies.\textsuperscript{355} The harm is particularized, however, when the CBA negotiators convey the patina of representativeness but the underlying reality is far different.\textsuperscript{356} If the CBA process is viewed by the ultimate decision makers—in this case, the Board of Alderman—as a proxy for public planning and negotiation, the CBA might well bypass public mechanisms designed to ensure that no community voice is omitted from consideration. And in the case of the Newhallville CBA, allegations by Rev. Newman that he was forcibly excluded from participating in closed-door sessions\textsuperscript{357} casts additional doubt on any claim that the negotiating committee was truly representative of community interests.

Finally, that the absent or silent negotiators are aligned with labor’s objective of using CBAs to trade public support for union concessions only deepens the concerns of representativeness, transparency, and accountability for the ultimate outcome. Scholar Benjamin Sachs has noted that the model of “tripartite” lawmaking raises the specter of “a politics of indirection.”\textsuperscript{358} Specifically, labor advocates, unable to alter local labor rules because of federal preemption, re-channel what would otherwise be direct advocacy into the politics of zoning and permitting.\textsuperscript{359} This raises two particular concerns—first, such indirection undermines the democratic foundations of civic participation.\textsuperscript{360} Second, the incursion of labor politics on unrelated areas of law—here, the laws associated with land sale and regulation—results in opaque logrolling that renders legislators less accountable for their horse-trading.\textsuperscript{361}

\textsuperscript{355} See Been, \textit{supra} note 32, at 23-24.
\textsuperscript{356} Lance Freeman, \textit{Atlantic Yards and the Perils of Community Benefit Agreements, PLANETIZEN CONTRIBUTOR BLOG} (May 7, 2007), https://www.planetizen.com/node/24335 (“If the signatories to the CBA were simply viewed as another interest group, that might be ok. But the CBA is being presented as illustrative of the development’s community input. Public officials are posing for pictures with the developer and signatories to the CBA, giving the impression that the community had significant input into the planning Atlantic Yards. This is not necessarily the case.”); see Rubenstein, \textit{supra} note 303.
\textsuperscript{357} See GNHCA Dec. 11 Press Release, \textit{supra} note 248.
\textsuperscript{358} See Sachs, \textit{supra} note 134, at 1207.
\textsuperscript{359} \textit{Id}.
\textsuperscript{360} \textit{Id.} at 1208.
\textsuperscript{361} \textit{Id.} at 1209 (noting that “[w]ith labor lawmaking under preemption . . . only one part of the legislative deal takes place inside the legislature, and thus only one piece of the deal is transparent to constituents.”).
While the CBA negotiations undeniably offered a breadth of consultative opportunities with members of the community that exceeded those mandated by law, the unapologetic exclusion of apparently representative community groups (namely, the GNHCA), along with the agenda-setting role played by labor and labor-affiliated organizations, casts doubt on the procedural fairness of the CBA process. Ultimately, several important elements of the CBA were omitted from public record: the neutrality and card check agreement, the $150,000 grant commitment, and the names of influential negotiators with particular interests. Whether these omissions embody a tactical decision by labor advocates to avoid the preemptive force of the NLRA, or simply a strategy to ensure the negotiating committee appeared wholly representative of the community, much doubt remains as to the legitimacy of both the final outcome and the process by which it was obtained. This raises concerns not only of the steamrolling of the proprietary and dignitary interests of individual landowners, but also that no mechanisms currently exist to ensure the CBA matches or exceeds the procedural guarantees provided by a public regulatory scheme.

D. Distributive Consequences—The Horizontal (In)equity of CBAs

Responsible development advocates, in addition to portraying CBAs as procedurally superior to the standard regulatory apparatuses, also claim that CBAs offer a more distributively just outcome than the regulatory status quo. Countering the position that redevelopment itself is a community benefit by virtue of the additional taxes raised and services provided by the new project, CBA advocates highlight the distributional consequences that such projects might have on affected neighborhoods. In many cases, this may include both residential and retail displacement (affecting low-income tenants and replacing higher wage jobs with low wage work), the conversion of public spaces, and other disruptive socio-cultural factors that may harm the neighborhood.

362. See, e.g., ANNIE E. CASEY FOUNDATION, COMMUNITY BENEFITS AGREEMENTS: THE POWER, PRACTICE, AND PROMISE OF A RESPONSIBLE DEVELOPMENT TOOL 12 (2007) (“CBAs give a role . . . to community residents and other stakeholders and help ensure that all sectors share in the benefits as urban areas are redeveloped.”); BAXAMUSA, supra note 36, at 7, 157; Camacho, supra note 258, at 377.
364. See, e.g., id. at 222; Ken Jacobs, UNIV. OF CAL. BERKELEY CENTER FOR LABOR RESEARCH AND EDUCATION, Raising the Bar: The Hunters Point Shipyard and Candle-
For many CBAs, where the target development concerns a city-wide amenity such as a stadium, an airport, or large retail complex, developers and consumers may benefit substantially from the project without internalizing costs that fall disproportionately on the immediately affected community.365

The redistributive aims of CBAs may be portrayed most clearly under the rubric of vertical equity.366 Yet the fact that CBA negotiations involve competition for benefits among specific interest groups raises the question of whether the CBA also promotes the interests of horizontal equity—that is, whether like groups are treated alike in this particular competition over how to allocate developer surplus once captured.367 As was the case with allocative efficiency, the structure of the CBA prioritizes the interests of constituencies who are most capable of influencing local land use decisions.368 Extrapolating from the case of 580 Dixwell, the CBA mechanism does not guarantee a horizontally equitable outcome between neighbors, particularly when groups seeking to mitigate a project’s negative externalities compete for resources with groups seeking to promote redistributive aims.

Comparing the benefits package that ultimately prevailed with the package proposed by the GNHCA helps illustrate this conflict. The GNHCA proposal dealt almost exclusively with externality mitigation: privacy fences, time limitations related to lighting and noise, a residential permit parking system, garbage cans, and the like. In contrast, the prevailing package contained no mitigation benefits (with the exception of the provision requiring Achievement First to build a mural


366. In this way, CBAs have been analogized to exactions—a government-imposed requirement that developers provide funds or in-kind grants or dedications in exchange for permitting rights. See, e.g., Been, supra note 32; Been, supra note 279 (noting that, among other uses, “exactions may be used either to redistribute wealth from the developer or its customer to others, or to prevent the developer from appropriating wealth created by the activities of local government. A community may impose exactions as a means of capturing part of the developer’s profit. . . . [or] a community may use exactions to recapture from the developer part of the value added to land by improvements financed by the community.”)). This paper will not undertake an assessment of the vertical equity considerations of CBAs, and limits its exploration to only those issues of distribution among similarly-situated parties.

367. See Been, supra note 277; Ellickson & Been, supra note 43, at 628; Robert C. Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 YALE L.J. 385, 415 (1977) (portraying horizontal fairness as “requiring a person to bear a loss [when] he should be able to perceive that a general policy of refusing compensation to people in his situation is likely to promote the welfare of people like him in the long run.”).

368. See supra notes 298-301.
to honor the civil rights leaders portrayed on the original building). Ultimately, the latter set of interests won out, and despite public excoriation by Reverend Newman, the GNHCA elected not to push its agenda once the CBA had been signed.369

Fundamentally, the CBA as an instrument is normatively agnostic: the particular benefits that may be requested during a given negotiation will likely reflect the composition of the organizations advocating for its passage. I have argued, of course, that labor interests tend to predominate the landscape of current CBAs—and that their advantages as a form of “tripartite lawmaking” that escapes the preemptive force of federal labor law motivate their use by labor advocates nationwide. But labor need not be the driving interest motivating the formation of a community coalition. However, because CBAs are valuable only when they can assure the developer of either (a) vocal community support, or (b) substantial forbearance from a potentially vocal opponent, when interests compete over the precise composition of benefits, the group that can assure the broadest support will be most attractive to the developer. Furthermore, whichever interest group has a mobilization advantage—as is often the case with labor interests that possess community-organizing infrastructure—may be more likely to prevail in such a competition.

This problem is easily illustrated by imagining a developer who comes to the table with a budget of $100,000 to spend on community benefits.370 Three different interests groups propose three different benefits packages that are priced equally at $50,000. Package “A” consists of labor-related conditions, such as wage floors and neutrality and card check agreements. Package “B” consists of redistributive benefits, such as affordable housing guarantees and grant commitments to local youth organizations. Package “C” consists of nuisance-reduction measures, such as those described by the GNHCA’s proposed benefits package. If, as discussed above, the interests backing Package A make clear that their package is non-negotiable,371 the coalition will be forced to choose between packages B and C. Under the structural incentives of the CBA, the developer will prefer whichever package will guarantee the most support. If the interests behind Package A control the mobilizing and organizing infrastructure, they have the capac-

370. The hypothetical assumes that the $100,000 budget represents the threshold at which the developer’s surplus becomes too small to justify the investment.
371. See supra Part IV.C.3.
ity to direct the process by which B is selected over C or vice versa. Fundamentally, B and C are interchangeable, and the give and take of the negotiation process will determine which group prevails.

A wrinkle arises when considering whether package A, B, or C in isolation would be permitted under the alternative land use regulatory process. Under this lens, Package A is impermissible under federal labor law. Package B would potentially fail under the Supreme Court’s Nollan/Dolan jurisprudence for ensuring exactions are calibrated to offset development impacts. Package C, however, would likely fall comfortably within the zone of permissible conditions that may be imposed upon developers in exchange for permitting rights. These observations are not meant to suggest that any particular set of these benefits is more or less normatively superior based on their compliance (or lack thereof) with existing law.

However, to the extent that Package C proponents are unable to secure benefits that would likely be granted under the current regulatory regime, the results are inequitable. Under the current rules, there are few rights to redistributive benefits, but numerous rights possessed associated with mitigating the negative externalities of development. Thus, a CBA may promote horizontal inequity when non-rights holders obtain benefits at the expense of individuals who, in fact, have a right to compensation under the current allocation of property rules.

Horizontal equity may also be examined from the perspective of the developer, and under this rubric the mechanism appears quite fair. Here, too, the CBA proves to be normatively agnostic: CBA proponents have not identified “appropriate” and “inappropriate” targets of CBAs. Rather, they seek specific outcomes, regardless of the identity of the developer. That Achievement First was targeted suggests that CBAs do, in fact, treat all developers alike, and do not discriminate on the basis of corporate structure, motive, or service provided. Of course, the tool is flexible, and thus the identity of the developer may, play a role in determining whether a CBA is sought in the first place. Charter school detractors, for instance, may view the CBA as offering the collateral advantage of placing an additional tax on

372. See supra Part IV.C.2.
374. Achievement First, supra note 217. The Yale-New Haven Cancer Center CBA also supports the idea that CBA advocates seek particular outcomes—such as wage minimums, community contributions, or labor agreements—rather than targeting the identity of the developer. Yale-New Haven CBA, supra note 61.
independent charters. But without analyzing the data to see whether patterns of identity-motivated action does, in fact, occur, such motives are at this stage speculative at best.

E. A Coda: On Politics and Land Use Regulation in a Union City

Although helpful as an analytic framework, the normative evaluations discussed above come into sharper relief when presented against the backdrop of New Haven’s current political landscape. The current alignment of interests between the politically-dominant UNITE-HERE Locals 34 and 35, the union-backed members of New Haven’s Board of Aldermen, and the union-supported Mayor elect, Toni Harp, reflects a dramatically different political landscape for New Haven that may further undermine the purported participatory benefits of CBAs.375

A decade earlier, New Haven mayoral and aldermanic politics were fluid and dynamic, requiring alliances between key members of New Haven’s socio-cultural sub-communities. John DeStefano, serving as Mayor for twenty years beginning in 1994, formed bonds with key power brokers like Rev. Boise Kimber, an influential leader and clergymen within the black community376 and the Fuscos, a wealthy family within the Italian community.377 And as CCNE founder and union organizer Andrea van den Heever discovered, politics in 1990s New Haven required broad-based coalitions that were able to garner support from the powerful—but stratified—leadership of disparate communities within the city. Justice Alito, in his concurrence in the firefighters’ discrimination case, Ricci v. DeStefano,378 went so far as to highlight Kimber’s role as “a politically powerful New Haven pastor and a self-professed ‘kingmaker.’ ”379

By 2011, the scales had shifted dramatically. Dissatisfied with the comfortable relationship between the Board and the mayor’s office, union leaders funded challengers in fifteen different aldermanic seats,


376. See Paul Bass, Was He the Culprit? NEW HAVEN INDEP. (June 29, 2009), http://www.newhavenindependent.org/index.php/archives/entry/was_he_the_culprit/.


379. Id. at 598 (Alito, J., concurring).
winning a veto-proof supermajority that allowed the Board to play a more aggressive role in setting the political agenda for New Haven. 380

Comparing the negotiations surrounding the Omni Hotel Development Agreement381 and the Yale-New Haven Hospital CBA382 with the negotiations over the Newhallville CBA, it seems clear that the nature of development-oriented, coalition-based advocacy has changed. In the case of the former, to build momentum for their advocacy platform, the unions required the assistance of a broad range of community groups, including the black clergy, civil rights and housing advocates, and other social justice organizations. The political quid pro quos offered mutual benefit and encouraged a broad-based, participatory process.

But CCNE and its funders have played the long game, cultivating a deep set of community ties that have since obviated the need to involve other purported power-brokers in city politics. The alleged steamrolling of GNHCA by CCNE over the 580 Dixwell negotiations revealed the limited value CCNE placed on securing the support of the black clergy.

With a veto-proof supermajority on the Board, the need for logrolling diminishes along with the need to maintain a broad set of alliances to advance a particular interest group’s political agenda. As demonstrated by Alderwoman Brenda Foskey-Cyrus’s last-minute decision to send the agreement back to the Community Development Committee—allowing a last-minute, closed-door session to iron out the contours of the CBA—the current political leaders are able to set the priorities and terms of these negotiations as they see fit. 383 In the case of this union city, therefore, the chance that the Board will scrutinize the terms of a labor-backed CBA appears similarly unlikely.

V. Conclusion

The Newhallville-Amistad deal is but one iteration of a community benefits agreement, negotiated in a very specific political and historical

381. See Warren & Cohen, supra note 110, at 643-53.
382. See supra notes 132-147.
context. As this article has discussed, CBAs may take many forms—whether public or private, singular or multiple, transparent or opaque. There are, at present, few limitations or guidelines for determining how and under what circumstances CBAs should be used to supplement or circumvent the existing system of land use controls in any particular locality.

This dynamism is one of the chief virtues of the CBA, for it helps to erase the clear, but often arbitrary, lines determining what categories of benefits a locality may demand as a condition of granting development rights. And as CBA advocates have clearly articulated, the tool helps disrupt entrenched power dynamics in existing mechanisms of urban governance, giving greater power and control to disadvantaged classes of individuals who are often unable to make land use law work to their benefit.

But the salubrious effects of this instrument should not be overemphasized in order to obscure the risks that CBA bargaining—unconstrained by judicial or administrative review—may pose. A close look into the negotiating process underlying the Newhallville-Amistad CBA illuminates many of the concerns raised by land use scholars who remain cautious, albeit optimistic, about the potential this tool holds for future development projects. Because there are, at present, no legal mechanisms to scrutinize the process, the negotiations are prone to risk of capture by powerful interest groups. And I have placed great emphasis in this article on the role that organized labor plays in biasing not only the content of the benefits themselves but also the structure the agreements take.384

As a result, the commendable goals of transparency, inclusiveness, and equity may be lost in service of particular pre-determined outcomes. When the needs of these powerful interests can motivate a developer to meet the needs of the broader community, so much the better. But such a claim, I believe, raises more questions than it answers. Who, in fact, constitutes the relevant “community”? Should all members be entitled to share in the developer’s surplus? Recognizing that resources are limited, which members of this community should be given priority over others if there is a conflict? And, finally, who should decide?

Because they are so new, localities are only beginning to grapple with how to manage these instruments. Some have argued for regula-

384. Whether or not this is true empirically remains an open question. Any answers may help further our understanding of whether CBAs have vitality independent of these interests.
tion, asking cities to re-exert control over the freewheeling negotiations of wholly private dealmaking. But by re-inserting government into the process, such regulation may well undermine the efficiency gains that this flexible tool provides. Others have suggested taking advantage of the free-market, using freedom of contract to insure the integrity of the process by way of a CBA “operating agreement.” Recourse to neoliberal correctives may help mitigate the current shortfalls of this mechanism, but there is no way to guarantee that such best practices will always be followed. Finally, some have advocated for eliminating the ability of land use decision makers to consider CBAs in reaching their decisions, even if an outright ban on CBAs is impractical.

At a minimum, the emergent popularity of these instruments should suggest discomfort with the existing regulatory regime. And it may well be that innovations in our current methods of land use controls may offer the best solution for addressing the concerns of disadvantaged groups without the concurrent risks that land use law has long sought to mitigate.

385. See, e.g., Michael A. Cardozo, Reflections on the 1989 Charter Revisions, 58 N.Y.L. SCH. L. REV. 85, 93 (2014) (suggesting that the New York City Charter Revision Commission might consider demanding all CBAs be incorporated into existing formal structures like the Uniform Land Use Review Procedure (ULURP), regulating their subject matter, or limiting the participation of city officials in their public capacities); David Schleicher, City Unplanning, 122 Yale L.J. 1670, 1707 (2013) (describing efforts in New York to solicit input by advisory neighborhood bodies as part of the ULURP process).

386. See Marcello, supra note 68, at 663-64 (discussing the example of a CBA in New Orleans whereby coalition members, by executing an operating agreement, agreed to be bound to specific principles that minimized conflicts of interest, reduced the chance for side-deals, and a guarantee of transparency).

387. New York City Bar Association, The Role of Community Benefit Agreements in New York City’s Land Use Process (March 8, 2010), available at http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf (“It is our recommendation that the City announce that it will not consider CBAs in making its determinations in the land use process, will give no “credit” to developers for benefits they have provided through CBAs, and will play no role in encouraging, monitoring or enforcing the agreements. To the extent that the City wishes to consider CBAs outside of the land use process, such as in its decisions to grant subsidies or contracts to developers pursuant to its economic development program, it should set forth clear standards that a CBA must meet in order to be considered.”).
APPENDIX A

580 Dixwell Land Disposition Agreement, Exhibit B (Community Benefits Agreement)

I. PURPOSE
The purpose of this Community Benefits Agreement is to provide for a coordinated effort between the Newhallville Community and Achievement First to maximize the benefits of the construction of a new high school at the sight of the former Martin Luther King, Jr. High School at 580 Dixwell Avenue in New Haven. This Community Benefits Agreement agreed to by the Parties includes provisions for access to jobs for New Haven residents, increased access to AF resources to the Newhallville community for youth enrichment programs, community access to the school, and community input on the design of the building.

II. JOBS
Achievement First commits to partnering with New Haven Works (NHW) to recruit, train and place New Haven residents into new positions that may become available in all Achievement First New Haven schools, including the newly constructed high school. As part of this partnership, AF will work specifically with New Haven Works (NHW) to identify and recruit potential teachers from underrepresented groups (Black, Latino, Multi-Racial, and first generation college graduates). Together, they shall work with the state’s universities to enhance recruitment efforts of candidates from underrepresented groups. This partnership will last for five years. At the end of that term, the partnership will be re-evaluated by both parties.

During the period of construction, Achievement First agrees to hold their Construction Manager (CM) and subcontractors accountable for achieving the goals for employing minorities, women, New Haven residents, apprentices (1st and 2nd year), and ex-felons. AF shall do this by holding monthly reporting meetings with the CM in which the CM will disclose its project employment data and that of all of its subcontractors. AF will then hold meetings every other month to share this data with Aldermen Foskey-Cyrs and Clyburn and the Newhallville Management Team.

III. STUDENT ACCESS
Achievement First will offer ten seats in its 9th grade class to New Haven public school students (with an agreement for Achievement First and the Board of Aldermen to discuss and make recommendations after five years) who have not attended one of Achievement First’s middle schools through the New Haven Schools of Choice lottery. The new lottery-admissions students will be offered seats at Achievement First Amistad High School for the first school year that the high school is in the new facility.

IV. STAFF DIVERSITY, RECRUITMENT AND RETENTION
As part of Achievement First’s overall Diversity and Inclusiveness Initiative, Achievement First shall commit to the retention, engagement, and promotion of candidates who are Black, Latino goals through this initiative:

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a. 30% of finalist candidates identify as Black, Latino, Multi-racial, or first generation college graduates at their New Haven schools (teachers and leaders).

b. No difference in matriculation rate for Black and Latino candidates versus overall matriculation rate.¹

c. 5% increase over last year in applications from Black, Latino, and multi-racial teachers and leaders for 2013-14 and an additional 5% increase for 2014-2015.

VI. COMMUNITY ACCESS TO SPACE

Certain areas of the Premises will be available for community use when such areas are not being used by the School or AF. Because design and construction of the Premises is not yet complete, and the School does not know what amenities will be available on the Premises, the School will provide a list of the Usable Areas to the Alderperson for the ward in which the School is located. These Usable Areas will, at a minimum, include the gymnasium and the outdoor athletic field. The kitchen will not be considered a Usable Area due to sanitation requirements and liability concerns. All use of the Premises by Community Users shall be subject to applicable laws and school rules, regulations and policies, and, when appropriate, reasonable insurance and/or security protection.

Achievement First agrees to grant access to space to invest in community engagement in Newhallville. The Newhallville Management Team, the Wards 20 and 21 Political Committees of any political affiliation, and other community organizations shall have access to space in the newly constructed high school. Eligible Users are non-profit or other community organizations that have a primary address in New Haven, or an individual with a primary address in New Haven that desires to use the school for the benefit of the New Haven community and whose membership and/or mission is not inconsistent with legitimate concerns for the safety of students at the school. Such access shall be free of charge and include:

- A space able to hold up to 100 people when AF or the school is not using it.
- A conference room that holds up to eight people. Newhallville Leadership will have priority over Achievement First and/or the school for the usage of this conference room even during school hours.
- Full access to outdoor fields and the gymnasium when not in use by AF or the school, subject to reasonable limitations for facilities maintenance and seasonal or weather limitations.
- Parking in the schools’ parking lot for the usage specified during non-school hours and on the weekends when no Achievement First or school events are taking place.
- Usage of the schools parking lot by neighborhood entities during non-school hours and weekends.
- Access for high-risk events shall require a certificate of insurance in a reasonable amount unless determined to be unnecessary by Achievement First in its reasonable discretion.

¹ Matriculation rate is defined as the percentage of candidates who begin to work at Achievement First after receiving an official offer.

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if there are more than four community events in a given year that require security, significant
prep or clean up expenses (e.g., expenses in excess of $2,000 per event), Achievement First will
have the right to charge for additional events only to recoup the costs of such security
expenses, preparation and clean up.

Achievement First will create a summary of allowable and prohibited uses of the school
to guide community use. A collaborative process will be used to determine the process for how
community requests are granted. This process will include a building application, a reasonable
timeline for making space requests of Achievement First or the school and allowing
Achievement First and the school to prioritize community requests, and when appropriate, the
required insurance coverage.

Additionally, the building will continue to be available as a voting and polling site for the
Newhallville and Dixwell communities as it has in previous years.

VI. PHYSICALITY
AF agrees to establish a work of art that pays tribute to civil rights leaders as the former MLK site does. This piece shall be visible from the street. AF agrees to work with the Design Advisory Committee to advise the design of the artwork as long as a meeting of this committee can be arranged by January 15, 2013.

VII. GENERAL PROVISIONS
A. Enforcement Clause. The City of New Haven or the Board of Aldermen has the right
to ask for a court order requiring Achievement First to honor the commitments
contained in this agreement for as long as Achievement First is the operator of the
AF Amistad High School.
B. Review Clause. The CT Center for a New Economy (CCNE) will review the agreement
annually and provide a written report of that review to the Parties, the Board of
Aldermen, and the City of New Haven.
C. Severability Clause. If any term, provision, covenant, or condition of this
Community Benefits Agreement is held by a court of competent jurisdiction to be
invalid, void, or unenforceable, the remainder of the provisions shall continue in full
force and effect.
D. Material Terms. All provisions and attachments of this Community Benefits
Agreement are material terms of this Community Benefits Agreement.

ACHIEVEMENT FIRST, INC.

By: [Signature]
Title: Co-Founder & CEO
Date: December 17, 2012

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The Failure of America’s First City Plan

Maureen E. Brady*

Many legal scholars and urban planners extol the virtues of the great American downtown grid: the uniform blocks and parallel streets that dominate cities from New York to San Francisco. Against this precision, the serpentine roads of many early American towns are viewed derisively, as an undesirable consequence of disorganized colonization. The history of America’s first planned city offers a natural experiment for examining the legal and economic consequences of both types of layouts—and evidence about when the conventional wisdom on grids is wrong.

This Article tells the story of the failure of America’s first city plan: the Nine Squares grid in New Haven, Connecticut. The Squares were problematic from their inception because they were too large and improvidently located. To adapt to land conditions and a commercial future far from what the town’s founders anticipated, eighteenth-century civic leaders resorted to a variety of processes to revise the layout, including a major subdivision that required use of the eminent domain power without payment of compensation in the 1780s. Town planning within the grid contrasted sharply with planning in areas surrounding the grid during the same time frame. In other parts of New Haven, incremental street decisions, legal mechanisms for resident involvement, and laws permitting in-kind compensation for new roadways allowed the town responsively to plan streets suited to changing land and settlement conditions.

This Article advances a new theory of street planning drawn from the New Haven case study, aiming to surface the virtues piecemeal planning can bring during some points in a city’s development. Streets can be thought of in market terms, and comprehensive grid plans may act as market distortions, preventing settlement forces from organically producing more effective street layouts. Particularly where information about land is dispersed among members of a small population, bottom-up street plans may be desirable because they reflect residents’ preferences and harness dispersed knowledge about land conditions and uses.

“[T]owns newly founded may be established according to plan without difficulty. If not started with form, they will never attain it.”

— King Ferdinand of Spain, 1513

* Ph.D. candidate, Yale University. I thank participants in workshops at Yale Law School and the American Society for Legal History annual meeting for comments on a preliminary draft. I am especially indebted to Jack Brady, Eric Kades, Claire Priest, Daniel Sharfstein, and, most importantly, Bob Ellickson.

Introduction

If given the opportunity to design a new town, how would you plan the streets? This is not as far-fetched a question as it might seem: this sort of advance planning happens frequently in our midst. In China, for example, urban planners have set up street grids, interlocking cul-de-sacs, and rings of streets populated with buildings where no one yet lives.2 The same process is underway in India.3 In selecting a city layout, planners of new cities are making judgments not just about what future residents will prefer, but also about how the street plan will facilitate the economic and social life of new villages, towns, and cities.4 New work by Robert Ellickson suggests that for most downtown areas, rectangular layouts are best because they are likely to maximize land values on the resulting blocks.5 In a play on words inspired by the iconic 1987 movie Wall Street,6 Ellickson posits that when designing street plans, “grid is good.”7

The first grid plan in the United States was the Nine Squares of New Haven, New Haven’s three-block by three-block downtown city plan.8 New Haven’s plan served as inspiration for William Penn when he designed Philadelphia.9 The New Haven plan has been hailed as a triumph of colonial planning; scholars have praised the Squares’ “neat precision” as a “rarity”10 when compared with some of the more irregular New England settlements with winding roads and confusing street patterns, like Boston, Cambridge, or Salem.11 Where the irregular road patterns of many cities have been criticized, New Haven’s Nine Squares, have been revered. New Haveners take great pride in the plan; city historian Elizabeth Mills Brown has stated that the Nine

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5. Id. at 479-84.
6. WALL STREET (20th Century Fox 1987).
7. Ellickson, supra note 4, at 479.
8. See 2 JAMES D. KORNWOLF, ARCHITECTURE AND TOWN PLANNING IN COLONIAL NORTH AMERICA 1177 (2002); Reps, supra note 1, at 129.
9. Reps, supra note 1, at 129 (noting that despite a lack of direct evidence, there is a reasonable basis for this belief).
10. Id.
Squares “plan proved a good one. . . . It has long been cherished by its own citizens.”12 Most recently, the Nine Squares have been designated a National Historic Planning Landmark by the American Institute of Certified Planners.13 But this praise and admiration is not deserved.

This paper demonstrates that New Haven’s Nine Squares—the first comprehensively planned grid in the American colonies,14 and hence one of America’s famous urban spaces—ultimately failed its residents and stunted New Haven’s growth.15 The failure of the original New Haven plan was writ large during a second planning event: the subdivision of the Nine Squares by new streets, which began in 1784. The subdivision took nearly sixty years to complete, and cost time, land, and money, all to correct the flaws of the original town plan. Using the history of the plan, I argue that comprehensively planned grids are not always normatively desirable and present a theory of street planning based on the conception of city streets in market terms. The original town plan left New Haven’s infrastructure inflexible in a time of changing economic and social circumstances during the seventeenth and eighteenth centuries, the most important of which was the rise of New Haven as a commercial center as opposed to a closed agrarian religious community. Within the Nine Squares, the supply of streets did not reflect or keep up with the demand for them, either in number or in terms of their location. I argue that the history of New Haven and other early colonial town plans demonstrates that piecemeal planning—planning done incrementally—better served new wilderness towns and their residents, because piecemeal planning harnessed the expressed preferences of settlers as an informational resource and facilitated streets that best nurtured otherwise unpredictable colony needs. In short, my aim is to complicate the theory that “grid is good.”

This Article makes a secondary contribution. It contains unprecedented research into early use of eminent domain in the trenches, away from the models in the statutes. Colonial highway statutes are ubiquitously cited as the predecessors to the Takings Clause of the Fifth Amendment, yet no one has looked into the practical use of

14. Id.; see Ellickson, supra note 4, at 470.
15. This is not to say that all planned towns or colonies were failures. See infra Section IV.B. (discussing New York and Philadelphia).
eminent domain on the ground in eighteenth century towns and cities and how it shaped urban space. This Article uses over two hundred unpublished documents from the New Haven Land Records in which the town government acquired land from the residents of New Haven for highway construction. I use these documents to explore how early legal procedures—like rules permitting in-kind compensation—facilitated piecemeal development and created street plans that left cities responsive to changes in the landscape and economy.

Some background on New Haven may be useful. New Haven Colony, at first separate from its colony to the north, Connecticut, was founded in the spring of 1638, when a group of about two hundred and fifty settlers arrived from Massachusetts into New Haven harbor. One of the group’s leaders—Theophilus Eaton, a wealthy merchant—had come to the site beforehand, in the fall of 1637, and chose it for its suitability as both a harbor and a site of fertile land.

The origins of New Haven’s Nine Squares plan are obscure and speculative. One scholar has gone as far as to suggest that the idea for the Nine Squares originated in the layout of an ideal city proposed by the Roman engineer Vitruvius. The only map which portrays New Haven at the time of its founding—the so-called “Brockett Map” (named for the alleged surveyor)—was drawn sometime in the nineteenth century, painstakingly reconstructed from the New Haven Land Records. Fortunately, it does not much matter for this study


It can be difficult to tell which transfers were consensual and which were the result of nonconsensual eminent domain. Only a very small minority of landowners requested a road on their own properties, meaning there was some degree of compulsion exerted upon most affected landowners. Even in nonconsensual cases, the town seems to have negotiated with the affected landowner about compensation and documented the transfer using a deed. This study uses all transfers of highway land from citizens to the town in its discussion of compensation patterns and planning, though these transfers likely fall across a spectrum from consensual sales to nonconsensual eminent domain and compensation.


18. REPS, supra note 1, at 129.


20. Brown, supra note 12, at 11-20. Elizabeth Mills Brown has written a thorough and convincing critique of the popular assumption that John Brockett laid out the town, even offering suggestions of other possible surveyors.
what the exact history of the Nine Squares plan is. The town’s form probably did not change much between the first settlement and the first reliable contemporary maps, produced in 1724 and 1748, although it is plausible that it took several years to actually settle all of the squares.

The plan for the new town consisted of a perfect square divided into nine nearly identical blocks by eight streets. The square was tilted at an angle, not arranged perfectly North-South. This appears to have been done so that the bottom and right sides of the square would be aligned with two impermanent creeks coming in from New Haven harbor, respectively called East and West Creeks. It seems likely that this type of plan could not have been designed ad hoc at the time of the first settlement. John W. Reps, a historian of urban planning, has advanced the hypothesis that Eaton or other leaders of the New Haven group may have drafted a plan in the time between their first visit and the arrival of the first group of settlers.21

The sheer size of the squares is stunning: as the blocks were originally laid out, they were fifty-two rods, or roughly eight hundred and fifty feet, on each side.22 Each square thus contained over sixteen acres of land.23 While eight of the blocks were reserved for house lots, the center block was designated a public space or town green, rendering it the largest open urban space in either England or New England at the time. Only London’s Lincoln Inn Fields, at a much smaller eight hundred by six hundred feet, came close.24 Even among those towns ordinarily called “regular” or grid-like—Cambridge, Massachusetts, Hartford, Connecticut, and Newport, Rhode Island, serve as examples25—the Nine Squares are unique. In no other

21. Reps, supra note 1, at 129. Reps’s hypothesis derives primarily from one peculiarity of the Nine Squares: from the time of their first settlement, there was a less regular “suburb” along the water, already settled in the 1640s. According to Reps, as Eaton and Davenport were preparing to leave for New Haven, they realized that there would be more in their company than previously anticipated. As a result, they tacked on the suburb as an afterthought, providing evidence that the plan for the Nine Squares predated the settlers’ arrival in Connecticut. Id. at 129-30. Elizabeth Mills Brown has suggested that if Eaton never returned to Massachusetts, he may have laid it out (with some help) over the winter of 1637-1638. See Brown, supra note 12, at 4.
22. See infra note 31.
24. Reps, supra note 1, at 130.
25. Id. at 126-27, 129.
contemporary town were any two blocks the exact same size, let alone nine blocks. Although the general grid pattern was well known in Europe and England and even somewhat mimicked in the “regular” towns, it was only in the colony of New Haven that the grid pattern was developed on such an enormous scale and with such precision.

On the other hand, as legend has it, the town of Boston was laid out by “wandering cows.”\(^26\) This legend illustrates just how unusual New Haven’s comprehensive plan was, given the state of the streets in other colonial towns. More likely than the cow theory, Boston settlers arrived to a complete wilderness and laid out their city infrastructure according to the existing topography, with some improvisation. In contrast to New Haven’s comprehensive plan, colonial towns like Boston epitomized piecemeal development: streets were formed incrementally, often street-by-street or block-by-block, responding to the will and needs of the community or else the demands of geographic features like hills and waterways.

Though no early map for Boston exists, a map from 1722 closely approximates the general layout of the streets in 1640: streets going from east to west wind around the peninsula, with occasional side streets tracking south toward the harbor.\(^27\) The cities of Salem and Ipswich are even more irregular, but like Boston, follow a generally water-centered design, with the town streets mainly running along the water line or to the water, varying with topography.\(^28\) Because of the irregular streets, the blocks varied in size, too, probably according to function.\(^29\) Most blocks closer to the water were small, while those further inland were typically larger and less densely crowded.\(^30\)

\(^{26}\) Lawrence W. Kennedy, Planning the City Upon a Hill: Boston Since 1630, 12 (1992).
\(^{27}\) See Reps, supra note 1, at 142.
\(^{28}\) See id. at 124, 137.
\(^{29}\) The map of 1722 depicts some blocks which remain measurable today. For example, in Boston’s North End, Prince Street, Bennett Street, Salem Street, and North Street (now Hanover Street) formed one block that was split by an alley or smaller street—this block was about five hundred and twenty-eight feet by two hundred feet. Closer to Boston Common, there were larger blocks. The block formed by Winter Street, West Street, Tremont Street, and Marlborough Street (today, Washington Street) was closer to five hundred and twenty-eight feet on each side. See Reps, supra note 1, at 142.
\(^{30}\) See id.
Scholars have tried to explain the reasons for early New England’s irregular street patterns in varying ways. Carl Bridenbaugh has characterized early road development in these colonies as largely “fortuitous.”

“Paths appeared from house to house as they were needed, and an occasional road pushed to a nearby settlement. The first paths

31. The blocks vary in size within each of these cities, but I have chosen what I believe are fairly average sizes. New Haven’s original blocks were eight hundred and fifty feet to a side. John W. Barber, History and Antiquities of New Haven, Conn. 12, 18 (1831), available at http://ia311338.us.archive.org/1/items/historyantiquiti00barbe/historyantiquiti00barbe.pdf. John W. Reps misstated this distance in his book, stating that each was “16 rods, or 825 feet,” but those are not equivalent. Reps, supra note 1, at 128. A New York City block in Manhattan north of 14th Street is about two hundred and sixty-four feet by one thousand and fifty-six feet (or one-twentieth of a mile by one-fifth of a mile). In Savannah, the city blocks within each ward consisted of three ninety-foot long home lots fronting one side and four sixty-foot wide home lots fronting the other side, resulting in rough dimensions of about two hundred and seventy feet by two hundred and forty feet. Reps, supra note 1, at 187, 189. Philadelphia blocks were four hundred and twenty-five feet wide, but varied in length from five hundred to six hundred and seventy-five feet. I used six hundred feet as the length for this diagram. Reps, supra note 1, at 163.

tended naturally to follow the configuration of the terrain with little thought of symmetry; ease of travel was the prime consideration.”

Thus, according to Bridenbaugh, infrastructural design in many New England towns was an afterthought. Street creation followed the contours of where homes and marketplaces were already built. Similarly, Sam Bass Warner has called the process which led to these irregular results “folk planning.” For Warner, folk planning was a product of “medieval English village traditions fused with religious ideology.” The town was close-knit and group-oriented, and in most towns, piecemeal planning best suited resident needs. Irregular planning was conducive to growing American colonial individualism: as self-sufficient farmers sought out larger grants of land outside the city center, they sought new access ways to their own distant plots that were not part of any organized plan. Later on, as merchants crowded the city, the town plan developed more streets to carry traffic and facilitate denser settlement. The ultimate results of this type of piecemeal planning are the layouts of many of the oldest cities we see today: winding roads with bends and curves, irregularly sized blocks, and occasionally confusing intersections, with some streets probably tracking an ancient farmer’s route to his fields.

In any case, it was not long before the consequences of “folk planning” came to be associated with frustration. The town layouts of most colonial cities have been described as “ugly, chaotic, and scattered,” and to most modern drivers and city planners, these streets, while charming, can seem incomprehensible, or, to use a city-planning term of art, “illegible.” But gripes about New England town planning have been ongoing since long before modern times. For example, although the irregular road system suited the needs of early Bostonians, the Royal Commissioners of 1665 already complained of the town’s streets as “crooked, with little decency and no uniformity.”

33. Id.
35. Id.
37. Id.
38. See K E V I N L Y N C H, T H E I M A G E O F T H E C I T Y 3 (1960) (“Just as this printed page, if it is legible, can be visually grasped as a related pattern of recognizable symbols, so a legible city would be one whose districts or landmarks or pathways are easily identifiable and are easily grouped into an over-all pattern.”). Lynch has described Boston’s street pattern as “generally confused.” Id. at 22.
early as the 1790s, one prominent New Havener, Yale President Timothy Dwight, wished New Haven’s plan on the winding roads of Boston: “Had ten open squares been formed at the proper intersections of the principal streets . . . or had some other plan . . . been completed, Boston would even now have been the most beautiful town that the world has ever seen.”

However, New Haven’s grand and regular plan resulted in several critical errors for the city’s future growth. First, the blocks were extremely large, much larger than they were in towns that were “folk-planned,” requiring time-consuming and imperfect revisions to the plan a century later. Moreover, the large blocks necessitated deep lots, limiting the amount of downtown land available for resident purchase at a time when settling new residents was critical to further economic and social development. Second, although it is true that New Haven was oriented around East and West Creeks, New Haven was not oriented toward a substantial river or its natural harbor. This limited circulation between the water and the downtown market area. In Boston, Ipswich, Salem, and Manhattan, large, natural sources of water served as the main points of orientation, and in each of those cities, the main street or streets tracked the natural waterway. The water became the source of commerce and industry for early colonial cities, and New Haven’s plan limited rather than facilitated access to it.

Ultimately this paper argues that comprehensive grid planning can fail, particularly when contrasted with piecemeal designs. The lesson from this microhistorical study is not that all grids fail, nor that all incrementally planned cities result in flawless plans. It instead suggests that streets can and should be thought of in terms of supply and demand, and that New Haven is a paradigmatic case of market failure.

In the 1640s, the Nine Squares plan responded inadequately to the

41. See supra note 31.
42. Cambridge, Massachusetts, probably the second most famous “compact” town in contrast to the “linear” towns of Salem and Boston, was also laid out along a creek rather than the Charles River. See REPS, supra note 1, at 126-27.
43. Boston’s downtown area was redesigned in parts in the late eighteenth and early nineteenth centuries. However, these redesigns were often part of rebuilding after fires or other disasters rather than a result of necessary eminent domain, and those projects which were accomplished with eminent domain were relatively small scale when compared to the Nine Squares subdivision. See KENNEDY, supra note 26, at 23-41.
44. Although a preferable metric for judging the success of streets would be property values, by virtue of the imprecise demarcation used in the records, this is impossible to determine for seventeenth- and eighteenth-century New Haven. Thus, I judge
demand for streets in the developing colony, effectively performing as a market distortion because of the way the plan limited the supply of streets and artificially directed their distribution around the settlement. These lessons may prove useful as new towns and cities are being planned around the world.

This paper proceeds according to the market analogy. Part I discusses the technicalities of “supplying” streets: it briefly overviews the conditions of streets and mechanics of laying them out, but also discusses the legal procedures used to create streets in seventeenth- and eighteenth-century Connecticut. Part II identifies the typical sources of demand for streets, using examples of roadway construction from New Haven outside the Nine Squares to demonstrate how legal procedures for piecemeal development within the colony facilitated efficient production and planning of streets. Part III identifies the problems that began to be felt as a result of the failures of the Nine Squares plan and describes the government’s solution: the subdivision of the Nine Squares. Part IV uses this microhistory to develop a “theory of streets,” and the circumstances that cause comprehensive grid planning to fail. Part V concludes.

I. Supplying Streets in Early New Haven

This Part proceeds by discussing two different aspects of colonial streets. The first Section discusses the construction and conditions of New Haven streets, as background for understanding the primitiveness of the technology and the ways colonists laboriously created and used streets. The second Section discusses the procedural components of laying out a street, identifying how a street was initiated and planned and how affected landowners were compensated. Unless otherwise indicated, this Part will focus on the smaller, intratown streets or highways in New Haven, rather than the larger post roads and intertown streets or highways, which were subject to different technological and procedural hurdles.

A. The Construction and Conditions of New Haven’s Streets

The highways of early Connecticut were legendary, but not for positive reasons. Many travelers in the eighteenth century left diaries the success of streets by the amount of settlement and construction they facilitated, a less precise but still valuable measure of their desirability. See, e.g., infra Section III.
describing them as the worst roads they had ever encountered, and worse, these miserable travelers were on relatively major, well-traveled roads, not even the smaller intratown streets. Our concept of a street is very different from the highways of early New Haven Colony. While the records provide only glimpses of the roadways of colonial New Haven, in order to better understand the difficulties of city planning and highway construction and maintenance, it may be helpful to have an idea of what most streets or highways may have looked like in the 1600s and early 1700s in Connecticut.

Within the Nine Squares, New Haven’s streets were designed to accommodate cart and pedestrian traffic. In theory, the streets of colonial New Haven were actually as wide as or wider than most modern streets: the Nine Squares streets were major arteries, and were hence designed to be four rods wide, or sixty-six feet across. Road surveyors do seem to have recognized a primitive “hierarchy of streets.”

Major local streets, like the Nine Squares streets, were usually four rods wide, and these roads were probably designed to bear the most traffic. Outside the Nine Squares, roads were of varying width. Some roads fluctuated in length, perhaps tapering at one end. Most other streets were two rods wide, and these seem to have been subordinate collector streets for the four-rod highways. Although a width

45. ISABEL S. MITCHELL, ROADS AND ROAD-MAKING IN COLONIAL CONNECTICUT 2 (1933) (quoting several travelers’ diaries, including Lord Adam Gordon’s quote from 1768 that the road from Norfolk, Connecticut was the “worst he had seen in America”).

46. See BARBER, supra note 31, at 12.

47. See ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 486-87 (2d ed. 2000) (describing the four categories of streets used by modern traffic engineers as “arterial, collector, subcollector (local), and access (cul-de-sac or loop”).

48. Major streets outside the Nine Squares were also four rods wide. See, e.g., Deeds of Jan. 7, 1771, in 30 NEW HAVEN LAND RECORDS 500, 500, 501 (on file with the New Haven City Clerk’s Office) [hereinafter NHLR] (creating major roadway to North Haven).

49. See, e.g., Deed of Apr. 10, 1760, in 23 NHLR, supra note 48, at 289, 289 (creating road in Wallingford that began five rods wide but tapered to two rods wide).

50. This is by far the most common width, judging from my own experience reading over two hundred deeds from the period 1750-1784. See, e.g., Deed of Jan. 14, 1751, in 15 NHLR, supra note 48, at 422, 422 (creating a two rod highway which connected to one of the four rod highways); Deed of Oct. 31, 1765, in 27 NHLR, supra note 48, at 371, 371 (creating road two rods wide in Amity along the lands of two neighbors); Deed of Sept. 6, 1773, in 33 NHLR, supra note 48, at 284, 284. Rarely, streets were smaller. See Deed of Dec. 6, 1750, in 15 NHLR, supra note 48, at 386, 386 (creating highway out in the western farmlands “about twenty two feet wide more or Less, not Less than twenty foot in the narrowest Place”).
of two rods may sound small in comparison to the larger roads, even two-rod roads were still thirty-three feet wide—well within the average for local street widths today, which is thirty-one to thirty-nine feet wide.\footnote{Ellickson & Been, supra note 47, at 487.}

Like many modern streets, these colonial streets were much wider than the space actually needed for two carts to safely pass.\footnote{Id. (citing American Society of Civil Engineering et al., Residential Streets 38 (2d ed. 1990)) (stating that modern streets need only be twenty-eight feet wide to accommodate two-way traffic and curbside parking on each side).} Streets were used as places for carts to travel,\footnote{Settlers sometimes explicitly requested roads for use as cart paths. See Ancient Town Records, Volume I: New Haven Town Records, 1649-1662, at 164 (Franklin Bowditch Dexter ed., 1917) [hereinafter Volume I: 1649-1662].} of course, but they were also used by pedestrians and even served as meeting places, much like sidewalks are used today. Early streets were both access corridors and places of social engagement. The New Haven Town Records are filled with admonishments to “young persons” walking and playing in the streets on the Sabbath.\footnote{See id. at 396.} There are records of fights in the streets between neighbors and sometimes even melees involving wives.\footnote{See Ancient Town Records, Volume II: New Haven Town Records, 1662-1684, at 242 (Franklin Bowditch Dexter ed., 1919) [hereinafter Volume II: 1662-1684].} Indeed, animals were often found in New Haven’s streets, necessitating wide streets to permit people and carts to travel around them.\footnote{See id. at 361; Volume I: 1649-1662, supra note 53, at 33 (noting that property owners were fined for defective fences when their animals got into the streets).}

To create a street, the land was simply cleared; there was no paving and very little if any grading.\footnote{Isabel Mitchell provides a colorful description of early highways: The highways that were to be so carefully laid out with “as little damage as possible to private men’s properties” were but wide swaths cut through the forest, rough and uneven, with half buried boulders and tree stumps sticking up here and there. No attempt was made to improve the surface. Instead of piling up gravel in the center, turnpike fashion, or laying a foundation of rubble or stone, they simply cleared it of bushes and the easily removable trees and stumps. Frequently the middle was lower than the sides. Mitchell, supra note 45, at 9.} The Connecticut highway statute provided that highways would be cleared using the conscripted labor of all freemen between the ages of fifteen and sixty, who could only be exempt from their clearing duties upon penalty of a fine (with some exceptions for members of the upper classes).\footnote{High-ways, in Acts and Laws, of His Majesties Colony of Connecticut in New-England 49 (1702).} While clearing the land
was undoubtedly difficult, little else was done to improve the roadways. Creeks and brooks sometimes flowed through streets, and there was no drainage after storms or snow melts, undoubtedly rendering most streets muddy and rife with puddles.\textsuperscript{59} An eighteenth century legend about one of the main streets in nearby Hartford illustrates this: as the story went, a man in downtown Hartford saw a hat in the road, and stopped to pick it up. To his surprise, he found a man underneath who exclaimed that he needed no help, and that his horse had just struck solid ground.\textsuperscript{60} Underused streets were susceptible to bushes and other wildlife re-growing in the cleared land.\textsuperscript{61} In 1655, every man was charged with going into the streets in the Nine Squares to clean up and cut down the “stinking weede” in the roads and “other common places aboute the Towne.”\textsuperscript{62} As late as 1725, several individuals were fined for failing to obey these ordinances, indicating that weed growth continued to be a problem.\textsuperscript{63} In short, the conditions of the streets were most likely dismal because of the inadequacy of grading, and the absence of paving of any sort. In New Haven, even relatively important roadways like the Mill Lane, which led to most of the planters’ fields, were in a constant state of disrepair. For example, from 1662\textsuperscript{64} to 1671,\textsuperscript{65} there were repeated agitations to clean up Mill Lane and attempts by the townsmen to gather a labor force to do so.

Although the roads were constantly threatened by nature, early New Haven residents also improperly used roads for their own ends at times, leading to dangerous conditions for passage. Settlers were known to dig holes in the street, seeking gravel or stone for their personal use.\textsuperscript{66} In New Haven, the town records for the year 1662 describe the problem of the town settlers stacking wood in the streets, and the townsmen desired them to move it so that “persons might walke without danger.”\textsuperscript{67} A law passed in Connecticut in the early eighteenth century indicated that street debris was still a problem, prescribing that persons who “block up, or lay, or cause to be laid in any High-way, any Stones, Tree or Trees, or Timber; or shall by Digging,
or any other Means obstruct, hinder, or indanger the Passage of Travellers” had to pay the cost of cleaning up as well as a punitive fine. 68 Aside from causing obstructions, the freemen also occasionally fenced off parts of streets for their own use. Already by 1652, the town records contain a reproach to a freeman for fencing off a part of a public highway. 69 The early colonists solicited the public’s help to deal with the problems created by these perpestures. According to a 1702 law, any person could tear down improper fences in the street without notice to the person who had put them up. 70

In sum, New Haven’s streets were poorly delineated, poorly kept, and difficult if not impossible to use as points of orientation. Even the streets making up the squares in New Haven did not have names, although that was customary in most other American colonial towns. 71 The early settlers oriented themselves either by using prominent landmarks, such as natural features, or else a notable person’s house or land. 72 Because of these problems, even the early government had trouble remembering where the highways were. In 1684, the town government had to pay for an inventory of the current highways to keep track of their location. In one case, they noted in the town records that they should “speak with Mr. Brockett who layd out the lotts and lands on the East side the East river and enquier what high waies were laid out and where.” 73 As late as 1724, one freeman had “through a mistake built his house upon a high way,” apparently an understandable mistake, because the townsman allowed the highway to be diverted around his home so long as the freeman was willing to pay for the extra costs required. 74

68. An Act for Providing, Altering, Regulating, and Mending High-ways, in ACTS AND LAWS PASSED BY THE GENERAL COURT OR ASSEMBLY OF HIS MAJESTY’S ENGLISH COLONY OF CONNECTICUT IN NEW ENGLAND IN AMERICA 85, 87 (1768) [hereinafter Connecticut Highway Law, 1768]; see also MITCHELL, supra note 45, at 13 (dating the passage of this law to 1715, although I have been unable to independently confirm the date of passage).

69. VOLUME I: 1649-1662, supra note 53, at 156.

70. High-ways, supra note 58, at 50 (providing that any person can tear down encroachments in the road). One can imagine that confusion about the exact location of roadways may have rendered this a confusing and damaging provision. Hence, by the middle of the eighteenth century, the Connecticut laws required that the landowner receive warning from the town selectmen prior to being fined or having their structure forcibly torn down. See Connecticut Highway Law, 1768, supra note 68, at 87.

71. See BRIDENBAUGH, supra note 32, at 15-16.

72. See, e.g., VOLUME I: 1649-1662, supra note 53, at 81 (describing several land transactions in terms of the location of natural resources, a particular freeman’s meadow, and the homelots of other individuals).


74. Id. at 537.
New Haven’s streets were as much public lands as the town green, and they were real sources of neighborhood character. Choices about streets—where to put one, how wide to make it, and whether to take care of it—shaped the town’s development for many reasons. The metes and bounds of a street determined which properties would front it. It determined block size, and thus, to a certain extent, influenced the size of the lots that would make up that block and who the residents would be. The start and end points of a street shaped the kind of traffic that would travel on it: churchgoers, farmers, seamen, or the wealthy. Largely because of the streets, areas of New Haven began to develop identities, whether those identities were commercial, residential, wealthy, public, or poor.

B. Legal Procedures for Creating Streets

Before a street could be traveled, much less laid out, it had to be planned and surveyed, implicating early legal and governmental institutions. This Section will briefly overview the procedures in place for creating streets in colonial New Haven. In general terms, the procedures for creating a road were as follows: (1) a road would be initiated through either an application or town action; (2) the road would be surveyed and planned; and (3) damages for affected landowners would be assessed. Though the parties effectuating each of these procedural steps changed, this was the general structure of highway planning procedure in the seventeenth and eighteenth centuries.

In the earliest period of colonial New Haven, prior to its merger with the colony of Connecticut, there appears to have been no official law governing the procedure for planning streets. However, highway business seems to have fallen under the jurisdiction of the General Court. Under a fundamental order on the government of New Haven, dating from 1643, the General Court was comprised of the colony Governor, Deputy Governor, elected magistrates, and deputies of the plantations within the colonies, all leading landowners of the colony. In both England and Massachusetts prior to the founding

75. The merging of the two colonies occurred in 1662. According to the records, a group of gentlemen from Connecticut came down with a charter claiming to include New Haven, which was perceived as an evil and duplicitious act. The lively debate is preserved in the town records. VOLUME II: 1662-1684, supra note 55, at 12-14.

of New Haven Colony, the government had general powers to survey, maintain, and correct highways, and it is almost certain that the General Court of New Haven was emulating the procedures and powers already in place elsewhere.

In the early 1600s, the General Court of New Haven officiated the laying out of highways alongside the Proprietors of the Common and Undivided Lands. As a technical matter, all common land in New Haven (including highway land) belonged to the proprietors, composed of the original shareholders in the New Haven plantation venture (and later, their descendants). The proprietors met regularly and retained jurisdiction over the public lands belonging to the town, including the town green. After the creation of the local office of selectman or townsmen by a by-law passed in 1651, and even when they coexisted with the General Court, the proprietors appear to have had relatively little independent power, so other town officials were routinely involved in carrying out highway planning. Thus, even though the common land was theoretically disposed of by the proprietors, the townsmen were always involved, and many officials served as both townsmen and proprietors during their political careers. Suffice it to say that throughout the seventeenth and eighteenth

79. Id. at 430; ROLLING G. OSTERWEIS, THREE CENTURIES OF NEW HAVEN, 1638-1938, at 107 (1953).
80. Levermore, supra note 78, at 430 (identifying how the creation of the New Haven selectmen mirrored the town governance structure created in colonial Massachusetts).
81. At least one scholar of early New Haven has painted a rivalry between the town government and the proprietors over the disposition of common lands. FRANKLIN BOWDITCH DEXTER, NEW HAVEN IN 1784 (1884), available at http://www.archive.org/download/newhavenin1784pa00dextiala/newhavenin1784pa00dextiala.pdf. However, it seems that they not only were cooperative in their administration of New Haven affairs, but that the lines between the two groups were extremely blurred. Many proprietors were former selectmen or town surveyors. To provide an example, Ebenezer Beecher and Samuel Sherman, proprietors in 1750, were selectmen for the year 1746 and 1747, respectively. Chauncy Whittlesey, another proprietor in 1750, was a surveyor in 1751. See 2 New Haven Proprietors Records: 1749-1771 9, 11 (unpublished collection, on file at New Haven Colony Historical Society); VOLUME III: 1684-1769, supra note 73, at 651, 659, 683. There is one interesting difference: new settlers could not be proprietors as late as 1723. It was an honor reserved for descendants of the original proprietors. OSTERWEIS, supra note 79, at 106-07. This distinction seems relatively symbolic and of little consequence, at least for street planning.
centuries, the civic leaders were in charge of carrying out highway planning, development, and implementation. 82

The earliest highway procedures were informal. The General Court seems mainly to have exercised its authority to lay out roads when planning highways through undeveloped areas where they planned to grant settlers land; the Court would describe where a new highway should be laid out in a new part of the town, or else, they would appoint a few townsmen to travel to the location and report back on the proper course of action. 83 The Court might also assist in laying out highways in areas that were already settled, responding to perceived problems with the highway system. It occasionally heard concerns that free planters had about the location of existing highways, and supervised their relocation for more convenience. 84 The early procedure seems to have been as follows: the Court would hear an individual or group’s request for a new or relocated highway, and rule on that request. 85

Who could request a new highway? The earliest street creation procedures allowed for roadway construction to be initiated by the request or application of a resident, who would approach the General Court or the selectmen with a request for a road. This general approach, which permitted private individuals to petition the government for new streets, survived throughout the eighteenth century. The first official highway law in Connecticut was not enacted until 1702, about seventy years after the very first highway statute passed in the American colonies, but roughly contemporary with other highway statutes in New Hampshire, Pennsylvania, Delaware, New York, and New Jersey. 86 By that time, New Haven had merged with the nearby colony of Connecticut,

82. The records are even more confusing, with petitions for roads coming to proprietors, the Court, and selectmen alike, each group occasionally dictating the boundaries of a road. In terms of formal policy, the mayor and selectmen seamlessly officially received the power to lay out highways “in the name and behalf of the prop’rs” by a town vote in 1764. 2 New Haven Proprietors Records, supra note 81, at 181. By this point, the new settlers may have so much outnumbered descendants of the proprietors that all distinctions were obsolete.

83. See VOLUME I: 1649-1662, supra note 53, at 115 (appointing four freemen to travel to Mill Lane to assess where it should be relocated for more convenience and least damage to landholders).

84. Id. at 115 (discussing the relocation of Mill Lane).

85. VOLUME II: 1662-1684, supra note 55, at 309 (ruling on petition of Henry Glover for a highway toward the farm lands).

86. Hart, supra note 77, at 257-63. The first highway statute in the colonies was in Virginia in 1632, providing only that the colonial authorities had the power to lay out convenient roads; the first to provide compensation was in Massachusetts in 1635, and it closely resembled the one Connecticut ultimately adopted. Id. at 258.
subjecting it to Connecticut’s laws and procedures for highway construction and layout. The 1702 highway statute formalized the procedure for creating new roads, which was somewhat of a departure from the earlier, less formal practice of showing up at the General Court with a request. Under the formalized process, a person would apply centrally to the County Court, which would then appoint a “Committee of two or three sufficient Freeholders of the next Towns” to visit the proposed location and evaluate the need for a new highway at that location. These freemen were selected from other towns apparently to ensure they were disinterested parties. The practice of appointing a small committee to investigate a proposed roadway continued throughout the eighteenth century. Formally, between 1702 and 1773, the government did not have the authority to initiate roads in the absence of a private person’s application; however, it seems that an easy solution to this problem would be to have a townsman or proprietor request a highway in his capacity as a private citizen. In 1773, the selectmen officially gained the power to investigate and lay out a public roadway even in the absence of a private person’s application. The selectmen were required to give notice of the proposed roadway either in person or at the dwelling of affected landowners before laying out the road.

Who actually planned the road? In the early period, if a highway was deemed necessary or convenient by the committee, the Court would then order the local sheriff to summon a jury, again from freeholders of neighboring towns. After the jury determined the boundaries of the road and the damages to landowners, they returned their verdict to the sheriff, who was responsible for ensuring the road

87. High-ways, supra note 58, at 50.
88. An Act in Addition to, and Alteration of a Law of this Colony intitled, an Act for Providing, Regulating and Mending High-Ways, in ACTS AND LAWS, MADE AND PASSED BY THE GENERAL COURT OR ASSEMBLY OF HIS MAJESTY’S ENGLISH COLONY OF CONNECTICUT, IN NEW-ENGLAND, IN AMERICA 379, 380 (1773) [hereinafter Connecticut Highway Law, 1773].
89. Id. The jury was sworn under this oath:

You Swear by the Name of the Ever-living God, That you will Lay out the Way mentioned in the Precept by which you are now Summoned, according to the best of your Skill and Judgment; with most Convenience to the Publick, and least Prejudice to any particular Person or Persons: And that you will make a Just Estimation of the Damages done to the Property of any particular Person, by your laying said Way, according to your best Judgment. So help you God.”

An Act Prescribing the Forms of Several Oaths, in ACTS AND LAWS PASSED BY THE GENERAL COURT OR ASSEMBLY OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW ENGLAND 388, 388 (1731).
would be identified and recorded at the next session of Court. However, it is not clear from the records whether a jury was regularly appointed in early New Haven. More often, the court or townsmen seem to have appointed a committee of disinterested freemen from among their rank in response to a road petition. This process became formalized in 1773, when the selectmen officially received the authority to appoint a planning committee in place of a jury.

Once a road had been requested and physically planned, the only remaining task was determining whether there were damages, and if so, how much. There is already a great deal of scholarship on the compensation requirement in early highway laws. Because highway laws were the first laws authorizing the government to take private property for public use, scholars interested in the intellectual and constitutional origins of the Takings Clause look to early highway laws to understand the use of eminent domain power in both theory and practice in colonial times. Connecticut, like the other New England colonies, adopted a compensation requirement for taking highway land fairly early. Although the initial highway compensation law required satisfaction to be made only when improved lands were taken for highways, after 1773, the law also required the townsmen to provide compensation when unimproved lands were taken. John F. Hart has argued that in colonies bonded by religious ties, like the colonies in New England, compensation was a mechanism for keeping social order: landholders in these dense colonies were more likely to

90. High-ways, supra note 58, at 50. Paying these jurors seems to have become too expensive for the town to maintain. The preamble of a highway act passed in 1773 eliminated the role of the jury, stating that the move to planning by a small committee as opposed to planning by a jury was necessitated by the “great and unnecessary Expense” occasioned by the earlier method. Connecticut Highway Law, 1773, supra note 88, at 379.


92. See, e.g., Ely, supra note 16; Hart, supra note 77; Stoebuck, supra note 16; Treanor, supra note 16.

93. The earliest highway law in Connecticut contained a compensation requirement: Provided, That if any person be [by the laying out of a highway] damnified in his Propriety, or Improved grounds, the Town shall make him reasonable satisfaction, by the Estimation of those that laid out the same; and if such persons so damaged, find himself aggrieved by any act or thing done by the Jury, either in laying out of the said way, or estimate of his Damages, he may apply unto the said County Court for relief, before any allowance, or determination be made by them; who are hereby impowred to hear and determine the same . . . .

notice and be affected by intrusion on their lands because their parcels tended to be smaller and closer together, and they were more dependent on their communities, so compensation helped keep the peace.\textsuperscript{95}

For this study, it is not the intellectual origins of the highway compensation law that are of interest; it is how early colonists interpreted the compensation requirement. Although monetary payments were frequently given, in colonial Connecticut, there was a system allowing compensation in kind. In 1727, an act was passed that permitted the town proprietors to exchange common land to create new highways.\textsuperscript{96}

By the mid-eighteenth-century, the law governing compensation thus permitted the town to use other common lands—including old or underused highways—to obtain other highways, in lieu of money. Whether in the form of in-kind land grants or in the form of monetary payments, compensation was routinely given when highways were created in New Haven. Indeed, I have been able to confirm no land transfer from an individual to the town, at least between 1750 and 1784, for which the landowner did not receive some kind of compensation.\textsuperscript{97}

It is helpful to understand the factors affecting the supply of streets—the way early streets looked and the legal regime which governed them—in order to examine colonial town planning in New Haven. The following Parts will examine the success and failure of developments in different parts of early downtown New Haven. In the next Part, I will discuss the other side of street planning: demand, and how it was reflected in New Haven’s subsequent development after the Nine Squares plan. New Haven began as a town with an ideal, perfect plan, but New Haven expanded outside the Nine Squares in

\textsuperscript{95} See Hart, supra note 77, at 305.

\textsuperscript{96} An Act for Enabling the Proprietors . . . to Make Exchanges of said Common Land, for the Procuring Needful and Convenient High Ways, \textit{in Acts and Laws Passed by the General Court or Assembly of His Majesties Colony of Connecticut in New England} 346, 346 (1727).

\textsuperscript{97} More detail on compensation patterns appears in Subsection II.B.2. I have reviewed every transfer of highway land from citizens of New Haven to the Proprietors, Selectmen, or Town of New Haven between 1750 and 1784. 15-41 NHLR, \textit{supra} note 48. There are two possible exceptions, which do not identify whether or not compensation was paid; however, because there was no mention of a hearing or damage calculations, as there are in the confirmable cases in which no compensation was paid later on, I imagine that there must have been some deal struck between the government and the landowners. \textit{See} Deed of Apr. 1, 1771, \textit{in} 31 NHLR, \textit{supra} note 48, at 465, 465; Deed of Aug. 6, 1770, \textit{in} 30 NHLR, \textit{supra} note 48, at 459, 459.
ways that were often much more piecemeal and driven by changing settlement patterns.

II. Demand for Streets in Early New Haven

In the paragraphs that follow, I overview some of the street development that occurred following the initial laying out of the Nine Squares. This Part will discuss the conditions motivating new development between 1640 and 1784, and identify features of highway planning in action during this time. Between 1640 and 1775, private citizens and the town government planned highways that were responsive to settlement patterns and community needs, much like the piecemeal designs found in other New England colonies. The legal procedures supported piecemeal development in three ways: (1) roads were often planned with direct input from affected landowners, (2) the government could use the fluid highway exchange system to trade old, unsuccessful highways for more suitable ones, and (3) by virtue of the petition process, most street development followed settlement rather than vice versa. I argue that, unlike the rigidity of the Nine Squares, these features of piecemeal development outside the Nine Squares allowed the street system to adapt to changing demand.

A. Determinants of Demand

1. CITY SPREADING: AGRARIAN FACTORS

After the initial settlement, the town of New Haven immediately began to expand as a result of initial settlers seeking more land for planting and for keeping their animals. The system of land division encouraged the spreading of the town: the proprietors of the common land, or all the free planters, effectuated “divisions” allocating land to the town settlers according to a number of factors, mainly their investment in the company and the number of people in their households.98 The first division took place in January, 1640; the second, a few months after that; and the third, in 1680.99 Excellent records exist for the third division, illustrating how this system of allocating lands affected town expansion: an individual would have received potentially large

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99. *Id.* at 3.
quantities of land in disparate geographic areas north, east, and west of the Nine Squares.\textsuperscript{100}

This system of land allocation necessitated new pathways for people living in the town center to reach their distant holdings. Already by the second division, settlers could receive land as far as two miles away from the town center.\textsuperscript{101} Indeed, because of the way the colony was laid out, the townsmen ordered a survey at a very early date to establish highways between the town center and the major “quarters,” or large radial fields, that surrounded the Nine Squares. This is confirmed by the Town Records; in 1684, following an inventory of all the highways in the town, the records of the town recall that “at the laying the lands of the plantation ther were high wais laid out for persons to goe to theyer lands meadows and the commons.”\textsuperscript{102}

2. CITY DENSIFICATION: COMMERCIAL FACTORS

However, while roads out to the farms were certainly most important prior to 1700, New Haven’s evolving role in the colonial economy also precipitated infrastructural changes. In its early years, the commercial enterprise at New Haven was a colossal failure; New Haven’s location prevented territorial expansion, the harbor was shallow and semi-inland, and the agricultural productivity was never very good.\textsuperscript{103} The value of the taxable assets in New Haven provides evidence of the depression New Haven experienced after its founding. In 1666, the value of the estates in New Haven was 17,474 pounds; until well after 1700, it was never that high again. The value reached its low point of 12,367 pounds in 1682.\textsuperscript{104} One wonders whether Davenport, one of the colony’s main founders, left for Boston in 1668 because New Haven was losing its religious zeal\textsuperscript{105} or because the economic future of the colony looked so bleak. A contemporary in Massachusetts in the late 1600s described New Haven as follows: “The Merchants either dead or come away, the rest gotten to their Farmes, The Town is not so glorious as once

\textsuperscript{100} For example, in the third division, the meadows were near the creeks; the Neck was north of the squares, close to Mill River. Id. at 10-11.
\textsuperscript{101} Id. at 3.
\textsuperscript{102} Volume III: 1684-1769, supra note 73, at 40.
\textsuperscript{104} Edward E. Atwater, The Town of New Haven Before the War of the Revolution, in History of the City of New Haven, supra note 78, at 10, 22 [hereinafter Atwater, The Town of New Haven].
\textsuperscript{105} Atwater, The Colony of New Haven, supra note 98, at 9-10.
it was.” 106 Although Eaton and Davenport had lofty goals of a town bustling with ship-building and trading, New Haven thus settled into a comfortable lull, where its freemen practiced subsistence farming with little surplus to export.

However, in the early 1700s, New Haven’s future changed. New policies from London encouraged the New England colonies to send livestock and other goods to the West Indies, and as the main coastal town in Connecticut, New Haven rose to prominence as a site of export. 107 Between 1700 and 1750, despite some conflicts and competition with New York City (including their attempts to portray New Haven as a town of smugglers) and only modest increases in tonnage in the port, 108 the amount of taxable wealth in New Haven began to steadily rise. 109 By 1715, New Haven and Boston had begun to carry on vibrant trade in furs, lumber, cloth, and other products. 110 Land trading and transport appears to have taken off in this time period as well. In 1717, the Connecticut legislature permitted John Munson of New Haven to set up a wagon route from Hartford to New Haven “to pass and transport passengers and goods,” on the condition that he faithfully do so from spring through fall or else face penalty of fines. 111 By land and by sea, New Haven was becoming a critical mercantile city within Connecticut.

It was only around 1750, though, that New Haven really began to experience a boom in its economy. The amount of tonnage in New Haven’s harbor increased fortyfold between 1748 and 1774. 112 The citizens of New Haven agitated for new bridges and an extension of Long Wharf further into the harbor. 113 As New Haven’s mercantile prosperity increased, the town also faced a huge influx of population. The town grew from 1400 inhabitants in 1748 to more than 5000 in 1756, then to more than 8000 in 1774. 114 Longtime residents and

108. See id. at 199-202.
110. OSTERWEIS, supra note 79, at 101.
112. See Trowbridge, supra note 107, at 112-114.
113. OSTERWEIS, supra note 79, at 101-02.
114. Trowbridge, supra note 107, at 229.
established families began to distinguish themselves as “Town-Born,” as opposed to the “Interlopers.” Among the new people flocking to New Haven in this period were families that would soon become as identifiable with New Haven as any family: the Woosters, Shermans, and Hillhouses came to the town because of its success during this time. New Haven’s fleet grew, too; New Haven’s harbor grew from supporting just five boats in the late 1600s to supporting over one hundred by 1775. A large number of the new residents were affiliated with New Haven’s commercial trading industry. In 1774, the number of “seafaring men” in New Haven was counted at 756. That number is nearly ten percent of the total population of the town in 1774, and closer to forty percent of all men in New Haven between the ages of twenty and seventy.

With more people and more commerce, there was a need for new highways in and around downtown New Haven. Even a cursory glance at the Town Records for any year after 1750 reveals that highway business preoccupied the town meetings. The town’s Land Records, which record all transactions and deeds within the town, also show how much new highway construction was occurring. Between 1750 and 1754, the town of New Haven only entered into nine transactions for highway land. Between 1770 and 1774, they entered into seventy-four transactions as part of new highway construction. The town also utilized an increasing number of surveyors of highways during this time. Though only twenty surveyors were sworn in for the year 1750, for the year 1769, the selectmen appointed thirty-three.

115. OSTERWEIS, supra note 79, at 102.
116. Id.
117. See id. at 104.
119. See infra Appendix (Compensation Patterns in New Highway Construction, 1750-1784).
120. Id. Although a good number of the new highways were on the outskirts of New Haven—in Amity, Bethany, and other parishes that would later become independent towns—many were also close to downtown. For example, the street which probably preceded Fair Street in downtown New Haven (the extension of George Street past State Street) was accomplished in 1771. Deed of Sept. 5, 1771, in 34 NHLR, supra note 48, at 205, 205 (granting land of John Hall, deceased, “opposite to the shop of Mr. Tho. Howell” to the town). Both of the individuals identified in the deed are visible on the map from 1748. Other highways formed during this town were created in what was known as the “Oysterpoint Quarter,” in the area east of the city along the water (just south of what is today Wooster Square). See, e.g., Deed of Jan. 26, 1771, in 33 NHLR, supra note 48, at 517, 517 (describing land transaction from Caleb Trowbridge to the town in Oysterpoint Quarter, for a highway).
121. Volume III: 1684-1769, supra note 73, at 676.
122. Id. at 800.
B. Meeting the Demand for Streets: Piecemeal Planning

Although some new residents opted to live within the Nine Squares, many early residents sought to live on the water or on the outskirts of the growing town instead, especially necessitating development in those regions. The infrastructural development which took place outside the Nine Squares looks more similar to the development in other New England towns than it does to the symmetrical planning within the Nine Squares. Much of this development was created through legal procedures facilitating resident involvement, highway exchange, and responsive planning.

1. RESIDENT INVOLVEMENT

Though the government assumed the responsibility for planning some roads on its own initiative when it granted land in new areas of the town, most of the new highways were planned by either private initiative or private-public collaboration. Landowners frequently requested highways that would link their properties in one area to properties in another area, or to another highway. Private individuals thus played a critical role in making infrastructural decisions, whether they established informal paths or served as petitioners requesting that the selectmen lay out a road in a certain area.

Some of the highways that were developed in this period seem to have been pre-established public corridors, probably informally created by long-term common use. Carol Rose has described these types of pathways as “prescriptive” roads or roads established by “implied dedication”; both terms refer to passageways to which the public has acquired rights through use.123 Multiple deeds that created public highways during this period refer to the routes of existing “paths” as markers for the boundaries of the new highway.124 For example, in 1762, Jared Robinson received “a certain Part of a highway” in exchange for granting the proprietors of New Haven a highway across his land “where ye path now goes 2 rods wide.”125 Other deeds are

124. See, e.g., Deed of Aug. 6, 1781 (recorded Aug. 6, 1781), in 38 NHLR, supra note 48, at 253, 253 (highway exchange between town and landowners granting land “round the point of the hill as the path now goes”); Deed of Dec. 5, 1768, in 29 NHLR, supra note 48, at 437, 437 (highway exchange implicating land where the “path now goes”); Deed of July 10, 1767, in 28 NHLR, supra note 48, at 463, 463 (giving Bazell Munson monetary compensation for land where the “path now goes”).
125. Deed of Aug. 9, 1762, in 24 NHLR, supra note 48, at 460, 461.
more explicit: a grant from Matthew Gilbert in 1786 stated that the land he was giving over to the town “hath been many years used for a highway.” Sometimes the townsmen might slightly alter a well-established path in reconstituting it as an official road. For example, in 1765, Jonathan Dickerman received “a part of three highways” from the town, in exchange for

one Certain part of my Land I bot [sic] of Peter Pernitt which is to be for an open highway for ever & is to be two rods and a half wide and is to begin at that highway y't runs by Amos Allings house and to run westward through the Teer where y'e Path now goeth most of the way but at the west end to run a Little north of the Path where it will better accommodate the highway.

Although Rose envisioned that the public could acquire these road lands “without purchase,” it seems that in New Haven at least, the landowner always received some compensation when the road officially went into the record books, whether in the form of money or land.

More typically, community members served a different role in street creation: they were petitioners, applying for new streets. These requests are indicative of the collaborative, public-private method of planning. Unlike informal path creation, in collaborative planning, the government had a more active role in determining the bounds of the new street. Petitions could come from either individuals or groups, and the government’s role varied from minimal to significant.

Sometimes, the government seems merely to have acted as a middleman between landowners, facilitating and addressing one individual’s

128. Rose, supra note 123, at 723.
129. See the deeds discussed supra note 124. Given the benefits conferred on these landowners by new roads, the prevalence of compensation is striking. The townsmen may have compensated these landowners to formalize their control over them as public pathways, both satiating landowners and possibly making it more difficult for a subsequent landowner to reclaim them. Contemporary records indicate that the townspeople were having a difficult time keeping their own underutilized roads free from private encroachment. In 1768, at a town meeting, the following vote was recorded:

Whereas there are many highways taken in by Persons who have possessed them more than fifteen years and now Claim the Same by vertue [sic] of the Law of Possession which to the Town Seems altogether unreasonable that they should hold the Same It is therefore voted that the Selectmen remove Such persons off from Such highways and if they Cannot do it with a Course of Law, they are hereby directed to try a Case in the Law, and See whether highways Can be holden by Possession at the Cost of the Town.

VOLUME III: 1684-1769, supra note 73, at 804.
desire or need to cross the land of his neighbor.\textsuperscript{130} For example, in 1750, Nathaniel Sperry petitioned the townsmen for a new public road out in the fields northeast of the Nine Squares.\textsuperscript{131} The highway would cut through the land of one of Sperry’s neighbors, Samuel Darling, and lead to Sperry’s parcel. The townsmen first appointed two representatives to go view the place.\textsuperscript{132} They returned to the next proprietors’ meeting having approved Sperry’s suggestion and having made an agreement for compensation with Darling.\textsuperscript{133} The signed deed in the Land Records states that for dedicating to the public a strip of land twenty feet wide through his land, Darling received four and a half acres adjacent to the farm of one of Sperry’s relatives.\textsuperscript{134} It is unclear whether the land Darling received was public land belonging to the proprietors, or maybe Sperry’s own land. Although the road was public, it was thus largely motivated by a single individual’s need to gain access through his neighbor’s land.

The government also appointed the committee of two or three individuals that determined the contours of the new road. An example shows how residents, the committee, and the government cooperated in generating a new street. Around 1758 or 1759, a group “Requested to Lay out a highway in . . . New Haven” close to East Haven, informing the selectmen that it was “very much needed and w[ould] be of Publick advantage.”\textsuperscript{135} A committee then “repaired to said Place and viewed the Circumstances thereof and found that it was absolutely necessary to have a highway Laid out for the Bennifit of the Inhabitants of said New Haven.”\textsuperscript{136} The selectmen then surveyed a long highway which crossed the land of several different landowners.\textsuperscript{137} The landowners and selectmen appear to have negotiated over consideration for the land taken; at least one of the landowners in this particular case received just over seven pounds for the strip he granted to the town.\textsuperscript{138}

\textsuperscript{130} Volume II: 1662-1684, supra note 55, at 309.
\textsuperscript{131} 2 New Haven Proprietors Records, supra note 81, at 13.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 14.
\textsuperscript{134} Deed of Dec. 6, 1750, in 15 NHLR, supra note 48, at 386, 386.
\textsuperscript{135} Volume III: 1684-1769, supra note 73, at 748. The “Half Mile” refers to an area near Branford. See id. at 748-49.
\textsuperscript{136} Id. Although the committee was supposed to come from neighboring towns, see supra notes 87-88 and accompanying text, this practice does not seem to have been followed consistently.
\textsuperscript{137} Id. at 749.
\textsuperscript{138} Deed of Apr. 12, 1760, in 28 NHLR, supra note 48, at 461, 461 (deed from Moses Thompson).
Sometimes the government had a very strong role in shaping infrastructural development by opposing a resident’s request for a new road. But they had to go through a type of adversarial, court-mediated process to do so. On occasion, the New Haven government does seem to have contested the roadways proposed by members of the public. In the winter of 1766-67, a group led by individual petitioner Caleb Hitchcock asked the County Court to “Send a Committee to view the Necessity of having a highway as mentioned in [the] Petition.” The townsmen appointed a committee to “view said place or places and any other place or places where it may be thought Necessary to have highway or highways for the Good of the Publick and report their opinion upon the whole unto the Next Town meeting.” After viewing the location, the committee evidently found a problem with the roadway. They reported back that “they were of the opinion that it would be best for the Town to oppose said Petition at the County Court. Whereupon this meeting do appoint Capt. Amos Hitchcock, Mr. St’n Ball, and Deacon David Austin a Committee to oppose said Petition at said County Court.” Although there is no County Court record of this particular dispute, it seems the government and Hitchcock eventually came to some kind of agreement about the plan. In 1771, just four years later, Caleb Hitchcock and his neighbor were compensated for a new highway laid out through their holdings. Although the government played a significant role in street planning when they chose to oppose roadways, it is important to note that the adversarial process prevented the government from unilaterally overruling plans by the community. Instead, it permitted community members and the selectmen to compete for control of infrastructural decisions in front of a theoretically neutral court, perhaps incentivizing bargaining between community members and the government over roadway locations.

In sum, residents had a large part in determining the contours of new roads. But the government’s ability to be either partner or adversary

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139. Although this hearing procedure between the townsmen and the petitioner was not established by law prior to 1702, High-ways, supra note 58, at 49-50, it was part of the process by the middle of the eighteenth century. An Act for Providing, Altering, Regulating and Mending High-ways, supra note 68, at 87.
140. VOLUME III: 1684-1769, supra note 73, at 789.
141. Id.
142. Id. at 790.
143. Deed of Jan. 7, 1771, in 30 NHLR, supra note 48, at 500, 500 (deed of Sam Sarket); Deed of Jun. 26, 1771, in 40 NHLR, supra note 48, at 526, 526 (deed of Caleb Hitchcock).
helped protect the system from abuses—for example, by limiting the chance that a purely self-interested road, one solely beneficial for the petitioner, as opposed to the public, could be created. Unlike comprehensive planning, piecemeal planning had the major advantage of allowing local residents with first-hand knowledge about their communities to help determine the location of the roads. And whether they merely ratified a decision or actually surveyed the street, the government still carried out provision of the road, avoiding the problems associated with private provision of roadways. 144

2. HIGHWAY EXCHANGE

The system of highway exchange, officially established by Connecticut law in 1727, 145 also shaped piecemeal development during this time. By “highway exchange,” I refer to the power that the selectmen gained to exchange highways in order to procure new highways. There were two huge advantages to this system. First, because it allowed the selectmen to relocate unsuccessful roads, it was extremely flexible. Second, it was extremely cheap, permitting the selectmen to compensate landowners in kind, even when currency may have been scarce.

The highway exchange system rendered many infrastructural decisions subject to a sort of Darwinian selection: roads which were used survived, while those which were underused or unused were recycled back to the proprietors, who could then use them to purchase other land. This system allowed the selectmen to plan both preemptively and responsively. They could try to anticipate where a suitable road would go, but could also get rid of that road if settlement patterns required a different one elsewhere. There were definite limits to when the system would be useful. Typically, the only people who desired small strips of highway were adjacent landowners, who would often give up other sections of their land for a new highway as part of the exchange. 146

144. If roads were to be planned purely by private initiative without the government as intermediary, there would probably be difficulties in financing, coordination, and initiation (for example, a landowner might not have any incentive to open a road if he assumes his neighbor will assume the costs and difficulties of doing so). See Robert C. Ellickson, Property in Land, 102 Yale L.J. 1315, 1385 (1993). Moreover, the government could prevent landowners from opening unnecessary, duplicative streets, or opening streets solely for their private gain.

145. An Act for Enabling the Proprietors, supra note 96, at 346.

146. An example is the case of Alvan Bradly, who gave up a strip fifty rods long and four rods wide along the south side of his holding in exchange for an equally-sized
Even if the number of parties interested in obtaining small sections of highway was small, it is evident that the highway exchange system was beneficial for both the selectmen and adjacent landowners. There are multiple records of community members petitioning the selectmen to exchange a highway near their land, indicating their interest in obtaining the strip at the cost of another part of their property.\textsuperscript{147} Joseph Basset, for example, requested in 1749 that the selectmen grant him part of an old highway near some land he stood to inherit.\textsuperscript{148} The proprietors of the town determined an exchange would be appropriate and appointed a committee to visit Basset so that Basset could “Initiate ye proprietors to y^t land which [he] propose[s] to l[e]t y^e proprietors have.”\textsuperscript{149} The committee laid out a new road through Basset’s land, and in exchange, he received rights to the old public highway adjacent to his father’s former holding.\textsuperscript{150} For whatever reason, old highways were attractive land for adjacent proprietors, and the demand for former highway strips seems to have been significant enough that the selectmen and proprietors could frequently trade them.

The highway exchange system also allowed the selectmen to capitalize on a resource which had become of limited value to them and the public, but which did have value for adjacent landowners. This was incredibly advantageous: it made the cost of new development extremely low, probably allowing more development to occur. One might argue that the highway land was more valuable to the proprietors than money, but that was clearly not the case. For example, in planning one new road in 1769, the proprietors directed the committee that they should “find waste Land or needless highways to Dispose of” in order to purchase the new road, and only if that was insufficient were they “ordered to draw out of the Town Treasury.”\textsuperscript{151}

There is evidence that at times throughout the later eighteenth century, the New Haven government was rather currency-poor, making highway exchange critically important in allowing new development...
to continue. New Haven struggled to pay in specie for some of its projects, in particular, Dragon Bridge over the Quinnipiac River, a project which was initiated during the Revolutionary War, but not close to completed until the 1790s due to debts and funding struggles. On at least some occasions in the late 1700s, the town was taken to the County Court or General Assembly over small debts that it could not pay. Although the government could theoretically have sold the pieces of highway to adjacent landowners, then used the money to purchase new highway land, this appears not to have happened. One possible reason is this: with currency often scarce and the government in debt, landowners may not have had the available cash to purchase highway strips from the town. Late eighteenth-century newspaper ads in New Haven advertised that stores would accept a variety of non-currency items for payment; Roger Sherman’s store, for example, accepted as payment “Wheat, Rye, Corn, Oats, white Beans, Flax-Seed, Butter, Cheese, Pork, Beef, Flour, Hoops, Staves, Heading, Boards, Plank, Hay, Wood, Geese Feathers, Tow-Cloth, Check, Flannel, and all kinds of Public Securities.” The highway exchange system bypassed the problems posed by currency scarcity and valuation, offering a simple method by which the selectmen could barter their highway assets for new highways or pay compensation to affected landowners. And indeed, the system was used frequently: highway exchange accounted for just short of a third of all highway creation during the period from 1750-1784, a total of about seventy-two exchanges.

152. Petitions by Inhabitants of New Haven (Nos. 44-59), microformed on 2 Travel, 2d Series, Connecticut Archives (Conn. State Library).
153. Petition of Gideon Todd (Nos. 46-47), microformed on 6 Travel, 2d Series, Connecticut Archives (Conn. State Library) (seeking recovery of debt against town of New Haven for thirty-six pounds, which they are unable to pay); Dayton v. New Haven, 8 New Haven Co. Court Rec. 558 (1784) (unpublished collection, on file at Conn. State Library) ( awarding Dayton thirty pounds against the town that he had been unable to secure from them).
154. Currency instability resulted from several factors. The circulation of specie was frequently in jeopardy because of policies from England and other restrictions. Additionally, the colonial economy occasionally faced deep recessions and inflation. See Claire Priest, Currency Policies and Legal Development in Colonial New England, 110 YALE L.J. 1303 (2001) (discussing currency crises of the eighteenth century, as well as the economic practices, such as bartering, that arose during times of currency scarcity).
155. NEW HAVEN GAZETTE, NOV. 11, 1784, at 5, microformed on Film An N413:1 (on file at Sterling Mem’l Library, Yale Univ.).
156. See infra Appendix (Compensation Patterns in New Highway Construction, 1750-1784).
Together with the other form of in-kind exchanges—grants of other common land, not abandoned highway—land and highways were used as compensation for half of all new highway construction between 1750 and 1784. The flexibility of being able to pay with common land may have solved one possible problem with the highway exchange system: what to do if abandoned highway land was scarce. Indeed, after 1769 (and thus, in the midst of the town’s rapid growth period), the amount of highway exchange relative to land payment decreased, not to rise again until after the Revolutionary War. This may be due to increasing traffic on highways, and hence, fewer abandoned highways to use in the exchange system. Still, being able to grant regular parcels of common land had many of the same advan-

157. See id. (containing numerical data and source for data).
158. Id. There are a few other outlying types of in-kind compensation—for example, taking the land for a highway, but awarding some kind of right to the original landowner. See Deeds of Dec. 31, 1778 (recorded Jan. 1, 1779), in 37 NHLR, supra note 48, at 536, 536-40 (awarding landowners the right to the cleared lumber in exchange for the land).
tages as being able to pay in abandoned highway land. And because highway exchange persisted alongside the use of common lands to purchase highways, other advantages remained: if a highway was deemed unsuccessful, it could still be recycled for a new highway, supporting piecemeal development and allowing the selectmen to assess and respond to demand for streets (or in many cases, minimizing the impact of the lack of demand for a particular roadway).

3. RESPONSIVE PLANNING

Both resident involvement and highway exchange, features of incremental development in New Haven, provided the government with good feedback on the roadway system and its shortcomings. Hence, the government was able to engage in what I call responsive planning, or planning that was shaped by existing settlement patterns. Responsive planning allowed the town government to take advantage of resident knowledge indirectly, by planning according to their expressed preferences on the best lands for living, farming, and doing business. The choices residents actually made about where to live and work were a valuable source of information that the selectmen could use in planning street grids which would support economic and social life.

The most major shift in settlement patterns within central New Haven was a movement toward the water. Looking at eighteenth century maps of New Haven, it is apparent that many new homesteads were situated either directly on the creeks or on the harbor.

Critically, the infrastructure near the water often developed around new settlement patterns; in other words, land was not granted on a pre-established highway, but instead, the highway followed the settlement. Some of the street creation took the form of “grant-and-reserve” planning—early settlers would petition for land in a particular area, and the town authorities would require them to leave space for a new street. Take, for example, the creation of Water Street, a long road that tracks New Haven harbor: in the 1650s, the town government granted settlers land near the water, provided they leave room for a “Cart highway” somewhere across their properties, allowing them some discretion over where exactly it would go.

159. See Edward E. Atwater, The Town of New Haven Before the War of the Revolution, in History of the City of New Haven, supra note 78, at 25; id. at 33 [hereinafter Stiles Map of 1775]; “Plan of the city of New Haven taken in 1748” (on file at Beinecke Library, Yale Univ.) [hereinafter Wadsworth Map of 1748].

developed piecemeal, based on where settlers had located their homesteads.  

As for the other harbor streets, they were not created by the initial grant of land, but instead were created after settlers located their households there. Most of the streets near the harbor were officially established between 1750 and 1775, at the same time that the harbor was emerging as centrally important to New Haven’s economy. Piecemeal planning allowed the government to respond to the demand for streets and adjust for settlement preferences, particularly important for the many New Haven residents who chose to reside near the harbor. A map of New Haven from 1824 depicts five incrementally-planned streets near the water—Water, Union, Fair, Olive, and Cherry Streets—that look far more like Boston than like any grid.

Around the harbor, the resulting street plan was more akin to the typical New England pattern of “folk” development, as opposed to the advance-planning of the Nine Squares. And indeed, as in other New England towns, these streets were formed incrementally. Presumably, many of the other small streets, alleys, and lanes depicted on the 1824 map were also the result of piecemeal planning, created in response to demand as settlers chose where to build homes and shops.

161. What is now Fleet Street, a road near Water Street, also appears to be the result of grant-and-reserve planning, rather than a road planned in advance of settlement. VOLUME II: 1662-1684, supra note 55, at 322 (describing necessity for highway near lands of Alsop and Trowbridge); Wadsworth Map of 1748, supra note 159 (showing Alsop and Trowbridge, residing near lower Fleet Street).

162. Union Street was established by two deeds, taking land from the lots of Hezekiah Sabin and Phillip Rexford, both of whom are depicted on the map of 1748. Sabin and Rexford were paid in “New York currency” for their strips of land. Deed of Dec. 3, 1750, in 15 NHLR, supra note 48, at 396, 396 (Sabin); Deed of Dec. 10, 1750, in 15 NHLR, supra note 48, at 395, 395 (Rexford). Fair Street was also the result of incremental planning, after a transaction with the heirs of a landowner whose parcel stood between State Street and Union Street. Deed of Sept. 5, 1771, in 34 NHLR, supra note 48, at 205, 205 (granting land of the late John Hall beginning “to begin on the East Side of the Town Street opposite to the Shop of Mr. Tho. Howell” and running east thirteen rods to another highway, presumably Union Street); Deed of Apr. 1, 1771, in 31 NHLR, supra note 48, at 465, 465 (establishing small highway to the harbor from lands of “John Rhode” south through lands Sam Mansfield and James Sherman); Wadsworth Map of 1748, supra note 159 (depicting lands of “Row,” Mansfield, and Sherman near modern Olive Street).

163. Plan of New Haven (on file at New Haven Colony Historical Soc’y) [hereinafter Map of 1824]. It should be noted that the location of Union Street is not quite as it was in the eighteenth century; Union Street was relocated in 1802. Deed of Nov. 30, 1802 (recorded Dec. 3, 1802), in 52 NHLR, supra note 48, at 181, 181. It was moved eight rods, or one hundred and thirty-two feet, to the east, and referred to as “New Union Street.” The move affected only two landowners, both of whom were compensated by “old” Union Street. In other words, they received an identically-sized strip at the west end of their lots in exchange for a strip on the east end, and they still had property fronting on Union Street. Id.
Accordingly, these roads are more irregularly shaped and more deferent to topography and existing landholding patterns.

III. The Nine Squares Subdivision

While the area surrounding the Nine Squares developed incrementally, as described above, the streets within the Nine Squares remained relatively unchanged. In local parlance, the streets were probably still identified either by the names of older proprietors who had resided nearby, or else the current occupants. But by 1775, they had at least begun to acquire names. Downtown New Haven was still defined by the regularity of the squares, which made a great impression on visitors. On seeing New Haven for the first time, the visitor Thomas Pownall described it as follows:

\[ \text{[T]he Traveller has from the hills an enchanting view of the Vale and the Town; a Town of Trading, and [the] Harbour full of Vessels. The Town is built on a regular designed Plan. Is a Square, has a Place or Square in the Middle, from the Angles of which go off in right lines eight Streets. The Houses are all built in the English Fashion. In the center of the Square is a fine Meeting House with its Spire like our English Churches.} \]

In 1754, then, Pownall described an infrastructure hardly different from the one originally laid out. Despite the growing number of lots, people, houses, and shops, the central part of New Haven in the 1750s had the same streets and blocks it had a century earlier.

A. Signs of Strain

Most of the economic and social life of the town was funneled into the Nine Squares, the heart of New Haven. New Haven historian Douglas Rae has referred to the infrastructure surrounding the seaport as an

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165. Some street names were based purely on their geographical location: Grove Street was known as “North Street,” and York Street as “West Street.” Atwater, *The Town of New Haven*, supra note 104, at 32; *Dexter*, *supra* note 81, at 52. Others were based on local features: Chapel, College, and Elm streets, named for the church, Yale, and New Haven’s first two trees, have retained the same names since at least 1775. Atwater, *The Town of New Haven*, *supra* note 104, at 32. Church Street was called “Market Street” because of its proximity to the green and the traditional center of commerce. George Street was called “Leather Lane,” *id.*, probably because of the several tanneries located there. *See* Stiles Map of 1775, *supra* note 159. State Street was known as “Queen Street,” perhaps the only street without a readily identifiable local source for its name. Atwater, *The Town of New Haven*, *supra* note 104, at 32; *Dexter*, *supra* note 81, at 52.

“umbilicus through which the central squares sucked up commercial opportunity from afar.”\textsuperscript{167} As New Haven’s role in commerce increased during the 1700s, the “compact part” of the city, as Yale President Ezra Stiles called it,\textsuperscript{168} was beginning to fill with new residences and new stores. With the increase in the number of dwellings, it is safe to assume that more people than ever were living on the eight major streets. The table below depicts a constant increase in the number of dwellings built within the Nine Squares:

<table>
<thead>
<tr>
<th>Year</th>
<th>Dwellings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1724</td>
<td>157</td>
</tr>
<tr>
<td>1742</td>
<td>165\textsuperscript{170}</td>
</tr>
<tr>
<td>1775</td>
<td>370</td>
</tr>
<tr>
<td>1787</td>
<td>466</td>
</tr>
<tr>
<td>1798</td>
<td>596</td>
</tr>
</tbody>
</table>

However, growth was not equally paced among all the blocks. To examine the growth in each of the squares, I have counted the number of structures that appear within each square in three maps of New Haven: the Brown Map of 1724,\textsuperscript{171} the Wadsworth Map of 1748,\textsuperscript{172} and the Wadsworth Map of 1775. The table below depicts the number of dwellings built within the Nine Squares:

<table>
<thead>
<tr>
<th>Year</th>
<th>Dwellings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1724</td>
<td>157</td>
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<td>1742</td>
<td>165\textsuperscript{170}</td>
</tr>
<tr>
<td>1775</td>
<td>370</td>
</tr>
<tr>
<td>1787</td>
<td>466</td>
</tr>
<tr>
<td>1798</td>
<td>596</td>
</tr>
</tbody>
</table>

\textsuperscript{167} Douglas W. Rae, City: Urbanism and Its End 40 (2003).

\textsuperscript{168} The Literary Diary of Ezra Stiles, D.D., L.L.D.: President of Yale College 17 (Franklin Bowditch Dexter ed., 1901) [hereinafter Diary of Ezra Stiles].

\textsuperscript{169} The first three numbers attesting to the number of dwellings come from a count done by Ezra Stiles in 1782, compiled after consultation with a local eighty-one year old man able to give him an account of the landscape in 1724. The final two numbers come from official counts done by local newspapers. The number for 1787, from Connecticut Magazine, is recorded in Stiles’s diary. The second, appearing in the Connecticut Journal, is reprinted in Edward Atwater’s book on the city. Diary of Ezra Stiles, supra note 168, at 15-17, 288-89; Edward E. Atwater, Annals of the City of New Haven from its Incorporation in 1784 to its Centennial in 1784, in History of the City of New Haven, supra note 78, at 80, 88-89.

\textsuperscript{170} This number, from the memory of President Stiles, is probably too low. I counted the number of structures appearing on the 1724, 1748, and 1775 maps, and came out with the following numbers of structures: in 1724, about 165 structures; in 1748, 390 structures; in 1775, about 450 structures. Although these are far from official numbers, they suggest that Stiles’s number is a bit under what it should be, perhaps by about 50-100. Thomas Trowbridge asserts that there were probably about 225 total buildings in this period, which would also be consistent with a higher number than that given by Stiles. See Trowbridge, supra note 107, at 201.

\textsuperscript{171} The map for the year 1724 was drawn by Joseph Brown and copied by Ezra Stiles in 1782. At that time, Brown was still living at the age of 81 and provided Stiles with the identities of the occupants to the best of his memory. Atwater, The Town of New Haven, supra note 104, at 24.

\textsuperscript{172} The map for the year 1748 was drawn by General James Wadsworth in red, blue, and black ink. It is probably from an actual survey; it records the names and occupations of the residents, and the different colors of ink appear to indicate the material composition of the structures (primarily whether they were wood or stone). See Wadsworth Map of 1748, supra note 159. The Wadsworth map was copied and engraved in 1806 by Thomas Kensett. I use the number of structures that appear on
and the Stiles Map of 1775. All three maps were drawn by locals within a short time of the years they claim to depict. Unfortunately, it is probably unwise to rely on the maps for providing a precise number of buildings, since they were not all the result of official surveys. Nevertheless, despite their shortcomings, the numbers of buildings depicted on the maps do provide us with a good idea about the relative densities in each square over this time period. I number the blocks based upon their distance from the harbor and continuing west to east, proceeding north. In other words, Block 1 is the block nearest to the water, bounded by what is now George and State streets; Block 2 is slightly west and north, Block 3 east, Blocks 4 and 5 on the corners of the center block, and Block 8 the most distant from the water.

Counting each of the separate, free-standing structures in each square, one arrives at the following numbers for each year:

<table>
<thead>
<tr>
<th>Block</th>
<th>1724</th>
<th>1748</th>
<th>1775</th>
</tr>
</thead>
<tbody>
<tr>
<td>Block 1</td>
<td>14</td>
<td>27</td>
<td>47</td>
</tr>
<tr>
<td>Block 2</td>
<td>9</td>
<td>22</td>
<td>44</td>
</tr>
<tr>
<td>Block 3</td>
<td>12</td>
<td>22</td>
<td>37</td>
</tr>
<tr>
<td>Block 4</td>
<td>11</td>
<td>25</td>
<td>30</td>
</tr>
<tr>
<td>Block 5</td>
<td>10</td>
<td>14</td>
<td>23</td>
</tr>
<tr>
<td>Block 6</td>
<td>16</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td>Block 7</td>
<td>10</td>
<td>17</td>
<td>19</td>
</tr>
<tr>
<td>Block 8</td>
<td>5</td>
<td>14</td>
<td>18</td>
</tr>
</tbody>
</table>

The changes in patterns of development in the Nine Squares can probably be attributed to the location of two important resources:

173. The 1775 map was drawn by Ezra Stiles, and appears in his diary in the year 1778. DIARY OF EZRA STILES, supra note 168, at 275; see Stiles Map of 1775, supra note 159.

174. For example, although I used the Wadsworth map of 1748 to count numbers of structures, the number of dwellinghouses depicted on Stiles’s map of the squares in 1742 is fairly consistent in terms of overall density. Both show less density in the upper three squares and increased activity in the lower squares, particularly Block 8. See DIARY OF EZRA STILES, supra note 168, at 17.

175. I have excluded the green; although the number of structures changed slightly as a few additional public buildings were added to the square, because no one was constructing homes or shops there, the need for a street through the green was not dependent on density.
the water and the fields. As New Haven became more of a commercial town, the importance of waterways for shipping and receiving goods grew. In particular, the closeness to the harbor (as well as what remained of the creeks) probably became of increasing importance to merchants seeking land in the Nine Squares. Accordingly, we would expect to see heightened development in Blocks 1, 2, and 3. However, agrarian landholders within the Nine Squares probably cared less about the harbor and more about their proximity to the roadways that led to the vast farm fields surrounding the town. As an example, it is significant that Block 6 retained a high level of development, despite its distance from the water; Block 6 was near a path to the fields in the western part of the town. Similarly, some of the development in Block 5 can probably be attributed to the location of the road to the fields where many other citizens had their holdings. It is logical that local farmers would want to situate their dwellings close to these roads.

Some of the patterns of development in the lower three squares are also attributable to the construction of stores and shops. The location of the traditional marketplace near the center block was likely important to enterprising New Haveners considering where to offer their commercial goods and services. Locating a shop in that area downtown probably facilitated tapping into a ready customer base. The town already had a sort of “commercial district” by the 1780s.176

Sometime between 1750 and 1775, as New Haven experienced its economic boom, members of the citizenry began to create small alleys or streets within the Nine Squares on the busiest commercial blocks, particularly Block 1. The maps produced in the mid-1770s show Gregson Street, a small, irregular street with multiple buildings on it; they also show Hubbard Street, probably named for nearby resident Leverett Hubbard.177 Landowners in these regions appear to have coordinated to create streets where they were necessary. As in many other regions in the town, community members were driving development where there was demand for new roadways.

However, in 1784, the selectmen of the newly incorporated city of New Haven took over development within the Nine Squares, choosing to subdivide each block (with the exception of the green) into four (nearly) evenly sized blocks. The story of the subdivision of the Nine Squares has never before been told in detail. The next Section

176. The map of 1748 identifies many merchants and shopkeepers on these streets. See Wadsworth Map of 1748, supra note 159.
177. See Stiles Map of 1775, supra note 159.
briefly explains how and why the government subdivided the squares the way they did—a history which identifies the time and cost required to subdivide the squares, in the process illustrating some of the problems posed by comprehensive grid plans in the colonial period.

B. Early Property Problems: Of Holdouts and Obstacles

On September 23, 1784, just nine months after becoming officially incorporated and chartered as a city, the New Haven selectmen voted at a city meeting not only to rename the original eight streets in New Haven, but also to create new streets within the original Nine Squares. The by-law appeared in the *New Haven Gazette* on October 14, 1784.

Given the completeness of the Town Records, it is striking that there is no mention of the decision to divide the streets. As it appears from the records, no committee was appointed to investigate whether new highways within the Nine Squares would be of public benefit. There are no records of surveyors discussing the matter with affected landowners. But it would be a mistake to assume there was no investigation and opposition, as the records might seem to indicate. The best sources for ascertaining what happened during the division of the Nine Squares are preserved in the New Haven Land Records and Connecticut Archives, in a few pages of records that reveal the people responsible for the Nine Squares subdivision and the difficulties the committee faced in trying to open the streets.

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178. *New Haven Gazette*, No. 23, Oct. 14, 1784, at 3, *microformed on Film An N413:1* (on file at Sterling Mem’l Library, Yale Univ.) ("VOTED. That the Streets in the City of New-Haven be named as follows, viz. The Street from Capt. Samuel Munson’s corner to Thomas Howell, Esq’r’s shop—STATE STREET. The Street from Cooper’s corner to Capt. Robert Brown’s corner—CHURCH STREET. The Street from Dixwell’s corner to Dunbar’s corner—COLLEGE STREET. The Street from Tench’s corner to Andrews’s corner—YORK STREET. The Street from Capt. Samuel Munson’s corner to Tench’s corner—GROVE STREET. The Street from Bishop’s corner to Darling’s corner—ELM STREET. The Street from Rhodes’s corner to Mr. Isaac Doolittle’s corner—CHAPEL STREET. The Street from Andrews’s corner to Thomas Howell, Esq’r’s shop—GEORGE STREET. . . . The Street from Grove Street across the squares, a little west of Pierpont Edwards, Esq’r’s, thence over into George Street—ORANGE STREET. The Street across the middle squares in front of the State House and other public buildings—TEMPLE STREET. The Street between the dwelling-houses, where Mr. Timothy Jones, deceased dwelt, and where Mr. David Austin, jun. now lives up through the square to the green, and across the opposite square, near the new gaol—COURT STREET. The Street across the upper squares from Grove-Street to George Street which runs between the dwelling house and store of Henry Daggett, Esq.—HIGH STREET. The Street from Mr. Joseph Howell’s, across the squares between the old and new houses of Mr. Joel Atwater—CROWN STREET. . . .").
On September 22, 1783, a year before the by-law, a petition arrived at the Connecticut General Assembly. It was signed by residents of the New Haven “town plat,” local vernacular for the Nine Squares environs. The petition requested that the residents of the New Haven downtown be permitted to form a corporation to better govern and regulate the city. The main impetus for incorporation was better local control over trade: the group stated that “by their local circumstances they are utterly unable to gain subsistence by agriculture . . . they have been obliged to turn their attention to commerce.” After the difficulties of the Revolutionary War, the New Haven group stated that they were “renewing their efforts to extend that commerce so necessary for them.” One of the powers they requested was to be able to lay out “streets and highways [] commodious for business” within the town plat.

This document is a clue to the main reason the selectmen seem to have wanted new streets within the Nine Squares in 1784: smaller blocks of smaller lots were more desirable. Long before 1784, the spacious home lots granted to the first group of settlers had been divided and subdivided into smaller lots. Almost immediately after the initial settlement, several of the large home lots within the Nine Squares were split into smaller pieces and sold off. People wanted to live and work near the center of the town, and the large blocks did not make settling the downtown blocks with the optimum number of residents possible. Creating smaller lots fronting on new streets would have increased aggregate land value by facilitating lot subdivision. If the owner of a Nine Squares lot wanted to sell off an internal portion of his lot to a new owner, the creation of a new public street with direct access to that lot would have made the land much more desirable.

Moreover, the new demand for smaller lots might also have been created by New Haven’s growing commercial character. The smaller lots were not lots for large gardens and small-scale farming; they were lots on which the men primarily intended to build homes,
warehouses, and shops.\textsuperscript{184} Accordingly, many of the new houses and lots purchased along the water were more densely packed than the spacious lots within the Nine Squares.\textsuperscript{185} Although the crowding of the blocks by houses and stores is a second possible reason for opening more streets, it seems less likely that this was the primary reason for the decision to divide. While some blocks were indeed uniformly fronted by buildings, others were very sparsely populated. As late as 1799, even after the blocks had been subdivided, a visitor to New Haven remarked that some of the houses in the Nine Squares were “detached, with considerable intervals, from one another.”\textsuperscript{186} More likely, the subdivision ensured that the deep lots could be split up and sold off, making more downtown lot space available for new residents to build homes and shops.

There is another reason why the selectmen may have chosen to divide the streets when they did. There were planned subdivisions occurring at exactly this time in two of the most important cities in colonial America: Philadelphia and New York. As in New Haven, the blocks planned in early Philadelphia were somewhat large: 425 feet by 675 feet, or 425 feet by 500 feet (although this hardly compares to New Haven’s enormous blocks).\textsuperscript{187} By 1762, they had begun to be cut up by narrow alleys and streets.\textsuperscript{188} Between 1762 and 1794, most of the large blocks (though not all) in Philadelphia were divided into anywhere between two and four blocks.\textsuperscript{189} New York, meanwhile, had been comfortably developing block-by-block in extremely irregular fashion over the course of the 1700s.\textsuperscript{190} But in the 1760s, the city appointed a surveyor to lay out a subdivision of some of the blocks on the west side of Manhattan, creating small rectangular blocks.\textsuperscript{191} Given the timing of these other city planning initiatives, the subdivision of New Haven’s blocks may not be a coincidence. The New Haven selectmen may have felt that cosmopolitan cities were moving toward smaller

\textsuperscript{184} Volume II: 1662-1684, supra note 55, at 425 (noting John Sackett’s request to build a shop); id. at 384 (noting Jon Pryor’s request for a shop by the “waterside”); id. at 400 (Bradly requests a shop “creekside”); id. at 440 (Mansfield’s request for creekside land for a shop).
\textsuperscript{185} See Stiles Map of 1775, supra note 159.
\textsuperscript{187} Reps, supra note 1, at 163.
\textsuperscript{188} Id. at 165.
\textsuperscript{189} Id. at 170; see also Figure 1 (Scale Drawing of Block Sizes in Early Planned Cities).
\textsuperscript{190} Reps, supra note 1, at 154.
\textsuperscript{191} Id.
block sizes, and accordingly, decided to reduce the size of New Haven’s blocks.

The by-law published in the newspaper in 1784 that named the streets and described the new layout would seem to indicate that all the streets would be laid out at once. According to that law, all the streets were ordered to be fully cut through the squares right away. This was far from reality. Street by street, piece by piece, the selectmen faced different struggles in their efforts to lay out the new roads. Some of these problems are detailed in the following subsections.

1. EVIDENCE OF RESISTANCE

The by-law establishing the streets was passed on September 23, 1784. Two weeks later, at a city meeting on October 11, 1784, the city government passed a resolution: “Voted, that application be made to the Connecticut General Assembly at their next session, for a grant to this city of more extensive powers respecting the laying out and opening of Streets and highways in sd city.”

Two of the town’s youngest and most successful individuals, Pierpont Edwards and James Hillhouse, were appointed to be a committee to bring the bill in front of the Assembly.

The timing of this request from Hillhouse and Edwards suggests a link between the powers requested and the problems that the selectmen were facing in laying out the Nine Squares roads. The procedure that Hillhouse and Edwards agitated for would be more accelerated than the standard procedure under Connecticut law. Under the procedures they requested to use in the city, an aggrieved landowner in New Haven would only have one month to apply to the court, which would have to meet within one week to decide on the merits of the complaint. More importantly, the Act stated that the city would pay the bill for convening the court, but only if the complaining landowner had “just cause” to complain; otherwise, the aggrieved owner would bear the cost. This must have been a powerful deterrent against challenging new roads. If the landowner did not complain within one month, then the aldermen could “after the end of two months after laying out the same[,] be by said Mayor, Aldermen and

192. Meeting at City of New Haven, Connecticut (No. 6), microformed on 10 Towns and Lands, 1st Series, Connecticut Archives (on file at Conn. State Library).
193. Id.
194. An Act in Alteration of an Act Entitled An Act for Incorporating a Part of the Town of New Haven (No. 7a-7b), microformed on 10 Towns and Lands, supra note 192.
195. Id.
Common Council laid out[,] and may be occupied as a common highway."196 If a landowner persisted in encroaching on the new road, the Act reaffirmed the city government’s power to tear down and remove any encroachment in the new streets without recompense.197

The New Haven government’s petition for more highway powers in 1784 corroborates the evidence that at least some of New Haven’s residents opposed the new highways. The record198 for one of the subdividing streets, Orange Street, serves as a representative example. The Orange Street Deed contains reference to a hearing where the “parties having appeared by themselves or agents or attorneys were fully heard.”199 This is the first ever reference to attorneys in a record of a highway transfer. The conclusion that part of Orange Street was contested is further supported by the fact that the legal procedures for resisting a highway were being followed. The selectmen recorded that they had given notice to those affected. They appointed a committee of disinterested freeholders—three individuals from West Haven—to appraise the damages. More importantly, the highway was left unopened for at least one year,200 which was prescribed by the state highway laws in the event a landowner felt “aggrieved” by the new highway.201 The deeds for three of the subdividing streets follow this pattern. There are variations in the records which make it unlikely that the language in each deed is merely boilerplate: only some of the records have references to hearings with the parties or their attorneys, while others contain simple quitclaims or relinquishments of the right to seek damages from the town.

Among the other unusual features of the records for Orange, Temple, and most of High Street is the fact that no compensation was paid. These new highways in the Nine Squares were laid out without the city paying any compensation, even a trivial amount. In choosing to award

196. Id.
197. Id.
198. Although I refer to these as deeds, and they are recorded as such in the New Haven Land Records, these documents serve as records of more than simply contractual transactions. In cases where roads were contested, they describe the bounds of the parcel to be taken, but also identify the parties involved, whether there was a hearing and if the parties were represented by attorneys or agents, and any compensation granted. It also identifies the members of the committee appointed to assess damages, their verdicts on whether damages were awarded, and, if damages were appropriate, how much was ordered paid.
199. Deed of Sept. 22, 1784 (recorded June 5, 1787), in 43 NHLR, supra note 48, at 9, 10 [hereinafter Orange Street Deed].
200. The deed was not signed until 1785. It was not recorded until 1787. Orange Street Deed, supra note 199, at 10.
201. Connecticut Highway Law, 1773, supra note 88, at 381.
no damages, the appraisers seem to have taken into consideration the offsetting benefits the adjacent landowners would receive from a new road,\footnote{202} although one could argue that any new road created since 1650 had generated offsetting benefits for nearby owners, and that had never barred compensation before.\footnote{203}

Taking a fifty foot swath out of a downtown home lot probably affected a huge portion of an owner’s property. By this time, the amount of street frontage each lot owner would have had seems to have been very small. One merchant’s drawing of downtown in the year 1786 depicts twenty-one separate lots (with more than twenty-one structures) on one side of a block.\footnote{204} Dividing the eight hundred and fifty foot block width by twenty-one lots, that results in an average lot frontage of about forty feet—meaning that each street could wipe out an entire home or store lot, or at the very least, a large portion of one or two.

Apart from the records of hearings just discussed, it is impossible to know what kind of resident resistance there was, or whether the new roads were unpopular among the locals. But of particular note is the fact that after creating the new highways in 1784 and implementing them slowly over the next decades, the city of New Haven (as distinct from the town) did not engage in any other formal street building project until 1799.\footnote{205}

2. STRUCTURAL OBSTACLES: ORANGE STREET

The selectmen may have faced resistance from landowners, but they also faced physical obstacles: structures standing in the paths of the new streets. The story of Orange Street indicates how the selectmen quite literally “got around” the problem.

\footnote{202. This is less explicit in the Orange Street Deed than it is in the deed for High Street. \textit{See} Deed of Aug. 4, 1784 (recorded June 5, 1787), in 43 NHLR, \textit{supra} note 48, at 10, 10 [hereinafter High Street Deed].}

\footnote{203. I cautiously advance an unsupported hypothesis that the New Haven government may have been currency poor and deeply in debt after the war and a surge of infrastructural projects, requiring them to resort to an extreme form of eminent domain. When they could not pay in ordinary circumstances, the selectmen seem to have used highway land to purchase new highway land. But most of the highway land at their disposal was in distant locations, and thus worth little to many of the occupants in the Nine Squares who may have been merchants rather than farmers. The city government simply may not have been able to afford to pay monetary damages to the affected landholders.}

\footnote{204. \textit{See} Atwater, \textit{Annals of the City of New Haven}, \textit{supra} note 169, at 83.}

\footnote{205. There is one exception: a highway exchange involving James Hillhouse’s mother where she gave the town an unidentifiable, minor street on her land near modern Grove Street. \textit{Deed of July 8, 1785 (recorded July 11, 1785), in} 42 NHLR, \textit{supra} note 48, at 449, 449; \textit{see infra} Subsection III.B.3.}
Of any of the new streets in the city of New Haven, Orange Street would seem to be the most urgent. Already by 1775, the southernmost piece of Orange Street was opened in Block 1 by private citizens acting on their own initiative, with structures beginning to front on it. But once Orange Street was fully laid out, it did not connect to the small street in the southernmost block which had formed by 1775. It was instead located slightly west, resulting in an odd little jog at one intersection. Why?

The clearest explanation is that there was a structure in the way. The by-law establishing the street states that Orange Street was to begin above where the southernmost street was formed and head north starting “a little west” of a house of Pierpont Edwards, then a prominent lawyer in the town. The deed states that Orange Street would run by his barn on its front or west side. In laying out the new street, the selectmen appear to have sacrificed geometric perfection to keep from running over their fellow common councilman’s barn, instead plotting Orange Street west of where its lowest part already ran. Edwards was a powerful individual involved in town government, leaving us to wonder whether his authority allowed him to prevent the road from adversely affecting his property. The irregularity in Orange Street still exists today.

3. HOLDOUTS: TEMPLE STREET

The selectmen would seem to have had a major advantage in laying out Temple Street. One of the blocks they needed to bisect was the central green, which they already controlled. But even this deed references a hearing. The record establishing Temple Street refers to the “land of Capt. John Mix.” The Mix family lands seem to have been fairly large and fairly valuable: they were needed for two of the subdividing streets.

One of these subdividing streets, Wall Street, was not included in the original 1784 by-law establishing the new streets. It may have been an afterthought; a glance at the 1775 map demonstrates that the upper squares, where Wall Street is located, were very sparsely settled and relatively separated from the growing commercial district south of

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206. See Stiles Map of 1775, supra note 159, at 33.
207. Vote of September 23, 1784, supra note 164, at 3.
208. Orange Street Deed, supra note 199, at 9-10.
209. Deed of Sept. 22, 1784 (recorded July 10, 1787), in 43 NHLR, supra note 48, at 12, 12-13 [hereinafter Temple Street Deed].
210. See id.; Deed of May 8, 1816, in 64 NHLR, supra note 48, at 255, 255 [hereinafter Wall Street Deed].
211. Vote of September 23, 1784, supra note 164, at 1.
them.212 Still, by 1787, the first Wall Street Deed was filed. It stated that the road would run in a line until it approached the boundary between the lands of John Mix and a neighbor.213

Yet the full extension of Wall Street through all three blocks was not accomplished until 1816, when both Capt. John Mix and his son, John Mix Jr., had died, at which point the townspeople were able to access the land by settling a debt from the estate.214 When Mix died, the selectmen acted immediately to finish extending Wall Street through the blocks. Mix died in debt $208.32 to the city of New Haven. The strip of land needed for Wall Street was appraised at $134, a not insignificant sum for a swath which was only two-hundred-and-twenty-eight feet long and twenty-six feet, eight inches wide.215 At just over twenty-five feet wide, Mix’s land only constituted half the piece needed to extend the forty-foot-wide road through to College Street. The two landholders who held the other pieces—John H. Lynde, who lived near Temple and Wall,216 and Elizur Goodrich—were prominent lawyers in the city,217 and both had some involvement with city government.218 With no shortage of civic spirit, both Lynde and Goodrich turned over their small pieces of land for Wall Street after Mix’s death, in 1816 and 1817, for the minimal consideration of one dollar a piece.219

4. EXTRALEGAL NEGOTIATIONS: HIGH STREET

High Street, the third new north-south street after Orange and Temple, was both the first and the last highway laid out in the Nine Squares.

212. See Stiles Map of 1775, supra note 159.
213. Id.
214. Id.
215. Wall Street Deed, supra note 210, at 255. After visiting New Haven in 1799, a French traveler stated that the average price for land in New Haven was between $14 and $18 an acre. Duke de la Rochefoucault Liancourt, supra note 186, at 523. It is unclear which part of New Haven the Duke was discussing. Land within the Nine Squares was probably more valuable than outlying land in New Haven, so the amount paid for Mix’s land may be consistent with land values within the town plat.
216. Lynde Harrison, The Bench and Bar of New Haven, in HISTORY OF THE CITY OF NEW HAVEN, supra note 78, at 244.
217. See id. at 243; Charles Atwater, Banks and Banking, in HISTORY OF THE CITY OF NEW HAVEN, supra note 78, at 323, 324.
218. Elizur Goodrich was a Justice of the Peace in the late eighteenth century, as well as a councilman and alderman. Id. at 324; Charles H. Levermore, Municipal History: 2. The City Government, in HISTORY OF THE CITY OF NEW HAVEN, supra note 78, at 446, 453. Lynde is listed as the individual (along with architect Ithiel Towne) who transacted with the estate conservator in the second Wall Street deed. Wall Street Deed, supra note 215, at 59.
219. Deed of Apr. 17, 1817 (recorded Apr. 17, 1817), in 64 NHLR, supra note 48, at 256, 256; Deed of Aug. 4, 1816 (recorded Apr. 17, 1817), in 64 NHLR, supra note 48, at 257, 257.
The street was advanced block by block; the first block was laid out in 1784, but the last one was not laid out until 1827. Unlike the other two north-south streets, which appear to have been laid out in the northernmost blocks first, the townspeople tried to lay out High Street beginning in the southernmost block. Lower High Street was only laid out forty feet wide, as opposed to Orange and Temple streets, both of which had a width of fifty feet. This may have been an adjustment made because of the crowdedness of the lower block, necessitating a narrower road to avoid houses and barns.

The same three West Haven men who had appraised the lands affected by Orange Street and Temple Street also appraised the lands which were taken on the lower block of High Street. But instead of awarding no compensation, this time, the committee referenced an unusual reason why the damages were settled:

We the subscribers freeholders under oath appointed by Sam Bishop Justice of the Peace to appraise and estimate the damage done to James Prescott Mary Lucas Joel Atwater Noah Potter and Thankfull his wife by laying out the within mentioned highway the sd James Prescott [sic] and Mary Lucas having agreed and by exchange of land settled the matter of damages respecting their sd two Lots so yf they demand no damages, do adjudge that the laying out sd highway is no damage to Joel Atwater and Noah Potter and Thankfull his wife but yf said lots are benefitted by laying out sd highway.

As with Temple Street and Orange Street, no monetary damages were awarded. This is the only deed which explicitly invokes the “offsetting benefits” doctrine, stating that the benefits of the new highway outweighed the damages that some of the landholders suffered.

But less straightforward is the reference to an “exchange of land” between the two damaged owners. It seems that Lucas and Prescott might have had claims against the town stemming from the creation of High Street, but that these claims were relinquished after a transaction between them. Hunting through the records, it becomes evident that the transaction was actually very complex, and designed to placate only one of the parties: James Prescott. The transaction provides a clear example of how the selectmen of New Haven may have dealt with possible problems related to their street plan: with a lot of extralegal deal-making.

In the fall of 1784, James Prescott was a party to two land deals on the same day: one, a transfer from New Haven Mayor Roger Sherman to him, and another reciprocal deed between himself and Mary Lucas.

220. Id. at 346.
221. High Street Deed, supra note 202, at 10.
222. Id.
223. Id. at 10-11 (emphasis added).
From the two deeds, Prescott appears to have had a house and shop between some of Lucas’s land and Sherman’s residence. His lot was not very deep; his neighbor, Mary Lucas, seems to have owned land bordering his lot on both its west and south sides. In the transfer, Roger Sherman swapped a piece of his land fronting on Chapel Street for a roughly equally-sized piece out of Mary Lucas’s land behind Prescott’s lot. Lucas and Prescott swapped all of their land on different sides of the new street, so that Lucas would have all of the land on the west side of the street and Prescott would have all of the land on the east side. The following diagram indicates the result of the swap:

**Figure 3: Representational Illustration of the Lucas Deed**

![Diagram showing land swap](image-url)

Note: Exact dimensions not available, hence not to scale.

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224. Deed of Sept. 4, 1784 (recorded Sept. 6, 1784), *in* 40 NHLR, *supra* note 48, at 448, 448 [hereinafter Sherman Deed].

In this transaction, two leaders of city government—Roger Sherman and James Hillhouse—had to give up land to relocate Prescott’s lot. Sherman may have been involved out of civic responsibility, but also family ties: he was married to James Prescott’s sister and, a decade later, went into business with his brother. Hillhouse’s connection to the deal is more remote. It is through Lucas: Mary Lucas was Hillhouse’s mother, using her maiden name. Although Lucas did gain frontage space on High Street, in terms of total acreage, this deal was a loser for her. She gained only a tiny strip on the west side of High Street. The one-sidedness of the deal suggests that Prescott could have been a key problem. There is a record of Prescott constructing the frame for a new house on his Chapel Street lot in late 1784, suggesting he may have had to move a structure when the new street was created. Hillhouse’s involvement is all but certain: the witnesses to the transaction between Prescott and Lucas were James Hillhouse and his biological father, William. By facilitating the land transfer from his mother to Prescott, Hillhouse seems to have aided in the creation of the new streets with his entrepreneurial skills, not his civic leadership abilities. He personally helped engineer deals to overcome major obstacles to laying out the roads.

C. Some Lessons from the Nine Squares Subdivision

Both the original Nine Squares plan and the subdivision were designed with a clear, fixed plan in mind. But it took over sixty years to fully recognize the plan they laid out in 1784. Visitors to the city near 1800 could still remark that only “most” of the squares were divided by cross streets.

227. S.W. Chapel St., in THE DANA COLLECTION (on file at New Haven Colony Historical Society).
229. Sherman Deed, supra note 224, at 448.
230. Lucas Deed, supra note 225, at 449.
231. See JEDIDIAH MORSE, AN ABRIDGMENT OF THE AMERICAN GAZETTEER 245 (Boston, 1798). Some of the streets that were opened at one time have since closed or have been purchased by private owners. See Danny Serna, Briefly: Wall and High Streets to Remain Closed to Traffic, YALE DAILY NEWS, Mar. 21, 2011, http://yaledailynews.com/blog/2011/03/21/briefly-wall-and-high-streets-to-remain-closed-to-traffic/.
In his later years, James Hillhouse apparently gave inquiring minds the impression that the Nine Squares were subdivided when the streets were “opened by the owners of the property at their own convenience and discretion, according to some plan spontaneously agreed upon.”\footnote{REV. LEONARD BACON, SKETCH OF THE LIFE AND PUBLIC SERVICES OF HON. JAMES HILLHOUSE OF NEW HAVEN 37-38 (1860), available at http://books.google.com (search title).} If Hillhouse was referring to a schedule for opening the streets, then perhaps there is a positive explanation for the extreme delays. Perhaps the selectmen of New Haven were relying on a type of amortization period. They gave landowners in certain areas advance warning of the plan for the streets, fair notice not to continue improving their properties or building structures on those lands; there is also the possibility that some landowners may have been given time to re-locate completely.\footnote{Cf. In re Furman Street, 17 Wend. 649, 667 (N.Y. Sup. Ct. 1836) (disallowing damages for buildings erected after a map of new streets had been published).} Although this is a plausible explanation for the delay, and most landowners must have been given notice when the plan for the streets was published in local newspapers, there is no concrete evidence to confirm or refute that the delay was intentional.

Indeed, there is at least as much evidence to the contrary. It appears that while maybe a few sections of a couple streets were opened harmoniously and slowly according to some spontaneous schedule, other rewards point the other way. The city government pursued greater powers over removing encroachments and limiting road appeals. The records refer to local hearings. In some blocks, the government enjoyed the advantages of resident cooperation, usually from a member of their own rank. In others, they took land without compensation for the first time in recorded town history. Sometimes they had to resort to personal connections and negotiations to sway landowners into supporting their street plan. On other occasions, they waited patiently for a landowner to die to finally access the estate. All in all, it was an event fraught with problems that seemed to plague the city for the next several decades, as roads which were supposedly named and established in 1784 remained unopened until nearly 1850.

There are two ways to interpret the subdivision, yielding different results. The subdivision may have been a positive event. It is probably safe to assume that in the aggregate, property values within the Nine Squares rose when the new streets were implemented, simply because they helped create more frontage lots and made better circulation around downtown possible. Even the order in which the streets were laid out
may reflect a positive version of Harold Demsetz’s famous thesis that property rights “develop to internalize externalities when the gains of internalization become larger than the cost of internalization.” With a few exceptions, the streets were generally laid out in the most crowded blocks first, and in the most sparsely settled blocks later. It could be argued that public property rights in streets were created when it was efficient to do so: when the gains of internalizing the negative externalities incurred by crowding, internal building, and private negotiations over easements exceeded the admittedly high costs of establishing a new road. If part of the explanation for the lengthy amount of time required to open all the Nine Squares streets was a sort of compromise, or a type of amortization period—a time during which landowners were given significant advance warning not to make improvements to their properties that would affect the land already designated for streets—then this positive story may well be correct.

But the unavoidable conclusion is that the subdivision may only have been overly costly in the short term. In the long run, the subdividing streets seem to have been successful. Property values probably rose, and settlement on the new streets occurred fairly rapidly; by 1824, in each of the Nine Squares, residents had built on the subdividing streets then laid out. Although the subdivision may have been costly and premature in parts, even if the timing was wrong, the plan itself was probably inevitable. There are only so many ways to divide a square, and it was probably better to ensure the subdividing streets were long and straight than to chance the possibly irregular consequences of private formation of these streets. The street planning committee may have done the best they could with the poor plan they were dealt by their predecessors. The subdivision may have had its flaws, but if anything, these time-consuming revisions are further indications of just how much New Haven’s original Nine Squares plan may have set the city back.

Hillhouse did express one regret about the subdividing streets: late in his life, he regretted “that he did not insist on carrying every street through to the water in a straight line, viz: to the harbor in one direction,

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235. The most important exception is probably the southernmost block of Orange Street, which was divided by private initiative in part, but a section of which seems to have been divided later than the northernmost and center blocks. See infra Section IV.B.
236. See supra notes 232-33 & accompanying text.
237. See Map of 1824, supra note 163.
and from Mill River to West River in the other.”238 This may reveal the true extent of his leadership in the subdivision, but also exposes some of the flaws inherent even in the new plan. Even after the subdivision, the Nine Squares were poorly integrated with the rest of the streets in the city. As in 1800, a traveler on Wall Street or even Crown Street and High Street today cannot travel to any other part of the city without taking one of the other parallel Nine Squares streets. Indeed, here lies the main problem with the entire Nine Squares development, both in 1638 and in 1784. In the government’s efforts to carry out idealized, geometric street plans, they neglected community needs like the location of resources (for example, the harbor) and the patterns which would best help New Haven grow into a metropolis.

IV. Toward a Theory of New Streets

Looking back on this history, is the Nine Squares plan something to be celebrated? New Haven takes a lot of pride in its status as the first planned city. As modern drivers, we applaud the straight streets of the Nine Squares grid. But it is not clear that New Haven’s plan has always been beneficial for the city. Gleaning lessons from town planning in New Haven, this Part attempts to define a theory of street creation, limited to street creation in the wilderness.

A. A Market for Streets

In areas planned by incremental planning and folk planning, street creation was dependent on market forces. The demand for streets determined their location and their layout. Infrastructural choices followed settlement patterns. In certain parts of New Haven, the result was perhaps less geometric, but the resulting streets were efficient for the community and provided a nice gradient of blocks and lots with mixed sizes and mixed uses. Resident preferences and demand—a person’s desire to live near the wharf, for example—determined settlement patterns, and correspondingly, lot and block sizes, and the street grids which framed them.

The Nine Squares plan, in contrast, responded to no perceived demand. Instead of choosing to live within the Nine Squares, almost from the outset, many new residents migrated to lots on the harbor, creek, or river. Besides the fact that the squares were oriented strangely away from the harbor line, the block sizes prescribed by

238. See id.
the street grid were also incompatible with public demand. While large garden lots on spacious blocks may have been what a few early planters desired, less than a century later, many residents of downtown New Haven gravitated toward home and commercial lots which were on smaller blocks with less deep lots. As this Article has described, on some blocks, they cut their own streets into the lots, subdividing blocks on their own initiative.

Piecemeal planning, done with input from residents, offered many advantages in early colonies like New Haven. First, the petition process lowered the search and information costs the government would incur in planning roads: although small government committees still had to travel to the proposed location and investigate the appropriateness of putting a road there, the neighbors and affected landowners could quickly and easily provide the surveyors with good information about nearby settlement and the need for the road. Second, when the residents were involved in infrastructural planning, it was *prima facie* evidence that a road was in demand and would be used, minimizing losses from unnecessary highways that might need to be corrected or relocated later. Third, the government’s role in laying out roads was preserved through the petition process, preventing problems associated with purely private road generation. By filtering all road requests through a representative body, the chance that self-interested behavior would affect road planning decreased (for example, someone creating a street that benefitted his own property, but created strong negative externalities for his neighbors). 239 Additionally, public roads are classic examples of public goods; few would argue with the assumption that governments are best at providing roads, particularly because of their powers of taxation and eminent domain. 240 And laying out a street is a large event that requires coordination; although some of New Haven’s roads appear to have been formed solely by “customary usage,” governments are certainly best at facilitating and coordinating the physical layout of roadways. 241 Indeed, this is why the network benefits of street coordination were not lost when planning was influenced from the bottom up: the government was still at the top, coordi-

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239. A pessimistic view of some of the townsmen’s actions in carrying out comprehensive plans might yield evidence of just as much self-interested behavior. We know that at least one councilman averted the seizure of his own property for a new street, at least for a while. *See* Temple Street Deed, *supra* note 209 (Jeremiah Atwater).


241. *Id.*
nating the street layout as it developed. Piecemeal planning allowed the government to use the knowledge of residents and the enforcement powers of the government, maximizing the relative strengths of both the private and public spheres.

In a sense, imposing a comprehensive grid plan in the early colonies may have operated as a market distortion, preventing natural settlement forces from producing the ideal street layout. The planners seem to have been in a difficult position to accurately assess what type of infrastructure would best meet resident needs. Given the uncertainty of their settlements, it was near impossible to predict whether the city would be commercial or agrarian, and even who the new residents would be, giving them poor information with which to create a street plan that would support settlement. By prescribing a comprehensive plan with meager information, the planners of New Haven left the colony and town inflexible as residents learned about the advantages and disadvantages of their locales and the strengths and weaknesses of their populations.

B. Analyzing the Market Theory: The Plans of New York, Philadelphia, and Boston

At first glance, the histories of the city plans in Boston, New York, and Philadelphia might seem to contradict my theory about the failure of comprehensive grid planning in New Haven. On the contrary, I do not want to assert that all early grid plans failed, or that all piecemeal plans were perfect. My theory is more limited than that. I instead assert that a street plan should be thought of in terms of supply and demand, and that New Haven’s original comprehensive plan failed because it was hopelessly divorced from the needs of its residents. I also argue that piecemeal planning seems to have conferred some advantages on the colonies. Indeed, the histories of these three cities seem to support my theory, because those plans succeeded most when they complemented the needs of city residents.

Boston has retained its city plan in large part, although the piecemeal plan is criticized by planners and visitors alike. Indeed,
such plans may not be normatively desirable from a modern perspective. However, if we perceive city planning in terms of supply and demand, there are good reasons for encouraging piecemeal planning in close-knit, relatively small towns like those in the early colonies. The first advantage is informational. Incremental planning allowed early colonial governments to tap into the knowledge base of immediate neighbors about where roads should be located, either directly (by speaking with the landowner), or indirectly (by planning a road after settlement occurred). The local landowners were best able to assess the desirability of a new road and had the opportunity to influence the road plan—if multiple locals conveyed interest in a particular pathway to a certain area, or a certain street pattern conducive to particular block and lot sizes, the town government could take advantage of that resource. Locals could create access ways for public use that were efficient for them, in the sense that residents were best able to inform the authorities about which lands to dedicate to the public and which to reserve for private use in order to maximize benefits and minimize costs.

The second advantage is predictive. Incremental planning does not mandate foresight, but it does require attentiveness to developing settlement patterns, rather than prescribing them. Renowned city planner Frederick Law Olmsted once wrote that the “time and attention” devoted to some comprehensive plans might be as “scanty” as the time devoted to piecemeal ones, judging from how well those plans anticipated future city needs. But I counter that at the very least, piecemeal plans are successful in the sense that they respond to contemporary needs, whereas poorly-thought-out comprehensive plans may not. One of the intriguing results of piecemeal planning in Boston is the street and block gradient which resulted: the streets generally formed small, crowded blocks near the harbor, and larger, more

244. See Ellickson, supra note 144, at 1320-21; Demsetz, supra note 234, at 350 (discussing the hypothesis that property regimes evolve efficiently).

245. See Ellickson, supra note 144, at 1320 (arguing that “land rules within a close-knit group evolve so as to minimize its members’ costs”).

How much land should a group place within its public network? The calculus of cost-minimization suggests that a proposed marginal addition to the network should be judged according to its benefits (taking into consideration its likely misuse on account of its being public), and also the opportunity costs the group would incur from taking a parcel out of cultivation or other uses to which a private owner might devote it.

Id. at 1381-82.

expansive blocks farther away.247 This gradient may have supported growth by addressing changing and unstable settlement preferences in a way comprehensive grid plans could not.

Although piecemeal planning has major informational and predictive advantages, it also has limits. Piecemeal planning seems to work best in close-knit communities, when landowners are likely to cooperate in cost-minimizing behavior for the group.248 Moreover, it would also work best in communities where preferences are otherwise difficult to assess or predict—perfectly suited to the uncertainties in the early colonies. When the information asymmetry changes—when long roads require coordination among many landowners, when the residents are less close-knit and may be more likely to engage in self-interested planning decisions that inflict high negative externalities on their neighbors, or when planners are in a good position to predict future land uses and the social and economic environment—comprehensive planning by designated representatives is probably preferable. It would undoubtedly be both difficult and undesirable to encourage incremental planning in larger, less close-knit cities, hence it was probably wise for the New York City government to take control over all road construction in 1807, preventing private citizens from opening roads.249

The grid plan implemented in New York City in 1811 is an ideal example of when planning is appropriate.250 In the populous and expanding city, it was no longer desirable or efficient for residents to plan the roads; that was better allocated to their representative body, the corporation of the city. The planners were intensively concerned with the demands of the growing city, and adjusting the plan to fit those needs. In choosing a new street plan for New York, the planning commission was primarily concerned with “what the space was actually going to be used for.”251 In the words of one historian

247. See Reps, supra note 1, at 142.
248. See Ellickson, supra note 144, at 1321, 1331. Downtown New Haven seems to have been close-knit both in 1640 and 1784, even though the population had grown. In 1640, the ties that bound the population were religious and social. In 1784, they were familial and commercial. See, e.g., supra notes 226-227 & accompanying text.
250. Although I have cited New York as an example of successful comprehensive planning, the history of some of Philadelphia’s town plan is similarly positive. See Olmsted, supra note 246, at 172-73.
251. Hartog, supra note 249, at 164. See also id. at 163-64 (“Unlike most city planners, [the commissioners] did not seek to impose a particular, idealized way of life on the community through the manipulation of space. They justified the map...
of New York’s city government, Hendrik Hartog, “the choices contained in the map were not impositions of public power, but, rather, extrapolations from trends. . . . [P]ublic officials could learn from private practices and habits how best to mold a public sphere that satisfied the wants of their public.”\(^ {252}\) Although their primary objective was making land cheaper and more convenient for residents, the planners also considered where commercial activity would take place, and how and whether commerce should be dispersed around the city.\(^ {253}\) They concluded that a grid made up of rectangular blocks was the ideal solution to produce affordable housing and encourage commerce to spread outside of the central marketplace.\(^ {254}\) The New York City plan of 1811 is an example of a comprehensive plan which seems to have worked, although it has no shortage of critics.\(^ {255}\) On top of problems with the grid plan in New York, critics have identified the epidemic spread of the grid across the country as problematic.\(^ {256}\) This makes sense: a comprehensively planned grid may not make sense for every city’s demands, and hence, should not be implemented. Piecemeal plans, smaller-scale comprehensive plans, or altogether different large-scale plans may be more appropriate, depending on the individual city’s economic and social needs.

The history of Philadelphia’s town plan provides an excellent comparison for evaluating early town planning. There are parts of Philadelphia’s comprehensive plan which are revered by town planners.\(^ {257}\) The founder, William Penn, may have modeled his gridiron plan after a contemporaneous plan advanced for London after significant parts of it burned, or else modeled it after the other grid patterns emerging at that time in locales ranging from New Haven to

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\(^ {252}\) Id. at 165. It is intriguing that the planners initially planned to keep some privately generated roads in their plan; judging from the implementation of the plan, this did not happen. Hartog has no explanation for why they did not do so, considering they had described incorporating privately-generated roads as “a favourite object with the Commissioners” in their own plan. Id. at 161.

\(^ {253}\) Id. at 164-65.

\(^ {254}\) See id.

\(^ {255}\) See REPS, supra note 1, at 294-99 (describing the history of New York’s plan and criticizing it); Frederick Law Olmsted and J. James R. Croes, Preliminary Report of the Landscape Architect and the Civil Topographical Engineer, upon the Laying Out of the Twenty-third and Twenty-fourth Wards, in LANDSCAPE INTO CITYSCAPE: FREDERICK LAW OLMSTED’S PLANS FOR A GREATER NEW YORK CITY 352 (Albert Fein, ed., 1967).

\(^ {256}\) See, e.g., REPS, supra note 1, at 314 (discussing the lack of logic in implementing a grid plan in San Francisco).

\(^ {257}\) See supra note 250.
Ireland. And indeed, even though comprehensively planned in the gridiron pattern, there are parts of Philadelphia’s plan that seem to have adequately addressed the demands of a new colony. The town is located along the Delaware and Schuylkill rivers, major water arteries. As in New Haven, the Philadelphia streets were uniform, though the blocks were slightly smaller. However, Philadelphia, too, appears to have had some major problems with its regular plan, and like New Haven, underwent a costly and unpopular subdivision to deal with crowding and commercialization. The subdivision was effectuated in the 1730s or 1740s, and involved the relocation of some streets, the division of many blocks, and the elimination of a few of the formerly public squares. The subdivision was extremely unpopular with some residents, who argued that the plan favored wealthy proprietors at the public’s expense by increasing the proprietors’ access to and frontage on the river and eliminating some of the squares. It would be difficult to fully assess the history of Philadelphia’s town plan without a complete microhistorical study of the records. However, I hypothesize that the history is positive when the street addressed some assessed demand (for example, the layout of a major street along the Delaware River). But like New Haven, it is plausible that Philadelphia also struggled with the consequences of imposing a uniform, comprehensive plan instead of supplying diverse streets suited to different and fluctuating colony needs.

Comparing the histories of New York, Boston, and Philadelphia to New Haven’s early infrastructural history, there is good reason to suggest that incremental planning influenced by residents—like the planning that created Boston and many other New England colonial towns—was better suited to early colonial development than systema-

258. REPS, supra note 1, at 163.
259. This was a significant concern of the planner, William Penn. His instructions for situating the colony, sent along with the original settlers, said as follows:

[L]et the rivers and creeks be sounded on my side of Delaware River, . . . where most ships may best ride, of deepest draught of water, if possible to load or unload at the bank or key side, without boating or lightening of it. It would do well if the river coming into that creek be navigable, at least for boats . . . .

Id. at 160 (quoting Instructions Given by me, William Penn . . . to . . . my Commissioners for the Settling of the . . . Colony . . . , in SAMUEL HAZARD, ANNALS OF PENNSYLVANIA 527-30 (1850)).
260. Id. at 162.
261. See supra Figure 1 (Scale Drawing of Block Sizes in Early Planned Cities).
262. See REPS, supra note 1, at 167-72 (describing the subdivision).
263. Id. at 69; id. at 169 (quoting John Reed, Explanation, in 3 PENNSYLVANIA ARCHIVES 295 (3d. Ser. 1894)).
tized, comprehensive grid planning because of the informational and predictive advantages it conferred. The Nine Squares plan seems to have suffered by being disadvantaged in both. It lacked foresight about future needs and failed to meet contemporary needs. Even beginning with the 1640s, there is no good or clear explanation for why the blocks were made so large. Even if the planters of New Haven Colony could not have predicted the commercial changes coming their way, if they had planned incrementally, they would not have needed any foresight. Moreover, they may have been more able to adapt to the town’s changing settlement patterns and economic and social needs.

This is not to say that the winding roads and irregular streets which may result from “folk planning” are normatively desirable: instead, this study merely suggests that for the members of developing colonies, small-scale, accretive development best served residents. There are certainly advantages to “legibility” and ease of comprehension in a city plan that cities like Boston and Cambridge lack. But I counter that in the colonial and Revolutionary period, when attracting and settling new residents and industries was critical for growth, piecemeal plans were preferable because of their adaptability and responsiveness to resident preferences and demands. New Haven’s leaders, for all of their centralized planning, failed to do what the “folk planners” of other colonial-era towns and cities were able to do. New Haven spent more than a century—and a century of some of its most important and substantial growth—with a street plan that limited intratown circulation, reduced homelot availability in central downtown, and cut off access between the marketplace and the water. This almost certainly would not have happened had a plan developed incrementally. Indeed, one must wonder whether the substantial growth that eventually prompted New York to require a new plan may be due in part to the success of its own piecemeal plan on the lower tip of Manhattan.

Conclusion

This paper has called into question the admiration for New Haven’s earliest town plan, the Nine Squares. While idealized and geometric, it adapted poorly as the town and eventually, the city of New Haven experienced the economic and social changes of the seventeenth and eighteenth centuries. In contrast to the parts of the town laid out through the petition procedure and other legal mechanism, the streets and blocks of the Nine Squares were divorced from resident demand.
They created blocks that were inefficiently-sized, and ill-suited to commercial development.

Outside the Nine Squares, New Haven’s piecemeal street planning was often the result of small-scale, incremental decisions. Planning committees did not have a large end plan in mind when they approved petitions: they planned only whatever streets were necessary for people to reach their fields or the waterways. Streets shifted with settlement patterns, deferring to topography and resident preferences. Moreover, the system of highway exchange encouraged these small-scale, experimental decisions, because they were not necessarily final. If successful, the road would survive and become part of the street pattern. If unsuccessful, the street could be remedied easily: it could be relocated to a more suitable location. Road creation, in essence, proceeded through a “succession of incremental changes,” allowing planners to “avoid serious lasting mistakes.”

In contrast, New Haven’s Nine Squares grid plan was classically comprehensive. Decisions were made about what the end plan of the streets would be, and then, the means for development were chosen and the large-scale plan was carried out. But once laid out, problems were apparent, and errors difficult to remedy because settlement had followed the infrastructure. The blocks were too big, limiting the availability of accessible parcels downtown. Rather than opening New Haven’s commercial center, the seaport structure funneled traffic into the corner of George and York Streets. And it is not altogether evident that absurd street patterns and comprehensive planning are mutually exclusive. When other cities developed irregularly-shaped blocks and winding streets, they avoided strange, angular three-street intersections like those at the corners of the Squares.

The failures of the Nine Squares plan were further exposed during the subdivision of 1784. It is true that as demand changes—for example, when interstates and major arterials for automobile traffic became necessary—the street grid changes, so it would be foolish to judge a street grid a failure simply because it looks different than it originally did, or because eminent domain was required to accomplish it. The difference in New Haven is the amount of time and money required. I have demonstrated that New Haven’s redevelopment in 1784 was large-

scale, as opposed to minor street revisions occurring at the time in other cities. The New Haven town officials, in both their public and private capacity, had to expend tremendous resources both to open the streets and to prevent and repair encroachment. It took sixty years to lay all of the streets out, and throughout, confusion reigned about where the streets actually were. As late as 1805, a New Havener evidently had been mistakenly sold some of one of the new streets by a downtown landowner, and had to deed it back to the city for a dollar. All of this effort seems to have been expended in order to make New Haven’s infrastructure capable of supporting a modern, commercial city—a result which other cities, and even other areas of New Haven, accomplished with far less intervention and far fewer resources.

Why did the Nine Squares persist? After they were laid out with such confidence, and particularly after town leaders disbursed the home lots within the Nine Squares, New Haven was committed to its city plan. New Haven’s Nine Squares are an example of semi-strong form path dependence. We know now that New Haven’s large blocks were costly to adapt to commercial life. But would it have been efficient to completely destroy them, in favor of a new, water-oriented, community-developed plan? Probably not. Still, looking at the map of the piecemeal streets around the harbor, it is not so difficult to imagine a plan like Boston’s here in New Haven, with streets winding around the waterway and then progressing inward, creating irregularly-shaped blocks. It is tempting to speculate on what consequences New Haven has suffered as a result of its strange city plan. Examining the other mercantile cities with long streets that tracked along harbors and rivers, one wonders whether they started with an advantage of accessibility that New Haven, with its funnel-shaped seaport structure and enormous blocks, never had. The history of its town plan suggests that the quaint, quirky roads that many travelers curse today may have been those best poised to nurture the town three hundred years ago—and that new planners would do well to consider the realities of demand on the ground before designing grand city plans that bear no relationship to future residents’ preferences.

265. E.g., KENNEDY, supra note 26, at 27-30 (describing the revision of Boston’s plan by the creation of Franklin Street as part of the Tontine Crescent project).

266. Deed of Mar. 18, 1805 (recorded Mar. 15, 1805), in 54 NHLR, supra note 48, at 201, 201.


268. See Map of 1824, supra note 163.
Appendix

Compensation Patterns in New Highway Construction, 1750-1784

<table>
<thead>
<tr>
<th>Years</th>
<th>Sample Size</th>
<th>Compensation in Kind</th>
<th>In Kind-Land</th>
<th>In Kind-Highway</th>
<th>Money</th>
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<td>1750-54</td>
<td>9</td>
<td>7</td>
<td>1</td>
<td>6</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>1755-59</td>
<td>36</td>
<td>23.5</td>
<td>6.5</td>
<td>17</td>
<td>8.5</td>
<td>4</td>
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<td>1760-64</td>
<td>37</td>
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<td>9.5</td>
<td>14.5</td>
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<td>1</td>
</tr>
<tr>
<td>1765-69</td>
<td>39</td>
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<td>15.5</td>
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<td>6</td>
</tr>
<tr>
<td>1770-74</td>
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</tr>
<tr>
<td>1775-79</td>
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<td>6</td>
<td>3</td>
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<td>11</td>
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</tr>
<tr>
<td>1780-84</td>
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<td>15</td>
<td>6</td>
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<td>9</td>
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<td>111</td>
<td>39</td>
<td>72</td>
<td>109</td>
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</table>

Note: A value of one-half represents compensation that was partially in one category, partially in another.

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269. Represents all deeds for highway land to the Proprietors, Selectmen, or Town of New Haven between 1750 and 1784, not including the Nine Squares conveyances. 15-41 NHLR, supra note 48.
Substantive Due Process Through the Just Compensation Clause: Understanding Koontz’s “Special Application” of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine’s History

Peter A. Clodfelter*
Edward J. Sullivan**

Koontz v. St. Johns River Water Management District recently resolved, at least to some extent, a question hounding judges, land use lawyers, developers, and commentators since the Supreme Court decided Nollan v. California Coastal Commission and Dolan v. City of Tigard in 1987 and 1994 respectively. In Koontz, a five-justice majority held that in addition to real property, money exacted from a property owner during the land use permitting process must satisfy Nollan’s essential nexus test, as well as Dolan’s rough proportionality test. The Court based its decision on the doctrine of “unconstitutional conditions,” a doctrinal dinosaur that has staved off extinction since its judicial invention in the 1800s through a protean evolution in different contexts and areas of the law. Understanding the Court’s trilogy of decisions in Nollan, Dolan, 1. 133 S. Ct. 2586 (2013).
5. See Koontz, 133 S. Ct. at 2603.
6. See generally id. at 2594-603 (explaining the doctrine and how it applies to permit denials and monetary exactions).
7. See Cass R. Sunstein, The Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 620 (1990) (calling the doctrine an “anachronism[,]” crude, general, and incompatible with
and Koontz requires understanding the doctrine of unconstitutional conditions, which in turn requires tracing its development.

In its basic formulation—although the Court has applied the doctrine in a remarkably inconsistent fashion over the years, when it has applied it at all\(^8\)—the doctrine says that “the government may not deny a benefit to a person because [that person] exercises a constitutional right.”\(^9\) The doctrine may be used to stop the government from punishing one who exercises a constitutional right or pressuring someone to waive a constitutional right.\(^10\) In other words, the doctrine prohibits the government from doing indirectly what it cannot do directly,\(^11\) so that even if the government may withhold a benefit altogether, it generally cannot condition the benefit on the beneficiary’s relinquishment of a constitutional right.\(^12\) Benefits protected by the doctrine include things like business licenses,\(^13\) tax exemptions,\(^14\) employment contracts,\(^15\) medical care,\(^16\) unemployment benefits,\(^17\) food stamps,\(^18\) pre-trial release from jail,\(^19\) and building permits.\(^20\)

Since the mid-1800s the Court has applied the doctrine in different contexts and with different rationales to laws alleged to burden constitutional rights.\(^21\) The Court’s application of the doctrine in different settings varies—like a “quilt” of individual segments within a

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8. See Sullivan, supra note 7, at 1416.
10. Sullivan, supra note 7, at 1416-17.
19. E.g., U.S. v. Scott, 450 F.3d 863 (9th Cir. 2005).
20. E.g., Koontz, 133 S. Ct. at 2592.
21. See Baker, supra, note 11, at 1186 n.4; Sullivan, supra note 7, at 1415-17. Perhaps the first case in which the Court applied the doctrine’s rationale is Lafayette Ins. Co. v. French, 59 U.S. 404, 407 (1855) (concluding that the State of Ohio could place conditions on the right of foreign corporations to engage in business in the state so long as they were constitutional). Baker, supra note 11, at 1186 n.4.
broader doctrinal border. Scholars describe the doctrine as “riven with inconsistencies[,]” “a minefield to be traversed gingerly[,]” and say that it “confounds[s] courts” and suffers from an “unfortunate lack of clarity . . . .”

In Parts I through III, this paper discusses the Court’s evolution in formulating the doctrine by focusing on the absolute-power versus germaneness themes, especially in the early corporate rights cases, some law enforcement cases, and federalism cases. Part IV looks at the doctrine applied to the Free Speech and Free Exercise Clauses, focusing on the Court’s framing of conditions as coercive or as penalties, versus non-subsidies. Part V addresses the Court’s application of the doctrine to certain un-enumerated rights. Part VI takes a step back and tries to make sense of the doctrine based on the cases discussed in Parts I through V. Then, Part VII focuses on land use exactions, explaining what they are, and how the doctrine applies to them through the Just Compensation Clause; that discussion focuses on the Court’s trilogy of decisions in Nollan, Dolan, and Koontz. In Part VIII, this paper contends that the Court’s application of the doctrine to land use exactions is a new form of substantive due process through the guise of a takings analysis in which the Court pulls land use planning decisions that traditionally received more judicial deference into a stricter, substantive review, expanding the Just Compensation Clause’s protection of property rights. Part IX discusses the doctrine’s current formulation to land use exactions after Koontz and potential agency responses to Koontz, and Part X briefly concludes.

I. Absolute Power Versus Germaneness

Whether a condition is germane often decides unconstitutional conditions cases. However, what exactly that means is not always clear. Commentators describe germaneness as a “heuristic device” to weed out conditions meant to pressure constitutional rights that deserve heightened scrutiny. Generally, the less germane a condition, the

23. Id. at 1186; Sullivan, supra note 7, at 1416; Planned Parenthood Ass’n of Hidalgo Cnty. Tex., Inc. v. Suehs, 692 F.3d 343, 349 (5th Cir. 2012).
25. Id.
more strictly the Court will review the condition.27 Some, like Justice Scalia, contend a condition is germane when the government’s justification for imposing the condition is the same justification that the government could rely on to withhold the benefit.28 That is a narrow idea of germaneness relative to that in the Court’s decision in South Dakota v. Dole, authored by Justice Rehnquist, in which the Court formulated germaneness as a rational relationship between the condition and a broadly defined legitimate government interest.29 This debate is an important theme in unconstitutional conditions cases.

Criticism of germaneness is that its application can be manipulated and it is unclear whether the degree of connection should receive heightened judicial review, or whether a general rational relationship between the two is sufficient.30 What level of review to use in different situations is the primary battle fought in unconstitutional conditions cases.31 It seems a fair assertion that no judicial officer is immune from the attack that the doctrine is often used to advocate for heightened judicial review in some areas (and not others) based on personal policy preferences.32

A. Early Cases

The Court invented the doctrine of unconstitutional conditions during the Lochner era33—although it did not always state the doctrine by that name—and first used it as a means to invalidate states’ regulation of corporations.34 The Court’s early decisions were inconsistent in that

27. Sullivan, supra note 7, at 1458.
28. Id. at 1457; see Nollan, 483 U.S. at 836-37.
29. Fudenberg, supra note 24, at 414 (citing South Dakota v. Dole, 483 U.S. 203 (1987)). Although Justice Rehnquist supported a broader interpretation in that case, he supported a narrower interpretation in the context of property rights and the Just Compensation Clause in Dolan.
30. Fudenberg, supra note 24, at 414.
31. See id. at 394.
32. Id. at 379 & n.46 (providing examples of that and commenting that “[v]irtually every justice” who has been involved in unconstitutional conditions cases is inconsistent regarding the greater-lesser rationale, arguing for a more absolute view of it when in service of policy choices they approve of and a narrower view when they want to more critically review legislation).
33. The term “the Lochner era” refers to the period roughly between 1880 and 1940 in which the Court used the Fourteenth Amendment Due Process Clause to evaluate the substance of economic regulation, much of which it invalidated under the theory that it violated individual’s constitutional right to be free from excessive government interference. Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 STAN. L. REV. 379, 379-80, 442 (1988). The name comes from the famous case characteristic of that approach, Lochner v. New York, 198 U.S. 45, 62-64 (1905), in which the Court ruled that New York’s law that established maximum hours that bakers could work in a week interfered with their freedom of contract and, therefore, violated the Due Process Clause. Id.
34. See Sullivan, supra note 7, at 1505; Baker, supra note 11, at 1186 n.4.
the Court first rejected any kind of germaneness requirement, and then reversed track. The first view the Court adopted was the “absolute power” formulation of the greater-lesser rationale, in which no condition is unconstitutional. Doyle v. Continental Insurance Co. is characteristic of that view.

In Doyle, the plaintiff corporation challenged Wisconsin’s law that a foreign corporation wanting to do business in the state had to give up its right to remove lawsuits from state to federal court. The benefit to the corporation was the business license. The right to be relinquished was the corporation’s right under the Judiciary Act to remove lawsuits from state to federal court, which is a constitutional right. In Doyle, the Court reasoned that the state’s greater inherent power to give permission to particular businesses to operate within its borders necessarily included the lesser power to give that permission conditioned on the corporation’s waiver of its right to remove lawsuits from state to federal court. According to the Court, the corporation had the option of whether to accept the state’s offer, so even if it voluntarily relinquished the right, the corporation was not being unconstitutionally compelled to do so. The Court upheld the condition.

However, that absolute view of the greater-lesser rationale was heavily criticized and the opposite principle ultimately became the favored approach—that the greater power does not necessarily include the lesser power to attach unconnected conditions to the receipt of a benefit. Terral v. Burke Construction Co., which has similar facts to Doyle, shows the Court’s reversal. In Terral, the plaintiff challenged Arkansas’ statute that, likewise, required foreign corporations

35. Sullivan, supra note 7, at 1458.
36. Id.
38. Fudenberg, supra note 24, at 433. For an example, see Doyle, 94 U.S. at 537-41.
39. See Doyle, 94 U.S. at 540 (describing the corporation’s complaint detailing how the state could revoke its license).
40. Id. at 538. The Judiciary Act guarantees foreign defendants a right to remove lawsuits to federal court, which courts have interpreted as based in Article III of the United States Constitution because it was necessary to implement the Constitution’s concept of federal diversity jurisdiction. Scott R. Haiber, Removing the Bias Against Removal, 53 CATH. U.L. REV. 609, 613-14, 618 (2004).
41. Id. at 540-42 (“If the [s]tate has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.”).
42. Id. at 542; Sullivan, supra note 7, at 1429.
43. Doyle, 94 U.S. at 542.
doing in-state business to relinquish their right to remove lawsuits to federal court. In striking down the statute, the Court rejected its earlier greater-lesser reasoning and stated the following:

[the principle established by the more recent decisions of this court is that a State may not, in imposing conditions upon the privilege of a foreign corporation’s doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not.

The Court restated and elaborated on the doctrine in *Frost & Frost Trucking Co., v. Railroad Commission of the State of California* when it said:

[it is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.]

In *Frost*, the State of California conditioned a foreign corporation’s use of the state highways on requiring the foreign corporation to purchase common-carrier liability insurance even though its business was unrelated to that of a common carrier. The California Supreme Court approved, reasoning the state could impose whatever conditions it saw fit because it had the greater power to deny access to the highways. Like the Court’s conclusion in *Terral*—that the condition exacted a waiver from the corporation—in *Frost*, the Court concluded that the corporation had no meaningful choice other than to purchase the insurance and become a common carrier so as to gain the state’s business; the corporation would rather take a small profit than none at all. According to the Court, the condition was un-germane to regulating the use of the highways and, instead, was a way to control the competitive conditions in the common-carrier market. Because of that suspicion, the Court

46. Id. at 530-33.
47. Id. at 532.
48. 271 U.S. 583 (1926).
49. Id. at 593-94.
50. Id. at 589-90.
51. Id. at 593.
52. See id. at 593 (noting that doing in-state business might be necessary for the corporation’s survival).
53. See id. at 591 (“It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the businesses of those who are engaged in using them.”).
reviewed the condition more strictly and ultimately concluded that the coercive condition violated the corporation’s due process rights.\(^{54}\)

Generally speaking, the absolute power formulation of the greater-lesser rationale was abandoned in favor of a more nuanced germaneness theory. However, the Court has described its application of the doctrine since the \textit{Lochner} era in terms of the greater-lesser rationale, so that logic is still relevant.\(^{55}\)

**B. The Greater-Lesser Rationale Returns in Posadas**

In \textit{Posadas de Puerto Rico Associates v. Tourism Co.},\(^{56}\) Puerto Rico banned certain casino advertising to Puerto Rican residents but allowed such advertising in publications directed at tourists.\(^{57}\) Plaintiffs argued that the law effectively conditioned the right to operate a casino on the operator’s surrender of its Free Speech Clause rights.\(^{58}\) Writing for a majority of the Court, Justice Rehnquist reasoned that because “the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether . . . the greater power to completely ban casino gambling necessarily included the lesser power to ban advertising of casino gaming . . . .”\(^{59}\)

Although the Court seemed to rely on an absolute power formulation of the greater-lesser rationale, perhaps the Court could have upheld the ban using germaneness because the advertising prohibition arguably served the same purpose that a total ban on gambling would serve,\(^{60}\) which was a desire to reduce gambling by Puerto Ricans.\(^{61}\) In dissent, Justice Brennan wanted to apply strict scrutiny to the commercial speech regulation and argued that even if the restrictions were supported by a substantial government interest, the state failed to show its regulation directly advanced that interest and that it was the narrowest means of doing so.\(^{62}\) Even when the Court does not use a broad formulation of the greater-lesser rationale, in other contexts the rationale’s reasoning is still relevant.

\(^{54}\) \textit{Id.} at 596-600.

\(^{55}\) Cf. Posadas de P. R. Assoc. v. Tourism Co. 478 U.S. 328, 345-46 (1986) (concluding that the State of Puerto Rico’s greater power to prohibit gambling advertising included the lesser power to regulate certain gambling advertising).

\(^{56}\) \textit{Id.}

\(^{57}\) \textit{Id.} at 330-32.

\(^{58}\) \textit{Id.} at 337-38.

\(^{59}\) \textit{Id.} at 345-46.

\(^{60}\) Sullivan, \textit{supra} note 7, at 1464.

\(^{61}\) \textit{Posadas}, 478 U.S. at 341.

\(^{62}\) \textit{Id.} at 351, 355-56 (Brennan, J., dissenting). The balancing test the Court used—which is the Court’s rationale for regulating commercial speech—is embodied in \textit{Central Hudson Gas & Elect. Corp. v. Pub. Serv. of N. Y.}, 447 U.S. 2343 (2005).
II. Law Enforcement Monopoly Power

The Ninth Circuit Court of Appeals discussed and rejected the greater-lesser rationale in United States. v. Scott,\(^63\) a more recent Fourth Amendment search and seizure case. The court cited Doyle to note the temptation of the broad greater-lesser rationale’s logic.\(^64\) In Scott, as a condition of a prisoner’s pre-trial release from jail following his arrest on a drug charge, the prisoner waived his Fourth Amendment right to be free from unreasonable searches and seizures by consenting to warrantless drug testing and warrantless searches of his home for drugs.\(^65\) Because the government could have kept him in jail until trial, the court noted it naturally seemed fair to allow him to trade his Fourth Amendment rights to be otherwise free until then.\(^66\) However, focusing on the government’s monopoly power in the law enforcement context, the court reasoned that “[g]iving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.”\(^67\) Accordingly, the Court ignored his waiver of rights and went on to analyze the reasonableness of the search, concluding it was unreasonable and, therefore, violated the Fourth Amendment.\(^68\)

In another Fourth Amendment case, the First Circuit Court of Appeals concluded that a prison unconstitutionally conditioned all visits to prisoners on the guests’ submission to strip searches.\(^69\) Focusing on the unreasonableness of the search and rejecting the state’s argument that the visitors were free to choose whether to submit to the search, the court reasoned “it is the very choice to which [the plaintiff-guest] was put that is constitutionally intolerable . . . .”\(^70\) Invalidating the plaintiff-guest’s consent, the Court concluded the search violated the Fourth Amendment.\(^71\)

The doctrine is also used to protect the Fifth Amendment right against self-incrimination in various contexts.\(^72\) In Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); Garrity v. New Jersey, 385 U.S. 493, 497 (1967).

\(^{63}\) 450 F.3d 863 (9th Cir. 2005).
\(^{64}\) Id. at 866 (citing Doyle, 94 U.S. at 542).
\(^{65}\) Id. at 865.
\(^{66}\) Id. at 866.
\(^{67}\) Id. at 889.
\(^{68}\) Id. at 866-75.
\(^{70}\) Id. at 568 (emphasis in original).
\(^{71}\) Id.
ningham the Court invalidated the State of New York’s law conditioning political party officers’ employment on waiving their right against self-incrimination after the state fired an officer for asserting his right against self-incrimination and he refused to testify. The Court stated, “[W]hen a state compels testimony by threatening to inflict potential sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the defendant in a criminal prosecution.” Likewise, in Garrity v. New Jersey, the Court concluded that the state violated several police officers’ rights against self-incrimination when the state told the officers they would be fired if they refused to testify. The Court compared the state’s coercion of the officers to the coercion states used to impermissibly induce corporations to waive their right to remove lawsuits to federal court or engage in interstate commerce, which were unconstitutional conditions. Because the officers waived their privilege at the time and only objected to use of their testimony later, the Court held that their statements could not be used. Implicit in that holding is the fact that if the officers had objected to the condition and been fired, the state, like in Lefkowitz, would have directly violated their Fifth Amendment rights against self-incrimination.

Unconstitutional conditions claims in contexts involving allegations of coercion related to states’ law enforcement power are unsurprising because of the vast and monopolist nature of law enforcement power and have, in some circumstances, proven successful. Attempts to use the coercion argument in the context of the state-nation relationship have, however, for the most part, failed.

III. The Broad View of Germaneness in Federalism Cases

The Tenth Amendment provides: “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

73. Lefkowitz, 431 U.S. at 801, 802-03.
74. Id. at 805.
75. Garrity, 385 U.S. at 493, 494.
76. Id. at 498, 500.
77. Id.
78. Cf. South Dakota v. Dole, 483 U.S. 203, 205 (1987) (rejecting the state’s argument that the condition placed by Congress on a state’s receipt of federal funds infringed on the state’s ability to regulate the drinking age).
are reserved to the States respectively, or to the people.”

There are a number of cases in which the federal government allocates funds to states but attaches conditions that intrude in areas normally reserved for states to legislate. More often than not, the Supreme Court liberally construes the scope of Congress’s spending power. As such, states’ attempts to characterize federal spending conditions as coercive have been mostly unsuccessful; the Court uses a broad view of germaneness to uphold conditions that the Court concludes have a rational relationship to a government interest.

United States v. Butler, the first case to apply the unconstitutional conditions doctrine in that context, however, provides one exception to the rule. In Butler, the Court used the doctrine to hold Congress’s regulation of state agricultural crops through the Agricultural Adjustment Act of 1933 as beyond Congress’s authority. In Butler, to raise the overall value of farm crops, the law authorized the Secretary of Agriculture to pay farmers to reduce their crop production. Some farmers thought the effect of the program was to dilute the value of their crops, and the Court described the issue like the fake-choice as in Frost: i.e., whether to accept the government’s payment (a benefit), was really involuntary. Although the Court saw the choice as fake, its primary concern was stopping Congress from reaching a result through the Spending Clause that the Commerce Clause and the Tenth Amendment prohibited it from doing directly. At that time, the Court found that Congress did not have the authority to directly regulate intra-state agricultural crops, a power reserved to the states.

Ultimately, the Court’s decision in Butler proved to be an anomaly. Next, to the contrary, the Court repeatedly concluded that federal con-

79. U.S. CONST. amend. X.
80. See Aviam Soifer, Truisms that Never Will be True: The Tenth Amendment and the Spending Power, 57 U. COLO. L. REV. 793, 800 (1986) (noting that over the years the Congress’s spending power has seemed to expand while the Tenth Amendment has seemed to disappear).
81. See Sullivan, supra note 7, at 1432 (commenting that the Court pays “lip service” to the one successful case applying the doctrine in this context).
82. Cf. Dole, 483 U.S. at 209 (describing the condition as “reasonably calculated to address” the states asserted interest).
84. Id. at 78.
86. Butler, 297 U.S. at 34.
87. See id. at 72.
88. Id. at 68, 70-72, 78. (“At best, it is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states.”).
89. Id.; Sullivan, supra note 7, at 1431.
itions on states incentivized, but did not rise to the level of coercing states and that the conditions were within the scope of legitimate federal regulatory authority. Characteristic of that approach is *Steward Machine Co. v. Davis*. In *Steward Machine*, the unemployment compensation provisions of the Social Security Act of 1935 set up a national tax structure that required, in part, the cooperation of states to enact state-level unemployment laws collecting payroll tax to be deposited into the federal treasury and distributed nationally in participating states. One of the arguments against the law was that rather than merely intending to collect revenue, the federal government’s ulterior motive was to interfere with states’ autonomy and that states were coerced into complying with the law.

The Court discussed and distinguished its decision in *Butler* from the year before, concluding that it could draw a line between temptation and coercion. The Court said that the laws attackers “confuse[d] motive with coercion[,]” and the Court saw the state’s choice to participate in the federal program as real:

> [E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. . . . Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.

By describing the conditions as inducements or temptations and noting the state-nation relationship, the Court seemed to question whether federalism and the Spending Clause is an appropriate context in which to apply the doctrine at all.

In *South Dakota v. Dole*, the Court’s decision indicated these concerns are not overriding, or at least that the lowest level of scrutiny

94. Id. at 578, 585-86 (“[S]tates in submitting to [the law] have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.”).
95. Id. at 586, 590 (“Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, . . . at times, perhaps, of fact.”).
96. Id. at 589.
97. Id. at 589-90 (emphasis added).
applies. In *Dole*, Congress conditioned South Dakota’s receipt of federal highway funds on the state’s raising of its drinking age to twenty-one. The state used the *Butler* argument—that the federal government was orchestrating an end run around the Twenty-First Amendment and that the state had no real choice but to accept the condition and relinquish part of its sovereign authority because it needed the funding.

The Court upheld the condition. Even if Congress could not directly mandate a minimum nationwide drinking age, Congress could, effectively, do just that through the Spending Clause. The majority viewed the condition as sufficiently germane to the government’s underlying basis for the condition in that there was a rational relationship between requiring the higher drinking age and highway safety generally. Justice O’Connor, in her dissent, more narrowly viewed the conditions as un-germane to the program’s purpose of funding highway construction and an invalid exercise of the spending power because it was really meant to regulate alcohol sales, which amounted to an end run around the Twenty-First Amendment.

The majority emphasized the uniqueness of Congress’s taxing and spending power, citing the Court’s precedent that indicates such power is not limited in the same way as the United States Constitution’s other delegations of powers. Apparently referencing its decisions like *Butler* and *Steward Machine*, the Court said “[t]he language in our earlier opinions stands for the unexceptionable proposition that the [taxing and spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional.” Although the Court acknowledged that the state’s potential loss of five-percent of its highway funds encouraged the state to increase its minimum drinking age, the potential loss did not coerce the state to make that choice and did not violate another constitutional right.

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99. *Id.* at 205.
100. See *id.* at 205-06, 209, 211 (“‘Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment.’”) (quoting Brief for Petitioner at 52-53). The state pointed to the federal government’s success in getting states to raise their drinking ages with the spending condition as evidence of its coerciveness. *Id.* at 211.
101. *Id.* at 211-12.
102. *Id.* at 206.
103. *Id.* at 208-09.
104. *Id.* at 212 (O’Connor, J., dissenting).
105. *Id.* at 206-07.
106. *Id.* at 210.
107. *Id.* at 210-11.
The Court has been more receptive to individual’s arguments that state and federal laws coerce them into relinquishing rights protected by the Bill of Rights, or, effectively, penalize them for refusing to relinquish those rights.108

IV. Coercion, Penalties, Non-subsidies, and Individual Liberties

A. The Free Speech and Free Exercise Clauses

Although the Court has applied the unconstitutional conditions doctrine to protect individual liberties since the 1950s, the Court has not used one consistent theory in doing so.109 Cases with similar fact patterns may well come out differently.110 In Speiser v. Randall,111 California created a property-tax exemption for veterans conditioned on the veterans’ giving an oath not to advocate for the overthrow of the United States government.112 In contrast to the federalism cases discussed above, the Speiser Court viewed the condition more critically using a heightened standard of judicial review.113 The Court declined to impose the usual burden on a plaintiff challenging a government’s taxing authority, concluding both that the condition that veterans take the loyalty oath penalized the veterans’ Free Speech Clause rights by denying them the property-tax exemption if they exercised their Free Speech Clause rights, and that it coerced the veterans into relinquishing their rights in order to obtain the benefit of the exemption.114 Finding no compelling government interest to justify the condition, the Court held it violated due process.115

108. Sullivan, supra note 7, at 1505 (describing the Court’s perpetuation of the doctrine from the corporate rights context to protect personal liberties).


110. Compare Sherbert, 374 U.S. at 408-10 (concluding that withholding unemployment benefits from Seventh Day Adventist because she refused to work on her Sabbath coerced her into giving up her Free Exercise Clause rights), with Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 874-75, 890 (1990) (refusing to apply the Court’s holding in Sherbert to unconstitutional conditions claim by members of Native American Church who were fired for using peyote as part of their religious practice and subsequently denied unemployment benefits).

111. Speiser, 357 U.S. at 513 (1958).

112. Id. at 514-15.

113. Id. at 520-21 (“[T]he more important the rights at stake the more important must be the procedural safeguards surrounding those rights.”).

114. Id. at 518-19, 524-25.

115. Id. at 528-29.
The Court used identical reasoning in a Free Exercise Clause-based challenge in *Sherbert v. Verner*.\(^{116}\) In *Sherbert*, the state denied Plaintiff unemployment benefits because she refused to work on Saturdays, which, as a Seventh Day Adventist, was her Sabbath on which she felt religiously prohibited from working.\(^{117}\) Similar to the phrasing of the Court’s application of the doctrine in *Speiser*, the Court in *Sherbert* said that denying Plaintiff her unemployment benefits unconstitutionally burdened her Free Exercise Clause rights both by “forcing her to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of her precepts of her religion in order to accept work . . . .”\(^{118}\) Further, it penalized her choice to freely exercise her religion by denying her unemployment benefits if she did so.\(^{119}\) Regarding the penalty, the Court opined that even indirect fines could have the same effect as imprisonment, criminal fines, or taxes; and that the denial of unemployment benefits was effectively equivalent to the state directly fining the woman for worshipping.\(^{120}\) Rejecting the state’s asserted interests as less than compelling, the Court held the denial of benefits unconstitutional.\(^{121}\)

In another Free Exercise Clause-based challenge, *Thomas v. Review Board of Indiana Employment Security Division*,\(^{122}\) the Court reasoned that even indirect pressure on someone’s religious exercise could be substantial and that when the state denies a benefit because of someone’s religiously motivated conduct, the state burdens religious exercise. In *Thomas*, a Jehovah’s Witness who conscientiously objected to war quit his job after his employer transferred him to a department within the company in which he had to make tank turrets.\(^{123}\) The Court treated the condition as a First Amendment violation because the state lacked a compelling interest and noted the record lacked evidence that there were enough people that were forced to choose between their religious beliefs and unemployment benefits so as to create large-scale unemployment.\(^{124}\)

Compared to those cases, however, not all of the Court’s other First Amendment unconstitutional conditions cases easily square.

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117. *Id.* at 410.
118. *Id.* at 403-04, 406.
119. *Id.*
120. *Id.* at 404 & n.5.
121. *Id.* at 406-10.
123. *Id.* at 709-10.
124. *Id.* at 719.
In *United States v. Lee*, the Court’s application of the doctrine focused on the government’s interest and found any potential coercion insufficient to violate the Free Exercise Clause. In *Lee*, an Amish employer claimed that the federal government’s collection of social security taxes violated his and his Amish workers’ Free Exercise Clause rights. According to the Amish belief, it is considered a sin “not to provide for [one’s] own elderly and needy.” Therefore, the Amish employer argued that it necessarily followed from the Court’s precedent in *Sherbert* that the government’s collection of Social Security taxes unconstitutionally penalized his and his workers’ Free Exercise Clause rights. The Court heavily weighed the government’s “very high” interest in maintaining a continuous, compulsory national social security system and concluded that accommodating the Amish’s belief had to “yield to the common good.”

The Court’s reasoning in *Lee* looks more like the Court’s later application of the doctrine in *Employment Division Department of Human Resources of Oregon v. Smith*, in which the Court focused on the government’s interest in enacting “generally applicable criminal law[s]” and avoiding widespread religious exemption from “almost every conceivable [civic obligation].” In *Smith*, the Court downplayed the potential burden of a denial of unemployment benefits on Native American church members’ Free Exercise rights, which included using peyote as part of their religious exercise. The Court distinguished *Sherbert* on the ground that the Court had avoided extending its holding in *Sherbert* beyond the employment compensation field and that it developed in the context of an individualized determination of employment benefits that looked at the applicant’s specific circumstances, unlike this generally applicable law.

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126. Id. at 254-55.
127. Id. at 255.
128. Id. at 257-59 (“Religious beliefs can be accommodated, but there is a point at which accommodation would ‘radically restrict the operating latitude of the legislature.’”) (citing Braunfield v. Brown, 366 U.S. 599, 606 (1961)) (internal citations omitted).
130. Id.
131. See id. at 874, 885-90.
132. Id. at 883-84; *Bob Jones University v. Texas*, 461 U.S. 574, 578-83, 603-04 (1983), is a similar case in which the Court focused on the strong governmental interest in eradicating racism from educational facilities to reject two universities’ unconstitutional conditions claims that were denied tax exempt status because they either racially discriminated against applicants or imposed racial dating bans, which they argued were part of their sincere religious beliefs.
Comparing cases like *Speiser*, *Sherbert*, and *Thomas* to cases like *Lee* and *Smith* show how the doctrine can be manipulated in different contexts by weighing some factors more heavily than others in a balancing test. Perhaps trying to distinguish the Court’s results in the First Amendment cases is why the doctrine is considered “wonderfully inconsistent.”\(^{133}\) The Court’s reliance on measuring coercion and determining whether a condition penalizes a right is problematic and leads to that inconsistency.\(^{134}\) When the Court calls a condition coercive, the Court is merely asserting a conclusion.\(^{135}\) Further, that conclusion is normative in that it represents a value judgment by the justices about a particular condition or the effect of a condition.\(^{136}\) Thus, applying the unconstitutional conditions doctrine is ripe for manipulation, whether conscious or not. In some circumstances however, the Court frames the issue so as to avoid analyzing conditions as coercive or as penalties at all, which is perhaps normative in its own way.

**B. Framing Penalties as Non-subsidies**

In *Regan v. Taxation With Representation of Washington*,\(^ {137}\) Justice Rehnquist added another layer to the Court’s application of the doctrine in the First Amendment context with the non-subsidy rationale. *Taxation With Representation* (the group) was a nonprofit, taxation-oriented group organized to promote the “public interest.”\(^ {138}\) The Internal Revenue Service (IRS) denied the group 501(c)(3) status because the IRS found that the group’s activity would substantially consist of lobbying for legislative changes, which IRS rules prohibited 501(c)(3) groups from doing with subsidized funds.\(^ {139}\) The group argued that the IRS rules violated the group’s Free Speech Clause rights by, effectively, coercing the group into abstaining from

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134. Cf. Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. Rev. 859, 859-60 (1995) (noting that using a coercion theory is problematic because coercion references a sanction, like a fine, and that the typical unconstitutional conditions case is better viewed through a “waiver” lens in which the discretionary benefit gives the person more rather than fewer options).
136. See id. at 1506 (“Constitutional reasoning here lags behind the recognition, in both philosophy and private law, that coercion in the absence of physical compulsion or force is not an empirical concept but a normative one that necessarily refers to value lying beyond the value of autonomy itself.”).
138. Id. at 541-42.
139. Id. at 542.
lobbying; and citing Speiser, that the IRS’s denial of the group’s 501(c)(3) application penalized the group’s Free Speech Clause rights by prohibiting it from receiving tax-deductible contributions just because it lobbied.

The Court rejected the group’s comparison to Speiser and avoided discussing coercion by relying on its precedent that the Free Speech Clause does not require Congress to subsidize lobbying. Rather than coercing the group, the IRS rule represented the policy choice not to subsidize lobbying with taxpayer money. Accordingly, the Court asserted that it did not need to remove impediments to peoples’ exercise of rights that it did not put in place.

The Court’s characterization of conditions as subsidies in Regan shows how the unconstitutional conditions framework can be altered depending on how the condition is viewed. The Court in Regan assumed as a baseline not that all nonprofit activities are subsidized, but that no lobbying activities are subsidized. The Court’s framing of the issue in that way allowed it to pay less attention to the potential deterrent effect of the IRS rule on the group’s lobbying activities; if the baseline is no subsidies for lobbying activities, it is logically impossible to conclude that the policy choice to subsidize one group’s form of lobbying over another penalized the group that was not subsidized. As the Court makes clear in the next case, however, for purposes of the non-subsidy issue, it mattered that the group in Regan could have received 501(c)(3) status if it was willing to segregate its money and actions.

Four years later, this time rejecting non-subsidy phrasing, the Court decided Federal Communications Commission v. League of Women Voters of California. After Congress passed the Public Broadcasting Act, the Corporation for Public Broadcasting formed to disburse

140. See id. at 545 (describing the groups argument as relying on Speiser, and quoting the Court’s penalty language from Speiser, 357 U.S at 518).
141. See id.
142. Id. at 545-46 (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)).
143. Id. at 546.
144. See id. at 550-51.
145. Cf. Sullivan, supra note 7, at 1441 (discussing the different levels of scrutiny that could have been applied to the condition in Regan depending on whether the condition was categorized as a ban on lobbying activities or as a tax benefit).
146. Id.
147. Id.
148. Id. at 1465 (noting that the group could be set up as a 501(c)(3) organization for its non-lobbying activities and a 501(c)(4) organization for its lobbying activities if it kept those parts separate, which the group had done in the past).
federal money to media companies. However, no funds could be distributed to companies that engaged in editorializing. Framing the question presented as an unconstitutional conditions challenge, Justice Brennan writing for the Court asked whether the benefit—the disbursement of federal funds—coerced recipient groups into relinquishing their Free Speech Clause rights. The Federal Communications Commission (FCC) argued that the case was like Regan, i.e., that the FCC was simply choosing not to subsidize certain speech rather than restricting the organization’s speech. However, the Court distinguished Regan by reasoning that here, even if the organization’s budget was only one-percent federal funding, the organization was prohibited from editorializing because it could not segregate its regulatory and funding functions. Disposing of the FCC’s non-subsidy argument, the Court characterized the provision as a suppressive ban on speech that was too broad to support the asserted government interest.

The Second Circuit Court of Appeals also recently rejected framing a Free Speech Clause unconstitutional conditions challenge as a non-subsidy in Alliance for Open Society International, Inc. v. U.S. Agency for International Development, calling it “well beyond what the Supreme Court” has upheld as constitutional conditions on funding. There, the government interpreted a provision of the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act to require groups that received funding to vocally oppose prostitution and sex trafficking. The court cited the Supreme Court’s non-subsidy line of cases and concluded that rather than prohibiting certain conduct to receive funding, the Act “compel[led] recipients to espouse the gov-

151. League of Women Voters, 468 U.S. at 366.
152. Id. at 380. The rationale was that public broadcasters could be subjected to additional constraints that private broadcasters were not subjected to because the constraints were meant to assure the public would “receiv[e] a balanced presentation of views on diverse matters of public concern.
153. See id. at 366.
154. Id. at 399.
155. Id. at 400; Regan, 461 U.S. at 544.
156. In dissent, joined by Justice White, Justice Rehnquist thought the Court’s decision in Regan decided the case the other way. League of Women Voters, 468 U.S. at 405 (Rehnquist, J., dissenting) (“[In Regan, w]e squarely rejected the contention that Congress'[s] decision not to subsidize lobbying violates the First Amendment, even though we recognized that the right to lobby is constitutionally protected.”).
157. Id. at 391, 395, 398.
ernment’s viewpoint[,]”161 which is reminiscent of the Speiser line of cases in that the condition directly violated the First Amendment.

V. Various Applications For Constitutionally Recognized Rights

A. Legislative Refusal to Subsidize Abortions

Courts’ phrasing of certain conditions as non-subsidies rather than as penalties is not unique to the Free Speech Clause context.162 One of those rights not explicitly listed in the Constitution to which the Court has applied the doctrine is abortion. After the Court’s decision in Roe v. Wade,163 plaintiffs used the unconstitutional conditions doctrine to challenge state and federal laws that limited funding for indigent women’s abortions and limited access to abortion-related counseling.164 Such an unconstitutional conditions challenge arose in Maher v. Roe165 after the State of Connecticut Welfare Department limited the receipt of state Medicaid benefits to women whose abortions were performed in the first trimester and were medically necessary.166 The plaintiffs relied on Shapiro to argue that the restriction penalized women who chose to exercise their right to have an abortion.167 Rejecting that characterization and setting out the non-subsidy rationale that the Court used in Regan168 and League of Women Voters169 discussed above, the Court reasoned that the right to abortion does not limit a state’s authority “to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of

161. Id. at 223. For an example of a condition found not to unconstitutionally compel speech, see Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47, 51, 60 (2006), in which the Court concluded that a condition on law school funding that required law schools to allow military recruiters the same on-campus access as nonmilitary recruiters was constitutional because Congress could constitutionally compel the same result.
162. E.g., Harris v. McRae, 448 U.S. 297, 318 (1980) (applying the non-subsidy rationale to an unconstitutional challenge to a restriction on abortion).
163. Roe v. Wade, 410 U.S. 113, 153 (1973). In Roe, the Court based its holding on the constitutionally recognized right to privacy. Id. The Court found that right in the Fourteenth Amendment, while acknowledging the Court’s precedents finding privacy interests protected by the First, Fourth, Fifth, and Ninth Amendments in different contexts. Id. at 152-53.
166. Id. at 466.
167. Id. at 474 n.8.
168. Regan, 461 U.S. at 545.
169. League of Women Voters, 468 U.S. at 399-400.
public funds.” The Court acknowledged that being indigent makes it hard for poor women to get an abortion but that being indigent itself puts barriers on women’s access to abortion, not the law. As such, the law did not penalize a constitutional right.

The Court repeated that reasoning in *Harris v. McRae*. According to the Court in *Harris*, a woman’s freedom of choice does not include “a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.” Congress could choose to subsidize nothing—not childbirth either—and then indigent women would have the same choices. The Court’s characterization of states’ choices to subsidize childbirth but not abortion as non-subsidies proved fatal to unconstitutional conditions claims in this context. The abortion cases show, again, how conceptualizing the unconstitutional conditions challenges can influence the outcome. In the abortion cases, for purposes of determining whether the right is penalized, instead of assuming as the baseline that all medical needs are subsidized to those who qualify, the Court assumes as a baseline that there is no subsidization of one specific procedure, abortion.

Framing conditions as non-subsidies allowed the Court to be more deferential to legislative decisions than when it framed conditions as penalties. Similar to the Court’s unwillingness to second-guess Congress’s and states’ policy choices favoring childbirth over abortion, the Court was unwilling to disturb Congress’s policy choices regarding implementing its family-welfare distribution program.

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171. *Id.* (“An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the state’s] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.”).
172. *See id.*
174. *Id.* at 316.
175. *Id.* at 316-17. For another example, see *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Court used the non-subsidy rationale to quickly reject an unconstitutional conditions challenge to restrictions on funding for women’s family planning services that included abortion-related planning, and citing *League of Women Voters*, concluded that the group could separate its functions and funding to retain its Free Speech Clause rights.
176. *See Sullivan*, supra note 7, at 1439; *see also Planned Parenthood*, 692 F.3d at 350 (citing *Rust* to hold constitutional the Texas law that had an expressed policy of only using public funds to subsidize non-abortion related family planning services and of excluding abortion-related speech).
177. *Sullivan*, supra note 7, at 1440.
B. Rational Basis for Conditions on Familial Privacy

Although the Court recognized a constitutional right to familial privacy in Moore v. East Cleveland, a majority of the Court rejected using the doctrine of unconstitutional conditions to apply strict scrutiny to legislative decisions defining what a family is for purposes of family welfare assistance, preferring to review such policy decisions for a rational basis. In Lyng v. Castillo, families challenged the Food Stamp Act of 1964, which based the determination of food stamp benefit awards on a household basis. Congress amended the definition of “household” to differentiate between parents, children, siblings, and relatives and whether food was purchased and eaten together. Families that bought and prepared food as “separate economic units” but lived under one roof stood to lose or have their benefits reduced due to the changed definition because they would be treated as one household. The plaintiffs challenged the constitutionality of the law’s definition of “household,” arguing that when the government interferes with “choices involving family life, it must face special scrutiny . . . .” The Court disagreed.

Writing for the Court, Justice Stevens rejected reviewing the definition under a stricter standard of review and concluded that Congress had a rational basis for defining household in that way, which was in part, to prevent fraud and easily administer the program. Opining that most large families would want to dine together anyway, the Court downplayed any possible coercive effect of the definition and concluded that the definition of family did not “order or prevent any group of persons from dining together . . . .”

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180. Lyng, 477 U.S. at 635-36.
184. Id. at 637.
186. Lyng, 477 U.S. at 637-38.
187. Id. at 638-40 (“[T]he Legislature’s recognition of the potential for mistake and fraud and the cost-effectiveness of case-by-case verification of claims that individuals ate as separate household unquestionably warrants the use of general definitions in this area.”) (footnotes omitted).
188. See id. at 638.
Similarly, in *Bowen v. Gilliard*, Justice Stevens rejected a claim that amendments to the law establishing Federal Aid to Families with Dependent Children, which effectively reduced benefits to families with kids who receive financial support from noncustodial spouses, imposed an unconstitutional condition. Like in *Lyng*, the plaintiffs argued for heightened judicial scrutiny because the law affected their constitutional familial right to privacy and the plaintiffs presented evidence that it caused families to intentionally break up to avoid benefit reductions. Rejecting that claim and the alleged coercion, the Court said “[t]hat some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and direct effect is to ‘intrud[e] on choices concerning family living arrangements,’ nor into an effort ‘to foist orthodoxy on the unwilling.’” Dissenting, Justice Brennan argued for more than “a mere rational basis” of review of a law that hurt the protected parent-child relationship.

Like the abortion cases, *Lyng* and *Bowen* are examples of how the Court can acknowledge some deterrent effect in a condition, yet defer to the legislature and conclude that the government’s responsibility for the deterrent is insufficient to invalidate the law, or that rationally based policy reasons support it. Those cases are further examples of the normative nature of the value judgments the justices make and how analyzing conditions for their coerciveness, or lack thereof, leads to inconsistent results.

### C. Strictly Scrutinizing Conditions on the Right to Travel

Whereas the abortion and familial privacy cases are examples of the Court declining to impose heightened scrutiny to laws implicating constitutionally recognized rights, the Court was more willing to do

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190. *Id.* (Title IV of the Social Security Act of 1935, 49 Stat 627, established the AFDC program. Congress amended the family eligibility provisions in Title IV in the Deficit Reduction Act of 1984, 98 Stat 494).
191. *Bowen*, 483 U.S. at 601-02 & n.16.
192. *Id.* at 601-602 (quoting Califano v. Jobst, 434 U.S. 47, 54 n.11 (1977)) (citation omitted).
193. *Id.* at 611 (Brennan, J., dissenting).
so with the right to travel. A majority of the Court was successful in characterizing legislative policy decisions that used residency requirements as a basis for determining who obtains government benefits as worthy of stricter review using the unconstitutional conditions doctrine, substantive due process, and the Equal Protection Clause.

In *Shapiro v. Thompson*, two states and the District of Columbia enacted statutes conditioning the receipt of welfare benefits on the recipients having lived in the state for at least a year. Writing for the majority, Justice Brennan described the right to travel as “a right so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union of the Constitution created . . . ; [the] freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”

The Court characterized the laws as intending to keep people from travelling just for the purpose of receiving benefits and, therefore, the laws treated people differently based on an “invidious classification.” Accordingly, the Court invalidated the laws by applying stricter scrutiny through the Equal Protection Clause and substantive due process. The Court rejected the state’s various asserted interests and concluded that the laws both deterred people from exercising their constitutional right to travel freely and that they penalized people who exercised their right by denying them welfare benefits. Justice Harlan’s dissent rejected applying strict scrutiny to legislative classifications beyond racial ones and objected to the erosion of the “long established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective.”

Nevertheless, the Court extended *Shapiro* in *Memorial Hospital v. Maricopa County* to recognize the right to temporary travel, not just travel to establish a new residence. An Arizona statute required people to live in the state for a year before they could receive non-emergency medical care and hospitalization at the county’s expense.

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196. See *Shapiro*, 394 U.S. at 641.
197. *Id.* at 621-26.
198. *Id.* at 630-31.
199. *Id.* at 627-29, 633.
200. *Id.* at 638, 641-42.
201. See *id.* at 641-42.
202. *Id.* at 658-59 (Harlan, J., dissenting).
204. *Id.* at 252.
The Court reasoned that because medical care is as important as welfare benefits to indigent people, which are rights related to basic sustenance, they have “greater constitutional significance than less essential forms of government entitlements.”\(^{205}\) It held the residency requirement unconstitutional for the same reasons as in Shapiro, concluding that the law was unrelated to the asserted interest of protecting the medical program’s fiscal health and that the requirement created an invidious classification infringing the right to travel.\(^{206}\) Justice Rehnquist objected to such a strict standard of review and would have upheld the law because he thought it was rationally related to the states’ justification for protecting its economy and adopting a rule of thumb for determining residency.\(^{207}\)

VI. Making Sense of the Doctrine

Comparing the unconstitutional conditions cases in the different contexts leads to the inevitable conclusion that identifying exactly where a condition crosses the line from somewhat coercive to impermissibly coercive or what makes the Court weigh some government interests or policy choices in different contexts more heavily than others is tough. The Court’s varying formulations of the doctrine for different benefits frustrates drawing consistent connections or a unifying theme throughout all the unconstitutional conditions cases. The doctrine is framed in vague language, so the result of each case can be manipulated by focusing on the government’s interest, the source of the burden on the right, or just concluding that although a right might be pressured, it is not sufficiently so to cross the line to be unconstitutional. The doctrine arose out of the substantive due process regime in the Lochner era corporate rights cases, which is a fitting origin. Since then, the Court has used the doctrine as a tool to take a closer look at government action that leaves—or at first glance appears to leave—a bad taste in the mouth of the members of the court.

VII. The Doctrine and Land Use Exactions

Although local governments have used land use exactions as a land use planning technique for decades before 1987,\(^{208}\) until then, the

\(^{205}\) Id. at 259.
\(^{206}\) Id. at 268-69.
\(^{207}\) See id. at 287-88 (Rehnquist, J., dissenting).
Court never applied the unconstitutional conditions doctrine in the land use context. In the land use exaction cases the Court draws on its formulations of the doctrine in different contexts. Important themes include a narrower interpretation of germaneness associated with stricter scrutiny, protecting against the abuse of coercive government monopoly power, and stopping the government from doing things indirectly that the federal Constitution prohibits it from doing directly. First is a general discussion of land use exactions followed by a discussion of the Court’s trilogy of decisions applying the doctrine to exactions.

A. Land Use Exactions

A land use exaction exists when a local government conditions the right to develop land on the developer’s relinquishment of a property interest or money to be used for public infrastructure. Exactions are a land-use planning tool for shifting the development costs of infrastructure from the public to the developer responsible for the growth, and limiting the potential negative impacts of development like increased traffic, noise, or environmental harm.

In the early 1900s large subdivisions sprung up, and because developers were not held responsible for building the public infrastructure improvements that the growing communities inevitably needed, local governments turned to exactions, which the United States Department

209. See Merrill, supra note 134, at 861 (describing Dolan as applying the doctrine of unconstitutional conditions to the Just Compensation Clause for the first time).

210. See Koontz, 133 S. Ct. 2586 (2013) (citing, among other cases, Memorial Hosp., 415 U.S. at 250, in which the Court applied the doctrine to the right to travel in the context of a county’s residency requirement; Dolan, 512 U.S. 374, 385 (1994) (citing, among other cases, Perry v. Sindermann, 408 U.S. 593 (1972), in which the Court applied the doctrine to a terminated college professor’s Free Speech Clause rights).

211. See generally Nollan, 483 U.S. 825 (1987) (arguing over the breadth of the required relationship between the government’s justification for regulating and the government’s ability to deny the development, the majority’s narrower formulation trumpping the dissent’s proposed broader, more deferential, formulation).

212. See Dolan, 512 U.S. at 387 (discussing the government’s “extortion[ate]” motivations in Nollan) (citation omitted).

213. Cf. id. at 384 (saying that if the government took the landowner’s property outside of the permitting process it would clearly be a taking).


215. Id. at 479, 482-83 (noting that when local governments impose exaction on new development, it is normally part of the subdivision process); see also Edward J. Sullivan & Isa Lester, The Role of the Comprehensive Plan in Infrastructure Financing, 37 URB. LAW. 53, 61 (2005) (noting that when local governments impose exaction on redevelopment, it is normally before approving the necessary permits).
of Commerce recommended in its Standard City Planning Enabling Act of 1928.\textsuperscript{216} Exactions became common by the mid-1900s.\textsuperscript{217} On-site exactions include dedication of land by a developer within a subdivision to the local government so that the local government can build streets, sidewalks, schools, fire stations, and other public facilities.\textsuperscript{218} Alternatively, the developer could be required to build those types of facilities itself and dedicate them to the community.\textsuperscript{219}

After World War II, some local governments also started imposing off-site exactions on development, and that practice increased in the 1970s and 1980s as an alternative to raising property taxes, which local governments historically used to fund those off-site infrastructure projects.\textsuperscript{220} Off-site exactions require a developer to provide similar amenities and facilities as on-site exactions, but elsewhere in the community rather than on the developer’s land.\textsuperscript{221}

Another common practice is for local governments to require developers to pay equivalent cash fees in-lieu of those physical projects.\textsuperscript{222} With those fees, local governments fund the same types of infrastructure projects mentioned above.\textsuperscript{223} Relatedly, some local governments require developers to set aside affordable housing as part of an inclusionary zoning policy, which could take the form of linkage fees that require developers to contribute money to building, or build themselves, low-income housing for the area’s expected population increase from the development to give low-income residents their fair share of housing.\textsuperscript{224}

\begin{itemize}
\item \textsuperscript{216}See Mulvaney, supra note 208, at 516-17.
\item \textsuperscript{217}Id.
\item \textsuperscript{218}Been, supra note 214, at 479-80.
\item \textsuperscript{219}Id. at 479.
\item \textsuperscript{220}Mulvaney, supra note 208, at 518; Sullivan & Lester, supra note 215, at 57.
\item \textsuperscript{221}Sullivan & Lester, supra note 215, at 57-58.
\item \textsuperscript{223}Id.
\item \textsuperscript{224}Daniel L. Siegel, Exactions after Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits its Scope, 28 STAN. ENVTL. L.J. 577, 601 (2009); Sullivan & Lester, supra note 215, at 61 (providing the City of San Francisco’s program as an example in which the city requires developers to build 9 housing units per every 50,000 square feet or more of office space the developers build). In California Building Industry Assoc. v. City of San Jose, 157 Cal. Rptr.3d 813, 815-16 (Cal. App. 2013), reh’g denied July 1, 2013, cert. granted, 307 P.3d 878 (Cal. 2013), builders in California facially challenged a city’s affordable housing ordinance, which provided that new development with 20 or more units must set aside fifteen percent of its units—on or off site—as below-market rate affordable housing. The trial court held the city failed to meet its burden of demonstrating the required reasonable relationship between the negative externalities of the new development and the set-aside or fee-in-lieu of condition. \textit{Id.} at 818. Disagreeing, and
\end{itemize}
Municipal governments can impose exactions based on a legislatively established, nondiscretionary basis, or on a case-by-case, discretionary basis. Legislatively established fees are sometimes called impact fees, which are a one-time payment that municipal governments require a developer to pay at the time of project approval and are often based on an administratively set rate schedule. Impact fees fund capital improvement projects off site that new development generates a need for; they are popular because unlike in-lieu-of fees, local governments can impose impact fees on all permits rather than just those in which dedications of land would have been alternatively appropriate.

B. Unconstitutional Conditions Doctrine Applied to Exactions using the Just Compensation Clause

Because exactions involve taking property and money, the Fifth Amendment’s Just Compensation Clause is implicated. The Just Compensation Clause is concerned with compensating property owners who have property taken from them for public use under the rationale that individuals should not be forced to bear burdens alone that the public as a whole should bear. The Just Compensation Clause is applicable to the states and local governments through the Fourteenth Amendment’s Due Process Clause.

225. Mulvaney, supra note 208, at 533.
226. Rosenberg, supra note 222, at 204-05.
227. Id.
228. Id. at 205; see Sullivan & Lester, supra note 215, at 62.
229. Id. at 205; see Sullivan & Lester, supra note 215, at 62.
230. The Just Compensation Clause is also implicated by purely monetary exactions after Koontz. The Just Compensation Clause provides: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend V.
232. Dolan, 512 U.S. at 383-84 (citing Chicago B & Q.R. Co. v. Chicago, 166 U.S. 226, 239 (1897)).
Historically, local governments have received deference in regulating land use against constitutional attacks by property owners so long as the regulations are rationally related to furthering the public health, safety, morals, and welfare.232 Throughout much of the 1900s, when landowners did attack legislative land use regulations, their attacks were based in substantive due process, arguing that land use regulations went “too far” and were arbitrary, and not rationally related to the general health, safety, morals, or welfare of the community.233 However, in the 1980s and 1990s the Court used the Just Compensation Clause and the unconstitutional conditions doctrine to more closely review local government’s exactions of property from property owners in the land use permitting process.234 Land use permits are a discretionary benefit, which is why the unconstitutional conditions doctrine is implicated.235

Two dangers identified with exactions are that (1) local governments can redistribute wealth by overcharging developers relative to the harm their development causes, and (2) local governments may be incentivized to overregulate so as to receive more benefits or money than they would otherwise have.236 A common way those concerns are voiced is by accusing local governments of using exactions as an end run around the Fifth Amendment eminent domain requirement that the government provide just compensation for property it takes for public use.237 In the first land use exaction case that the Court applied the doctrine in, Nollan,238 the Court did not explicitly
say it was applying the doctrine, but the Court applied the doctrine’s framework and in later cases said that *Nollan* is an unconstitutional conditions case.  

C. Nollan v. California Coastal Commission

In *Nollan*, the California Coastal Commission (the Commission)—the local government agency responsible for land use permitting in the area—conditioned the issuance of a building permit for the demolition and rebuilding of the applicant’s beachfront rental property on the exaction of an easement across the applicant’s property. The Court assumed the Commission could have denied the building permit outright, yet it also could not have taken the easement outright without giving the homeowners just compensation for the property interest taken. In exacting the easement, the Commission had to be legislating in furtherance of a legitimate state interest and the state interest had to be connected to the regulation, both of which the Court acknowledged that it had never defined the limits of in the land use permitting context.

The Commission asserted several interests in conditioning the grant of the building permit on exacting the public easement along the beach of the homeowners’ property: (1) the public’s need and ability to see the beach, (2) the “psychological barrier” to using the beach created by the proposed development, and (3) preventing congestion on public beaches. According to Justice Scalia, “[T]he Commission’s assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.” Although that sounds like the absolute power formulation of the greater-lessor rationale rejected long ago, Justice Scalia is getting at his idea of germaneness in this circumstance—the greater power to deny the building

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241. *Id.* at 831, 834.
242. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) was good law when the Court decided *Nollan* and held that one way the Just Compensation Clause is violated is when the government fails to legislate in furtherance of a legitimate state interest. As is elaborated infra, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005), the Court turned that test into a substantive due process test but said that *Nollan* and *Dolan* are still good law and represent the takings test for exactions.
243. *Nollan*, 483 U.S. at 834.
244. *Id.* at 838.
245. *Id.* at 836.
permit includes the lesser power to condition its issuance on a ger-
mane exaction. His idea of germaneness in this context is narrow
and characteristic of stricter scrutiny.

Ultimately, the Court concluded that the easement exacted was un-
germane in that it was too attenuated from the asserted government
interest.\textsuperscript{246} The Court acknowledged that the Commission probably
exacted the easement because of its belief that the easement would
serve the public interest, but the Court said that was insufficient to
pass constitutional muster; and that essentially, the Commission was
attempting an end run around the eminent domain requirement to
pay the applicant for taking its property by doing it through the permit
process.\textsuperscript{247}

The Court described the required connection between the asserted
government interest and the exaction as an “essential nexus.”\textsuperscript{248} As
an example in \textit{dicta}, Justice Scalia said that based upon the Commiss-
ion’s asserted interest of viewing the ocean and the Commission’s
power to withhold permit approval, the Commission could have con-
ditioned its approval of the permit on the applicant’s dedication of a
public viewing spot on their property overlooking the beach.\textsuperscript{249} In
other words, the viewing spot would be germane to what would be
the government’s basis for rejecting the permit outright—the develop-
ment’s visual impairment of the beach.\textsuperscript{250} The public easement was
about beach access, not viewing, and therefore un-germane to the as-
serted government interest.\textsuperscript{251}

Dissenting, Justice Brennan argued that the scope of the germaneness
inquiry should be broader in this context and look at the general interest
of providing for the public’s use and enjoyment of the beach.\textsuperscript{252}

\textsuperscript{246} See id. at 838-39 (“It is quite impossible to understand how a requirement that
people already on the public beaches be able to walk across the [applicant’s] property
reduced any obstacles to viewing the beach created by the new house. It is also impos-
sible to understand how it lowers and ‘psychological barrier’ to suing the public
beaches or how it helps to remedy any additional congestion on them caused by the
construction of the [applicant’s] new house. We therefore find that the Commission’s
imposition of the permit condition cannot be treated as an exercise of its land-use
power for any of these purposes.”) (footnote omitted).

\textsuperscript{247} See id. 841-42 (“California is free to advance its ‘comprehensive program,’ if
it wishes, by using its power of eminent domain for this ‘public purpose’; but if it
wants an easement across the [applicant’s] property, it must pay for it.”) (citation
omitted).

\textsuperscript{248} Id. at 836-37.

\textsuperscript{249} Id. at 836.

\textsuperscript{250} See id.

\textsuperscript{251} See id. at 836-37.

\textsuperscript{252} Id. at 848 (Brennan, J., dissenting).
broader view of germaneness is characteristic of the idea of germaneness articulated by Justice Rehnquist in *Dole*, where the condition that the State of South Dakota raise its drinking age as a condition of receiving highway funds just had to be rationally related to broad legitimate government interests. Perhaps the spending power and the police power, and property rights and states’ rights are sufficiently different to warrant different treatment—which would explain why Justice Rehnquist supported the narrow interpretation here but the broad interpretation in *Dole*—but making those distinctions seems to lead to a “mini-unconstitutional doctrine for each power, a mini-doctrine for each right, and a micro-doctrine for the intersection of each power and each right.” Justice Brennan noted that the Commission was caught off guard by the majority’s strict view of germaneness in this circumstance and that the Commission’s justification for the exacted easement was not merely visual access, but also public beach access generally, which would meet the traditional standard of review.

Upon determining the condition was not germane, Justice Scalia said the Court could not view the condition as a proper exercise of the state’s land use planning authority; rather, he saw it as arbitrary. At this point in the opinion the Court cites to the *Agins v. City of Tiburon* “substantially advance” test, which the Court in a subsequent opinion redefined as purely a substantive due process test, discussed infra; however Justice Scalia appeared skeptical of the substantially advance test in this context. He said that the Just Compensation Clause is “more than a pleading requirement, and compliance with it [is]more than an exercise in cleverness and imagination[,]” and that the Court was “inclined to be particularly careful” about applying the substantially advance test where a permit is conditioned on conveying property, which includes the attendant high risk that the government is being deceitful about its stated reason for imposing the condition and really is trying to avoid having to pay the property owner as the Just Compensation Clause requires.

In *Nollan*, the Court demonstrated its willingness to review local governments’ land use permitting decisions more closely for that

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254. *Nollan*, 483 U.S. at 850 & n.4 (Bennan, J., dissenting).
255. *Id.* at 839.
257. *Nollan*, 483 U.S. at 840-41.
258. *Id.* at 841.
kind of abuse, which Justice Scalia described as “‘out-and-out extor-
tion[ate]’”\textsuperscript{259} of property right. Although the Court adopted the essen-
tial nexus test to address germaneness, in doing so, the Court left
unanswered the question of the required degree of connection between
the exaction and the land use effects of the applicant’s development.
The Court did not reach that issue in \textit{Nollan} because it ended its
analysis at the first stage when it concluded that the essential nexus
was missing; however, the Court answered the second question in
\textit{Dolan v. City of Tigard}.\textsuperscript{260}

D. Dolan v. City of Tigard

In \textit{Dolan}, unlike in \textit{Nollan}, the Court explicitly said that it was applying the
unconstitutional conditions doctrine:

\begin{quote}
under the well-settled doctrine of ‘unconstitutional conditions,’ the government
may not require a person to give up a constitutional right—here the right to receive
just compensation when property is taken for a public use—in exchange for a dis-
cretionary benefit conferred by the government where the benefit sought has little or
no relationship to the property.\textsuperscript{261}
\end{quote}

In \textit{Dolan}, the applicant owned a plumbing and electric supply store on
property near a creek, which was part of the city’s 100-year flood-
plain.\textsuperscript{262} She applied for a permit to double the size of her store, pave
a 39-spot parking lot, and add an additional on-site structure.\textsuperscript{263} The
city issued her a building permit conditioned on her (1) dedication of
a portion of her property within the floodplain zone to improving
storm drainage along the creek by constructing a public greenway and
(2) her dedication of a 15-foot strip of adjacent land as a pedestrian
and bike path.\textsuperscript{264} The easements covered about ten percent of her prop-
erty.\textsuperscript{265} Framing her argument as an unconstitutional conditions chal-
lenge, the Court understood the applicant to contend “that the city . . .
forced her to choose between the building permit and her right under
the Fifth Amendment to just compensation for the public easements.”\textsuperscript{266}

Like in \textit{Nollan}, simply taking easements for the public greenway
and bicycle path would violate the Just Compensation Clause.\textsuperscript{267}

\textsuperscript{260. 512 U.S. 374 (1994).}
\textsuperscript{261. \textit{Id.} at 385.}
\textsuperscript{262. \textit{Id.} at 379.}
\textsuperscript{263. \textit{Id.} at 379.}
\textsuperscript{264. \textit{Id.} at 379-80.}
\textsuperscript{265. \textit{Id.} at 380.}
\textsuperscript{266. \textit{Id.} at 385-86.}
\textsuperscript{267. \textit{Id.} at 384.}
The first question was whether there was an essential nexus between the asserted government interest and the exactions. The asserted government interests were mitigating the flood risks that would result from the increased impervious surface from the expanded parking lot and offsetting traffic congestion in the business district in which the applicant’s property was located. At the first step, the Court determined that there was clearly an essential nexus.

Then, the Court described the second step as determining whether the “degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of [the applicant’s] proposed development.” The Court discussed tests adopted by different states, the intermediate level of review of those tests being the “reasonable relationship” test. The Court said that test is close to what the federal Constitution requires, but that due to its name’s confusing similarity to the less stringent “rational basis” test, the term “rough proportionality” best describes the Fifth Amendment’s requirements in this context. According to the Court, “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”

Rejecting Justice Stevens’ assertion that this type of business regulation deserves “a strong presumption of validity[,]” the Court asserted that there is no reason why the Fifth Amendment shouldn’t be treated the same as the First or Fourth Amendments. There, the Court signaled its intent to promote the Just Compensation Clause’s status and perhaps, that the level of review the Court applies to First Amendment

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268. Id. at 386. The Oregon Land Use Board of Appeals, the Oregon Court of Appeals, and the Supreme Court of Oregon all concluded that after Nollan the test was still whether there was a “reasonable relationship” between government interest and the exaction. Id. at 382-83. The United States Supreme Court granted certiorari because Nollan’s “essential nexus” standard is a stricter standard than a “reasonable relationship” standard. See id. at 383.

269. Id. at 387.

270. Id.

271. Id. at 388.

272. Id. at 389-91.

273. Id. at 391.

274. Id. (footnote omitted).

275. Id. at 392. Justice Stevens said he hoped that the Court was not disavowing the rational basis standard of review of land use decisions and returning to the substantive due process based “super-legislative power the Court exercised during the Lochner era.” Id. at 409 (Stevens, J., dissenting). He obviously thought it was when he said, “In its application of what is essentially the doctrine of substantive due process, the Court confuses the past with the present.” Id. at 410 (Stevens, J., dissenting).
cases could serve as guide.\textsuperscript{276} Applying the rough proportionality test, the Court concluded that the city failed to show a sufficient relationship between the public floodplain easement and the effects of the applicant’s proposed development.\textsuperscript{277} The city never explained why it demanded a public greenway when a private greenway would work just as well for the purpose of the exaction, which was to reduce flood risk caused by the increased impervious surface.\textsuperscript{278} The Court saw the public easement as interfering with the applicant’s property rights to exclude others to the extent that they would be “eviscerated.”\textsuperscript{279}

The Court’s decision in \textit{Dolan} marked a new application of the unconstitutional conditions doctrine in which the tests in \textit{Nollan} and \textit{Dolan} are one takings formula, specifically for exactions, out of the four different takings formulas that the Court uses in the land use context.\textsuperscript{280} However, at the time, the majority and dissent were divided on whether the doctrine should apply at all in the land use permitting context. Justice Stevens argued that the doctrine had traditionally been used with the First Amendment, which is a “fragile and easily ‘chilled’ constitutional right[,]” and it should not apply in the context of land use law with the traditional leeway given to local governments to regulate development.\textsuperscript{281}

Moreover, the Just Compensation Clause itself makes applying the doctrine in this situation conceptually different. If the government wants property for a legitimate public purpose and it uses the right procedures it can take that property and the only question is what constitutes just compensation.\textsuperscript{282} One argument is that in situations like in \textit{Nollan} and \textit{Dolan}, “[t]he building permit furnishes in-kind compensation for the easement[,]” and that the property owner’s acceptance of the permit with the conditions provides strong evidence that the property

\begin{itemize}
  \item \textsuperscript{276} Merrill, \textit{supra} note 134, at 866. Merrill notes that it’s unclear whether Justice Rehnquist meant that only the Just Compensation Clause should receive the same treatment, or whether he meant that other rights like the Second and Seventh Amendment, for example, should receive the same treatment. \textit{Id.}
  \item \textsuperscript{277} \textit{Dolan}, 512 U.S. at 394-95.
  \item \textsuperscript{278} \textit{Id.} at 393.
  \item \textsuperscript{279} \textit{Id.} at 394. The Court acknowledged that the applicant was operating a store, so she obviously wanted people to come onto her property at certain times; however, the Court noted the easement was permanent and recreational in nature. \textit{Id.}
  \item \textsuperscript{280} \textit{Cf.} \textit{Lingle}, 544 U.S. at 548 (naming the four different categories: (1) physical occupation takings, (2) \textit{Lucas}-style total regulatory takings, (3) \textit{Penn-Central} regulation-goes-too-far takings, and (4) \textit{Nollan} and \textit{Dolan} exaction takings).
  \item \textsuperscript{281} \textit{Dolan}, 512 U.S. at 407 n.12 (Stevens, J., dissenting).
  \item \textsuperscript{282} \textit{Cf.} Sullivan, \textit{supra} note 7, at 1505 (commenting that the Takings Clause does not prohibit all forced transfers of property to the state and is about compensation).
\end{itemize}
owner considers the compensation adequate. If so, then the government’s conditional offer of the building permit does not seem to affect a constitutional right, which would mean the unconstitutional conditions doctrine is actually inapplicable. That was one of Justice Stevens’ points, which led him to assert that the majority’s use of the doctrine was “novel, and arguably incoherent.”

However, perhaps that argument conflates adequate compensation with the idea that one thing is worth more than the other, (meaning, perhaps the property owner’s acceptance of the exaction shows only that, to the property owner, the value of the building permit exceeds the loss in value of the exaction, so there is still a net gain even though the property owner may not feel justly compensated for relinquishing the property right). The assumption that the government could have denied the permits outright that the Court made in Nollan and Dolan, i.e., assuming that the government’s asserted justification for denying the permits is legitimate, also raises problems with whether a property owner’s acceptance of the permit is evidence of compensation.

Cynically, there is an alternative situation in which the government has no basis to deny the permit outright but proposes a sham reason for denying it to get the property owner to concede to the exaction—making the property owner purchase the permit—which would mean that the property owner’s acceptance of the condition could not be appropriately characterized as compensation because the property owner would have a right both to the building permit and to the property exacted. In that scenario, the unconstitutional conditions doctrine is applicable because property would be taken without compensation, the Just Compensation Clause applies, and the government would be coercing and extorting the property owner into relinquishing that right. Justice Scalia’s and Rehnquist’s assumptions that the government could have denied the permits outright in Nollan and Dolan foreclose that line of analysis, although the Court still concluded that the property owner’s acceptance of the permits was not evidence of just compensation.

283. Id.
284. Dolan, 512 U.S. at 409 (Stevens, J., dissenting).
285. See Fudenberg, supra note 24, at 501 & n.446, for this argument.
286. Id.
287. See id.
288. See id. at 502 for this hypothetical.
289. Id. at 502 & n.453.
The effect of *Nollan* and *Dolan* is that the burden is on the local government to prove that the conditions it attaches to approving a permit are appropriately connected to the government’s asserted basis for imposing the conditions in the first place, and that the exaction is proportionate to the negative externalities of the development. In 2005 the Court took the opportunity to clarify its takings law doctrine generally and to explain how *Nollan* and *Dolan* fit in to the changed landscape.

E. **Lingle v. Chevron U.S.A., Inc.** 291 “Explains”

**Nollan and Dolan**

In *Lingle*, 292 the Court modified its takings law jurisprudence by overruling the “substantially advance” test stated in *Agins v. Tiburon*. 293 According to the *Agins* substantially advance test, a taking occurred when either (1) the government regulation failed to substantially advance a legitimate state interest, or (2) it denied an owner all economically viable use of his or her land. 294 In *Lingle*, 295 the Court reasoned that the substantially advance test focuses on the government’s asserted justification for regulating and is unconcerned with the effect of the regulation, which is addressed by the Fifth Amendment Just Compensation Clause. Accordingly, the Court held that the substantially advance test is a substantive due process test and is inapplicable for determining whether there is a Fifth Amendment taking. 296

The Court acknowledged that, arguably, the substantially advance test “played a role” in *Nollan* and *Dolan* and that those decisions quoted *Agins*, but that *Nollan* and *Dolan* did not actually apply the test and that they establish an “entirely distinct” rule. 297 The Court said *Nollan* and *Dolan* represent a special test for “dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings.” 298 The Court said that rather than examine whether the exactions advanced “some legitimate state interest[,]” *Nollan* and *Dolan* examined “whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether[,]” which the Court considered “worlds

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290. See *supra* Parts VII.C, VII.D.
292. *Id.* at 545.
294. *Id.*
296. *Id.* at 545.
297. *Id.* at 546-47.
298. *Id.* at 547.
The Court restated that Nollan and Dolan are unconstitutional conditions cases, but it did not elaborate on the doctrine and focused on Nollan and Dolan being equivalent to takings.

F. Koontz v. St. Johns River Water Management District

In Koontz, the Court recently turned Nollan and Dolan into a trilogy and expanded their scope. The facts in Koontz were relatively similar to those in Nollan and Dolan, with a few important twists. In Koontz, the applicant owned a 14.9-acre lot on partial wetlands in the State of Florida. He sought the necessary permits from the St. Johns River Water Management District (the District)—the relevant government permitting authority—in hopes of dredging portions of the wetlands to develop a 3.7-acre portion of his lot. Florida law provided that such a permit could include “reasonable conditions” that were “necessary to assure” that the development would not harm the water resources of the district. Accordingly, the District regularly required applicants who wished to build on wetlands to offset the environmental harm they caused by paying to preserve, enhance, or otherwise protect off-site wetlands. The applicant offered to offset the environmental effects of his development by deeding a conservation easement on eleven of his acres that he did not plan to develop. The District rejected that offer and presented alternative counteroffers: (1) the applicant could reduce the size of his planned development to one acre and deed a conservation easement on the property’s remaining 13.9 acres to the District, or (2) he could develop the 3.7 acres like he initially proposed, deed a conservation easement on the property’s remaining 11.2 acres to the District, and pay for improvements to land several miles away owned by the District.

299. Id. (emphasis in original).
300. Id. at 546-47.
301. Koontz, 133 S. Ct. at 2591-92.
302. Id. at 2593.
303. Id. at 2592 (citing 1972 Fla. Laws § (4)(1), at 1118 (codified as amended at FLA. STAT. § 373.413(1)(2014))).
304. Id. at 2593.
305. Id.
306. Id.
307. Id.
Considering the District’s offers unreasonable, he declined to propose alternative mitigation projects and, instead, filed suit in state court under a Florida law, which provided money damages for plaintiffs subjected to an unreasonable use of the state’s police power that resulted in an uncompensated taking.  

The lower state court granted the District’s motion to dismiss, but that decision was remanded, and on remand the lower state court concluded that the District needed to, but had not, satisfied either Nollan’s essential nexus requirement or Dolan’s rough proportionality requirement. The state appellate court affirmed, but the Florida Supreme Court reversed. 

The Florida Supreme Court found the present case distinguishable from Nollan and Dolan on two grounds. First, unlike in Nollan and Dolan, the District did not approve the applicant’s permits with conditions but, instead, it denied his requested permits because the applicant rejected the proposed conditions and decided not to offer his own equivalent alternatives. Secondly, the District proposed to exact a cash payment in one of its offers rather than just a property interest, which the state court acknowledged there was a division of authority on whether Nollan and Dolan apply. The United States Supreme Court accepted certiorari to resolve those two questions.  

The Court began by stating the familiar unconstitutional conditions language “ ‘that the government may not deny a benefit to a person because he exercises a constitutional right.’ ” The Court cited Perry and Memorial Hospital as examples of its unconstitutional conditions cases. Then, the Court described Nollan and Dolan as a “special application” of the unconstitutional conditions doctrine in the land

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311. Id. at 1230.  
312. Id.  
313. Id.  
314. Id. at 1229.  
315. Koontz, 133 S. Ct. at 2594.  
316. Id. at 2594 (quoting Regan, 461 U.S. at 545).  
317. Perry v. Sindermann, 408 U.S. 593, 594-95, 598 (1972) (concluding that withholding a college professor’s employment contract because the professor was outspoken against college administration could penalize and violate professor’s Free Speech Clause rights).  
319. Koontz, 133 S. Ct. at 2594.
use context that protects “special[ly] vulnerab[le]” landowners from the “[e]xtortionate demands” of local governments. The Court asserted: “Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.”

The Court’s analysis of whether a condition is germane to its regulatory justification probes the transaction for those sorts of alleged extortionate tactics. The less germane a condition is, the more like manipulation or extortion it is viewed as, which leads to a higher level of scrutiny. Like Justice O’Connor in her dissent in *Dole*, in which she viewed the government’s conditioning of the State of South Dakota’s highway funding on raising its drinking age as an extortion of the state’s power to regulate alcohol, the majority in *Nollan, Dolan,* and *Koontz* expressed distrust of local governments and their potential extortionate motives in the land use permitting process. Despite framing their motives that way, the Court in *Koontz* still acknowledged the benefit of exactions in that they do work to offset the public costs that accompany land development, and that *Nollan* and *Dolan* represent a policy of balancing their need with their potential for abuse.

1. THE DOCTRINE APPLIES TO PERMIT DENIALS

On the question of whether the government must approve a permit with conditions rather than have denied the permit because an applicant refused to accept the conditions for an unconstitutional conditions claim to arise, the Court said it did not matter. The Court reasoned that its holdings in other unconstitutional conditions cases “recognize that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”

That just quoted principle is how the Court reasoned that the District violated the Just Compensation Clause without taking anything,
which is an ironic result. Because the applicant believed that the District’s proposed conditions, if imposed, would require him to bear such a disproportionate burden that it would violate the Nollan and Dolan takings tests, plaintiff chose to keep the property, reject the conditions, and deal with the consequences when the District denied the permits.327 The Florida Supreme Court questioned how the Just Compensation Clause could be violated when no property was taken,328 but the Court’s majority explained the result as follows:

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.329

Insofar as the Court held that Nollan and Dolan apply to permit denials, that holding was unanimous. Justice Kagan in dissent said as follows:

I think the Court gets the first question it addresses right. The Nollan-Dolan standard applies not only when the government approves a development permit conditioned on the owner’s conveyance of a property interests (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (i.e., imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government’s condition lacks the “nexus” and “rough proportionality” to the development’s social costs that Nollan and Dolan require.330

Justice Kagan did not explain why she thought Nollan and Dolan apply to a permit denial however.

The District argued that applying Nollan and Dolan to a permit denial would wrongly extend those holdings beyond their context and revive the Agins331 “substantially advance” theory to takings law in the context of permit denials.332 Because the District denied the permit and it took no property, the District contended that the applicant should have asserted a Penn Central Transportation Company v. City of New

327. See id. at 2593 (explaining why the applicant filed suit).
329. Koontz, 133 S. Ct. at 2596 (emphasis added).
330. Id. at 2603 (Kagan, J., dissenting). According to Justice Kagan, the difference between the two types of conditions is that when the property owner rejects a proposed exaction and his application is denied, the appropriate remedy is to have the condition removed and the property owner can only seek monetary relief if available in state law.
York or a Lucas v. South Carolina Coastal Council style regulatory takings claim, or a due process or equal protection clause violation arguing that the permit denial was arbitrary and irrational. Further, the District argued that the requirement in City of Del Monte Dunes v. Del Monte Dunes at Monterey, Ltd. that there be a final deal with a required dedication on the table before Nollan and Dolan can apply was absent here since the District and the applicant were in back-and-forth negotiations that the applicant walked away from. As a policy consideration, the District stressed that reviewing the different offers in a negotiation process for compliance with Nollan and Dolan would be practically difficult; a reviewing court would have to apply the tests to every proposal in the negotiation to see if one passed the tests.

One of the Court’s two justifications for why Nollan and Dolan apply to permit denials was the practical policy argument that it would be too easy to evade Nollan and Dolan if they did not apply, and Nollan and Dolan would become a dead letter. Although probably true, that argument begs the question of whether the two situations are legally the same. For legal support, the majority argued that the Court’s unconstitutional conditions precedent justifies applying Nollan and Dolan to permit denials. Citing Perry and Memorial Hospital, the majority argued that the doctrine prohibits denials of government benefits in a way that infringes a constitutional right because the doctrine does not care whether the government “ultimately

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333. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (setting out the Court’s general balancing test for regulatory takings in which the Court examines the regulation’s economic impact on the applicant, the applicant’s reasonable investment backed expectations, and the character of the government’s act).

334. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1998) (setting out the per se takings test for when a landowner is denied “all economically beneficial uses” of his or her land) (emphasis in original).


337. Brief for Respondent, supra note 332, at 41-42.

338. At oral argument Justice Alito commented that if Nollan and Dolan did not apply to permit denial, then they would apply only to “really stupid” districts that structured their exactions as conditions subsequent to permit approval rather than as conditions precedent. Transcript of Oral Argument at 52-53, Koontz v. St. Johns River Water Mgt. Dist., 133 S.Ct. 2586 (2013) (No. 11-1447).


340. Koontz, 133 S. Ct. at 2595.
succeeds in pressuring someone into forfeiting” the right by “coercively withholding benefits from those who exercise them.”

In John Echeverria’s searing critique of the Court’s decision in Koontz, he contends that the Court’s decisions in Perry, Memorial Hospital, and its other unconstitutional conditions cases show that the Court requires a particular constitutional provision to be violated, which is different than being burdened, and that the Court’s use of the doctrine in Koontz is novel and “does not apply any version of [the] unconstitutional conditions doctrine previously recognized by the Court.” Is he correct?

Echeverria seems to be correct, but that could depend on how one views the rights in the Just Compensation Clause. Perry, discussed supra, was the case in which the college professor’s contract was revoked, assumedly because he exercised his First Amendment right to vocally criticize the college’s administrators. The Court affirmed the Fifth Circuit Court of Appeals, which reversed a summary judgment order that dismissed the professor’s claim because if the college did revoke the professor’s contract for that reason, presumably, it violated the First Amendment. Arguably, like the teacher who chose to exercise his First Amendment right and was penalized for it by the state by denying him his contract, in Koontz, the applicant chose to exercise his right to Just Compensation by rejecting proposed exactions that he believed would be takings under Nollan and Dolan, and the District penalized him for it by denying his permit. That comparison works if one can assert one’s Fifth Amendment right to just compensation before the property is taken, or if the Just Compensation Clause can be directly violated by being “burdened” without the property ever being taken.

The other case the Court cited, Memorial Hospital, discussed supra, supports the argument that an unconstitutional conditions claim can

341. Id.
342. Echeverria, supra note 339, at 20-22. Echeverria also contends that Justice Alito misrepresented Nollan and Dolan by describing them as centrally concerned with “the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue—thereby diminishing without justification the value of the property.” Id. at 28 (emphasis added) (quoting Koontz, 133 S. Ct. at 2600) (emphasis added). Echeverria forcefully argues that Justice Alito’s switches Nollan and Dolan’s focus from determining whether the government took an exacted property interest to focusing on the regulation’s effect on the underlying land being regulated. Id.
343. Perry, 408 U.S. at 594-97.
344. Id.; Sindermann v. Perry, 430 F.2d 939, 940-42, 945 (5th Cir. 1970), rev’d, 408 U.S. 593.
arise only when a right is directly violated. In *Memorial Hospital*, the Court concluded that Arizona’s year residency requirement as a condition precedent of receiving medical care penalized the constitutional right to travel and that because the state lacked a compelling government interest, the condition violated the Equal Protection Clause.345

The Court’s other First Amendment cases agree with the interpretation of *Perry* above. In *Sherbert*,346 discussed supra, the state’s denial of the Seventh Day Adventist’s unemployment benefits burdened her religious exercise, and after determining the state lacked a compelling government interest in doing so, the Court concluded it violated the First and Fourteenth Amendments, i.e., it had the effect of “prohibiting [her] free exercise” within the meaning of the First Amendment.347 Similarly, in *Thomas*,348 the state’s denial of the pacifist worker’s unemployment benefits burdened the pacifist worker’s First Amendment rights, and after determining the state lacked a compelling government interest held that it violated the First Amendment, i.e., it had the effect of “abridging [his] freedom of speech” within the meaning of the First Amendment.349

Cases discussed in other contexts also show that the Court considered the right at issue directly violated or there was another underlying direct constitutional violation. In *Frost*, the Court concluded that the state’s requirement that the foreign corporation purchase the unnecessary common-carrier insurance as a condition of being allowed to operate within the state was an unconstitutional condition, but the underlying constitutional violation was the Fourteenth Amendment’s Due Process Clause.350 In *Lefkowitz* and *Garrity* the Court considered the political party officers and the police officers’ Fifth Amendment rights against self-incrimination directly violated by the conditions of their employment that they could be fired if they refused to testify about alleged on-the-job malfeasance, because they were compelled in a

347. U.S. Const. amend I.
349. U.S. Const. amend I.
350. *Frost & Frost Trucking Co.*, v. R. R. Comm’n, 271 U.S. 583, 599 (1926). In the corporate rights context, see *Terral v. Burke Construct. Co.*, 527 U.S. 529, 530-33 (1922), discussed supra note 45, in which the Court said that the state’s requirement that foreign corporations wanting to do in-state business waive their right to diversity jurisdiction violated Article 3 Section 2 of the United States Constitution and substantive due process.
criminal case to be a witness against themselves within the meaning of the Fifth Amendment.\textsuperscript{351}

As Echeverria argues, by conflating “burdening” the Just Compensation Clause with directly violating it—or any other constitutional provision—the Court in \textit{Koontz} avoided the issue of the proposed exactions not being a direct constitutional violation, while still relying on the language of its precedent to find a “constitutionally cognizable injury.”\textsuperscript{352} Because no “private property [was] taken for public use. . .”\textsuperscript{353} by the District within the meaning of the Just Compensation Clause, and no other constitutional violation was presented, regardless of the proposed exaction’s failure to meet the nexus and rough proportionality requirements of \textit{Nollan} and \textit{Dolan}, there is no direct violation of a constitutional provision. Seemingly, the only way to explain the Court’s unanimous holding relative to the Court’s precedent is to accept that there are “mini and “micro” unconstitutional doctrines for different powers and rights, which Brooks Fudenberg mused,\textsuperscript{354} or that Court is expanding the Just Compensation Clause’s protection.

2. THE DOCTRINE APPLIES TO MONETARY EXACTIONS

Settling a question courts, lawyers, and commentators have debated for decades,\textsuperscript{355} the Court extended \textit{Nollan} and \textit{Dolan}’s protection of property dedications to money.\textsuperscript{356} In so holding, the Court necessarily implied that monetary exactions, if imposed outside of the land use permitting process, are \textit{per se} takings.\textsuperscript{357} That extends the reach of the Just Compensation Clause into a new realm.

Relying on \textit{Eastern Enterprises v. Apfel},\textsuperscript{358} the District argued that the Court had already foreclosed that possibility.\textsuperscript{359} In \textit{Eastern Enter-

\begin{itemize}
\item \textsuperscript{351} Lefkowitz v. Cunningham, 431 U.S. 801, 802-03 (1977); see Garrity v. New Jersey, 385 U.S. 493, 494, 498, 500 (1967). In \textit{Scott}, 450 F.3d at 865-75, the Ninth Circuit Court of Appeals ignored a prisoner’s waiver of his Fourth Amendment rights because they were an unconstitutional condition, but only found a cognizable constitutional violation because the underlying search violated the Fourth Amendment’s reasonableness standard.
\item \textsuperscript{352} Echeverria, supra note 339, at 20; \textit{Koontz}, 133 S. Ct. at 2596.
\item \textsuperscript{353} U.S. CONST. amend VI.
\item \textsuperscript{354} Fudenberg, supra note 24, at 414-15 (footnote omitted).
\item \textsuperscript{356} \textit{Koontz}, 133 S. Ct. at 2603.
\item \textsuperscript{357} \textit{Cf. id. at} 2598-99 (acknowledging \textit{Nollan} and \textit{Dolan} held as such); \textit{Lingle,} 544 U.S. at 547 (same).
\item \textsuperscript{358} E. Enters. v. Apfel, 524 U.S. 498 (1998).
\item \textsuperscript{359} Brief for Respondent, supra note 332, at 46-49.
\end{itemize}
prises, four justices concluded that a law that retroactively required a coal company to pay for lifetime health insurance costs of retired workers was unconstitutional because it violated the Just Compensation Clause. Justice Kennedy was the swing vote in agreeing that the law was unconstitutional, but in his opinion, because it violated substantive due process. According to Justice Kennedy, the Just Compensation Clause did not apply because the law did not affect a particular property interest like a lien or an interest in intangible property like intellectual property, “or even a bank account or accrued interest.” Because the statute was indifferent regarding how the company had to pay the benefits, Justice Kennedy reasoned that it simply imposed a general obligation to pay money similar to other laws not recognized as takings.

The four dissenting justices thought the law was constitutional and that the Just Compensation Clause was inapplicable. Because Justice Kennedy’s concurrence was the dispositive opinion, some courts and commentators interpret Justice Kennedy’s concurrence combined with the four justices’ dissenting opinion as a “second majority holding” that payments of money are not property for purposes of Fifth Amendment takings claims, which is what the District argued in Koontz. However, other commentators questioned the assumption that that principle would necessarily apply in the land use permitting context because of the underlying property interest at issue in the transaction.

The latter commentators proved right when the Court rejected that argument and held monetary exactions must satisfy Nollan and Dolan just like exactions of property. To begin, the Court again relied on a

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360. Chief Justice Rehnquist, Justice O’Connor, Justice Scalia, and Justice Thomas.
362. E. Enters., 524 U.S. at 504-05.
363. Id. at 540, 550.
364. Id. at 540.
365. Id.
366. Justice Breyer, Justice Stevens, Justice Souter, and Justice Ginsburg.
367. E. Enters., 524 U.S. at 554, 567-68 (Breyer, J., dissenting) (arguing that the Takings Clause was not triggered because “an ordinary liability to pay money . . . to third parties” was at issue rather than a physical or intellectual property interest).
368. Siegel, supra note 224, at 592.
369. Koontz, 133 S. Ct. at 2599.
370. Reznick, supra note 4, at 755; see also J. David Breemer, The Evolution of the “Essential Nexus”: How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here, 59 WASH. & LEE L. REV. 373, 390 (2002) (noting the “growing recognition” that Nollan’s and Dolan’s logic apply to monetary exactions).
371. Koontz, 133 S. Ct. at 2603.
practical policy argument that a contrary rule would allow local governments to sidestep *Nollan* and *Dolan*. The Court acknowledged that its holding was based, in part, on that policy rationale. Then, the Court distinguished *Eastern Enterprises*. The Court tied the monetary exaction to the applicant’s property by reasoning that the monetary exaction burdened the applicant’s specific 14.9-acre parcel because the District imposed the exaction through the land use permitting process, while the monetary exaction in *Eastern Enterprises* was completely disconnected from any specific property. The Court analogized the exaction’s relationship to the specific property interest to the appropriation of a lien on a discrete piece of property, which the Court has held is a taking. The Court did not foresee problems in, or elaborate upon, distinguishing between such monetary land use exactions and property taxes or other user fees, which are not takings.

The dissent disagreed that the District’s order to pay money was tied to a specific piece of property and thought that *Eastern Enterprises* foreclosed finding a taking here.

Because the government is merely imposing a ‘general liability to pay money’—and therefore is ‘indifferent as to how the regulated entity elects to comply or the property it uses to do so,’ the order to repair wetlands, viewed independent of the permitting process, does not constitute a taking. And that means the order does not trigger the *Nollan-Dolan* test, because it does not force [the applicant] to relinquish a constitutional right.

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372. See id. at 2599 (commenting that because only one option that the local government gives an applicant must pass the *Nollan* and *Dolan* tests, the local government could always rely on an in-lieu-of fee).

373. See id. (“For that [policy] reason and those [reasons] that follow, we reject respondent’s argument and hold that so-called “monetary exactions” must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”).

374. Id. at 2599-600.

375. See id.

376. Id. at 2601 (citing Armstrong v. United States, 364 U.S. 40 (1960)). Echeverria criticizes the majority for shifting the focus from the property interest exacted to the underlying land to be developed, which turns the *Nollan/Dolan* analysis upside down and allows the Court to use the Just Compensation Clause where it otherwise would not apply. See Echeverria, *supra* note 339, at 25.

377. *Koontz*, 133 S. Ct. at 2600-01 (citing *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 243 n.2 (2003)). The majority asserted, “We need not decided at precisely what point a land-use permitting charge denominated by the government as a ‘tax’ becomes ‘so arbitrary . . . that it was not the exertion of taxation but a confiscation of property.’” Id. at 2602 (quoting Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24-25 (1916)).

378. Id. at 2606 (Kagan, J., dissenting) (quoting *E. Enters.*, 524 U.S. at 555 (Breyer, J., dissenting)).

379. Id. (Kagan, J., dissenting) (quoting *E. Enters.*, 524 U.S at 540 (Kennedy, J., concurring)).

380. Id. at 2606 (Kagan, J., dissenting).
Further, the dissent rejected the majority’s policy rationale that local governments would rig their permitting systems to evade *Nollan* and *Dolan* by offering a monetary exaction, reviewed less strictly, that the government would then use to purchase the property interest that the government was prohibited from exacting under the stricter *Nollan* and *Dolan* standards.\(^\text{381}\) If there was evidence of that abuse—of which it noted no one presented any—then the dissent said courts could impose *Nollan* and *Dolan*.\(^\text{382}\) However, according to the dissent, that unjustified fear and the majority’s “yen for a prophylactic rule” did not justify extending *Nollan* and *Dolan* over all monetary exactions when the Court’s *Penn Central* takings framework, the Due Process Clause, and, often, state law all provide a ready remedy for property owners.\(^\text{383}\)

The dissent predicted the majority’s holding would cause “practical harm” by failing to provide any guidance for distinguishing its application between taxes and fees and that, as such, it “threatens the heartland of local land-use regulation and service delivery . . . .”\(^\text{384}\) According to the dissenters, “[t]he Federal Constitution . . . will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly.”\(^\text{385}\) The majority disagreed that there would be much change and noted that some states already apply *Nollan* and *Dolan*, or similar standards, to monetary exactions.\(^\text{386}\) We will see who is right.

3. THE REMEDY

The disagreement between the majority and the dissent in *Koontz* demonstrates that applying the unconstitutional conditions doctrine to the Just Compensation Clause, especially with monetary exactions, becomes a tricky task.\(^\text{387}\) For instance, what is the remedy when the

\(^{381}\) See id. at 2608 (Kagan, J., dissenting).

\(^{382}\) Id.

\(^{383}\) Id. at 2608-09.

\(^{384}\) Id. at 2607, 2609.

\(^{385}\) Id.


\(^{387}\) Courts already criticize the *Nollan* and *Dolan* tests as abstract and difficult to apply, e.g., Homebuilders Ass’n. of Metro v. City of Portland, 62 P.3d 404, 408 (Or. Ct. App. 2003) (calling the rough proportionality “test vague, abstract, and elastic”), and adding monetary exactions to the equation does not make judges’ jobs easier. Cf.
Just Compensation Clause is burdened but not triggered? Only when there is an actual taking must just compensation be paid under the Just Compensation Clause. When there is no taking, there is no general federal remedy; so the landowner must look to whatever law the landowner’s cause of action is based on. In Koontz, that was Florida state law and, as such, the Court left the remedy issue for the Florida courts to decide on remand. Justice Kagan clarified that on top of whatever state law remedy is or is not available, courts can still require a local government to remove conditions from a permit denial that violate Nollan and Dolan. Interestingly, the majority did not foreclose the possibility that there could be a federal remedy for a proposed exaction that does not pass Nollan and Dolan’s tests; rather, the majority did not address that issue because the applicant brought the lawsuit pursuant to state law.

VIII. Substantive Due Process Through the Just Compensation Clause

At first glance, the Court’s use of the doctrine to review exactions in the land use permitting process is reminiscent of the other settings in which the Court used the doctrine to police transactions between people, or corporations, and the government when the Court worries about the government abusing its power. But looking closer, the Court’s application of the doctrine in the land use context is unique. In other contexts in which the Court applies the doctrine, there is some direct constitutional violation—either an independent constitutional violation like the Due Process or Equal Protection Clauses, or the Court treats the condition equivalent to a direct constitutional violation. Because the Court applies the doctrine to proposed exactions to find a cognizable violation of the Just Compensation Clause before a local government actually takes a landowner’s property and there is no other underlying constitutional violation, the Court’s use of the doctrine in this setting is special.

E. Enters., 524 U.S. at 556 (Breyer, J., dissenting) (noting that applying the Just Compensation Clause to monetary exactions “bristles with difficulties”).

388. Koontz, 133 S. Ct. at 2596.
389. Id.
390. Id. at 2603 (Kagan, J., dissenting).
391. Id. at 2597.
392. See generally supra Parts II–III, V.A.
393. See supra Part VI.
Through this unique use of the doctrine, the Court engages in a heightened substantive due process style of judicial review under the guise of takings jurisprudence.\textsuperscript{394} The Court stated in \textit{Lingle} that, together, \textit{Nollan} and \textit{Dolan} are stand-alone takings tests despite their connection to \textit{Agins}, which the Court simultaneously redefined as a purely substantive due process case, not a takings case;\textsuperscript{395} but that statement is unsatisfying in understanding \textit{Nollan}, \textit{Dolan}, and now \textit{Koontz} as distinct from substantive due process. The Court’s reasoning in \textit{Lingle} that \textit{Nollan} and \textit{Dolan} apply to exactions that would be \textit{per se} takings outside of the permitting process, which, after \textit{Koontz} extended \textit{Nollan} and \textit{Dolan}, should awkwardly mean that an exaction of money outside of the permitting process is also akin to a \textit{per se} taking, squarely clashes with \textit{Eastern Enterprises}, in which a majority of the Court said a freestanding requirement to pay money is not a taking.\textsuperscript{396} That conflict evidences the Court’s forcing what is due process review into its takings jurisprudence.\textsuperscript{397} The need to address that conflict between the Court’s explanation of \textit{Nollan} and \textit{Dolan} in \textit{Lingle} and the Court’s decision in \textit{Eastern Enterprises} called, at least, for a concurring opinion from Justice Kennedy, but he was nowhere to be found.

Regardless of what the Court said in \textit{Lingle} about \textit{Nollan} and \textit{Dolan} being “worlds apart” from a traditional substantive due process analysis, in \textit{Nollan}, \textit{Dolan}, and \textit{Koontz}, the theme of the applicants’ arguments sounds inherently like the type of argument at home in a substantive due process framework. In the trilogy of cases, in substance, the applicants argued that the exactions were arbitrary in relation to the governments’ asserted basis for imposing them, or arbitrary in their size, and therefore not supported by the local government’s authority to regulate land use in furtherance of the community’s general health,

\textsuperscript{394} Using substantive due process to review economic regulation is generally disfavored unless a fundamental right is involved. Stuart M. Weiner, Comment, \textit{Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions}, 69 Temp. L.R. 1467, 1471 (1996) (providing Moore v. City of E. Cleveland, 431 U.S. 494, 498-500 (1977), about family privacy, as an example of when the Court will use substantive due process in land use cases involving a fundamental right).

\textsuperscript{395} See supra notes 296–99 and accompanying text.

\textsuperscript{396} See supra notes 297, 359–68 and accompanying text. Echeverria, supra note 339, at 29, identifies \textit{Koontz}’s conflict with \textit{Eastern Enterprises} in that regard, and notes that the majority does not attempt to address it.

\textsuperscript{397} Echeverria, supra note 339, at 24 (“The Court in \textit{Koontz} has committed the same category mistake the Court acknowledged and corrected in \textit{Lingle}: treating as a takings issue a claim that logically does not fit in takings doctrine but that naturally fits under due process instead.”).
safety, and welfare. 398 Although the general criticism of using substantive due process to second guess legislative decisions is applicable to using the doctrine in Nollan-, Dolan-, and Koontz-style cases in that, arguably, it provides judges with too much discretion to act as super legislatures making value judgments, 399 perhaps in cases where the government is singling someone out to regulate individually on a discretionary basis—like in the adjudicative setting that those three cases arose in—there is more risk for abuse and heightened review is justified.400 Such exactions will always receive judicial review in some form, but the Court’s choice to impose a stricter standard of review in this context gives courts more discretion to substitute their judgment for that of the local governments than courts had in the past. This is a policy choice.

Important for landowners using the doctrine to get a judge to scrutinize an exaction, opposed to traditional due process review in which a court will review the government’s action for a rational basis and put the burden on the challenger to prove the government abused its power,401 Nollan, Dolan, and Koontz start with a suspicion of the

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398. See Brief for Appellants at 17, 25-26, Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (No. 86-133), 1986 WL 720589 (arguing that the government’s exaction is unrelated to the negative externalities of the applicant’s development or anything the applicant will gain, and that it goes too far); Brief for Petitioner at 19, Dolan v. City of Tigard, 512 U.S. 374 (1994) (No. 93-518), 1994 WL 249537 (arguing that the government’s exaction “violates basic principles of fairness” because it imposes burdens on the applicant disproportionate to the applicant’s development, which are burdens that should be borne by the public as a whole); Brief for Petitioner at 44, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447), 2012 WL 5940280 (arguing that the government’s exaction was unrelated to the effects of the applicant’s development and that rather than using legitimate land use planning tools, the government was extorting the applicant).

399. See Lingle, 544 U.S. at 544 (criticizing the Agins substantive due process test on the grounds that it is “untenable as a takings test” and that it would allow and “often require courts to substitute their predictive judgments for those of elected legislatures and expert agencies.”); cf. Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, Comment, 90 YALE L. J. 1063, 1086 (1983) (opining that one of the problems of substantive due process review in Lochner was that the Court relied on its own normative idea of liberty, which may not have squared with a majority of people’s idea of liberty at that time).

400. Cf. Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (en banc) (“One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system. When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary conditions as a condition of development.”).

401. See Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926) (placing the burden on the plaintiff with a substantive due process claim to prove that the government acted arbitrarily and unreasonably, the regulation “having no substantial relation to the public health, safety, morals, or general welfare”).
government’s action by placing the burden on the government to justify both the exaction relative to its basis for imposing the exaction, and the size of the exaction. ④⁰² This review has considerably more bite than the traditional rational basis review. Similar to the Court’s normative decision-making in the First Amendment unconstitutional conditions context in which the Court labeled certain laws, but not others, as coercive, ④⁰³ in the land use permitting context, by ascribing an improper government motive or an applicant’s lack of power to take on the local government, with the aid of crafty attorneys, courts can use the doctrine to come to any desired result. Because this review can occur before the government actually takes property, this is substantive due process through the Just Compensation Clause.

IX. The Doctrine’s Current Formulation for Land Use Exactions

What does the doctrine applied to the Just Compensation Clause and exactions look like after Koontz? A public body cannot attach to a permit approval an exaction that “leverages its legitimate interests in mitigation to” coerce out of an applicant an exaction that lacks either an essential nexus to the government’s asserted justification for regulating, or rough proportionality to the external effects of the development. ④⁰⁴ Accordingly, there has to be some sort of “concrete” or “specific” demand before a court will take a closer look at the proposed exaction because Del Monte Dunes says that a pure “denial of development” does not lead to an unconstitutional conditions claim. ④⁰⁵ Koontz provides no help with that.

In Koontz, the District proposed two alternative mitigation plans, mentioned above, one with off-site mitigation work and one without it, along with the statement that the District would “also favorably consider” other “equivalent” off-site mitigation projects that the applicant

④⁰². See Dolan, 512 U.S. at 395 (requiring the local government to put forth evidence supporting its proposed exaction); Mulvaney, supra note 208, at 278 (describing the large burden that Nollan and Dolan put on local governments to justify exactions).

④⁰³. See supra Parts V.A and VII.

④⁰⁴. Cf. Nollan, 483 U.S. at 836 (agreeing with the government’s argument that a permit condition on development is not a taking if it “serves the same legitimate police-power purpose as a refusal to issue the permit . . . ,” which is the essential nexus test); Dolan, 512 U.S. at 391 (explaining the rough proportionality test); Koontz, 133 S.Ct. at 2595 (explaining how the rules in Nollan and Dolan are meant to make landowners “internalize the negative externalities of their conduct . . . “).

proposed to the District.\footnote{406} The Court declined to decide whether that was “too indefinite” for purposes of triggering an unconstitutional conditions claim under \textit{Nollan} and \textit{Dolan} because the Florida Supreme Court did not rule on that issue and, instead, relied on the Florida Court of Appeals’ treatment of the District’s behavior as a sufficient demand.\footnote{407} After \textit{Koontz}, that issue remains to be teased out at the state level, which is important because it is problematic if local governments can get into trouble by contemplating, rather than imposing, a disproportionate exaction. The Court’s failure to address that issue in \textit{Koontz} is one of the most troubling parts of the decision because it leaves much uncertainty for local governments and landowners as to where that line is.

Once sued by an applicant opposing a proposed exaction with the doctrine of unconstitutional conditions, the local government has the burden of overcoming the presumption that it is extorting the applicant and must articulate an essential nexus to the governments’ would-be basis for denying the development and show some sort of individualized determination that the exaction is roughly proportional to the negative externalities of the proposed development. Although in \textit{Nollan}, \textit{Dolan}, and \textit{Koontz} the exactions were all imposed in an adjudicative proceeding, the Court has not said the rules in those cases apply equally to exactions imposed legislatively.\footnote{408} Local governments will argue for courts to draw the adjudicative-legislative distinction so that legislatively imposed exactions receive judicial deference like run-of-the-mill zoning cases, in which the applicant has the burden to prove the government action is not fairly debatably in furtherance of the community’s general health, safety, or welfare.\footnote{409} The Court already rejected certiorari of a case presenting that question,\footnote{410} so lower courts and the states are left to figure it out themselves.

\footnote{406. \textit{Koontz}, 133 S. Ct. at 2593 (internal quotation marks and citation omitted).}
\footnote{407. \textit{Id.} at 2598 (citing \textit{Koontz}, 77 So.3d 1220, 1224 (2011), \textit{rev’d}, 133 S. Ct. 2586 (2013)).}
\footnote{408. For arguments that adjudicative and legislative exactions should receive heightened review, see \textit{Parking Ass’n of Georgia v. City of Atlanta}, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of certiorari) (“A city council can take property just as well as a planning commission can.”); \textit{Breemer}, supra note 370, at 401 (“There is as little to support a lower level of scrutiny for exactions levied pursuant to legislative acts as there is to justify an exception from essential nexus review for monetary exactions.”)).}
\footnote{410. \textit{Parking Ass’n of Ga.}, 515 U.S. at 1116 (rejecting certiorari).}
A. Potential Agency Responses

In states making the adjudicative-legislative distinction, local governments may adopt policies that calculate impact fees based on a legislative formula that takes away discretion that could be interpreted—or misinterpreted—as extortion. However, that would not be applicable to physical dedications, which are still a useful planning tool necessary to offset certain negative externalities of new development. Perhaps the haziness of determining exactly when a good-faith negotiation turns into extortion will cause the city and developer’s roles to switch and the developer will propose exactions to the local government. The majority of the Florida Court of Appeals, the decision with which the Court ended up agreeing, considered that result in its discussion of the unfortunate “uncertainty and unpredictability” of the doctrine.\(^{411}\)

It is hard to imagine that a landowner could invoke the doctrine of unconstitutional conditions and claim a taking if the landowner, and not the government, initiates the bargaining process and makes all of the offers. This role reversal accomplishes little, but seems a possible outcome given the uncertainty inherent in the doctrine of unconstitutional conditions to land use/development decisions rather than more traditional takings jurisprudence.\(^{412}\)

Unfortunately, that prediction from 2009 is still valid today after the Court’s opinion purportedly settling the issues on appeal.

Likely, to get through the permitting process quickly, the applicant—who probably knows the site better than anyone else—will address potential mitigation measures in its development application. Anything included in the application should be deemed conceded by the applicant, and a baseline should be established. Then, the local government may contend that additional mitigation measures are necessary to offset the development’s externalities; but in doing so the local government risks the applicant seeking judicial review of the exactions in court. The first judicial review will often be in state court.

Many states provide quicker—and less expensive—avenues for applicants to receive judicial review of exactions than federal litigation.\(^{413}\) In California, Cal. Gov. Code § 66005 requires exactions “not [to] exceed the estimated reasonable cost of providing the service for which the . . . exaction is imposed”\(^{411}\); and Cal. Gov. Code § 66001 puts additional requirements on California’s local governments to justify

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\(^{412}\) Id. at 15.

monetary exactions. In Oregon, ORS 197.796(1)-(2) allows an applicant to accept a condition, then challenge the condition at the Land Use Board of Appeals,\textsuperscript{414} or, if pleading damages, in circuit court.

If an applicant is unsuccessful in using state law to challenge the exaction—if properly preserved—it can still do so in federal court, arguing that the local government’s counteroffer is an unconstitutional condition burdening the applicant’s Just Compensation Clause rights. In court, local governments have the burden of justifying the exaction.\textsuperscript{415} In evaluating whether a particular impact fee is too high for instance, the developer and the local government will likely call in dueling expert witnesses to present their findings and analysis, and attempt to persuade the court as to which expert is correct.\textsuperscript{416} A cost-benefit analysis may dissuade some developers from challenging an exaction they think is disproportionate in federal court. Similarly, and perhaps what may be the most significant result of Koontz, risk-averse local governments may be overly conservative in their mitigation offers to avoid litigation.

X. Conclusion

Since the Court invented the doctrine of unconstitutional conditions in the 1800s, the Court has inconsistently applied it to different rights and different benefit in various contexts; no unifying rationale or theme is articulable from the Court’s different applications of the doctrine.\textsuperscript{417} The fight in most cases is over what level of judicial review to apply, something akin to strict scrutiny, or something like rational basis review. While a bloc of Justices had a majority in the Court to use the doctrine to strictly scrutinize laws they thought infringed peoples’ freedoms of speech, religion, or the right to travel in the 1950s, 1960s, and 1970s,\textsuperscript{418} beginning in the 1980s through today, a new bloc of Justices have a majority of the Court to using the doctrine to more closely scrutinize local government land use planning decisions they

\textsuperscript{414} The Land Use Board of Appeals is an administrative board created by statute to efficiently and consistently resolve land use disputes in Oregon. \textsc{Land Use Board of Appeals}, http://www.oregon.gov/LUBA/Pages/about_us.aspx (last visited May 20, 2014).

\textsuperscript{415} Cf. Dolan, 512 U.S. at 390 (describing what type of evidence the local government must produce to meets its burden of production). Mulvaney, supra note 208, at 288 (saying that the government has the burden of showing the condition complies with Nollan and Dolan).

\textsuperscript{416} Echeverria, supra note 339, at 36.

\textsuperscript{417} See generally supra Parts I.A–V.C.

\textsuperscript{418} See supra Parts IV.A and V.C.
see as infringing property rights. The result is a more powerful Just Compensation Clause that property owners can wield—or implicitly threaten to wield—as a club against local governments’ exaction proposals in the land use permitting process.

The Court’s attempt in *Lingle* to reclassify *Nollan* and *Dolan* as takings cases that are entirely distinct from *Agins* and substantive due process is unpersuasive—by clasping on to the Just Compensation Clause through the unconstitutional conditions doctrine, the Court engages in the same type of substantive review. Going full steam ahead after *Nollan* and *Dolan*, *Koontz* extends the stricter scrutiny that the Court applies to exactions of property through the Just Compensation Clause to proposed exactions and says that money is property in the permitting context; that pulls more land use planning decisions that are not traditional takings into a stricter, substantive judicial review and away from the historic deference afforded land use planners. Again, this is a policy choice. In land use law, the doctrine of unconstitutional conditions is the age-old substantive due process game with a different name.
Mobility and Community in Urban Policy: An Essay on Great American City by Robert J. Sampson

Kenneth A. Stahl*

Perhaps one of the most pressing issues for city governments today is whether they best serve their constituents by focusing on people or on places. On one side are those who believe that in a globalized world of porous borders and mobile citizens, individuals have decreasing attachments to particular places and make choices largely free of those attachments.1 As such, cities can lure footloose residents with high-quality services and amenities,2 alleviate poverty by issuing housing vouchers to enable the urban poor to escape from devastated ghettos,3 and deter criminality with crackdowns that emphasize the

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1. See, e.g., THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005) (arguing that modern technological advancements such as the Internet, mobile phones, laptops, and the increasing ease of air travel have diminished distance and significance of place); Edward J. Blakely, Competitive Advantage for the 21st-Century City: Can a Place-Based Approach to Economic Development Survive in a Cyberspace Age?, 67 AM. PLAN. ASS’N J. 133, 137 (2001) (arguing that in modern global, digital economy, workers will be mobile “perma-temps” who migrate to environments they find most attractive rather than where employment opportunities are, “because the work can go anywhere”).

2. See, e.g., EDWARD GLAESER, TRIUMPH OF THE CITY (2011) (arguing that resurgence of cities beginning in the 1990s is attributable to successful efforts to lure mobile residents and capital); JOEL KOTKIN, THE CITY: A GLOBAL HISTORY (2005) (arguing that cities can lure middle-class residents with quality schools); RICHARD L. FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE (2002) (arguing that cities can prosper by taking steps to make city attractive to mobile “creative class”).

draconian consequences of poor choices.4 On the other side of the di-
vide are those who believe that individual choices are bound up with
and constrained by the local milieus in which individuals are embed-
ded.5 Advocates of this approach believe that urban policy must be di-
rected at strengthening the communities that shape people’s lives rather
than treating community as a disposable consumer good, and they
favor “place-based” policies such as rent control and condominium-
conversion legislation that enable communities to resist gentrification,6
efforts to increase economic development within impoverished neigh-
borhoods,7 and a “community” approach to law enforcement in which
police work with local leaders to help build the community’s internal
social norms rather than engaging in mass arrests.8

The debate about place-based policies has often occurred at a high the-
etorical level in which warring romantic ideals are invoked—those who
advocate for mobility and individual choice draw upon the Whitman-
esque rhetoric of the noble wanderer and the longstanding American
dream of upward mobility,9 whereas those who favor place-based poli-
cies rely on the shopworn notion of “community.”10 In other words,
the debate has been badly in need of some empirical grounding. Fortu-
nately, a much anticipated new book by the pre-eminent Harvard sociol-
ogist Robert Sampson, entitled Great American City, seeks to provide

REV. 1193 (1985) (arguing that criminals can be thought of as rational economic actors
who respond to incentives in the form of criminal punishment).
5. See, e.g., Karen Chapple, Foresight or Farsight? It’s the Regional Economy,
Stupid, 67 AM. PLAN. ASS’N J. 142, 143 (disputing Blakely’s characterization of mod-
ern workers as “perma-temps,” claiming that “the spatial embeddedness of networks
makes clear that loyalties to place are intact and growing”).
6. See, e.g., WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVE-
MENT 93-95 (2001).
7. See id. at 69-76.
8. See, e.g., Tracey L. Meares & Dan Kahan, The Wages of Antiquated Proce-
Dan M. Kahan & Tracey L. Meares, Foreword: The Coming Crisis of Criminal Pro-
cedure, 86 GEO. L.J. 1153, 1160-61 (1998); Tracey L. Meares & Dan M. Kahan, Law
and (Norms of) Order in the Inner City, 32 LAW & SOC’Y REV. 805 (1998).
community-based policing strategy by invoking “the right to move ’to whatsoever
place one’s own inclination may direct,’” (quoting 1 WILLIAM BLACKSTONE, COMMENT-
ING ON THE LAWS OF ENGLAND 130 (1765)); Lemann, supra note 3 (stating that poor
neighborhoods “tend to be home to people who plan to move out as soon as they
make a little money”).
10. See, e.g., SIMON, supra note 6, at 41-68 (on notion of community undergirding
community economic development movement); Kahan & Meares, Foreward, supra
note 8, at 1168 (speaking of “restoring community life”).
that grounding.11 The book is a rigorously empirical examination of the effects of neighborhoods on people’s lives. Sampson deftly synthesizes a massive quantity of data, including thousands of interviews, firsthand observations, behavioral experiments, a treasure trove of newspaper archives and more into a series of highly nuanced findings about the relationship between people and neighborhoods.12 Over the course of the book, Sampson thoroughly debunks the notion of individual mobility and persuasively proves that individuals are ineluctable products of their local environments. He marshals an impressive data set to demonstrate that individual life chances are profoundly affected by the character of the neighborhoods in which people live. Sampson also shows that people cannot improve their fortunes simply by fleeing bad neighborhoods for good ones because, in an important sense, “neighborhoods choose people” rather than the reverse.13 In a very brief conclusion, Sampson argues that place-based policies that seek to build community are far more likely to be successful than policies predicated on an assumption of individual mobility and choice divorced from the context of community (an assumption that he calls “methodological individualism”).14

Given its stature as perhaps the most ambitious empirical study of urban life in a generation, and the fact that it fills an important empirical gap in the debate over place-based policies, Great American City is sure to have an enormous impact on urban policy. Nevertheless, Sampson devotes relatively little attention to the policy implications of his work, and thus, this essay attempts to elaborate upon what I see as the work’s major policy implications. Principally, Sampson’s findings can be read as implying a broad challenge to the predominant public choice model of local government, which assumes urban residents are atomized, mobile individuals who make locational choices regardless of social context. I argue that Sampson raises important questions about the wisdom of policymakers’ longstanding reliance on the public choice model, but that the model may nevertheless be sufficiently robust to withstand the challenge. Additionally, while Sampson claims his study supports place-based policies, in some respects his findings actually undercut the viability of such policies. Specifically, Sampson demonstrates that one of the greatest challenges

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12. Id. at 71-93 (describing methodology of the project).
13. Id. at 327.
confronting disadvantaged neighborhoods is the stigma of crime and poverty, but there is reason to believe that some of the place-based policies Sampson champions may further stigmatize such neighborhoods. Finally, I argue that, in light of Sampson’s findings, the most promising means of aiding disadvantaged communities may be providing people with inducements to stay in such communities, an ironic contrast to urban policies that have long induced people to leave troubled neighborhoods. Though this essay is designed to illuminate areas that Sampson may have neglected, it concludes that *Great American City* is worthy of the highest praise, for it clarifies a wide range of questions for policymakers and opens broad vistas for future research.

The essay proceeds in three parts. The first part is a summary of *Great American City*. Part II explores the implications of Sampson’s critique of methodological individualism. Part III then critically examines Sampson’s support for place-based policies, and briefly sketches my own policy proposals stemming from Sampson’s research.

I. Great American City

A. The Theory of Collective Efficacy

*Great American City* is the culmination of a decades-long research project regarding neighborhood life in Chicago, known as the Project on Human Development in Chicago Neighborhoods (PHDCN).\(^{15}\) Using a wide variety of methodological tools, PHDCN aspired to comprehensively detail the impacts of neighborhoods on individuals, and over the course of the research project PHDCN accrued a huge trove of data about Chicago neighborhoods.\(^{16}\) Based on Sampson’s analysis of this enormous data set, *Great American City*’s central thesis is that phenomena such as crime rates, poverty, health, even patterns of Internet usage within particular neighborhoods are strongly influenced by the degree to which neighborhood residents are willing to trust and help each other (a set of characteristics Sampson refers to as “collective efficacy”).\(^{17}\) The relationship between collective efficacy and these phenomena is so strong, Sampson finds, that a neighborhood’s level of collective efficacy at a certain date can actually “predict” crime rates at a future date.\(^{18}\)

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15. Sampson, supra note 11, at viii.
16. Id.
17. A synopsis of the main argument is contained in Chapter 7, “The Theory of Collective Efficacy.” See id. at 121-48; on levels of internet usage, see id. at 18-19; on how collective efficacy was measured, see id. at 156.
18. See id. at 173-77.
Sampson traces the presence or absence of collective efficacy to several neighborhood-specific factors, most notably the degree of residential stability, the organizational resources within the neighborhood, and the neighborhood’s level of concentrated disadvantage (a term denoting a tangle of factors such as poverty, unemployment, crime, and rates of incarceration). He also finds, however, that collective efficacy exerts an impact on neighborhoods that is independent of these other factors.19 Finally, Sampson demonstrates that a particular neighborhood’s degree of collective efficacy is stable over time notwithstanding population turnover, hence the “enduring neighborhood effect” referenced in the book’s subtitle.20

B. Mobility and Neighborhood Selection

For Sampson, the relationship between collective efficacy and outcomes such as crime rates establishes that individual choices are heavily influenced (albeit not wholly determined) by the local environment.21 Sampson makes this case most extensively in anticipating criticism that his findings are subject to a “selection bias”—that is, because individuals choose to locate in particular neighborhoods, the neighborhood context that appears to influence individual choices is itself the result of individual choices of where to locate.22 Sampson finds, however, that the choice of where to locate is itself highly influenced by neighborhood characteristics. After analyzing a huge data set of both movers and “stayers” within Chicago, Sampson finds that mobility—the choice of whether and where to move—is strongly correlated with the characteristics of the origin neighborhood, and only weakly correlated with individual characteristics such as income or education.23 People tend to move to neighborhoods that are similar to the neighborhoods they came from—in race, socio-economic class, shared friendship/kin networks, social perceptions, and geographic distance.24 Perhaps the starkest example of this tendency is that residents of black neighborhoods in Chicago, regardless of socio-economic status, virtually always move—if at all—to other primarily black neighborhoods within the city and almost never move out of the city or to white, Latino, or “mixed” neighborhoods within the city.25 Residents of white neighborhoods, again

19. See id. at 157-59, 199.
20. Id. at 168-73.
21. Id. at 276-78.
22. On “selection bias,” see id. at 287-90.
23. Id. at 300-02.
25. See id. at 302-08.
irrespective of socio-economic status, virtually always move to other white neighborhoods either within or outside Chicago.26

Sampson also finds that the perceived characteristics of the origin neighborhood account for most residential moves.27 The single greatest factor in predicting moves for all races was collective perceptions of disorder in the origin neighborhood (as measured by resident answers to survey questions about graffiti, litter, public drinking, drug dealing and so on).28 Whites and Latinos (but not blacks) were also highly motivated to move whenever there was an increase in the population of black residents within the neighborhood, and this type of racial change was the single greatest factor in explaining moves from Chicago to the suburbs.29

The upshot of these findings, according to Sampson, is that individual choices regarding neighborhood residence are inevitably constrained by the local context. Specifically, whether and where people move to is a function of where they come from. Whether people move at all is determined by perceptions about the origin neighborhood, and where people move is determined by the destination neighborhood’s degree of similarity—spatially and socially—to the neighborhood of origin. Thus, most moves do not result in upward social mobility or increased integration.30

Equally important, individual-level socioeconomic factors such as income and education have only a weak relationship with mobility.31

C. Moving to Opportunity

Sampson frames his findings as a corrective to what he sees as the “methodological individualism” underlying much urban policy, an approach that treats urban residents as isolated individuals who make choices regardless of the geographic context.32 Specifically, Sampson

26. See id. at 287-308. The graph on page 305 and accompanying text are particularly illuminating.

27. Id.

28. See id. at 136 (on how disorder was measured); id. at 298-302 (on why people move).

29. See id. at 296-302.

30. See id. at 300-302 (finding that upward mobility, as defined by movement from lower-income to higher income neighborhoods, is rare); id. at 296-98 (blacks in Chicago live almost exclusively in all-black neighborhoods, and when they move to “integrated” neighborhoods, integration proves temporary because whites rapidly flee the area).

31. See id. at 299-300; 306-308.

32. See id. at 63-64 (explaining that “the role of context” is the “main failure of methodological individualism”); id. at 355-385 (rejecting “methodological individualism” and stressing importance of context).
applies his insights to critique one of the most ambitious governmental efforts ever undertaken to address urban poverty, the controversial “Moving to Opportunity” (MTO) program.33 MTO was, in Sampson’s words, “an experiment designed to lift poor families out of concentrated poverty and into the American dream.”34 The federal government provided housing vouchers to families from high-poverty areas in several major cities, redeemable in low-poverty neighborhoods.35 Inspired by the works of William Julius Wilson, an important predecessor of Sampson’s who, like Sampson, purported to document the effects of neighborhoods on individuals, MTO was a test of the idea that neighborhoods have a determinative impact on individual lives.36 The logic of MTO was that if neighborhoods really did matter, then moving individuals from a bad neighborhood to a good one would markedly improve their lives.37

MTO proved to be a disappointment, however. In some cases modest improvements were reported, but in many others participating children (especially boys) were adversely affected by moving.38 Furthermore, critics charged that migrating inner-city residents brought their social problems with them to new neighborhoods, resulting in the dispersion of crime throughout the city.39 For the critics, the failure of MTO demonstrated that the whole idea of neighborhood effects and collective efficacy was a fallacy, because changing neighborhoods did not improve individual life chances.40

Sampson argues that the critics drew the wrong lesson from MTO’s failures. The problem with MTO, according to Sampson, was that its focus was rigidly individualistic and insufficiently sensitive to neighborhood context.41 As Sampson demonstrates, most MTO participants ended up either not using the voucher at all, or using it to move to a slightly more affluent neighborhood close to the origin neighborhood that was still racially segregated with high levels of concentrated disadvantage.42 This result is consistent with Sampson’s broader finding

33. Id. at 283-86.
34. Id. at 261.
35. Id.
36. See id. at 42-43, 265.
37. See id. at 261-62.
38. See id.
39. See id. at 261.
40. See id.
41. See id. at 283-86, 380-82.
42. See id. at 268-69, 278 (stating that the majority of families who were offered the voucher did not take it, and the vast majority of those who did remained
that individuals tend to move to neighborhoods that are socially and spatially similar to the neighborhood of origin. A larger problem with MTO, according to Sampson, was that it assumed that neighborhoods were entirely static, when in reality, the movement of inner city dwellers to new neighborhoods is likely to destabilize those neighborhoods. As noted earlier, an increase in a neighborhood’s black population tends to lead to outmigration by whites and Latinos. Thus, impoverished blacks who move to “integrated” neighborhoods in search of a better life soon find that their new neighborhoods are changing around them to resemble the very neighborhoods they left.43

D. Policy Implications

For Sampson, the lesson of the failed MTO program is that attempting to alleviate spatial inequality at the neighborhood level simply by promoting individual mobility and choice is doomed to fail because individual choice is so constrained by the environment. In a sense, Sampson writes, “neighborhoods choose people rather than the common idea that people choose neighborhoods.”44 Given that conclusion, Sampson cautiously recommends that government interventions focus at the community level, and specifically at building up the internal social norms of the neighborhood,45 rather than fostering individual mobility out of the neighborhood. In a very brief sketch of his policy proposals, Sampson endorses “place-based” interventions such as community policing, in which police work with local community leaders to foster trusting relationships and achieve shared crime-reduction goals, community re-entry programs for ex-convicts, and community economic development programs to boost economic activity in disadvantaged neighborhoods.46

II. The Tiebout Model and Methodological Individualism

The scope and rigor of Great American City ensure its place as one of the most important works of urban sociology in many years. As such, it
is likely that the book will have a major impact on urban policy. For generations, policymakers have eagerly utilized social scientific evidence to support urban policy measures. The obvious relevance of *Great American City* to the pressing policy question of “people v. places” guarantees that it will prove highly influential in policy circles.

In that light, it is curious that Sampson spends only a few pages elaborating on the work’s potential policy implications. Throughout the book, Sampson trains his focus on elucidating the contours of the neighborhood as an institution of civil society, and he devotes little attention to the role of the state in shaping the neighborhood. Of course, Sampson is a sociologist, not a policy analyst. The work’s aim is to describe the conditions of urban life, not to prescribe policy interventions. Indeed, Sampson may entertain the entirely justifiable suspicion that setting out his policy preferences too forthrightly may jeopardize the credibility of his findings by creating the impression that he has shaped the data to meet partisan objectives.

Whatever the case may be, considering that *Great American City* is likely to have a tremendous influence on urban policy, it is important that the work’s policy implications be fully articulated. Otherwise, it is possible that policymakers may misinterpret the book’s findings.


48. There is a lively debate among sociologists about the place within the discipline of “public sociology,” that is, sociology written for a lay audience and addressed to important public policy questions. While advocates see public sociology as a means of engaging a broad public and revitalizing an enervated public sphere, critics see it as compromising sociology’s legitimacy as a scientific discipline. For an interesting overview of this debate, see Michael Burawoy, *The Return of the Repressed: Recovering the Public Face of U.S. Sociology, One Hundred Years On*, 600 Annals Am. Acad. Pol. & Soc. Sci. 68 (2005).

49. As an interesting contrast, in his landmark book *The Truly Disadvantaged*, upon which Sampson’s own work builds, William Julius Wilson wrote that the policy implications of his own previous work had been misunderstood because he had failed to set forth its policy implications. William Julius Wilson: *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy* vii (1987). As a result, “it was possible for people to read selectively my arguments and draw policy
This risk is especially high because, in my view, the work’s policy implications are not nearly as straightforward as Sampson presents them. The remainder of this essay therefore discusses the policy implications that I believe follow from *Great American City*. First, this Part takes on Sampson’s critique of methodological individualism. Subsequently, in Part III, I evaluate Sampson’s support for place-based policies.

A. The “Weak” Tiebout Model

Sampson convincingly demonstrates that the failures of the MTO program were rooted in its methodological individualism—the assumption that individual life opportunities can be divorced from geographic context. Sampson frames his work, though, as a broad assault on what he sees as an individualist orientation underlying urban policy in general, which suggests that the work has wider implications. In particular, although Sampson does not mention it explicitly, *Great American City* can be interpreted as an attack on a highly influential model of local government and municipal finance known as the “public choice” or “Tiebout” model in reference to a famous article by economist Charles Tiebout. Tiebout posited that, given certain assumptions, individuals could be perceived as mobile “consumer-voters” who have a wide variety of choices regarding where to settle within a particular metropolitan region and will accordingly choose to settle wherever they find that the municipal services available to them (schools, utilities, fire and police, and so on) are most attractive. Presented in this stylized fashion, the Tiebout model is a classic example

implications significantly different from those that I would personally draw.” *Id.* at viii. Wilson accordingly felt compelled to write a follow-up work in which he spelled out the policy implications in considerable detail. Thus, nearly a third of *The Truly Disadvantaged* is devoted to explaining the book’s policy implications. By comparison, Sampson devotes only four pages in a 437 page book to explaining the policy implications of his work.

50. See *Sampson*, supra note 11, at 64 (citing “the role of context” as the “main failure of methodological individualism”); *id.* at 355-85 (rejecting “methodological individualism” and stressing importance of context).


52. *Id.* at 418; see also Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 507-09 (1991) (explaining that consumers “‘shop’ for a particular level and combination of public goods”); Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 COLUM. L. REV. 346, 400 (1990) (stating that “[t]he multiplicity of localities assures a range of choices and increases the likelihood that one locality will approximate the mobile consumer-voter’s preferences.”).
of the sort of methodological individualism Sampson critiques, in which people are assumed to make locational choices based on individual tastes and self-interest, largely unconstrained by any broader social context.

The Tiebout model has been deployed in a variety of contexts, but for purposes of this paper I synthesize the model into two basic forms, the “weaker” and the “stronger” form, and explain how Sampson’s findings problematize each form. To begin with the weaker form, the Tiebout model was initially designed to address a critical problem in municipal finance, namely how to determine individuals’ preferences and willingness to pay for “public goods.”

Public goods are services such as police protection that, once provided, benefit all members of the public whether they pay or not; as a result, individuals have incentives to “free ride” on the provision of such goods rather than truthfully reveal their willingness to pay. Under the weaker Tiebout model, preferences for public goods can be ascertained simply by individuals’ choices of where to locate. If I settle in a high-tax jurisdiction with high-quality schools, for example, I have expressed my preference to pay a higher price for better public schools (“preference” being the economist’s euphemism for willingness and ability to pay).

By implication, courts and policymakers should be relatively indifferent to interlocal inequalities in tax rates or service provision because these can be taken as the expression of divergent private preferences. This logic has sometimes been expressed, for example, in response to reports that toxic land uses such as landfills and electric power plants are disproportionately located in poor black neighborhoods. While some consider this phenomenon a form of “environmental racism” that results from black neighborhoods’ inability to effectively organize and lobby city hall to prevent unwanted land use sitings, others hypothesize that poor blacks may actually choose to settle near toxic land uses because such land uses depress property values and thus make the surrounding area more affordable.

residents, in other words, have expressed their preferences for affordable housing by locating near toxic land uses.56

Sampson’s findings, though not squarely addressed at the Tiebout model, rebut the underlying Tieboutian logic that individuals rationally gravitate to the environments that they find most consistent with their market preferences. One conceptual problem with the Tiebout model is that it “bundles” different municipal services regardless of consumer preferences for particular services within the bundle. As Richard Ford states in a critique of the Tiebout model, “I cannot live in San Francisco while paying Los Angeles taxes and receiving Los Angeles’s package of services, nor can I pick and choose among the San Francisco services I wish to receive and pay for.”57 To follow Ford’s example, if I choose to settle in San Francisco because I like its schools, I am forced to “purchase” its police department even if I would rather have Los Angeles’s police department. This sort of bundling is common in many markets, but what makes it so significant and potentially distorting in the Tieboutian market for municipal services is that all of the services are tied to the geographic location in which one settles. Municipal services, by and large, are distributed according to place of residence. This is precisely where Sampson’s contribution becomes crucial. Great American City demonstrates that individuals do not select their places of residence according to some rational set of criteria, but in some sense have those places chosen for them by demographic trends. As observed earlier, Sampson finds that individuals are generally motivated to move by the characteristics of the origin neighborhood, and that the destination neighborhood tends to be similar—both in geographic distance and in social composition—to the origin

56. If taken to its logical extreme, the weak Tiebout model would further hold that constitutional constraints such as the one person/one vote rule or even the Establishment clause should not apply to local governments because individuals have expressed a preference for normative commitments at variance with constitutional standards by choosing to locate in particular communities, and can easily exit if they are dissatisfied. See Robert C. Ellickson, Cities and Homeowners Associations, 130 U. Pa. L. Rev. 1519, 1539-63 (1982) (arguing that one person/one vote rule should not be applicable to local governments so that communities can adjust voting schemes to resident preferences); cf. Richard C. Schragger, The Role of the Local in the Doctrine and Discourse of Religious Liberty, 117 Harv. L. Rev. 1810, 1829 (2004) (arguing that local governments should have freer hand to favor religion under the Establishment clause than state or federal government because fragmentation of authority among numerous local governments “provides multiple ‘entry points’ and ‘exit points,’” thus promoting interlocal competition and individual choice).

neighborhood. He also finds that individual characteristics are rarely a major factor in explaining moves.

To take one particularly interesting example, Sampson finds that individuals who move from neighborhoods characterized by high levels of perceived disorder (predominantly black residents) tend to migrate to other neighborhoods that also have high levels of perceived disorder, whereas those who move from low-perceived-disorder neighborhoods (usually white) tend to move to other low-perceived-disorder neighborhoods. As Sampson writes, “migration flows do not cross the ‘disorder divide’ in significant numbers. . . .” Under the Tiebout model, this pattern would suggest that blacks have indicated a preference for highly disordered neighborhoods, and whites for less disordered neighborhoods. However, Sampson also finds that the single most significant factor in accounting for black residential moves is a high level of collectively perceived disorder in the origin neighborhood—in other words, blacks are fleeing neighborhoods they perceive as disordered, thus expressing a clear preference for lower levels of perceived disorder. Though Sampson does not take on this contradiction expressly, his finding that individuals tend to migrate to neighborhoods that are socially similar to the neighborhood of origin suggest that the reason blacks migrate to neighborhoods with similarly high levels of perceived disorder, despite an apparent preference to the contrary, emanates from movers’ strong desire to remain within a community of shared social meaning even as they move from one geographic location to another. As Sampson writes, although the classic sociological concept of an “urban village”—an isolated enclave of shared customs and traditions within the cosmopolitan city—appears outdated in the highly mobile modern city, it may still be applicable to explain “the larger structure of population flows” between neighborhoods.

For purposes of the Tiebout model, then, Sampson’s findings indicate that neighborhood selection is a social process that is driven by a perhaps innate desire to be and remain part of a community rather than by individualistic, rational economic concerns such as the quality of particular municipal services or regulatory policies. As a result, we cannot rationally infer preferences for services, taxation, or zoning simply by the proxy of geographic location. Likewise, we cannot consider interlocal

58. SAMPSON, supra note 11, at 321-23.
59. Id. at 323.
60. See id. at 298.
61. Id. at 327.
inequality, whether in the provision of services or the location of undesirable land uses, to be the expression of a free market preference.

B. The “Strong” Tiebout Model

Sampson’s results also have important implications for the “stronger” version of the Tiebout model. The basic model, as we have just seen, presumes that society is composed of mobile consumer-voters who are indifferent to particular places and will simply migrate to whatever location government policy makes most attractive. If the weaker version of the model is that this presumption can help elucidate constituent preferences, the stronger version—widely accepted by scholars and urban leaders—is that cities are essentially competing business firms that can use urban policy to attract footloose residents, capital, and jobs from other “firms,” as well as to repel unwanted land uses or individuals.62 Based on this assumption, cities have vigorously undertaken policies that they believe will entice whomever they consider to be the most desirable consumer-voters. Cities that desire to lure creative, affluent professionals invest in amenities such as parks, luxury condominiums, and hip retail options, those wishing to become “tourist cities” create sanitized entertainment and shopping bubbles that they hope will cause an influx of tourists, and those that want to entice middle-class homeowners with children will prioritize quality schools and safe streets.63 Although scholars disagree about what cities’ priorities should be—whether to attract the creative class or the middle class, tourists or global finance—they all assume that urban policy has some basic ability to influence locational decisions.64

62. See, e.g., Richard Schragger, Does Governance Matter? The Case of Business Improvement Districts and the Urban Resurgence, 3 DREXEL L. REV. 49 (2010) (arguing that “the driving assumption” of city leaders today is “that cities are competing with one another and with the suburbs for residents, firms, and consumers); Been, supra note 52, at 507-08 (explaining that not only do consumers “shop” for a particular level and combination of public goods,” but municipalities may also “compete for residents by trying to offer a desirable package of services at the lowest cost” (footnote omitted)).

63. In their great book CITY BOUND, Gerald Frug and David Barron discuss four basic models that cities can pursue: the “global city,” “tourist city,” “middle class city,” and “regional city.” See GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 141-229 (2008). Although none of the four models are mutually exclusive, limited urban revenues mean that cities will have to choose what to prioritize. I have focused here on city efforts to lure residents and, to a lesser extent, tourists. The strong Tiebout model also holds that local governments can attract business and development with favorable tax and regulatory policies. However, as Sampson’s study examines residential locational decisions, its implications for the Tiebout model are likewise limited.

64. A colorful debate has arisen in recent years between Richard Florida, who trumpets the virtues of cities luring the “creative class” with luxury amenities, and
As scholars have long observed, however, many of the Tiebout model’s assumptions are questionable. Richard Schragger, for example, has persuasively argued that locational decisions are driven by macroeconomic, demographic, and other large-scale structural factors that local governments have relatively little power to influence through policy decisions. Schragger draws heavily on the work of Nobel Prize winning economist Paul Krugman, who has used extensive modeling to demonstrate that the formation and growth of cities tend to follow certain mathematical laws seemingly regardless of decisions made by governmental authorities; cities “self-organize” into coherent systems as a result of independent locational decisions by individual actors. Those decisions, in turn, are largely influenced by seemingly random factors such as the “historical contingency” of initial locations as well as small changes in those initial locations, which give rise to the perception of a “tipping point” and generate additional moves. Krugman himself was influenced by the famous segregation model of Thomas Schelling, which showed that where individuals living in an integrated neighborhood have a slight preference for geographic proximity to some other individuals of their own race, the neighborhood will often end up completely segregated because even a few individual moves will trigger a chain reaction of additional moves as residents sense the onset of a tipping point of racial change. As Schragger summarizes this research, city fortunes are “often a function of luck, path dependency, or the effects of very small changes in a

Joel Kotkin, who argues that cities will do better by striving to be “boring” and entice middle-class families with more quotidian services. Compare Florida, supra note 2 with Kotkin, supra note 2.

65. See Schragger, Does Governance Matter?, supra, note 62, at 66 (arguing that “the basic idea of ‘competition’ between cities is incoherent” because sound local government rarely creates growth; rather, prosperity “is often a function of luck, path dependency or the effects of very small changes in a spatial equilibrium”); Richard C. Schragger, Rethinking the Theory and Practice of Local Economic Development, 77 U. CHI. L. REV. 311, 315-20 (2010) (criticizing the Tiebout public choice theory for adopting an overly simplistic notion of how cities develop, particularly through the assumption that local policies affect economic development instead of acknowledging the role organic growth plays in development).

66. See Schragger, Rethinking the Theory and Practice, supra note 65, at 318-23 (discussing Paul Krugman, The Self-Organizing Economy (1996)).

67. Krugman, supra note 66, at 35; Schragger, Rethinking the Theory and Practice, supra note 65, at 318 (noting “the role of contingency and path dependence in city growth and decline”).

68. Krugman, supra note 66, at 22-29; Schragger, Rethinking the Theory and Practice, supra note 65, at 318-20.

spatial equilibrium.” Whether and how cities grow, prosper and decline is largely independent of local government policies, which can only have a limited influence on any of these factors.

*Great American City* enriches these conclusions by providing some important context. Schelling and Krugman are economists like Tiebout, and their models, like his, are highly stylized frameworks that assume individuals make rational decisions largely free from social constraints. Krugman, for example, assumes that the economy self-organizes as a result of the microdecisions of atomized, self-interest maximizing economic actors.71 Sampson problematizes this basic assumption, as we have seen, by introducing the complexities of social context, but he nevertheless validates Krugman and Schelling’s models in important ways. Like Krugman, Sampson demonstrates that spatial organization largely depends on initial conditions. Where people move to is contingent upon where they move from, not because they make individually rational decisions but because they are so embedded in a particular social milieu that they cannot make locational decisions divorced from that context.72 It seems that wherever people move, they can never truly escape the influence of the “urban village.” Sampson also empirically validates the Schelling model by demonstrating that small changes in the racial makeup of particular neighborhoods will indeed trigger white flight and re-segregation—as we recall, one of Sampson’s key findings is that an increase in a neighborhood’s black population is the major causal factor in explaining outmigration by whites and Latinos.

In the face of these broad demographic trends, Sampson, Krugman and Schelling give reason to doubt that governmental policies can dramatically influence locational decisions. Indeed, Sampson reports that over the past 50 years, despite efforts at upgrading and gentrification, not a single predominantly black neighborhood in Chicago has become predominantly white (although the reverse has been commonplace).73 As he concludes, “once a neighborhood is beyond a certain threshold or ‘tipping point’ of either percent black or percent poor—but especially the former—further change is in the direction of greater racial homogeneity and more poverty.”74

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71. See Krugman, supra note 66, at 3-7.
72. See supra text accompanying notes 60-72 (on Sampson’s findings about how context drives locational decisions).
73. See Sampson, *supra* note 11, at 119.
74. Id.
C. Qualifications and Suggestions for Further Research

Though Sampson raises important questions about the Tiebout model, his findings do not conclusively disprove the model. Sampson’s implicit critique of the Tiebout model is limited in two important respects: first, his study is confined to the city of Chicago, and second, it does not test the correlation between particular governmental policies and mobility. To begin with the first limitation, the Tiebout model has been most fruitfully applied to interlocal competition, that is, mobility between or among different incorporated municipalities within a metropolitan region, and is not as useful in describing competition among neighborhoods within a city such as Chicago. Incorporates municipalities have a substantial degree of control over their land use, tax base, and municipal services (especially schools), and can thus theoretically use their services and regulations to attract mobile consumer-voters; urban neighborhoods, on the other hand, have relatively few regulatory powers with which to differentiate themselves from other neighborhoods and lure consumer-voters. Neighborhoods rarely have substantial authority to control their land use, schools, and taxes. Indeed, some scholars have argued that urban neighborhoods should be given increased power over land use, municipal finance, and neighborhood schools precisely so that they may compete for residents in Tieboutian fashion. It is perhaps for this reason that cities have experimented with devolving limited powers to the sublocal level with mechanisms such as tax-increment financing, business improvement districts, and special zoning districts. Despite these innovations, few would argue that urban neighborhoods fit the Tiebout model nearly as well as incorporated municipalities do.

75. See, e.g., FISCHEL, supra note 53, at 39-97 (describing operation of Tiebout model in interlocal context).
76. See id. at 90-97 (explaining why Tiebout model works less well in larger cities where neighborhoods do not have independent land use and taxing powers); Kenneth A. Stahl, Neighborhood Empowerment and the Future of the City, 161 U. PA. L. REV. 939, 941-45, 950-51, 1000, 1004 (2013) (contrasting urban neighborhoods’ lack of regulatory and taxing power with incorporated suburbs’ exercise of such power).
77. See ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT (2005); Stahl, supra note 76; Robert C. Ellickson, New Institutions for Old Neighborhoods, 48 DUKE L.J. 75, 89 (1998). Fischel also notes that cities can mimic the governmental advantages of suburbs with decentralizing devices such as ward voting and special assessment districts. See FISCHEL, supra note 53, at 94-95.
78. See Richard Briffault, The Rise of Sublocal Structures in Urban Governance, 82 MINN. L. REV. 503 (1997) (describing several devices through which municipalities devolve power to “sublocal” entities, and explaining that these devices are designed to introduce Tieboutian competition to cities).
There is, furthermore, some reason to believe that the methodological individualism that underlies the Tiebout model has more validity in the incorporated suburbs surrounding Chicago than within the city. While Sampson intriguingly demonstrates how the “urban village” mentality may affect city dwellers’ locational decisions, that mentality may have less of an impact on suburban residents. Sociologist Herbert Gans, who famously chronicled the “urban villagers” of Boston’s West End, found that the model of the close-knit urban village tended to apply exclusively in inner-city areas; suburbs were more like “communities of limited liability,” in which social ties are relatively weak and largely based on a common demand for municipal services. This depiction is consistent with the Tiebout model’s vision of atomized “consumer-voters” who shop for municipalities that meet their individual preferences regardless of the social context. Historically, suburbs have been smaller and more socioeconomically homogenous than core cities (although those demographics have been changing over the last few decades), so it may be that suburban dwellers are less influenced in their locational decisions by the social and demographic composition of communities than are residents of diverse cities.

This points to the second limitation of Sampson’s data set. It is easy to speculate about the potential impacts of particular municipal policies on population mobility because, while Sampson tests the correlation between population flows and a bewildering variety of factors, he does not include any governmental policies among the factors to be considered. We simply do not know, for instance, whether there is any correlation between tax increment financing districts and mobility, or between business improvement districts and mobility. Indeed, there is no necessary correspondence between the neighborhood units Sampson selected for study and sublocal governmental entities such as these. Considering that urban policy is largely predicated on the assumption that quality schools, zoning laws, tax rates, business improvement districts and the like influence population movement, it would be useful to test that assumption by directly correlating population movement with

regulatory policies, the quality of municipal services, and so forth. Absent such a direct test, the validity of the Tiebout model remains largely a matter of speculation.

Sampson’s study is nevertheless a useful contribution to the debate over the Tiebout model because it points to a significant normative critique of the model. It is worth noting that Sampson does briefly address the critical issue of interlocal competition in analyzing residential moves from Chicago to the suburbs. As we recall, Sampson finds that the most significant factor in accounting for such moves is racial change. This is significant from the Tieboutian perspective because we also recall that one important distinction between incorporated suburbs and urban neighborhoods is that the former control their own land use whereas the latter do not. Scholars have long noted that suburban zoning ordinances have played a vital role in creating and perpetuating the \textit{de facto} racial segregation extant in most metropolitan regions by raising the cost of suburban housing to levels unaffordable for most racial minorities.\footnote{See, e.g., Richard Schragger, \textit{Consuming Government}, 101 Mich. L. Rev. 1824, 1838 (2003) (“The current extreme segregation of American metropolitan regions owes a great deal to the power of localities to restrict in-migrants based on income.”); J. Peter Byrne, \textit{Are Suburbs Unconstitutional?}, 85 Geo. L. J. 2265 (2000).} This combination of factors suggests that, if the Tiebout model does accurately describe movement from central cities to the suburbs, it is accurate in a perverse way: people may be leaving environments in which they have little control over the racial composition of their neighborhoods for ones in which they do. In other words, consumer-voters are not choosing communities based on parks, quality schools or cupcake bakeries, but purely based on their ability to enforce racial homogeneity (an ability which they possess in the suburbs but lack in the cities).\footnote{It is of course possible that movers from Chicago to the suburbs associate racial change with diminishing school quality and so forth, and thus that these amenities still play an indirect role in the decision to move. It would be an interesting follow-up study to examine whether actual (as opposed to perceived) differences in school quality between urban and suburban neighborhoods had an independent impact on movement from Chicago to the suburbs.} This raises the disquieting possibility that the Tiebout model is nothing more than a racial-sorting mechanism, and begs the question whether such a mechanism, even if a descriptively accurate model of urban growth, is a normatively desirable state of affairs.

III. Examining the Wisdom of Place-based Policies

If the preceding analysis has cast some doubt on Sampson’s critique of the Tiebout model, it may also cast doubt on his critique of MTO:
perhaps locational decisions by the inner city poor would be less determined by the “urban village” mentality if urban neighborhoods had regulatory powers with which to differentiate themselves from other neighborhoods. Then, inner city dwellers would be able to “shop” for attractive neighborhoods much like suburban dwellers do. This is doubtful, however, for as Gans’ and other sociological research demonstrates, inner-city dwellers are more likely than outer-city and suburban dwellers to fall back on the urban village as a means of coping with the challenges of concentrated disadvantage and segregation.83 Moreover, given Sampson’s powerful demonstration of how neighborhood moves are infused with the dynamics of racial change, any effort to spirit the poor out of the inner city would likely lead to white flight and re-segregation. Thus, it can be fairly concluded from Sampson’s study that policies intended to improve the lot of the least fortunate by moving them out of bad neighborhoods and into good ones are unlikely to be successful. Given that, Sampson’s proposed policy prescriptions seem much more appealing than mobility-based policies such as MTO: he argues that urban policy should be directed toward building up the internal social norms of urban neighborhoods so as to create the collective efficacy that is so sorely lacking there, and he specifically endorses community policing, in which police work cooperatively with neighborhood residents to achieve crime-reduction goals.84

Although Sampson does not elaborate on specific community policing strategies or the ways in which such strategies could effectively build collective efficacy in disadvantaged neighborhoods, other scholars, notably Tracy Meares and Dan Kahan, have discussed at length how certain community-based policies can enhance collective efficacy, drawing on Sampson’s work as well as that of other urban sociologists. Meares and Kahan contend that criminal law enforcement policies aimed at deterring individual criminal behavior are unlikely to be successful without considering the underlying pathologies of

83. See supra notes 76-80 and accompanying text (differentiating between “urban villagers” of the inner city and more loosely affiliated suburban dwellers). Sociologist Loic Wacquant likewise argues that the urban ghetto, while a means for confining and controlling a subordinate group, is also perceived by the subordinate group as a “protective and integrative device” that “fosters consociation and community building within the constricted sphere of intercourse it creates.” Loic Wacquant, A Janus-Faced Institution of Ethnoracial Closure: A Sociological Specification of the Ghetto, in THE GHETTO: CONTEMPORARY GLOBAL ISSUES AND CONTROVERSIES 1, 10 (Ray Hutchison & Bruce D. Haynes, eds., 2011).

84. See SAMPSON, supra note 11, at 420-24.
the neighborhood that contribute to such behavior. Like Sampson, Meares and Kahan argue that policing strategies should focus on bolstering the internal norms of the local community so that it can self-regulate criminal behavior. For example, they contend that laws such as curfews and gang injunctions (limiting the ability of gang members to congregate in designated places) can “restor[e] community life” in inner-city areas and promote “friendship networks” by overcoming free-rider problems that prevent individual members of the community from attempting to enforce social norms in a piece-meal fashion.

In this part, I raise some doubts about the effectiveness of the place-based policies championed by Sampson, Kahan and Meares, and demonstrate that many of these doubts are rooted in Sampson’s own findings. I then elaborate on place-based policies that, again given Sampson’s findings, I believe will prove more effective.

A. Are Place-Based Policies Effective?

It is difficult to assess whether community policing or the other place-based policies discussed by Sampson, Kahan and Meares actually will enhance collective efficacy because, just as Sampson does not measure the impacts of any particular governmental policies on mobility, he also does not measure the effects of any specific policies on collective efficacy. His focus is firmly on elaborating how civil society autonomously generates (or fails to generate) collective efficacy, and he does not address the role the state may play in this process. This is a significant omission because there is very little empirical evidence that any place-based policies have been effective, and the anecdotal evidence provides results that are not particularly promising. Over the past several decades, cities have experimented with a number of different place-based remedies designed to stabilize urban neighborhoods,

85. See Kahan & Meares, Foreward, supra note 8, at 1179-1183.
86. Id. at 1168; Meares & Kahan, Wages, supra note 8, at 208 (minority communities seek “to establish law enforcement policies that will help them reinforce weak social structures that accompany neighborhood poverty”).
87. Kahan & Meares, Foreward, supra note 8, at 1164.
88. Id. at 1164, 1180-82; Meares & Kahan, Law, supra note 8, at 819-22 (arguing that curfews and gang-loitering ordinances diminish the reputation-enhancing effects of gang membership and assist in parental supervision). “Community policing” is a nebulous term, and many scholars take issue with Meares & Kahan’s use of the term to describe policies such as gang injunctions and curfews. Nevertheless, because Sampson himself does not articulate what “community policing” policies he favors, and because Meares & Kahan have relied on Sampson’s work to support their preferred “community policing” policies, their scholarship gives a sense of how Sampson’s insights would be applied in practice.
including community economic development, community development block grants, the Department of Housing and Urban Development’s “Hope VI” program, and enterprise/empowerment zones.89 On the whole, these programs have had, to put it charitably, mixed success. With regard to community-based policing strategies specifically, there is sparse empirical evidence of their efficacy.90 While some have attributed the recent urban resurgence to the success of order-maintenance policing tactics such as community policing, the balance of the evidence casts doubt on the causal relationship between order-maintenance policing and crime reduction, and attributes that reduction to a wide range of long-term demographic factors unconnected to governmental policy.91 This evidence is consistent with the emerging scholarship, mentioned previously, questioning whether local governments can really influence the large-scale demographic and macroeconomic factors that determine the conditions of urban life. Sampson may unwittingly support this point, as we have seen, by acknowledging that gentrification (itself part of the order-maintenance agenda) is powerless to counteract racial change once a perceived racial “tipping point” is reached.

Indeed, Sampson’s own findings provide reason to believe that community policing and other place-based policies may actually harm the communities they are intended to benefit. For instance, modern political theory holds that government benefits have a tendency to be distributed according to the effectiveness with which particular interest groups can organize and lobby city hall.92 Thus, where resources are distributed geographically, neighborhoods with high levels of organization will receive more resources, and neighborhoods with lower levels of organization will receive fewer. This is problematic because Sampson demonstrates that collective efficacy is strongly tied to a particular neighborhood’s organizational resources.93 The perverse result may thus be that community-based policies will simply exacerbate the

89. See, e.g., Lemann, supra note 3 (chronicling history of place-based economic revitalization programs and observing that “It is extremely difficult to find statistical evidence that any inner-city neighborhood in the country has been economically revitalized.”).
91. See Schragger, Rethinking the Theory and Practice, supra note 65, at 325.
93. See Sampson, supra note 11, at 198-200.
current inequality in access to police resources between neighborhoods with high and low levels of collective efficacy by serving well-organized, affluent communities while neglecting the poorly organized, disadvantaged urban communities that are most in need of better policing.94

Sampson’s findings suggest that other unintended consequences may also follow from place-based policies such as community policing. For instance, Sampson is eager to distance his own theory of collective efficacy from a cognate theory, the “broken windows” hypothesis, which postulates that signs of disorder within a neighborhood are causally related to criminal activity.95 Sampson demonstrates through rigorous empirical testing that the claim of a causal link between disorder and crime is false. Rather, disorder and crime tend to be correlated because both can result from an absence of collective efficacy.96 According to Sampson, the mistaking of correlation for causation has hardly been a harmless error; the widespread misperception that disorder causes crime has led to the stigmatization of visually disordered (often poor) but otherwise stable neighborhoods, which in turn creates a downward spiral of property values and outmigration of higher-status neighborhood residents, thus sparking a decline in collective efficacy and, accordingly, more crime.97 (As we recall, the major causal factor in sparking residential moves was collective perceptions of disorder.) Simply by declaring a causal link between visual disorder and crime, the broken windows theory thereby created it.

For Sampson, the “mold of stigmatizing perceptions” is one of the major challenges facing disadvantaged neighborhoods.98 Such perceptions attach themselves to impoverished areas with relative ease, and once attached, they can trigger a host of unwelcome consequences that cement the perceptions and create a nearly unbreakable vicious circle. This conclusion has important implications for place-based policies.

94. See David H. Bayley, Community Policing: A Report from the Devil’s Advocate, in COMMUNITY POLICING: RHETORIC OR REALITY 225, 233-34 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (arguing that greater difficulty in organizing the poor may cause community policing to widen gap between police services available in affluent communities and services for the “poor and uneducated underclass”).
95. See SAMPSON, supra note 11, at 121-48 (rejecting broken windows theory as inconsistent with empirical evidence).
96. See SAMPSON, supra note 11, at 128.
97. See id. at 121-23, 138-48.
98. Id. at 148.
Classifying neighborhoods based on their existing characteristics, as Sampson does, and targeting law enforcement resources to particular neighborhoods based on those characteristics, as community policing and a number of other place-based urban policies do, may send a powerful signal to residents, to real estate markets, and to the public as a whole about the character of the community, thereby reinforcing and perhaps perpetuating existing perceptions. Singling out an inner-city community for extraordinary measures such as anti-gang injunctions or curfews because of an absence of collective efficacy, for example, may “mark” that community as so deviant as to be beyond redemption.99

All this is to say that whether place-based policies can boost collective efficacy is uncertain because there is so little empirical evidence one way or the other. Considering the rigorously empirical nature of Sampson’s approach, it would have been useful to see Sampson turn his empirical tools to address the relationship between governmental institutions and collective efficacy. Sampson’s neglect of this relationship is understandable, given the limitations of space in an already long book and his desire to focus on the internal structure of civil society. However, it is also a curious omission because Sampson readily acknowledges that the early Chicago school sociologists upon whose work he builds ignored the role of political economy on civil society,100 and he concludes that there is an important role for the state in bolstering civil society.101

B. Ward Politics as A Form of Place-Based Intervention

In this light, one especially glaring omission from Sampson’s study is the effect of voting structures on collective efficacy. As just noted, Sampson finds that there is a powerful correlation between a neighborhood’s degree of collective efficacy and its organizational resources.


100. See SAMPSON, supra note 11, at 40-42.

101. See id. at 420-24.
The most significant organizational resource that many Chicago communities have, however, is one that Sampson entirely neglects: the voting district or “ward.” Unlike many cities, which elect city council members “at-large” on a citywide basis, Chicago is famous for its ward politics, in which council members (“aldermen” in Chicago lingo) are elected individually by geographically designated districts, or wards, within the city.\textsuperscript{102} The ward is not simply a mechanism for voting, however; it is a powerful means of connecting the community to city hall through the person of the alderman. For example, empirical studies on the effects of voting structures on land use policies have found that ward systems are more effective than at-large systems in enabling localized groups to influence growth, likely because ward systems give those groups a direct voice in city government that they do not have in at-large systems.\textsuperscript{103} Studies also show that ward systems are more effective than at-large systems at representing the interests of minorities, who tend to be highly geographically concentrated.\textsuperscript{104} These results suggest that the ward is indeed a powerful form of organization, and perhaps especially so in disadvantaged neighborhoods. It can thus be hypothesized that there is some relationship between ward politics and collective efficacy, but Sampson’s study is silent in this regard because, as before, the neighborhood units he studies do not necessarily correspond with the boundaries of political districts.

\textsuperscript{102} See, e.g., Richard C. Feiock et al., \textit{Policy Instrument Choices for Growth Management and Land Use Regulation}, 36 Pol’y Stud. J. 461, 465, 474 (2008) (finding higher incidence of growth management measures in ward-based than at-large municipalities, and concluding that “at-large representation . . . creates entry barriers for citizen groups seeking to restrict growth”); Laura I. Langbein et al., \textit{Rethinking Ward and At-Large Elections in Cities: Total Spending, the Number of Locations of Selected City Services, and Policy Types}, 88 Pub. Choice 275, 289–91 (1996) (finding that cities with ward representation provide more locations for desirable land uses and fewer locations for undesirable land uses than cities with councils elected at-large).

\textsuperscript{103} See, e.g., Feiock et al., \textit{Policy Instrument Choices}, supra note 100, at 465, 474 (finding higher incidence of growth management measures in ward-based than at-large municipalities, and concluding that “at-large representation . . . creates entry barriers for citizen groups seeking to restrict growth”); Langbein et al., \textit{Rethinking Ward and At-Large Elections in Cities, supra} note 100, at 289–91 (finding that cities with ward representation provide more locations for desirable land uses and fewer locations for undesirable land uses than cities with councils elected at-large).

C. “Immobility” Policies

If the roles of community policing and ward politics in generating collective efficacy are thus uncertain, Sampson’s findings do clearly point toward one promising avenue for building collective efficacy, particularly in the disadvantaged neighborhoods where collective efficacy is most desperately needed. In short, just as Sampson demonstrates that incentivizing mobility is a flawed strategy for alleviating concentrated urban disadvantage, he implicitly makes the case that incentivizing immobility, that is, inducing residents to stay in troubled neighborhoods, may be a winning strategy. But because Sampson does not explicitly advocate for immobility policies, I sketch the argument briefly here, highlighting Sampson’s contribution.

As noted before, Sampson finds that collective efficacy is closely correlated with organizational resources. There is one factor, however, that is even more strongly positively correlated with collective efficacy: the degree of residential stability within the neighborhood (as measured by residential duration and homeownership); likewise, Sampson finds that a high degree of residential mobility impedes collective efficacy. Sampson further proves that there is a relationship between residential stability and neighborhood health by demonstrating, as we have seen before, that collective perceptions of disorder are strongly linked with outmigration. This is part of what makes the broken-windows theory a sort of self-fulfilling prophecy: when residents perceive disorder, they are programmed by the broken-windows theory to anticipate a future increase in crime rates; therefore they move, depriving the neighborhood of social capital and causing the decline in interpersonal trust that then leads to increased crime rates.

By implication, if these residents responded to the collective perception of disorder not by deserting the neighborhood but by staying, they could forestall the self-fulfilling prophecy and disprove the broken windows theory. Indeed, Sampson observes that perceptions of disorder have a much more pronounced negative effect on poor black neighborhoods than on affluent white areas—where, presumably, residents are not likely to flee at the first signs of disorder.

Ironically, then, given urban policy’s long commitment to fostering mobility, Sampson’s findings suggest that the most promising means of building collective efficacy and preventing the downward spiral

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105. See Sampson, supra note 11, at 154, 199.
106. See supra text accompanying notes 93-95; Sampson, supra note 11, at 145-46.
of negative perceptions would be to deliberately foster *immobility*, either through direct restrictions on mobility or incentives to plant roots in the neighborhood. This can of course be done simply by making the neighborhood more attractive, such as by alleviating crime and perceived disorder, improving the quality of local schools and so forth.\(^\text{107}\) But more direct mechanisms of ensuring residential stability, such as constructing new housing that is designated for existing neighborhood residents, creating hybrid freehold/leasehold tenures that enable low-income residents to have a contingent ownership stake in rental housing, or requiring local employers to set aside employment opportunities for local residents, may be even more effective.\(^\text{108}\) In an important study of the community economic development movement, William Simon writes that incentivizing immobility with mechanisms such as these can boost the prospects of historically disadvantaged areas because “immobility creates an interest tied to the geographical community.”\(^\text{109}\)

Simon’s reasoning taps into a longstanding American belief in the salubrious effects of immobility. Policymakers have long extolled homeownership, for example, because of the belief that it would encourage individuals to have a long-term stake in their community, and they have accordingly attempted to encourage widespread homeownership through public policies such as cheap mortgages, highway subsidies, the mortgage interest deduction and single-use zoning ordinances.\(^\text{110}\) As a result, the suburbs and their stock of single-family homes have flourished while inner city neighborhoods, predominantly filled with rental housing, have declined. Rental housing has often been considered a mere way station on the inevitable road to homeownership,\(^\text{111}\) and public policies aimed at inner city neighborhoods, such as urban renewal (or, for that matter, MTO), have consistently

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108. These strategies and others are discussed at length in Simon, supra note 6, at 69-111, 145-55.

109. See Simon, supra note 6, at 143.

110. On the perceived virtues of homeownership and public policies designed to encourage it, see, for example Peter Hall, *Cities of Tomorrow* 316-22 (3d ed. 2002) (on the perceived virtues of homeownership and public policies designed to encourage it); and Jackson, supra note 47, at 45-72, 190-218.

111. This sentiment was famously expressed by President Hebert Hoover: “To possess one’s own home is the hope and ambition of almost every individual in our country, whether he lives in a hotel, apartment, or tenement . . . they never sing songs about a pile of rent receipts.” Jackson, supra note 47, at 172 (quoting President Hoover).
sought to destabilize those neighborhoods and resettle urban dwellers in owner-occupied homes in the suburbs. Sampson, as we have seen, persuasively demonstrates the perversity of that approach. And Simon argues that cities need not adopt that approach anyway because renters can be prodded to take on the long-term perspective of homeowners if they are given a similar stake in the community. As Simon sees it, then, fostering immobility in urban neighborhoods will provide them with some of the advantages that have long enabled the suburbs to prosper.

Furthermore, there is reason to believe that immobility-enhancing policies will do a better job of boosting collective efficacy than community policing and the other place-based remedies Sampson explicitly advocates in Great American City. Where an unconventional deployment of police resources to a particular neighborhood is likely to draw a significant amount of media attention and can thus cement the neighborhood’s reputation for lawlessness, it is hard to see the construction of new housing, the creation of hybrid tenure forms, or the provision of employment preferences doing the same. Furthermore, Sampson himself expresses concern that place-based remedies may, if successful, lure residents from other neighborhoods and thus destabilize those neighborhoods. A policy solely advantaging existing community residents would not, however, raise this concern.

There is, however, one major problem with immobility policies: they may be illegal. The courts have been very skeptical of city efforts to induce immobility in urban neighborhoods (an ironic contrast to the longstanding judicial solicitude for suburban homeownership). Rent control, local hiring preferences, restrictions on alienability (a facet of the hybrid tenure form Simon advocates) and the like have all had an uneven fate in the courts. According to Simon, “The Supreme Court considers that the federal structure of the constitution


113. See Simon, supra note 6, at 75-76 (arguing that community economic development is a “defensive and remedial” response to suburban zoning).

114. See Sampson, supra note 11, at 424-25.

implies rights of interstate mobility that are inconsistent with encompassing notions of local citizenship.” For instance, in one high profile case, the Supreme Court held that a Chicago ordinance prohibiting gang congregation in particular neighborhoods (a key place-based policy championed by community policing advocates such as Meares and Kahan) violated “the right to move ‘to whatsoever place one’s own inclination may direct,’” which the Court held to be a protected “liberty” interest under the due process clause.

It appears, in short, as if the Supreme Court is in thrall to exactly the sort of methodological individualism Sampson assaults, in which individual mobility is given precedence over the building of community. As in many areas, the Court’s substantive preference for mobility over community is seemingly unmoored from any empirical grounding. Great American City offers a critical contribution here. By showing that individual mobility is a fallacy (at least for the most disadvantaged) and that our lives are shaped by community, Sampson affords advocates of immobility policies the ability to forcefully challenge these judicial assumptions and make the case that bolstering community may be the only effective strategy for dealing with the enduring scourge of concentrated urban disadvantage and “the stigmatizing mold of negative perceptions.”

Conclusion

Great American City is an outstanding book, sure to be influential for a long time to come. In convincingly demonstrating that individual choices are bound up with the local environment, it is a powerful corrective to the methodological individualism underlying much modern urban policy. And it lights the way for numerous future research opportunities. This essay has sought, above all, to show how profoundly the book should affect the way we think about the future of urban policy.

116. SIMON, supra note 6, at 88.
117. City of Chicago v. Morales, 527 U.S. 41, 54 (1999) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130 (1765)).
118. See id. at 53-54.
120. See SAMPSON, supra note 11, at 148.
The Continuing Struggle Against Government Extortion, and Why the Time Is Now Right to Employ Heightened Scrutiny to All Exactions

Marc J. Herman*

“I’m going to make him an offer he can’t afford to refuse”

― The Godfather

THE GODFATHER, FRANCIS FORD COPPOLA’s 1972 blockbuster, is a timeless classic.¹ In addition to its legacy as one of Hollywood’s most successful motion pictures, The Godfather exemplifies a theme that roots itself in the very fabric of human nature: extortion. What is central to The Godfather has parallels, nuanced and more subtle, to land use regulation. Through a pervasive scheme of exactions, governments are coercing property owners. This coercion may neither be as blatant nor as repugnant as finding a horse’s decapitated head in one’s bed, but, nevertheless, it exists and mandates judicial oversight. Indeed, in 1987 the United States Supreme Court warned against the risk of municipal plans of “out-and-out...extortion.”²

The Supreme Court has made efforts to inhibit government extortion in the context of exactions. In two well-known cases, Nollan³ and Dolan,⁴ the Court crafted a framework that subjected exactions to heightened scrutiny. This framework, known as the “dual rationality test,”⁵ measures the constitutionality of modern-day exactions.

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¹. The Godfather (Paramount Pictures, 1972). Strong caveat required: “depending on one’s audience” (mostly for the benefit of my wife, who leaves the room whenever the film is playing).


³. Id.


⁵. See infra Part IV.
Since Nollan and Dolan, the Supreme Court has had little opportunity, or rather, has declined, to provide further guidance on the precise contours of the dual rationality test. This article focuses on the Court’s most recent exactions decision: Koontz v. St. Johns River Water Management District. Koontz—advanced by private property rights advocates as a resounding victory—expanded the dual rationality test to monetary exactions, an issue that had plagued lower courts for decades. Yet despite Koontz’s ability to provide some much-needed clarity, the decision left an important question unanswered: whether heightened scrutiny—the legacy of Nollan and Dolan—is equally applicable to both legislative and adjudicative exactions, i.e., generally applicable exactions and individually tailored exactions, respectively.

“[S]ome of the most frequently litigated issues in this area are whether the rules established in [Nollan and Dolan] apply to legislative or adjudicative exactions.” Judicial fragmentation in the lower courts is rife. While some argue that “Nollan and Dolan cannot be read as limited to discretionary, case-by-case conditions,” others advocate

8. See Lee Anne Fennell & Eduardo M. Penalver, Exactions Creep 8 (2013) (“Before Koontz, the Supreme Court had not intervened to decisively resolve [the] debate.”).
9. See Nollan, 483 U.S. 825; see also Dolan, 512 U.S. 374.
10. See Steven Eagle, Koontz in the Mansion and the Gatehouse, 46 Urb. Law. 1, 6 (2014); D.S. Pensley, Real Cities, Ideal Cities: Proposing A Test of Intrinsic Fairness For Contested Development Exactions, 91 Cornell. L. Rev. 699, 706 (2006) (providing a concise explanation of the distinction between legislative and adjudicative (ad hoc) decision making). Essentially, the distinction rests on the underlying process utilized to implement governmental policy: legislative decision-making is formulated via the law-making process, and, necessarily, has universal application. Adjudicative decision making, on the other hand, “sometimes called ‘quasi-judicial’ proceedings, are a hybrid between a purely legislative enactment and a full judicial proceeding.” Jane C. Needleman, Exactions: Exploring Exactly when Nollan and Dolan Should Be Triggered, 28 Cardozo L. Rev. 1563, 1574 n.76 (2006). Such decision-making involves individualized and tailor-made exercise of legislative authority. See id.; see also Catherine Buchanan Lehmann, Dolan v. City of Tigard: A Heightened Scrutiny of the Fifth Amendment, 32 Hous. L. Rev. 1153, 1176 (1995) (suggesting that there are three different tests that courts usually employ to distinguish legislative acts from adjudicative acts).
that “[t]here is language in Supreme Court decisions suggesting that Nollan and Dolan (and hence Koontz\(^\text{13}\)) should be limited to [adjudicatory] fees.”\(^\text{14}\) The answer to this question is tremendously important for landowners. With no explicit guidance from the Supreme Court, landowners cannot assert whatever constitutionally preserved rights they may have, and protect their property interests from government extortion. This article supports the equal treatment of legislative and adjudicative exactions: both should be subject to Nollan and Dolan’s heightened scrutiny analysis.

Part I of this article briefly examines the history of the Takings Clause, tracking its transatlantic voyage and its eventual re-birth in the United States. It then delineates the framework for a modern-day exactions analysis, discussing the Supreme Court’s decisions in Nollan\(^\text{15}\) and Dolan,\(^\text{16}\) and the subsequent reactions to those decisions in the lower courts. Finally, after analyzing the Court’s decision in Koontz,\(^\text{17}\) this article argues that the answer to the above-proposed question is an emphatic yes—heightened scrutiny is, or ought to be, applicable to legislative exactions. A bifurcated approach (one that treats legislative and adjudicative decisions differently) is perversely artificial and unworkable. To be sure, we do not want local municipalities making offers that landowners, in the words of Marlon Brando, “can’t refuse.”\(^\text{18}\) In addition, it would be remiss if this writing failed to spend some time discussing the level of scrutiny imposed by heightened review—in particular whether, as its label suggests, heightened review mandates exacting scrutiny.

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I. Historical (and Very English) Underpinnings of the Takings Clause

An understanding of American takings jurisprudence requires a brief journey across the Atlantic Ocean (“The Pond”). Sir Edward Coke, an English jurist who boasts an illustrious stature analogous to Learned Hand, declared: “the house of everyone is to him as his castle and fortress, as well for his defence [sic] against injury and violence as for his repose.” This libertarian-esque philosophy of personal freedom revered, and sought to protect, the sacrosanct natural right of autonomy over one’s property—a philosophy that ultimately motivated the drafting of the takings clause.

Coke advocated his theory four centuries after the Magna Carta Charter was signed and sealed under the reign of King John. The Charter was a direct response to the King’s common and arbitrary abuse of his sovereign power. In pertinent part, it stated: “[n]o freeman shall be taken . . . or in any way destroyed . . . except by the lawful judgment of his peers and by the law of the land.”

The adoption of the Charter “marked the dawn of the modern era of land law in England.” And, with the passage of time, it eventually led to a general practice of providing compensation when one’s title or possession of property was transferred to the government by force of law. This practice “preserved horizontal equity among property owners”—i.e., it ensured that any burdens placed upon some property owners would be offset by compensation, thus restoring equality among similarly situated landowners. Inevitably, with the advent of colonization, this practice, too, travelled across the Atlantic before firmly cementing itself as the “legal status quo.” The “brainchild of James Madison” was to codify this status quo, and accordingly,

23. Magna Carta Charter, art. 39.
27. Dana & Merrill, supra note 12, at 15.
he instigated its discussion at the state conventions. Madison’s successful efforts are evident in the Federal Constitution. Interchangeably referred to as the Eminent Domain Clause, Just Compensation Clause, and the Takings Clause, the Fifth Amendment reads in pertinent part: “nor shall private property be taken for public use, without just compensation.”

II. Takings 101

A “taking” ordinarily means to acquire possession or control of something. From an originalist’s viewpoint, the ratifiers of the Fifth Amendment most probably understood “taking” as referring to government action that typically transfers possession or control of private property to the state. This practice—eminent domain—does not define the limits of the takings clause. As American takings jurisprudence has developed, so has its complexity. Takings jurisprudence can be classified into several categories: per se takings, regulatory takings, and exactions.

A. Per se Takings

A per se taking may manifest itself in one of two ways: permanent physical invasion or complete economic deprivation. As to the former, “[w]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.” As to the latter, a regulation that “completely deprive[s] an owner of all economically beneficial use of her property,” similarly entitles such owner to compensation.

28. *Id.* at 13.
30. U.S. CONST. amend. V.
31. *Dana & Merrill*, *supra* note 12, at 86.
32. *Id.*
34. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (citing *Loretto v. Teleprompter Manhattan CTV Corp.*, 458 U.S. 419, 435-38 (1982), where New York law authorizing cable television company to place equipment within petitioner’s building constituted a physical invasion of her property. The United States Supreme Court held that any physical occupation of private property, authorized by the government, requires just compensation. (*Id.* at 441.).)
35. *Lingle*, 544 U.S. at 538 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), where South Carolina statute imposed developmental restrictions upon petitioner’s property that “denie[d] all economically beneficial or productive use of land,” and was thus a taking. (*Id.* at 1015.).)
B. Regulatory Takings

Regulatory takings, on the other hand, are less categorical—they demand a fact-intensive, multi-factored inquiry into whether the governmental action amounts to an unreasonable interference with one’s private land rights, as to trigger the takings clause. In *Penn Central Transportation Company v. New York City*, the United States Supreme Court delineated several dispositive factors ("The Penn Central Factors") that have particular significance to a takings analysis: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. "The Penn Central factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within [the per se takings framework]."

C. Exactions

While *per se* and *regulatory* takings jurisprudence have been subject to extensive development by the Supreme Court, the law pertaining to exactions is still, relatively speaking, in its infancy. An exaction describes a quid pro quo between the state and a private landowner. Governments often require developers to mitigate the potential adverse impacts of their projects by exacting something in return for an approval. There are several types of exactions: on-site land dedications, off-site land dedications, money...
payments, and other conditions. The government essentially seeks to obtain a variety of public improvements, infrastructure, and facilities through a process of bartering. “The most common (and expensive) facilities include street[s] and street improvements, water and sewage facilities, affordable housing, parks and recreation, and schools.”

Traditionally, the burden of providing such infrastructure was spread among existing residents. However, “there has been a dramatic change in regimes in the United States, so that newcomers must pay all of the cost of infrastructure to serve them, plus share[e] in the cost of infrastructure of existing residents through real estate taxes.” The current increase in government exactions evinces a trend of “exclusionary fiscal policy.”

Rich or poor, professional developer or not, anybody is susceptible to government exactions. Borrowing from one author’s proposed formulaic representation of a typical exaction, consider the following: John owns a magnificent two-story property by the beach. His ownership interest grants him certain rights and benefits. Those rights include the right to use, possess, and enjoy the land. We shall label those benefits as “A.” Incident to ownership, John must also endure certain burdens, such as compliance with zoning regulations, and payment of property taxes. Those burdens shall be labeled “B.” Thus, “A” + “B” = the status quo land use package. After several years of ownership, John wishes to develop his beachfront property. He proposes to add a third floor to his home. The planned addition will add approximately 15 feet to the property’s height, and 10 feet to its width. This proposal shall be labeled “C.” Naturally, one’s benefit often inures to another’s misfortune, and John’s proposed development burdens the local municipality—the increased height specifications cast a large shadow upon the beach, imposing an encumbrance upon avid sunbathers. This burden shall be labeled “D.” After seeking development permission from the local municipality, he is informed

45. See Eagle, supra note 10, at 10.
46. See id.
47. See id. at 15 (“Broadly speaking, land development applicants might be classified in two categories. The first is professional developers, who see property rights in instrumental terms. The second is home and small business owners, who see land ownership in personal and subjective terms.”).
48. FENNEll & PENALVER, supra note 8, at 13-18.
that, despite his compliance with zoning regulations, he must pay a “development impact fee” of $10,500 before he can proceed with the desired extension. The fee, according to the municipality, will be utilized to fund a public transportation project, enabling those wishing to sunbathe to take advantage of a shuttle bus that will transport them to a different beach. We shall label this condition “E.”

In light of the above, John has two options available to him. First,—“A” + “B”—which gives John the status quo of land ownership. Second,—“A” + “B” + “C” + “D” + “E”—granting John his desired development, but conditioned upon his payment. This second option is a quintessential example of an exaction. It is essentially a bargain between two parties looking to strike a deal; “[o]n the one hand, we have a developer who wants to build something. On the other hand, we have a local government that is in the business of providing services and facilities.” The Supreme Court has established a framework to analyze the constitutionality of exactions: there must be an “essential nexus” between the alleged burden and the government-imposed condition in order for the exaction to pass constitutional muster, i.e., there must be a substantial relationship between the burden imposed by John’s development—aggravating avid sunbathers—and the city’s proposed solution.

This framework provides a safety mechanism that protects against “thinly-disguised schemes for extortion.”

III. The United States Supreme Court: Passivism and Activism Toward Land Use Regulation

Before delving into the legal patchwork of exactions, one must answer a gateway question: namely, whether land development is a right or a privilege. This question has provoked extensive controversy over the years; not least in California, where the California Supreme Court has often found itself supporting the latter position. On the opposite end of the spectrum, perhaps under a Hegelian perspective, land development is viewed as more of a right. The United States Su-

49. Bosselman, supra note 12, at 345.
50. Nollan, 483 U.S. at 837 (“essential nexus” is directly attributable language to this landmark Supreme Court decision).
The Supreme Court has of late aligned itself more with this view.53 It adopted this philosophy during an era known as “The Renaissance of Land Use.”54 The word ‘renaissance’ conveys the Court’s progression from abandonment to reengagement—from the 1920s to the 1970s, various stimuli provoked the Court to take a prolonged absence from land use issues.55 One plausible explanation for this passivism is that the Court may have reasoned that land use is a “State and local concern,”56 and no business of the federal judiciary. Nevertheless, a new period of judicial activism ushered in throughout the latter part of the twentieth Century, with the Supreme Court taking an “unusual interest” in exaction theory.57 One academic describes this period as “spectacular” for land use.58 This writing agrees with such a proposition; for it was in this period that the Supreme Court conveyed intolerance toward the regulatory state to which many had become naturally accustomed.59

IV. A Legal Framework: The Unconstitutional Conditions Doctrine and Nollan/Dolan

A. The Unconstitutional Conditions Doctrine

Nollan v. California Coastal Commission60 and Dolan v. City of Tigard61 are at the heart of any modern exactions analysis. The Supreme Court viewed those cases as an ideal opportunity to clarify the constitutional safeguards against unlawful governmental interference with private land rights. The Court advanced its dual rationality test, and, in doing so, “broke new ground.”62

The dual rationality test is a derivative of the unconstitutional conditions doctrine. This doctrine buttresses the proposition that “the government may not deny a benefit to a person because he exercises a

53. Nollan, 483 U.S. at 833 n.2 (“But the right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’”).
54. See generally Skouras, supra note 21, at 49-64.
55. See id. at 40.
56. See id.
57. See Fischel, supra note 19, at 11.
58. Skouras, supra note 21, at 59.
59. Id. (“The Supreme Court with the addition of Justice Scalia attempted to chart a new course for land use law, by attempting to halt the expansion of regulatory government.”).
60. 483 U.S. 825.
61. 512 U.S. 374.
62. Skouras, supra note 21, at 60.
constitutional right." Thus, it follows that the government may not condition the granting of a discretionary benefit upon one’s agreement to relinquish a constitutionally protected right. To illustrate, a public university may not, under the unconstitutional conditions doctrine, condition the renewal of a faculty member’s contract upon his promise to forego his public criticism of its current administration, without violating the Constitution. Such temptation could conceivably unduly coerce a faculty member who values the assurances of a consistent salary over his rights to free expression. Essentially, the doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”

In the land use context, permit applicants are especially vulnerable to the types of coercion that the unconstitutional conditions doctrine seeks to inhibit. Typically, applicants value a development permit a lot more than their own property; consequently, the government is in prime position to pressure an applicant into “giving up property for which the Fifth Amendment would otherwise require just compensation.”

Cue Nollan and Dolan: when the government conditions its approval upon an applicant’s agreement to burden his property, an accession that may otherwise require compensation under the Fifth Amendment, the dual rationality test prohibits the government-imposed condition if it unduly coerced a property owner into forfeiting his Fifth Amendment right to compensation, i.e., there is no essential nexus between the negative externalities of the proposed development and the government-imposed condition. As will be seen below, the dual rationality test is eerily reminiscent of the unconstitutional conditions doctrine.

63. Koontz, 133 S. Ct. at 2594 (internal citations omitted).
65. Koontz, 133 S. Ct. at 2594.
66. Id.; see also Needleman, supra note 10, at 1570-71 (“A heightened level of scrutiny is necessary because, when a municipality requires an exception as a condition to grant of a permit, the risk increases that the municipality is simply trying to deprive the landowner of a property right for which it would otherwise have to provide compensation.”); Nollan, 483 U.S. at 841 (“When the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.”).
1. **NOLLAN v. CALIFORNIA COASTAL COMMISSION**

A beachfront lot in Ventura County, California, provided the backdrop as the Supreme Court first defined the constitutional limits of an exaction. The owners of the beachfront lot, the Nollans, proposed to demolish their existing property and replace it with a three-bedroom house.\(^{69}\)

Before building, the Nollans were required to obtain a development permit from the California Coastal Commission.\(^{70}\) After submitting a proposal, the Commission conditioned its approval on the Nollans’ agreement to grant a public easement over a portion of their property.\(^{71}\) The easement, according to the Commission, would alleviate the burden placed upon the public’s beach access—which, the Commission claimed, included “psychological” and “visual” access—by, the Nollans’ proposed construction.\(^{72}\) The Nollans refused to accede to such demands. The case ultimately reached the United States Supreme Court.

The Court recognized that ordinarily, if a local government obtains an easement over private land, under a traditional Fifth Amendment analysis, the government is obligated to pay compensation.\(^{73}\) However, in *Nollan*, the precise issue before the Court was whether requiring the easement to be conveyed *as a condition* altered the outcome.

Central to its analysis, the Court identified two separate, mutually exclusive, acts: the petitioner’s *proposed development* and the government’s *condition*.\(^{74}\) The Court assumed, without deciding, that under a substantive due process analysis,\(^{75}\) the government could have lawfully denied the Nollans’ proposal; it entertained the Commission’s assertion that such denial had legitimately sought to preserve the public’s view of the beach.\(^{76}\) With this assumption firmly rooted, it then asked whether the condition substituted for the denial “fails to further the end advanced as the justification for the [denial].”\(^{77}\) In other words, whether there is an “essential nexus”—or logical connection—between

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69. *Nollan*, 483 U.S. at 828.
70. Id.
71. Id.
72. Id.
73. Id. at 830.
74. Id. at 834.
75. See *Lingle*, 544 U.S. at 541 (A substantive due process analysis subjects municipal exercise of the police power—*inter alia* zoning regulations, permit approvals and denials—to a very deferential standard of review. As long as the exercise of the police power “was not clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare,*” it will pass constitutional muster.).
76. Id. at 837.
77. Id.
the conditioned public easement and the alleged burdens on the public’s beach access. The Court made it clear that when there is no essential nexus, there is no constitutional propriety, and compensation must be paid.\textsuperscript{78} Applying this framework, the Court deemed it “impossible” to understand how an easement across the Nollans’ property alleviates the alleged viewing burden created by the development.\textsuperscript{79} “In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an ‘out-and-out plan of extortion.’”\textsuperscript{80}

2. \textit{DOLAN v. CITY OF TIGARD}

The Court in \textit{Nollan} had articulated what later became known as less than a decade later, in \textit{Dolan}, the Supreme Court revisited the exaction issue, clarified \textit{Nollan}’s essential nexus test, and added another layer of judicial scrutiny. The Court explained that \textit{Nollan}’s essential nexus test was merely the first step in the analysis; the second part of the analysis requires a court to determine whether the degree of the exactions demanded by the government bore the required relationship to the projected impact of the petitioner’s proposed development.\textsuperscript{81} This, adopting the parlance of the Court, is the rough proportionality test.\textsuperscript{82} The framework enunciated in \textit{Nollan} and \textit{Dolan} has been described as an “insurance policy” against municipal racketeering.\textsuperscript{83} Together, the tests form the dual rationality test.

While the Court unambiguously articulated a framework, it declined to \textit{explicitly} communicate a formal standard of review.\textsuperscript{84} Was “rough proportionality” and “essential nexus” to be synonymous with strict scrutiny? Or, rather, were they to be equated with rational basis review? One author, relying on Chief Justice Rehnquist’s opinion in \textit{Dolan}, has suggested that \textit{Nollan} and \textit{Dolan}’s framework is \textit{not} synonymous with strict scrutiny.\textsuperscript{85} It should be recalled that in \textit{Dolan}, Chief

\textsuperscript{78} Id.
\textsuperscript{79} Id. at 837. The Court borrowed this phraseology from the New Hampshire Supreme Court’s decision in \textit{J.E.D. Assocs., Inc. v. Atkinson}, 121 N.H. 581, 584 (1981).
\textsuperscript{80} \textit{Dolan}, 512 U.S. at 386.
\textsuperscript{81} Id. at 391.
\textsuperscript{82} See \textit{CALLIES ET AL.}, supra note 43, at 2-3.
\textsuperscript{83} See Eagle, supra note 10, at 5 (“Notably, the opinions in neither \textit{Nollan}, nor \textit{Dolan}, nor \textit{Koontz} explicitly refer to \textit{Nollan/Dolan} as employing a heightened scrutiny standard of review.”).
\textsuperscript{84} Needleman, supra note 10, at n.50 (“It is important to note that although a heightened scrutiny is necessary, the Court does not demand (in either \textit{Nollan} or \textit{Dolan}) the strictest scrutiny usually applied in situations like discrimination cases.”). Indeed, Justice Rehnquist, in \textit{Dolan}, explained that “very generalized state-
Justice Rehnquist outwardly rejected the rigors of “exact[ing] [or strict] scrutiny,”86 but cautioned against a standard of review that was “too lax.”87 Instead, he endorsed a test that demanded an intermediate position—one “requiring the municipality to show a ‘reasonable relationship’ between the required dedication and the impact of the proposed development.”88 In an oft-cited passage, the Chief Justice summarized the required standard of review: “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”89 Despite its cryptic overture, Rehnquist’s analysis is widely accepted as subjecting exactions to heightened, or intermediate, review—a standard that is less demanding than strict scrutiny, but more demanding than rational basis scrutiny.90 Practically, what does this mean for an exaction’s litigant? John Echeverria suggests, based on an empirical analysis, that “the rough proportionality test, in operation, is only somewhat less demanding than the strict scrutiny test applied in other contexts.”91 After surveying various appellate opinions across the country, Professor Echeverria’s research revealed that the government “flunk[ed] the [rough proportionality] test about half the time.”92 Thus, Nollan and
Dolan’s rough proportionality test is evidently a little more venomous than Justice Rehnquist initially envisioned.

As discussed above, exactions are pervasive in a contemporary society. There is no doubt that commercial land development requires a surrounding infrastructure of facilities and services. While at one time local governments were obligated to bear the principal cost of development improvements and facilities, now—for the past several decades—local governments have been charging land developers for at least a portion of the cost of public facilities. Such charges have manifested themselves in the form of fees—“impact fees”—and land dedications. Exactions have also been utilized in the context of affordable housing; local governments have conditioned the granting of a development permit upon the developer’s agreement to provide low-income or affordable housing. Notwithstanding the commercial context, Nollan’s and Dolan’s heightened level of scrutiny is equally applicable. To illustrate, in Commercial Builders of Northern California v. City of Sacramento, an ordinance was enacted that required developers to pay a fee to offset the anticipated burdens of attracting low-income workers to the city. The Ninth Circuit held that Nollan’s essential nexus test had been satisfied because the fee had been designed to further the city’s legitimate interest in housing low-income workers. In contrast, in Building Industry Association of Central California v. City of Patterson, a development agreement that conditioned a permit upon the payment of a fee did not pass constitutional muster.

Opinions 71 (1997), available at https://law.wustl.edu/journal/51/Hopper_.pdf (“Notwithstanding Chief Justice Rehnquist’s characterization of this new test as one akin to an ‘intermediate position,’ the rough proportionality test is an activist standard of review because it reverses the presumption of validity and places the burden of proof on the non-judicial decision maker.”); Breemer, supra note 12, at 381 (“In the years since Dolan, lower courts consistently have applied the essential nexus test . . . [T]he essential nexus standard is routinely enforced beyond the halls of the High Court.”).

95. 941 F.2d 872, 873 (9th Cir. 1991).
96. Id. at 876.
V. Adjudicative vs. Legislative Exactions

Nollan and Dolan delineated a framework for analyzing government exactions: unless the exaction satisfies the judicially created essential nexus and rough proportionality tests (collectively, the dual rationality test), the government’s conduct is treated as a taking. There were, however, unanswered questions in the Court’s analysis. First, was Nollan/Dolan applicable to monetary exactions, in addition to physical land dedications? Or, as local governments regularly argued, was the analysis limited to physical dedications?98 As discussed below, the United States Supreme Court has now settled this issue, explaining that Nollan and Dolan’s analysis is indeed applicable to impact fees.99 A second, and somewhat more fundamental, question is whether Nollan and Dolan’s analysis was applicable to legislative exactions.100 Below, it is posited that such analysis is, or ought to be, applicable to both legislative and adjudicative exactions. Disparate treatment is illogical and leads to troubling results.

A narrow reading of Dolan might suggest that its analysis was limited to adjudicative decision-making. In its opinion, the Court, via a footnote, firmly distinguished legislative decision-making from adjudicative decision-making.101 Moreover, the Court emphasized the adjudicative nature of the exaction at issue.

Justice Stevens’ dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.102

One might argue that because the Dolan Court highlighted the adjudicative character of the challenged exaction, it is reasonable to conclude that the Court limited its analysis to adjudicative exactions.

98. See Ehrlich, 911 P.2d 429 (finding that Nollan and Dolan’s tests were applicable to monetary exactions).
99. See Koontz, 133 S. Ct. at 2599; see also Echeverria, supra note 14, at 39 (attacking the Court’s decision to expand Nollan and Dolan’s analysis beyond the realm of physical land dedications).
100. See DAVID L. CALLIES, BARGAINING FOR DEVELOPMENT 22 (2003); see also Bree mer, supra note 12, at 381 (“Even as the split over monetary exactions begin to favor applying Nollan and Dolan, a controversy over the applicability of the nexus test to legislative acts continues to retard judicial consistency in application of that test.”).
102. Id. (internal citations omitted).
This proposition is flawed. The Court’s reference to adjudicative/legislative decision-making ought not be afforded great significance—it merely clarified the allocation of the burden of proof. As is evident from the above excerpt, the Court placed the burden of proof *upon the government* because the challenged exaction was adjudicatory in nature. This burden allocation essentially reversed traditional constitutional doctrine103—when economic and non-fundamental rights are implicated, the post-Lochner Court “generally defers to legislatures,”104 placing the burden of proof upon the petitioner. This burden shift was unexpected,105 and, to the delight of some,106 “set up a constitutional obstacle course for local governments.”107 In highlighting the adjudicatory character of the challenged exaction, the *Dolan* Court was merely justifying its decision to depart from its previous pro-legislature stance—quite simply, the distinction was required by doctrinal necessity.108 Thus, the above passage ought not to be construed as indicative of *Nollan* and *Dolan*’s limited applicability; it was, rather, an attempt to legitimize its burden allocation.

To further muddy the waters, Justice Souter, in his dissent, argued that the exaction at issue in *Dolan* was actually *legislative* in nature.109 The permit conditions were, after all, imposed pursuant to Tigard’s

103. The Court was merely acknowledging that when a government engages in *legislative* decision-making, there is often an abundance of judicial deference and the burden of proof properly rests on the moving party. However, in the context of *adjudicative* decision-making, the burden properly rests on the government. See Lehmann, *supra* note 10, at 1171 (“[T]he Court strayed from the presumption of constitutionality of such economic regulations and imposed a much higher scrutiny.”). *See generally* Marshall S. Sprung, *Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard*, 71 NYU L. Rev. 1301 (1996) (discussing the interesting proposition that, unlike in *Nollan*, the *Dolan* Court shifted the burden of proof upon the defendant); *see also* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 243-44 (2000).

104. Reznik, *supra* note 103, at 250; *see also* Lehmann, *supra* note 10, at 1170, n.138 (“In *Lochner*, the Court struck down a New York law that limited the hours a bakery employee was allowed to work to 10 per day and 60 per week as an abridgement of liberty of contract and thus a violation of [substantive] due process.”).


109. *Dolan*, 512 U.S. at 413; *see also* Lehmann, *supra* note 10, at 1175.
Community Development Code. According to Justice Souter, “[t]he [only] adjudication here was of Dolan’s requested variance from the permit conditions.”

If, arguendo, the Dolan Court did limit its dual rationality test to ad hoc determinations, it is arguable that ad hoc assessments occur whenever a local government implements legislative policy to particular land parcels, and therefore, the “potential for the unconstitutional placement of disproportionate burdens” is present in legislative decision-making, too. Consider the following: if town X passes ordinance Y, the town will be required to implement the ordinance on an individual basis. Moreover, if a property owner challenges the ordinance, the town will be required to adjudicate. Accordingly, notwithstanding the ordinance’s original legislative character, its mandate will inevitably be facilitated through individual application; by their very nature, legislative acts fuel adjudicative proceedings. This paradox has been appropriately labeled as “The Dolan Misstep” and further deprives the legislative/adjudicative distinction of credibility.

Predictably, the legislative/adjudicative distinction has been debated in the lower courts that continue to apply the dual rationality framework. While many, if not most, courts have concluded that the analysis is restricted to ad hoc determinations, some judicial opinions cite approval for a blanket application. California, on the other

111. *Id.* at 413 n.6 (Souter, J., dissenting).
113. See *id*.
114. See *Breemer*, supra note 12, at 405 (“There is no logically consistent way to pinpoint the source of an exaction because they typically reach the landowner only after the involvement of both legislative and adjudicative bodies.”).
115. Compare cases that have adopted a bifurcated approach, such as Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997); Waters Landing Ltd., v. Montgomery Cnty., 650 A.2d 712 (Md. 1994), Arcadia Dev. Corp., v. City of Bloomington, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (“[T]he *Nollan/Dolan* analysis, however, applies only to adjudicative determinations that condition approval of a proposed land use on a property transfer to the government, which, standing alone, would clearly constitute a taking.”), Rogers Mach., Inc., v. Washington Cnty., 45 P.3d 966 (Or. Ct. App. 2002), with cases that render the distinction irrelevant, such as N. State Home Builders Ass’n v. County of Du Page, 649 N. E.2d 384 (Ill. 1995); Amoco Oil Co. v. Vill. of Schaumberg, 661 N.E.2d 380, 390-91 (Ill. App. Ct. 1995); J.C. Reeves Corp. v. Clackamas Cnty., 887 P.2d 360, 365 (Or. Ct. App. 1994) (emphasizing that the nature of land use regulations, and not the source, is most dispositive for a constitutional analysis.); Curtis v. Town of S. Thomaston, 708 A.2d 657 (Me. 1998); Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172 (Wash. Ct. App. 2000); see also Julian Conrad Juergensmeyer & Thomas E. Roberts, *LAND USE PLANNING AND DEVELOPMENT* §10:5 (2007).
hand, appears to have settled the issue.\textsuperscript{116} In \textit{Ehrlich} and \textit{San Remo Hotel}, the California Supreme Court rejected the suggestion that \textit{Nollan} and \textit{Dolan} are applicable to legislatively borne exactions.\textsuperscript{117} In \textit{Ehrlich}, the petitioner fell victim to a legislative “ransom.”\textsuperscript{118} Following his request to build a 30-unit condominium, valued at $10,000,000, to replace his financially inept sports and tennis club, Culver City conditioned approval upon the following: (1) the payment of $280,000 to be used for additional public recreational facilities as directed by the City Council; and (2) the payment of an exaction under the city’s “art in public places program” that would require the petitioner to provide artwork in an amount equal to one percent of the total building valuation, or pay for the city to provide it.\textsuperscript{119} Such demands reflect an inverted perception of legislative responsibilities; it is as though the legislature viewed itself with innate entitlement to a profit-sharing scheme. As succinctly put by one critic, “[t]o say that these conditions were startling would be an understatement.”\textsuperscript{120} The petitioner sued the city under a takings theory. The trial court invalidated the $280,000 fee, but it declined to set aside the “art in public places” fee.\textsuperscript{121} The appellate court found that there was a “substantial nexus” between the proposed condominium project and the $280,000 exaction. “The mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City’s approval of the townhome project and for the burden to the community resulting from the loss of recreational facilities.”\textsuperscript{122} Granting \textit{certiorari},\textsuperscript{123} the California Supreme Court reversed the appellate court’s approval of the $280,000 mitigation fee, but affirmed the legality of the art in public places fee.\textsuperscript{124} While an in-depth analysis of the court’s decision is beyond the scope of this

\textsuperscript{116} See \textit{San Remo Hotel L.P. v. City and Cnty. of San Francisco}, 41 P.3d 87 (Cal. 2002); \textit{Ehrlich v. City of Culver City}, 911 P.2d 429 (Cal. 1996) (legislative exactions need not be exposed to heightened scrutiny).

\textsuperscript{117} See \textit{San Remo Hotel}, 41 P.3d 87; \textit{Ehrlich}, 911 P.2d 429.

\textsuperscript{118} Kanner, supra note 106, at 214.

\textsuperscript{119} \textit{Ehrlich}, 911 P.2d at 435. The local government valued the petitioner’s project at $3.2 million, and therefore he would be required to pay $33,200 in lieu of providing the artwork.

\textsuperscript{120} See Kanner, supra note 106, at 214.

\textsuperscript{121} \textit{Ehrlich}, 911 P.2d at 450.

\textsuperscript{122} \textit{Id.} at 436

\textsuperscript{123} Initially, the California Supreme Court declined to review the case, but in light of the United States Supreme Court’s decision in \textit{Dolan}, it reneged on its original decision. See Kanner, supra note 106, at 214.

\textsuperscript{124} \textit{Ehrlich}, 911 P.2d at 450 (“The requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose.”). This decision demonstrated “unabashed nullification of [the Supreme Court’s]
article, it is noteworthy for present purposes that the California Supreme Court drew a firm distinction between legislative and adjudicative decision-making, and limited *Nollan* and *Dolan*’s application to the latter.

It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.126

Thus, the California Supreme Court concluded that because the risk of extortion is far more likely when the exaction is imposed on an individual basis, *Nollan* and *Dolan* are only applicable to ad hoc decisions.127 According to the Court, ad hoc decisions present “an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation.”128

More recently, the California Supreme Court took a similar approach in *San Remo Hotel v. City & County of San Francisco*.129 As discussed below, limiting *Nollan* and *Dolan* to individualized determinations is untenable. Instead, it is more doctrinally consistent for *Dolan*’s test to be applied universally to both ad hoc and legislative determinations. There exists a significant reason: in its most recent takings decision, *Koontz v. St. Johns River Water Management District*,130 the Supreme Court has implicitly signaled that both legislative and adjudicative exactions are deserving of heightened scrutiny. Adopting the parlance of Judge Alex Kozinski of the Ninth Circuit, a contrary approach


125. See Kanner, *supra* note 106, at 214 (offering an interesting perspective on the court’s decision).


127. *Id.*

128. *Id.; see also* Daniel Curtin, *Applying Nollan/Dolan to Impact Fees: A Case for the Ehrlich Approach*, in *TAKING SIDES ON TAKINGS ISSUES* 333, 339 (Thomas E. Roberts ed., 2002) (“In the more common situation when exactions are imposed pursuant to a general legislative act or rule, cities act within their traditional police powers.”).

129. 41 P.3d at 105 (“We decline plaintiffs’ invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction we drew in *Ehrlich* . . . between ad hoc exactions and legislatively mandated, formulaic mitigation fees. While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process.”).

merely reflects courts’ “thinly disguised contempt” for landowners’ constitutional rights.131

VI. Koontz: The Supreme Court’s Renewed Vindication of Private Land Rights

Koontz has caused turbulence in an already volatile and uncertain area.132 Critics have attempted to undermine its analysis with pointed cynicism, sarcasm, and rhetoric.133 Coy Koontz, Sr., the petitioner,134 had purchased an undeveloped 14.9 acre tract of land in his home state of Florida. Keen on developing 3.7 acres, he applied to the District for the appropriate development permits.135 To offset the perceived environmental impact from his planned development, Koontz offered to deed 11 acres to the District as a conservation easement.136 Despite this concession, the District considered the conservation easement “inadequate,” and conditioned its approval upon Koontz’ acceptance of one of the following conditions: (1) reduce his proposed development to one acre and deed to the District the remaining 13.9 acres as a conservation easement; or (2) permit as originally planned, but only if Koontz also agreed to hire contractors to make improvements to District-owned land several miles away (i.e., to fund offsite public projects).137

After Koontz refused to accede to the District’s demands, his application was rejected.138 In an attempt to vindicate his Fifth Amendment right to compensation, he sought judicial redress. His chief argument in the Florida District Court was that the District’s proposed exaction constituted a taking without just compensation.139 The district court sided with Koontz and awarded him $376,154 in compensation.140 Its decision was affirmed in the Florida District Court of

133. See, e.g., Echeverria, supra note 14.
134. Actually, Coy Koontz, Jr., his son, represented the estate in the proceedings, but for ease of reference, Coy Koontz, Sr. shall be treated as the petitioner and applicant.
135. Koontz, 133 S. Ct. at 2592.
136. Id.
137. Id. at 2593.
138. Id.
139. Id.
Appeals. Exercising its discretionary reviewing authority, the Florida Supreme Court reversed on two grounds: (1) the mere denial of a permit application—as opposed to an acceptance with conditions—does not trigger the protection afforded by the Fifth Amendment; and (2) a demand for money, as opposed to land, cannot constitute a taking under the Fifth Amendment.\(^{141}\)

In an opinion authored by Justice Alito, the United States Supreme Court reversed the Florida Supreme Court, and remanded. It concluded that there is no substantive difference between the denial and acceptance of an application permit.\(^{142}\) It recognized that a contrary conclusion would encourage untenable results; essentially, it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. Specifically, “[u]nder the Florida Supreme Court’s approach, a government order stating that a permit is ‘approved if’ the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words ‘denied until’ would not.”\(^{143}\) Rather, articulated the Court, the unconstitutional conditions doctrine declines to attach significance to the distinction between conditions precedent and conditions subsequent. Second, the Supreme Court held that “so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”\(^{144}\) *Koontz* undoubtedly provided two clear-cut answers to two very specific questions.\(^{145}\)

Yet, the Court did not provide an explicit answer as to whether *Nollan*

\(^{141}\) *Koontz*, 133 S. Ct. at 2594.

\(^{142}\) *Id.* at 2597.

\(^{143}\) *Id.* at 2595-96.

\(^{144}\) *Id.* at 2599. As alluded to above, the Court’s decision has come under fierce criticism. Most notably, John D. Echeverria has vehemently criticized the decision. See generally Echeverria, *supra* note 14.

\(^{145}\) *But see* Echeverria, *supra* note 14, at 32 (describing the Court’s expansion of *Nollan/Dolan* to encompass monetary exactions as “convoluted, illogical thinking”). According to Professor Echeverria, the mandated payment of a fee does not trigger the Takings Clause because an exactions analysis requires one to assess whether the exaction, viewed independently, constitutes a taking. Relying on the Supreme Court’s analyses in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) and *Nollan* and *Dolan*, he asserts that the payment of a fee, viewed independently, is not a taking. To respond to Professor Echeverria’s observation, I suggest that the fundamental philosophy that underlies the Court’s exactions jurisprudence is a consistent observation of the unconstitutional conditions doctrine. See infra Part VII. That doctrine seeks to protect property from unwarranted governmental coercion, notwithstanding the nature of that coercion. Accordingly, Echeverria’s concern is not dispositive to the analysis. What is most troubling about Professor Echeverria’s approach is that a government could avoid an exaction analysis by simply requiring the payment of a fee, instead of a land dedication.
and Dolan’s analysis is limited to ad hoc exactions.\footnote{146} It is submitted, nevertheless, that Koontz provides ample justification for including generally applicable legislative exactions within the penumbra of Nollan and Dolan’s framework.\footnote{147}

A. The Court Implicitly Conveyed a Universal Application of Nollan and Dolan

Unlike its previous opinion in Dolan, the Koontz Court declined to define the exaction at issue.\footnote{148} If, as proponents of disparate treatment suggest, the type of exaction is indispensable to a court’s constitutional analysis, then surely the Court would have ensured that its opinion clearly conveyed it. Koontz was, after all, decided almost 20 years after the Court expounded its exactions analysis in Dolan. Given the timing of the decision, and the disharmonious muddle percolating in the lower courts, one may assume that the Court would have drawn attention to the type of exaction if it was relevant to the constitutional analysis. The Court did not do so.\footnote{149}

Second, in writing for the Court, Justice Alito was presumably aware of the disparate treatment of the issue in the lower courts. Indeed, almost two decades prior, Justice Thomas had pointed out that “the lower courts are in conflict over whether [Dolan] . . . should be applied in cases where the alleged taking occurs through an act of the legislature.”\footnote{150} Thomas, in his dissent, suggested that any distinction between legislative and adjudicative acts was artificial.\footnote{151} Furthermore, if Thomas’s dissent had not captured Alito’s attention, then Kagan’s dissent, in Koontz, surely did. In her passionate dissent, Kagan requested that the majority clearly articulate its stance: “[t]he majority might, for example, approve the rule, adopted in several states, that Nollan and Dolan apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable . . . [m]aybe
today’s majority accepts [a] distinction; or then again, maybe not.” In light of the surrounding uncertainty, the *Koontz* majority had an ample opportunity to endorse different treatment of legislative exactions. Yet since it declined to do so, it is conceivable, maybe even quite likely, that the Court deemed the distinction completely irrelevant to its constitutional analysis; the omission implicitly reveals the Court’s refusal to endorse a novel and unsound proposition.

B. An Expansive Application of *Koontz* Remains Faithful to the Court’s Current Agenda

It is difficult to deny that *Koontz* provides an expansive interpretation of the Fifth Amendment’s taking provision. It is this sort of expansive analysis that has prompted vehement criticism. As mentioned above, the Supreme Court reengaged with land use issues in the 1970s, crafting “a new course for land use law, by attempting to halt the expansion of regulatory government.” If one traces the Court’s takings jurisprudence over the past several decades, it is evident that the Court has set forth a conservative agenda of vindicating private land use rights. Consistent with its previous jurisprudence, the *Koontz* Court remained faithful to that agenda in its expansive interpretation of the Fifth Amendment. In light of this private property rights agenda, it is entirely plausible that the Court intended for its *Koontz* opinion to convey disaffection toward a non-universal application of *Dolan*.

With no definitive answer on the issue, at least outside of California, lower courts are, theoretically, at liberty to employ different approaches.

153. See Echeverria, *supra* note 14, at 46 (arguing that “the Court’s language [suggests that it has] . . . reserved the question of whether Nollan and Dolan can or should extend beyond ad hoc exactions.”).
154. See *supra*, pp. 20-1.
155. See Echeverria, *supra* note 14, at 1 (“The case of *Koontz* v. St. Johns Water Management District is one of the worst—if not the worst—decision in the pantheon of Supreme Court takings decisions.”).
157. For example, see *Arkansas Game & Fish Comm’n v. United States*, 133 S. Ct. 511 for an additional example of the Court’s expansive, conservative agenda. The Court held that government-induced temporary flooding is not categorically exempt from the scope of the Fifth Amendment. It provided a “unanimous victory for property rights.” See Brian T. Hodges, *Arkansas Game & Fish Commission v. United States: A Temporary Fix for Temporary Takings*, 14 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 38, 38 (2013).
Yet under its state constitution, California appears to have settled this issue. In two separate opinions, the California Supreme Court has conveyed its preference for a bifurcated approach. One might cite to California Building Industry Association v. City of San Jose as a prophetic indication of change on the “Golden Coast.” This litigation was triggered by an inclusionary housing ordinance requiring developers to set aside fifteen percent of their dwelling units as affordable housing. The trial court declared the ordinance invalid under a Nollan/Dolan analysis, and the appellate court reversed. In a disjointed and flawed opinion, the appellate court demonstrated great deference to the municipality—despite the ordinance’s resemblance to a quintessential exaction, the court declined to analyze it as such. Remarkably, the court opined that “the Ordinance should be reviewed as an exercise of the City’s police power,” and accordingly framed the issue as whether the ordinance was “arbitrary, discriminatory, and without a reasonable relationship to a legitimate public interest.” This analysis—a typical substantive due process analysis—is far more deferential than an exactions analysis. The case is currently pending resolution by the California Supreme Court; perhaps the court is preparing to seize the opportunity to signal a revolutionary change in judicial policy.

It would be disingenuous to suggest that the argument in favor of universal application is an easy sell. Quite frankly, it is not. The general consensus among courts is that Nollan and Dolan’s exaction framework is inapplicable to legislatively imposed exactions. For sure, as discussed above, California leads the way in advancing this anti-property-right philosophy. A recently published memorandum

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159. Id. at 816.
160. Id. at 825.
161. Id. at 823 n.8 (“The case before us involves neither an asserted taking nor a land-use challenge governed by Nollan and Dolan.”).
162. Id. at 824.
163. Id.
164. The United States Supreme Court has explained that a substantive due process analysis is separate and distinct from a takings analysis. Lingle, 544 U.S. 528, 545-548 (2005). See Steven Eagle’s suggestion that while an ordinance passes constitutional muster under a substantive due process analysis, it does not necessarily pass constitutional muster under a takings analysis. Eagle, supra note 10, at 20 (“While the court of appeal viewed the [Housing Ordinance] as a legitimate way of effectuating the state’s policy of furthering affordable housing, that holding goes to the [ordinance’s] legitimacy, and not whether it constitutes a taking.”).
165. See supra Part V.
166. According to some academics, California has had the greatest role in takings jurisprudence over the past two decades, even shadowing the United States Supreme Court. Thus, perhaps California’s approach is indicative of the “correct” approach. See
from the deputy city attorney of San Diego accurately captures the harmful overture for California property owners.\textsuperscript{167} Attorney Keely Halsey, responding to a request by the San Diego Housing Commission, was asked this question: is a legislative fee proposal for non-residential developers subject to heightened review, in light of \textit{Koontz}?\textsuperscript{168} Her response is as follows.

Not likely. In \textit{Koontz}, the Court did not specifically state a legal standard for the adoption of legislatively enacted fees. Parties may raise this issue in future litigation. Unless the question is further addressed by the courts, however, it is reasonable to conclude that the state of the law in California with respect to legislatively enacted fees remains as it existed prior to \textit{Koontz}, under which heightened scrutiny would not apply to the Fee.\textsuperscript{169}

Citing to \textit{San Remo Hotel} and \textit{Ehrlich},\textsuperscript{170} the memorandum advanced the classic rhetoric alluded to above—that legislative exactions are less deserving of exacting scrutiny given the availability of a democratic political process.\textsuperscript{171} The deputy city attorney acknowledged that “[i]n failing to specifically address the issue of whether \textit{Nollan/Dolan} applies to generally applicable legislatively enacted fees, \textit{Koontz} opened the door for future litigation on that issue.”\textsuperscript{172}

\section*{VII. Any Distinction between Legislative and Adjudicative Acts is Artificial, Unworkable, and Illogical}

Notwithstanding \textit{Koontz}, attempts to apply differential treatment to legislative and adjudicative decisions defy two essential pillars of sound legal theory: logic and historical underpinnings. As discussed above, those courts adopting a narrow reading of \textit{Dolan} view the Supreme Court’s opinion as truly indicative of its intent to limit its analysis to ad hoc exactions.\textsuperscript{173} Yet this proposition is problematic due to two fundamental failings of such a narrow reading.

An oft-cited justification for a bifurcated approach is that “extortion [is] more likely when the exaction is imposed on an individual

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\textsuperscript{168} \textit{Id. at 4.}  
\textsuperscript{169} \textit{Id.}  
\textsuperscript{170} \textit{San Remo Hotel}, 41 P.3d 87; \textit{Ehrlich}, 911 P.2d 429.  
\textsuperscript{171} Memorandum, supra note 167, at 10.  
\textsuperscript{172} \textit{Id. at 13.}  
\textsuperscript{173} \textit{See Needleman, supra note 10, at 1574.}  
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basis... [and] abusive behavior is more likely in an adjudicative setting because the decision-making process is discretionary in nature."

Essentially, proponents of that thesis view the underlying democratic political process as an adequate safety mechanism against abuse. They consider heightened scrutiny for adjudicative exactions a solution to the “extortion” problem because it forces local governments to “improve the substantive formulation of standards for discretionary review.” Legislative enactments, on the other hand, which affect many people, are less likely to violate the Takings Clause because the legislative and political processes will protect landowners.

While worthy of consideration, this proposition fatally assumes that all communities function according to the representative democracy model, naturally applicable to larger governments. Yet, as recognized by one author, smaller, local governments are inherently incapable of true representative democracy—a lack of electoral diversity inhibits the “coalition-building safeguard” inherent in larger governments, and thus minorities are not protected from majoritarian oppression. Those interests that Dolan seeks to protect belong to “precisely the kind of minority whose interests might actually be ignored.”

For example, consider a small town, located in an extremely affluent suburb. The town, a commuter town, is home to many influential corporate personalities, and upper-echelon employees of a nearby energy conglomerate. The town boasts low-density zoning and, unsurprisingly, its poorer residents are confined to a small area. In light of a shortage of affordable housing, some residents are pushing for the local legislature to encourage developers to build more affordable housing. Yet wealthier residents are opposed to such plans. A local legislature that recognizes the value of affluence will undoubtedly cater to

174. Reznik, supra note 103, at 268; see also San Remo Hotel, 41 P.3d at 105.
175. See Reznik, supra note 103, at 270; see also San Remo Hotel, 41 P.3d at 105 (acknowledging that “[w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process”); Craig R. Habicht, Dolan v. City of Tigard, 45 Cath. U. L. Rev. 221, 265 (1995).
176. See Reznik, supra note 103, 270-72; see also Breemer, supra note 12, at 401-04 (“[P]rocedural mechanisms designed to protect the minority often break down in the legislature as well as in the administrative context. Indeed, as the branch most accountable, and thus most responsive, to the majority, the legislature may be especially prone to exert disproportionate amounts of property from under-represented groups.”).
177. Reznik, supra note 103, 271.
179. Reznik, supra note 103, 271; see also Needleman, supra note 10, at 1586.
the majority’s interests, without appearing to overtly discriminate against poorer communities. This town passes an ordinance that decreases density requirements, but in an effort to dissuade low density development, it imposes a relatively large exaction upon new affordable housing development. Alas, legislative exactions are similarly prone to political abuse.\textsuperscript{180} Ironically, an application of *Dolan*\textsuperscript{181} that hinges upon the character of the government action may only exacerbate the evil of government overreaching: legislative bodies are just as capable of extortion as adjudicative bodies. Moreover, in light of the protections afforded by procedural due process, adjudicative decision-making, in contrast, is subject to an inherent safeguard that decreases the possibility of extortion.

Thus, “if legislative decisions are shielded from the ‘rough proportionality’ standard and adjudicative decisions are subjected to it, the result may be that extortionate behavior is granted deference, while fair processes are overscrutinized.”\textsuperscript{182} To further illustrate this unwarranted paradox, consider a legislative ordinance that is overbroad. In an effort to abate a relatively minor nuisance, a local government might employ overindulgent, non-tailored measures that negatively impact a majority of the populace. Such legislative action ought not to be afforded deference by virtue of its legislative nature; to do so oversimplifies the issue. Other academics have similarly suggested that a legislative/adjudicative distinction may be “under and over inclusive.”\textsuperscript{183} Specifically, they suggest—following research on the subject—that excessive exactions are most likely to be exercised in “communities with large, unmet infrastructure needs who have failed to spread costs among earlier developments, especially nearly built out communities. In addition, municipalities with unique amenities, such as beach towns, and perhaps communities that have adopted strong growth control measures fall into the ‘likely to demand excessive exactions category.’”\textsuperscript{184} By contrast, they posit, “communities with available developable land that is somewhat fungible and that are now engaged in long-term

\textsuperscript{180} See also Eagle, supra note 10, at 6.
\textsuperscript{181} Dolan, 512 U.S. 374.
\textsuperscript{182} Reznik, supra note 103, 270. Also, consider that legislative exactions—by virtue of their universal application—may effectuate a completely disproportionate response to a relatively small problem, i.e., the legislative action might unnecessarily affect the rights of private property owners. The protections afforded by the takings clause must be utilized to lessen this risk. This consideration raises further doubts about the plausibility of a distinction.
\textsuperscript{183} Carlson & Pollak, supra note 166, at 131.
\textsuperscript{184} Id.
planning to spread anticipated infrastructure costs” are less likely to indulge in excessive exactions. Thus, it follows that in the former context the risk of extortion ostensibly affects both ad hoc and legislative exactions; while in the latter context, the lower risk of extortion renders heightened scrutiny superfluous. Once again, we see the doctrinal flaws of a legislative/adjudicative distinction.

Quite simply, a legislative label must not be afforded a protective “presumption of validity” because even in the legislative context, there still exists a grave and real risk that local governments may abuse the privilege of public governance. Thus, any suggestion that legislative decision-making is unworthy of the judicial protection afforded under Dolan’s analysis is indefensible and illogical. “It is unclear why courts believe human nature or legislators have changed so much that an invasion of property rights by ‘men and women of our choice’ should be scrutinized with more ‘confidence' today.”

Justices Thomas and O’Connor have expressed their disapproval of different treatment of legislative and adjudicative decision-making in the land use context. In Parking Association of Georgia Inc., v. City of Atlanta, both Justices voiced their discontent in their respective dissents to certiorari denial. In Parking Association of Georgia, the Georgia Supreme Court declined to invalidate a zoning ordinance that imposed an exaction upon parking lot owners; characterizing the exaction as “legislative,” the court refused to apply Dolan. In the United States Supreme Court’s denial of certiorari, Justice Thomas questioned the logic of why a Fifth Amendment takings analysis should depend on “the type of government responsible for the taking.” Expressing his frustration, he declared:

It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property.

185. Id.
186. Breemer, supra note 12, at 394.
187. Id. at 404.
188. 515 U.S. at 1117.
189. Parking Ass’n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (applying substantive due process analysis instead of takings analysis).
190. Parking Ass’n of Ga., 515 U.S. at 1117-18.
191. Id. at 1117-18 (Thomas, J., dissenting); see also Amoco Oil Co., 661 N.E.2d at 389 (“[A municipality could] skirt its obligation to pay compensation... merely by having the Village Board of trustees pass an ‘ordinance’ rather than having a planning
This article has traced the historical underpinnings of the Court’s exactions analysis to its affirmative obligation to adhere to the unconstitutional conditions doctrine—a product of primary constitutional jurisprudence. Given that the doctrine, in its original form, failed to distinguish between adjudicative and legislative determinations, it would be improper and disingenuous to read such a distinction as necessary for an exactions analysis.\textsuperscript{192}

**VIII. Conclusion**

The Supreme Court never intended to limit the outer boundaries of its *Dolan* analysis to ad hoc exactions.\textsuperscript{193} Those advocates of disparate treatment for legislative and adjudicative decision-making fail to recognize the problematic import of their thesis: the distinction fatally fails to identify, and protect against, unruly governmental overreaching. Furthermore, that position disregards the historical underpinnings of the Court’s exaction analysis. Consequently, “one may draw the conclusion that the ‘rough proportionality’ standard should be applied to all exactions without making the legislative/adjudicative distinction.”\textsuperscript{194}

*Koontz* displays the Court’s most recent vindication of individual rights. This article has suggested that the decision implicitly communicates judicial intolerance toward an approach that discriminates between legislative and ad hoc exactions. Moreover, as discussed above, dissimilar treatment produces various inconsistencies and untenable results. As the Supreme Court continues to weigh in on the classic standoff between individual rights and the limits of the takings clause, it has the ability to change its course. However, at least for the time being, it has adhered to a Madisonian philosophy—revering individual land rights. *Koontz* enabled the Court to clarify the outer limits of *Nollan* and *Dolan*’s analysis, and its position on the unlawful exercise of the police power by governmental units. Despite its critics, the Court’s *Koontz* opinion is of monumental importance, and clearly signals a robust intolerance for municipal racketeering.

\textsuperscript{192} DANA & MERRILL, supra note 12, at 227.

\textsuperscript{193} But cf. Reznik, supra note 103, at 274 (“However, such an extension of heightened scrutiny would be inconsistent with the Dolan Court’s reasoning. The Dolan Court itself explained its creation of the ‘rough proportionality’ standard, which places the burden on the local government to justify the exaction, by limiting it to adjudication, as opposed to legislation which carries a presumption of constitutional validity.”).

\textsuperscript{194} Id.
Koontz’s significance should not be underestimated; its effect ought to be felt in lower courts around the nation. As constitutional jurisprudence often does, takings doctrine has come around full circle. The future promises a new renaissance for individual rights—one that should inhibit municipal extortion.\textsuperscript{195}

\textsuperscript{195} Perhaps in direct response to Koontz, the Florida legislature has enacted a statute that shall take effect in July, 2014. The statute—HB 1077—explicitly prohibits municipalities from imposing “on or against any private property a tax, fee, charge, or condition or require any other development exaction, either directly or indirectly . . . that is unrelated to the direct impact of the proposed development, improvement project, or the subject of an application for a development order or administrative approval . . . . This section does not prohibit a county, municipality, or other local government entity . . . from [i]mposing a tax, fee, charge, or condition or requiring any other development exaction that serves to mitigate the direct impact of the proposed development and that has an essential nexus to, and is roughly proportionate to, the impacts of the proposed development upon the public, private, or public-private infrastructure or facility that is maintained, owned, or controlled by the county, municipality, or other local governmental entity.” H.B. 1077, 2014 H. of Reps, Reg. Sess. (Fla. 2014), available at http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1077__.docx&DocumentType=Bill&BillNumber=1077&Session=2014 (emphasis added). Note there is absolutely no distinction made between legislative and adjudicative exactions. The Florida legislature has appropriately suggested its intolerance toward a bifurcated approach.
Recent Developments in Comprehensive Planning

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I. Introduction

The State and Local Government Section of the American Bar Association undertakes an annual survey of state and federal cases dealing with the role of the comprehensive plan (sometimes called the “General” or “Master” plan) in land use regulation. That survey and this article illustrate trends in the current use of three modes of perception regarding comprehensive plans by state legislatures and state courts. The first mode, the “unitary view,” is that planning is neither essential nor possibly even relevant to zoning and land use regulation, and it is the local zoning ordinance that is dispositive.1 The second view, the “planning factor view,” is that a plan is relevant, but not necessarily dispositive of the validity of a land use regulation.2 The final view, the “planning mandate” view, is that planning is essential to land use regulation.3 Although many states have similar zoning and planning laws derived from legislation suggested by the United States Department of Commerce in the 1920s (hereinafter sometimes referred to as the model acts),4 state courts have not been uniform in


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1. See infra Part II.
2. See infra Part III.
3. See infra Part IV.
their interpretation of this legislation and we note that states have seen fit to amend or revise their enabling legislation over time to deal with that relationship.

Some of the confusion is derived from the requirement in a 1926 model act relating to zoning, which requires land use regulations to be “in accordance with a comprehensive plan;”\(^5\) however, the model act relating to planning does not use the words “comprehensive plan,” although that suggested legislation uses the terms “master plan” or “city plan.”\(^6\) Even greater confusion arises from the fact that zoning regulations (as opposed to plans) have been the object of legal scrutiny because they are written to be regulations, are more precise in their limitations on land use, and apply on a property-by-property basis. As a result, planning was seen to be less essential to the future of a community and might be seen as superfluous or worthy of a lesser priority place in terms of state or local funding or effort. Thus, communities may well have zoning, but no plan, or a plan that is not viewed as binding.

With respect to the relationship between planning and land use regulation, the unitary theory was the dominant view for many years in American planning law history.\(^7\) However, there were voices crying in the wilderness for a more rational approach. The late Charles Haar wrote two important and prophetic law review articles on the subject,\(^8\) and advocated a fundamental rethinking of that relationship. Similarly, Professor Daniel Mandelker, who has examined the cases and statutes, suggests resolving the ambiguities of the two model acts to express the subordination of land use regulation to planning.\(^9\) These scholars, and others,\(^10\) may have had some influence in persuad-

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5. SZEA, supra note 4, at § 3.


7. The leading case for that view is Kozensik v. Montgomery, 131 A.2d 1 (N.J. 1957).


ing courts and legislatures to move away from the unitary view, as has been demonstrated in the reports over the last few years.

A final aspect of our report is a discussion on the interpretation of plans and amendment of plans, which both become more important as plans themselves gain credence. The thesis throughout this report is that plans are credible limitations on land use regulations—in some cases, determinative of the result, and in most cases, a factor in the outcome.

II. Unitary View

Although the view that the comprehensive plan is found in zoning ordinances and maps was once the majority view, very few states now adhere to that analysis. Connecticut has the most cases in this category, continuing its trend from the last several years.

In a state where courts consistently find that the zoning regulations and zoning maps comprise the municipal comprehensive plan, it comes as no surprise that a Connecticut appellate court upheld a city’s decision to grant a setback variance for development of a boathouse on a small Norwalk Island because it did not substantially affect the city’s “comprehensive zoning plan.” The case explicitly relies on the “we know it when we see it” philosophy: “[Plaintiffs] ask at what
point a variance impairs the comprehensive zoning plan. Our answer is: Not in this case.”13 The court was persuaded that under the “comprehensive zoning plan” (actually the overview of the zoning maps), the various setbacks from the mean high water mark overlap due to the small size of the island, and if enforced, would prevent any structure from being built on the island.14 Further, the court criticized plaintiffs for failing to demonstrate why a small boathouse on the island affects the comprehensive plan any more than the dwelling houses on the larger Norwalk Islands.15

In an Ohio case which utilized the unitary view, State ex rel. Phillips Supply Co. v. City of Cincinnati,16 a group of local businesses challenged relocating a homeless shelter for inconsistency with the comprehensive plan.17 The court found no statutory requirement in Ohio mandating cities to enact a comprehensive community plan.18 But even if there were such a requirement, the city’s allowance of a shelter on the subject property was consistent with the Homeless to Homes Plan, Cincinnati’s adopted comprehensive plan for the homeless.19

In another Ohio case, Apple Group Ltd. v. Board of Zoning Appeals Granger Township,20 Apple sought a variance to increase residential density on a portion of an 88-acre site (setting aside a portion of the site as open space), rather than meet the minimum two-acre lot requirement of the zone.21 The variance was denied and Apple appealed, claiming the township’s zoning ordinance was unconstitutional because the town did not have a comprehensive plan that is separate from its zoning resolution.22 The court found that although a comprehensive plan is usually separate and distinct from a zoning ordinance,

13. Id. at 451. On the other hand, in 347 Humphrey Street, LLC v. City of New Haven Bd. of Zoning Appeals, No. NNHCV116020538S, 2013 WL 1943774 (Conn. Super. Ct. Apr. 8, 2013), the failure to make adequate findings with regard to criteria that included reference to the city’s comprehensive plan resulted in remand of four variance approvals.
15. Id. at 452.
17. See id. ¶ 31. Although the court ultimately found individual standing, the plaintiffs’ argument for taxpayer standing was denied because general enforcement of the comprehensive plan is not grounds for taxpayer standing. Id. ¶ 23.
18. Id. ¶¶ 46-50.
19. Id.
21. Id. ¶ 2.
22. Id. ¶¶ 7-9.
it is possible for an ordinance in and of itself to be a comprehensive plan.23

Apple further argued that the zoning ordinance did not meet the requirements of a comprehensive plan, and as a result, the township’s resolution denying the variance request was not made “in accordance with a comprehensive plan.”24 Again, the court ruled in favor of the township and concluded that the zoning resolution functions as a comprehensive plan because it covers many factors, “including but not limited to land use, commercial development and conditional zoning terms.”25

A Louisiana court similarly held, in the case of a denial of a truck stop casino permit, that a parish is not prohibited from passing zoning regulations without first approving a comprehensive plan.26 The court ruled that an ordinance creating a zoning district has been found to qualify as part of a comprehensive plan, and the ordinance in question prohibiting truck stop casinos shared “the requisite relationship to health, safety, and welfare of the public” to constitute comprehensive planning.27

In South Dakota, the Supreme Court affirmed a decision of Rapid City to deny a rezone application for a portion of property zoned within the Flood Hazard Zoning District.28 Here, the city’s zoning regulations acted as a comprehensive plan because the floodway was meant to “ensure the community’s safety and to minimize property damage” in the event of future flooding.29

Thus, in states that continue to adopt the historical unitary view concerning zoning ordinances, and where local regulations focus on public health, safety, and welfare considerations, courts will uphold decisions that conclude such regulations constitute a comprehensive plan.

III. Planning Factor Cases

For many years now, the trend in cases relating to the significance of the comprehensive plan is that in which the plan is at least a factor or

23. Id. ¶ 10.
24. Id. ¶ 14.
25. Id. ¶ 17. “For each district, the zoning resolution sets out use, height, and area restrictions. It defines with certainty the location and boundaries of each zone.” Id. ¶ 19.
27. Id. at *8.
29. Id. ¶ 19. The flood hazard zone protected upstream property and operated to ensure the “health, safety, and general welfare” of the city’s citizens was maintained. Id.
consideration in a judicial analysis. This past year has seen a similar trend.

A Georgia decision, City of Suwanee v. Settles Bridge Farm, LLC, illustrates the point. At trial, plaintiff landowner successfully brought an inverse condemnation suit against a city for amending its zoning regulations to provide that large development projects, which included the subject school, required a special use permit wherein it must be shown that the project is not inconsistent with the overall objective of the comprehensive plan. Previously, schools were an outright permitted use authorized without public review. The Georgia Supreme Court did not reach the taking issue, but rather reversed the judgment in favor of the landowner, finding the additional discretionary evaluative requirement to consider the comprehensive plan through the administrative process established for permit approval precluded the inverse condemnation claim.

In a Kentucky case, Yocum v. Legislative Body of the City of Fort Thomas, the court dealt primarily with other issues, but noted a Kentucky statute that required a zoning map amendment to be “in agreement with the adopted comprehensive plan.” The local government asserted compliance, but plaintiff contended that one of the plan elements regarding reducing density as slopes increased should govern. But in this instance, the court agreed with respondent that other plan language obviated the slope policy in the area of the subject land use change.

30. 738 S.E.2d 597 (Ga. 2013).
31. Id. at 598-99.
32. Id. at 598.
33. Id. at 601. To similar effect is J.D. Francis, Inc. v. Bremer County Board of Supervisors, No. 12-0600, 2013 WL 104541 (Iowa Ct. App. Jan. 9, 2013), where the denial of a zone change consistent with the comprehensive plan was used as part of an inverse condemnation claim. Respondent Board’s decision, which the court upheld, included the following:

The plan itself, in the implementation section, notes that consistency with the plan is only one factor to be considered along with compatibility with surrounding land uses, minimal impact on adjacent property, density of proposed use, impact on traffic generation and flow, and environmental impact, among others.

Id. at *2. The court went on to say that it was legitimate to counterbalance other plan policies and land use designations and that the plaintiff was not automatically entitled to a zone change. Id.
37. Id. at *3; see also K.R. STAT. ANN. §100.213(1)(a), (b) (West 2014); Bell v. Meade Cnty. Fiscal Court, No. 2011-CA-000369-MR, 2013 WL 1091239, at *3 (Ky. Ct. App. Mar. 15, 2013) (noting that an exception to the general statutory requirement
In *Irshad Learning Center ("ILC") v. County of Dupage*, a Muslim religious and educational group sought a conditional use permit to use property in the county for religious services and educational purposes. The county found that ILC failed to show its application was harmonious with the “general purpose and intent of the zoning ordinance, and will not be injurious to . . . the public welfare, or in conflict with the . . . comprehensive plan.” However, the court disagreed with the county’s conclusions because the record did not support the parade of horribles that objectors believed would cause too many impacts. Rather, the court concluded that ILC specifically limited the number of people who could be on the site to 100, and that the county’s denial findings were the product of speculation and factual errors. Moreover, the court concluded that “[a]cting administratively, the County is bound by its Zoning Ordinance, and not the Comprehensive Plan, and thus, the County may not rely on its Comprehensive Plan to justify the decision to deny an application where the

of agreement with the comprehensive plan if the existing zoning classification is “inappropriate” and the proposed classification “appropriate” or that there have been major changes in the area that were not anticipated in the original plan and have “substantially altered the basic character of the area.”). Thus, it appears that plan conformity in Kentucky is a factor in the evaluation of some land use permits. Similarly, in *Pittsfield Investors LLC v. Pittsfield Charter Township*, No. 08–000151–CH, 2013 WL 1165247 (Mich. Ct. App. Mar. 21, 2013), a rezoning denial was challenged by plaintiffs who asserted that some of the township’s stated interests (including conflicts with its comprehensive plan) were not advanced. The court concluded that a plaintiff must demonstrate that no government interests are advanced, and the trial court finding that there was no question of fact involving whether the comprehensive plan factor, among other factors, were advanced, was upheld. *Id.* at *6.

39. *Id.* at 914.
40. *Id.* at 945.
41. *Id.* at 946. The “parade of horribles” included concerns related to wedding ceremonies and other special events that may attract more than the maximum occupancy of 100 persons. *Id.* at 918, 945-47. A much more extensive set of findings was given credence by the Minnesota Court of Appeals in *Ruhland v. City of Eden Valley*, No. A13-0110, 2013 WL 3285019 (Minn. Ct. App. July 1, 2013) when a neighbor challenged the rezoning to a residential/commercial reserve classification to accommodate the landowner’s landscaping business. The court cited *Minn. Stat.* §462.352(5) to the effect that a plan is “a compilation of policy statements, goals, standards, and maps for guiding . . . development.” While it is advisory, it is entitled to “some weight.” *Ruhland*, 2013 WL 3285019, at *3. In this case, the court found sufficient findings, including those based on the comprehensive plan, to affirm the grant of the rezoning. *Id.*

42. *ILC*, 937 F. Supp. 2d at 947. Interestingly, the court had earlier in the opinion denied RLUIPA challenges even though the record included contentions from the objectors that ILC was synonymous with the Alavi Foundation and had connections to terrorist organizations, and intended to use the property to spread radical-jihadist Islamic ideology. *Id.* at 930-949. The county, at least in the court’s view, did not base its decision on this testimony when it applied the code to the decision. *Id.*
proposed use is recognized as a Conditional Use by the Zoning Ordinance.” The court granted IRC summary judgment because the county improperly denied the application based on conflict with the comprehensive plan and the county could have reasonably conditioned approval of the use.

In Roundstone Development, LLC, v. City of Natchez, the Mississippi Supreme Court affirmed the city’s denial of an affordable housing proposal because it was not in accord with the general plan for development. As a prerequisite to plaintiff’s development proposal, the city determined that a zone change would be required because the proposed use did not fit within the general plan’s open-land designation. The court determined that by requiring reclassification of the property to a single-family zoning designation, the city was able to “ensure that the proposed use fits within the City’s general plan of development.” The court further determined that denying plaintiff’s rezoning request was reasonable because in its practice of requiring zoning reclassification before a large project, the City was able to ensure that the proposed use fits within the City’s general plan of development.

In an unpublished Minnesota case, the court affirmed a city’s approval of a requested rezoning of property from a designation as a single and two-family residential zoning designation to commercial reserve to enable the applicant to use the site for his landscaping business. The court affirmed, finding that: “[a]lthough entitled to some weight, a comprehensive plan is ‘generally viewed as advisory and the city is not unalterably bound by its provisions.’” Nonetheless, the court recognized that rezoning to a commercial reserve was sup-

43. Id. at 952. Similarly, in a Wyoming case, “[f]indings on a project’s general compatibility with the Comprehensive Plan are no substitute for specific findings required by the county’s own land development regulations,” and the county’s decision was remanded for to consider a development’s improvement to scenic views. Wilson Advisory Comm. v. Bd. of Comm’rs., 2012 WY 163, ¶ 55-58, 292 P.3d 855, 869-70 (Wyo. 2012).
44. ILC, 937 F. Supp. 2d at 955. In contrast, a Washington court upheld a city’s decision not to extend water outside the urban services boundary because such extension would be inconsistent with the comprehensive plan. Governors Point Dev. Co. v. City of Bellingham, 175 Wash. App. 1008, at 14 (Wash. Ct. App. 2013).
45. 105 So. 3d 317 (Miss. 2013).
46. Id. at 318.
47. Id. at 320.
48. Id. at 321.
49. Id. at 322.
51. Id. at *3.
ported by the plan’s policy of encouraging commercial development along highway corridors.\(^{52}\)

In a Montana case, *Helena Sand and Gravel, Inc. v. Lewis and Clark County Planning and Zoning Commission*,\(^{53}\) plaintiff landowner alleged that defendant county engaged in “reverse spot zoning” in adopting zoning for an area so that mining was disfavored.\(^{54}\) The court said that conformity to a comprehensive plan is relevant to the spot zoning analysis.\(^{55}\) The court sent the matter back on other issues; however, conformity to the comprehensive plan appeared to be a principal determinant of the reverse spot zoning analysis.

Three minor and unreported New Jersey cases also point to the plan as a factor in evaluating land use decisions in that state. In *Laborim v. Mehnert*,\(^{56}\) the court upheld the grant of a variance, noting that applicants must demonstrate, *inter alia*, that an approval will not “substantially impair the intent and purpose of the zone plan and zoning ordinance,” and declaring the memorialization of the municipal grant decision sufficient for that purpose.\(^{57}\) In *Riya Cranbury Hotel, LLC v. Zoning Board of Adjustment for the Town of Cranbury*,\(^{58}\) the appellate court applied the same statute and the Board’s evaluation of a use variance, but referred to the town’s adopted master plan as the standard, without reference to the zoning ordinance.\(^{59}\) Finally, in *Malashhevitz v. Governing Body of the Township of Little Egg Harbor*,\(^{60}\)

\(^{52}\). *Id.* In a New Mexico Court of Appeals decision, *Pecos River Open Spaces, Inc. v. Cnty. of San Miguel*, 2013-NMCA-029, ¶¶ 12-13, 2013 WL 309847, at *4 (N.M. Ct. App. 2013), the court agreed that appellants could use the comprehensive plan’s purposes for open space protection to establish a use as charitable for purposes of that state’s tax code.

\(^{53}\). 290 P.3d 691 (2012).

\(^{54}\). *Id.* at 694-95.

\(^{55}\). *Id.* at 700. The court said that compliance with the comprehensive plan or growth policy is “especially relevant” to the analysis. *Id.* at 704.


\(^{57}\). *Id.* at *5; see N.J. STAT. ANN. § 40:55D-70(c)(2) & (d). It is quite possible that the words “zone plan” evince an improper conflation of planning and zoning. In a condemnation context, whether the use of eminent domain is in the “public interest” included contemplation of the consistency of the use with the zoning ordinance. Norfolk S. Ry. Co. v. Intermodal Props., LLC, 71 A.3d 830, 843 (N.J. 2013).


\(^{59}\). *Id.* at *5-6.

plaintiff challenged the grant of subdivision and site plan review to a Wal-Mart development because of concerns regarding its effects on the town’s master plan.61 The trial court and the town had found the proposal “substantially consistent” with the housing and land use elements of the master plan, and thus the grant was affirmed.62 However, the New Jersey statutes have other criteria,63 so the plan is not the final word on validity.

In a New York case involving the appraisal of real estate taken for a commuter rail station and parking lot, In re Metropolitan Transportation Authority v. Longridge Associates, LP,64 the likelihood of the realization of more intense future commercial uses in the comprehensive plan map appeared to be a significant factor in the just compensation.65

Finally, a South Carolina case, Dunes West Golf Club, LLC v. Town of Mount Pleasant,66 involved the denial of rezoning a portion of a golf course that was previously placed in a special zoning district, the Conservation Recreation Open Space (CRO) District.67 Rezoning requests were governed by several local code factors, including its relationship with the local comprehensive plan.68 In reviewing and upholding the denial, the South Carolina Supreme Court found the town did not gain any economic advantage over the golf course due

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63. For example in Malashevitz, the court found that the purposes of the New Jersey Municipal Land Use Law, set out in N.J. STAT. ANN. § 40:55D-2(2) (2014), must be met and that the plan must comport with constitutional constraints on the zoning power and the municipality must follow procedural requirements for ordinance adoption. Malashevitz, 2013 WL 2338607, at *3. The variance criteria applicable in Laborim and Riya also required that the variance relate to a specific piece of property, advance the purposes of the state’s Municipal Land Use Law, and be granted without substantial detriment to the public good, that the benefits of a grant substantially outweigh any detriments. Laborim, 2013 WL 3762892; Riya Cranbury Hotel, 2013 WL 375564; see also GM Hock Penn LLC v. Zoning Hearing Bd. of Scott Twp., No. 557 C.D. 2012, 2013 WL 3946279 (Pa. Commw. Ct. Feb. 1, 2013) (finding that proposed uses in a challenged zoning action were not inconsistent with the township’s comprehensive plan which had a policy of encouraging commercial developments at the I-80 Interchange, which could have been fulfilled in many ways).
65. See id. at *10-14. In another New York case, Greater Huntington Civic Group v. Town of Huntington, 2012 N.Y. Slip Op. 52146(U) (2012), a supreme court judge affirmed a rezoning to a higher residential density, inter alia, rejecting a challenge that the same constituted spot zoning and violated the town’s comprehensive plan. The court noted that the plan itself recommended high density residential development between existing commercial or industrial uses and residential uses.
67. Id. at 606.
68. Id. at 607.
to the CRO designation, but merely preserved the golf course’s conservation and recreational uses set forth by the town’s comprehensive plan.\textsuperscript{69} Furthermore, the court acknowledged that the golf course CRO designation was subject to later evaluation of rezoning proposals to convert such land if appropriate.\textsuperscript{70}

Over the past year, these decisions, in which planning is a factor in evaluating a land use regulation or action, are consistent with results in similar cases of this nature.

**IV. The Planning Mandate View**

The notion that a comprehensive plan governs land use regulations and actions is still a minority view, but in those states taking such position through statute or case law, the implications are profound.

In California, the General Plan is the basis for a “consistency” determination for land use plans and actions.\textsuperscript{71} The reach of that general requirement was at issue in *LA Neighbors United v. City of Los Angeles*.\textsuperscript{72} The appellate court determined that the city’s Community Plan Implementation Overlay Ordinance (CPIO) to carry out individual community plans was adopted under the General Plan rather than the California Environmental Quality Act (CEQA), and therefore did not require an environmental impact report.\textsuperscript{73}

In Florida, another state with a statutory consistency requirement,\textsuperscript{74} an attempt to allow a use prohibited by the Palm Beach County...
Comprehensive Plan was annulled in *United States Sugar Corporation v. 1000 Friends of Florida*, where the court stated:

> Whether a development order is consistent with a comprehensive plan is determined by comparing what the order permits, not what the current holder intends to do under the order. The current order permits general commercial mining, a use prohibited under the comprehensive plan. The burden is on the applicant to show that the development order conforms strictly to the comprehensive plan... The adopted order is inconsistent with the plan. If in fact U.S. Sugar wants to mine in a manner consistent with the plan, then it should reapply and limit its application so that any order which grants the application would be properly consistent with the comprehensive plan.

Another example of the ramifications of plan consistency is found in a Court of Federal Claims case arising in Florida, *Childers v. United States*, in which the court was called upon to determine damages over a former railroad easement converted into a public way under the Rails-to-Trails Act. Florida requires plan consistency, so the extensive opinion dealt with the impacts of the future land use plan on valuation for 13 separate properties. The court accepted testimony that a zone change conforming to the future land use plan is “automatic.”

In Delaware, variances must be justified in terms of consistency with the local comprehensive plan. In Minnesota, the denial of a cer-

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76. Id. at 1053; see also *Seminole Tribe of Fla. v. Hendry Cnty.*, 114 So. 3d 1073 (Fla. Dist. Ct. App. 2013) in which state power plant siting statutes (FLA. STAT. §§ 403.501-.518 (2014)) required a determination of local plan consistency. The applicant in this case, however, deliberately applied for local land use approval before filing under the siting act, received that approval, and then convinced the trial court that it could not review that determination because it was preempted. *Seminole Tribe of Fla.*, 144 So. 3d at 1074. The appellate court determined, however, that the siting act did not apply to land use applications filed locally before a similar application was filed with the state’s power plant siting agency and remanded the case for a determination as to the validity of the local government determination of plan consistency. Id. at 1077-78.
77. 112 Fed. Cl. 617 (2013).
78. Id. at 626; Rails to Trails Act, 16 U.S.C. § 1247(d) (2012).
79. FLA. STAT. § 163.3215 (2002).
80. *Childers*, 112 Fed. Cl. at 640. Similarly, in *Etzion v. Etzion*, 972 N.Y.S.2d 143 (N.Y. Sup. Ct. 2013), a domestic relations case, the adoption of a new plan that had a significant effect on marital assets was a matter of public record and could not be the basis of a later motion to reopen the marital estate.
Certificate of appropriateness for a change to a historically designated building was also governed by plan consistency requirements. Similarly, a Missouri case reinforced a statutory requirement that urban renewal plans be consistent with the local comprehensive plan.

In a Hawaii case, Kauai Springs, Inc. v. Planning Commission of the County of Kaua‘i, the Hawaii Supreme Court affirmed an Intermediate Court of Appeals decision from 2013 which found the plan to be the “guide” to development, agreeing with the robust view of the role of the plan, as the county had done in its code: “All actions and decisions undertaken by the County Council and the County Administration, including all county departments, agencies, boards and commissions, shall be guided by the vision statement, policies, and the implementing actions of the General Plan.”

In Maryland, a complex case involving the role of the plan, as well as its interpretation, brings to light the issue of plan consistency. In Pringle v. Montgomery County Planning Board, petitioner challenged a development project with a “big box” component as inconsistent with the “Germantown Employment Area Sector Plan” adopted by the Maryland-National Capital Park and Planning Commission. The county’s zoning ordinance requires development under the “TMX” (Transit Mixed Use) zone to be “consistent with the recommendations of the applicable master or sector plan.” The Board found substantial consistency with the sector plan, even though the approved project allowed a “big box” store a few blocks from a transit stop, and did...
not follow every site design recommendation provided by the Sector Plan.\textsuperscript{89}

The court noted that whether a plan is a guide or binding depends on both statute and precedent. It concluded that where “the local government has enacted a statute, ordinance, or regulation that links planning and zoning, ‘the status of comprehensive plans [is elevated] to the level of a true regulatory device.’”\textsuperscript{90} The court observed that when words such as “should” or “encourage” are used in a binding plan, the respondent planning board need not view those words as binding, but did place a burden on the board to explain why an objective that was “encouraged” was not implemented.\textsuperscript{91}

Together, these cases illustrate a focus on the comprehensive plan as the standard for review of local decisions when such an approach is required by law.

V. Plan Interpretation

As plans become more significant, their interpretation becomes more important, as the following cases demonstrate.

In a District of Columbia case, \textit{Durant v. District of Columbia Zoning Commission},\textsuperscript{92} the issue of plan interpretation in the evaluation of a planned unit development was complicated by what appeared to be conflicting plan policies.\textsuperscript{93} The court determined that the respondent commission must balance the “occasionally competing policies and goals” of the plan and that, if those policies and goals are addressed, the court would not substitute its judgment for that of respondent.\textsuperscript{94} Because the Commission did not address three policies in making that balance, the court remanded the matter.\textsuperscript{95}

\textsuperscript{89.} \textit{Pringle}, 69 A.3d at 531-33.

\textsuperscript{90.} \textit{Id.} at 534 (citing Maryland-National Capital Park & Planning Comm’n v. Greater Baden-Aquasco Citizens Ass’n, 985 A.2d 1160, 1166 (Md. 2009)).

\textsuperscript{91.} \textit{Pringle}, 69 A.3d at 534-35.

\textsuperscript{92.} 65 A.3d 1161 (D.C. 2013).

\textsuperscript{93.} \textit{Id.} at 1169-70. Under local law, the District’s Comprehensive Plan “[d]efine[s] the requirements and aspirations of District residents” and “[g]uides executive and legislative decisions on matters affecting the District and its citizens.” \textit{Id.} at 1172 n.1; see D.C. CODE §1-306.01(b)(1)(2) (2012 Supp.).

\textsuperscript{94.} \textit{Durant}, 65 A.3d at 1167-68.

\textsuperscript{95.} \textit{Id.} at 1168-72. The court concluded that “[i]n light of what we see as the Commission’s failure expressly to address these contested issues, we conclude that a remand for further consideration is required. In so concluding, however, we do not suggest that the Commission must exhaustively review, or even cite, every policy in the entire Plan; we hold only that it is insufficient to recite that a particular action is consistent with the Plan as a whole: ‘bare conclusion[s]’ will not do . . . Our precedents
An important issue in plan interpretation cases is jurisdiction—which officer or body is charged with making or reviewing interpretations. That point was made in a Florida case, *Seminole Tribe of Florida v. Hendry County*, where an Indian tribe challenged a Planned Unit Development rezoning designation that allowed construction of a natural gas power plant and solar energy farm, which was allegedly in violation of the local comprehensive plan. But because the challenge was not made in the correct statutory manner, the court affirmed the dismissal of that claim.

In a Kentucky case, *Masonic Homes of Kentucky v. Louisville Metro Planning Commission*, a statutory requirement mandates that the Commission review a cell tower application “in light of its agreement with the comprehensive plan and locally adopted zoning regulations.” The court found that, despite its limited jurisdiction, the commission’s decision was not arbitrary, and summarily affirmed the grant of the permit.

require the Commission, when presented with a material contested issue, to address that issue and to explain its conclusion.” *Id.* at 1171.

97. *Fla. Stat.* §§ 163.3215(1), (3)-(4) (2011) require consistency challenges to be made to a development order in a *de novo* proceeding for declaratory or other relief, instead of certiorari proceedings, which are the usual vehicle for review of local development decisions. A similar result occurred in Oregon in *Grabhorn, Inc. v. Washington Cnty.*, 297 P.3d 524 (Or. Ct. App. 2013), where the Court affirmed the dismissal of a challenge to a land use compatibility statement because it was brought in a court of general jurisdiction, but Oregon statutory law (*Or. Rev. Stat.* § 197.825) vests exclusive jurisdiction over land use decisions with the Oregon Land Use Board of Appeals.

98. *Seminole Tribe*, 106 So.3d at 22-23. In other Florida cases, such as *Beyer v. City of Marathon*, No. 3D12-777, 2013 WL 5927690 (Fla. Dist. Ct. App. Nov. 6, 2013), an inverse condemnation claim was made against respondent, which denied a development for a dwelling, asserting that the recreational use of plaintiff’s island under the city’s plan precluded a finding that all economically beneficial use of the land was precluded. However, in *Galleon Bay Corp. v. Bd. of Cnty. Comm’rs*, 105 So.3d 555 (Fla. Dist. Ct. App. 2012), petitioners were successful in reversing a determination that it would be “highly inequitable” for it to meet the current plan, given their commitments and expenditures, because the provisions of the plan were balanced with those commitments and expenditures in the landowner’s favor.

101. *Masonic Homes*, 2013 WL 462345, at *1. The court concluded: “[a]fter reviewing the record, it is clear the Commission’s decision was supported by substantial evidence. Although Masonic presented evidence opposing the tower, [the applicant] presented a variety of evidence to show that its application was in agreement with the objectives of the comprehensive plan and local zoning regulations. . . Given the amount of evidence supporting the Commission’s action, we can find no error with the circuit court’s decision to affirm.” *Id.* at 13. In *Pecos River Open Spaces*, 2013 WL 309847, the court affirmed a trial court decision that determined that a comprehensive plan designation of open space entitled the landowners to a charitable use and exemption from property taxes.
In a case where the county plan was implicated in removal of coquina rock formations that protected the subject development from beach erosion, a North Carolina appellate court supported the state’s approval of a sandbag project for The Riggings development to protect it from further erosion.\(^{102}\) Although the state’s coastal management plan generally does not allow permanent revetments, the court ruled that the substantial private property interests of the homeowner outweighs the competing public interest to not place permanent sandbag revetments on the beach.\(^{103}\) This decision allowed the state to grant a variance and avoid a takings claim.\(^{104}\)

Finally, in a Washington case, *Chinn v. City of Spokane*,\(^{105}\) petitioner challenged a rezoning approval to redesignate an eight-lot block to allow taller buildings, claiming that the action violated a city requirement of conformity to a comprehensive plan.\(^{106}\) However, the trial court decision dismissing the challenge was affirmed, because the plan language relied upon by the petitioner was framed in precautory terms (“should,” “encourage,” “as a general rule”) and was not a valid basis for challenging the rezoning.\(^{107}\)

Plan interpretation cases in this period follow the generally accepted rules applicable in statutory interpretation, and thus provide a modicum of predictability to planning law.

**VI. Plan Amendments**

As with plan interpretation cases, plan amendment cases reflect the increasing significance of plans, as the cases over the past year indicate.

In *Latinos Unidos de Napa v. City of Napa*,\(^{108}\) a California court rejected a challenge to plan amendments for the housing element of the city’s General Plan.\(^{109}\) Plaintiff alleged that the changes required an


\(^{103}\) Id. at 312.

\(^{104}\) Id. at 315.


\(^{106}\) Id. at 404; see SPOKANE MUN. CODE §§ 17G.060.170(C)(1), (2), (5) (2010).

\(^{107}\) Chinn, 293 P.3d at 407. However, in SSHI LLC v. City of Olympia, No. 43300-1-II, 2013 WL 5436406 (Wash. Ct. App. Sept. 24, 2013), an extensive set of plan consistency findings in support of a denial of a residential development was upheld by both the trial and appellate courts, which awarded attorney fees to respondents. The same result was obtained in *North Kelsey v. City of Monroe*, 174 Wash. App. 1077 (Wash. Ct. App. 2013).


\(^{109}\) Id. at 277. In *Coalition for Adequate Review v. City and Cnty. of San Francisco*, No. A131487, 2013 WL 1912521 (Cal. Ct. App. May 9, 2013), the California First District Court of Appeals also denied relief under CEQA and substantive plan-
environmental impact report (EIR), but the court found that a previous EIR anticipated the amendments and zoning changes.\textsuperscript{110} Therefore, the amendments were upheld because they complied with the California Environmental Quality Act (CEQA) requiring such reports be prepared prior to agency approval.\textsuperscript{111}

Hawaii recently dealt with plan amendments when it invalidated a local charter amendment to amend its General Plan to limit the number of transient accommodation units.\textsuperscript{112} The court concluded that the Hawaii Constitution provided the state legislature with authority to enact laws of statewide concern, and such laws included those dealing with the adoption, amendment, and administration of a local general plan.\textsuperscript{113}

Washington has dealt with the effects of a subsequent plan invalidity determination on permits issued based on that plan in Town of Woodway v. Snohomish County.\textsuperscript{114} The court held the issue was controlled by a statute granting the Growth Management Hearings Boards (which hear appeals on plan and land use ordinance amendments, but not permits)\textsuperscript{115} with authority to determine whether the amendments were invalid, and finding invalidity only when the noncompliant amendment substantially interfered with goals of the state’s Growth Management Act.\textsuperscript{116}

These cases further the assertion that state courts are increasingly viewing plans as a significant tool to help regulate land use.
VII. Conclusion

The trend in caselaw for 2012-13 demonstrates increased respect for comprehensive planning, less tolerance for the view that zoning regulations are isolated from their planning roots, and more emphasis on the role of planning when plans are amended or interpreted.
Case Notes

Ark. Game & Fish Comm’n v. United States, 736 F.3d 1364 (Fed. Cir. 2013). Flooding that is a result of government action, even when temporary in duration, can be considered a taking compensable under the Fifth Amendment when: (1) direct causation can be found between the government action and damage caused, (2) the damage caused is a foreseeable result of the government action, and (3) the severity of the damage caused by the government action intrudes on the landowner’s reasonable, expected use of the property. The plaintiff, Arkansas Game & Fish Commission, is the owner of the Dave Donaldson Black River Wildlife Management Area, which it maintains as a timber resource area and a wildlife and hunting preserve. The defendant, the United States Army Corps of Engineers, built, maintained, and controlled the flow of a dam upstream from the land owned by the Commission. The Commission filed a cause of action against the government stating that the water release practices employed between 1993 and 2000 created a taking compensable under the Fifth Amendment. In 1953, shortly after the dam was constructed, the Corps instituted a policy governing when water would be released from the dam into the Black River. The policy was intended to mimic the natural flow of water while at the same time prevent severe floods. While the policy was followed there was no harm to the tree-growing season (April through October) because the floodwaters generally receded by late May. In 1993 the Corps approved and began implementing deviations from the 1953 policy by changing the timing and amount of water that was released from the dam. These policy modifications caused changes in the water levels of the river. The modifications were made due to a request from agriculture interests to extend the harvest period for farmers in the flood-affected areas. The deviations resulted in an increased flood period in the management area, which extended into the growing season. Over the course of six years, the increased flooding had a detrimental impact on the timber owned by the Commission. In 2012, the United States Supreme Court held that temporary invasions require “a more complex balancing process” in determining if they are a compensable taking. Ark. Game & Fish Comm’n v. United States, 133 S. Ct. 511 (2012). The Court remanded the case to the United States Court of Appeals for the Federal Circuit for additional proceedings specifically related to the trial court’s findings regarding
causation, foreseeability, substantiality, and the amount of damages. The Supreme Court found that the duration of the government-induced flooding cannot be the sole point in determining whether a taking has occurred. Instead, the causation, foreseeability, and severity of the invasion must be considered. In determining causation, the Federal Circuit found that the deviations imposed by the government caused substantial increases to flooding in the Management Area during the tree growing-season, and, in turn, that flooding caused severe damage to the Commission’s trees. This finding was based on testimony from the Commission’s expert stating that the flooding caused injury to the trees’ roots and admissions by the Corps that the water level deviations had the potential to cause damage to the Commission’s trees. When determining foreseeability the court found that the Corps of Engineers could have foreseen that the deviations implemented would have caused increased flooding to the Commission’s property and, in turn, damage to their trees. The court noted that the Corps had repeatedly informed the Commission of this possibility. The court determined that the severity of the invasion made by the government was sufficient for a takings claim because it deprived the Commission of use of the Management Area as a forest and wildlife preserve, which was the Commission’s reasonable expected use of the land. Finally, the Commission argued that they were entitled to greater damages for the regeneration of lands where invasive wetland species had damaged the hardwood forest. The court found that the Commission must prove damages to a reasonable certainty and affirmed the trial court’s finding that damages were only warranted where the Commission could prove that regeneration was required because the damage was “severe;” not where the damage was only “heavy” or “moderate.” (Lindsey Holcumbrink)

Sandlands C&D LLC v. Cnty. of Horry, 737 F.3d 45 (4th Cir. 2013). A county ordinance prohibiting the disposal of waste generated within the county at any site other than a designated publicly owned landfill does not violate the Commerce Clause or the Dormant Commerce Clause because (1) the ordinance treated all private businesses the same; and (2) the ordinance served a legitimate local public interest. Sandlands runs a private landfill for construction and demolition waste in neighboring Marion County, South Carolina, and Express Disposal Service (“EDS”) operates a waste hauling service in parts of North and South Carolina. The defendant is Horry County, representing a non-profit corporation, Horry County Solid Waste Authority
"SWA"), in support of the ordinance. SWA owns and operates two
landfills and a recycling facility in Horry County. The ordinance pro-
hibits the dumping or depositing of any acceptable waste generated
within Horry County to any place other than the approved landfills.
HORRY COUNTY, S.C. CODE OF ORDINANCES, 02-09 (Apr. 7, 2009) (the
“Flow Control Ordinance”). Effectively, this prevented haulers from
bringing Horry County waste to the Sandlands landfill in order to
take advantage of its lower tipping fees. As a result, Sandlands expe-
rienced a significant decrease in its business while EDS was issued at
least seventeen citations for transporting waste from Horry County to
the Sandlands landfill. Sandlands and EDS challenged the ordinance
on the ground that it violates the Commerce Clause and the Dormant
Commerce Clause of the United States Constitution, which provides
that states cannot pass laws that favor in-state actors over out-of-
state actors. The United States Court of Appeals for the Fourth Circuit
stated that a Dormant Commerce Clause violation exists where a re-
striction on commerce is discriminatory—that is, it benefits in-state
economic interests while burdening out-of-state economic interests.
The court determined that the Flow Control Ordinance is not discrimi-
natory because it treated all private disposal companies alike, whether
in-state or out-of-state. To support its conclusion, the court employed
the two-pronged test used by the United States Supreme Court in United
Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Authority,
550 U.S. 330, 345 (2007). First, the court must determine whether
the Flow Control Ordinance discriminates against interstate com-
merce. Id. Second, if the court finds that the ordinance is not discrimi-
natory, it must consider its benefits and burdens under the Pike test.
the facts under the first test, the court ruled that the Ordinance does not
discriminate against interstate commerce. In United Haulers, the Su-
preme Court determined that flow control ordinances favoring the gov-
ernment, while treating in-state private business interests exactly the
same as out-of-state business interests, do not discriminate against in-
terstate commerce. Like the ordinances in United Haulers, the Fourth
Circuit found that the Flow Control Ordinance benefits a “clearly pub-
lic facility”—the SWA. Because trash disposal is a traditional function
of local government, county waste-management ordinances can per-
missibly distinguish between private and public businesses. However,
the ordinance must treat all private business alike. Therefore, contrary
to appellant’s argument, the question is whether Sandlands has been
treated differently from other private businesses—not from other
public entities. Furthermore, because appellants have not been treated differently from other private businesses, the ordinance does not discriminate by prohibiting them from processing and sorting mixtures of acceptable waste from Horry County at their facility in Marion County. Second, because the ordinance was not discriminatory, the court then considered its benefits and burdens under the *Pike* balancing test. *Pike*, 397 U.S. at 142. In *Pike*, the Supreme Court held that if a “statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Id.* Once again, the Fourth Circuit referred to the Supreme Court’s decision in *United Haulers*, where it was held that flow control ordinances address a legitimate local public interest. In that decision, the Supreme Court did not decide whether the ordinances imposed any incidental burden on interstate commerce because it found that the public benefits of the ordinance could not be outweighed by any arguable burden. The court found that the same analysis is applicable to the Horry County Flow Control Ordinance because it clearly confers public benefits that outweigh any conceivable burden on interstate commerce. To begin, the Ordinance had only an arguable effect on interstate commerce, even if it does affect intrastate commerce to some degree. The court stated that businesses had only showed that the Flow Control Ordinance affects them; they did not show that it has any impact on out-of-state businesses. The Fourth Circuit also found that the Ordinance provides the same types of benefits and imposes the same types of burdens upheld in *United Haulers*. For example, the Ordinance creates a revenue stream through which the county can support waste management, recycling programs, and its 911 calling system. Although revenue generation alone cannot justify discrimination on the face of the ordinance, *United Haulers* recognized that it does constitute a benefit under the *Pike* test. Finally, the court reasoned that the Flow Control Ordinance’s waste-management program is a quintessential exercise of local police power, which courts are reluctant to overturn by substituting their judgment for that of local elected officials. (Reed Martens)

*Annex Books, Inc. v. City of Indianapolis*, 740 F.3d 1136 (7th Cir. 2014). An ordinance requiring adult bookstores, but not other businesses, to close between midnight and 10 a.m. every day and all day Sunday is unconstitutional because its suppression of speech in order to regulate the secondary effect of reduction in armed robberies
is was so restrictive of one narrow class of speech to indicate it is content-based. The plaintiffs, Annex Books, New Flicks, Lafayette Video & News, Keystone Video, and Southern Nights (“bookstores”), were owners of adult entertainment establishments in Indianapolis. The bookstores challenged the constitutionality of a city ordinance requiring adult bookstores to close between midnight and 10 a.m. every day, and all day on Sundays. Other establishments in the city were not limited by these restrictions. The city argued that the ordinance contributed to the prevention of armed robberies at or near adult bookstores during the restricted hours. Furthermore, while the city conceded that the ordinance was restrictive, the city argued that there is no loss of free speech, as “anyone who wants any magazine, book, or movie can get it, eventually—and some gain in the reduction of armed robbery.” 740 F.3d at 1138. The United States Court of Appeals for the Seventh Circuit, however, disagreed, finding the decrease in armed robbery too insignificant, and that robberies at adult bookstores were no more frequent than robberies at other establishments not subject to the ordinance’s restrictions. In reaching this conclusion, the court relied on the United States Supreme Court precedent set forth in City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002). In Alameda Books, Justice Kennedy stated that “a city may not regulate the secondary effects of speech by suppressing the speech itself.” 535 U.S. at 427. Furthermore, the court rejected the city’s rationale by generating a hypothetical in which the city prohibited the distribution of the Sunday newspaper. Such a scenario, the court reasoned, would (1) reduce traffic accidents caused by trucks delivering papers, (2) reduce the number of robberies committed against newspaper deliverers, and (3) better benefit the environment by reducing the paper’s carbon footprint. Concluding that the ordinance, like the hypothetical, was a violation of the First Amendment, the court found that the underlying reason for the ordinance was the content of the material. Moreover, the court found no existing precedent in support of government bodies halting distribution of books simply because the content is objectionable unless the content was obscene. The Seventh Circuit had previously found that pornographic material that is not obscene cannot be suppressed. American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir.1985). Thus, the court reversed the district court’s decision and remanded with instructions against the enforcement of the ordinance. (Mahdi Abdelaziz)
Peruta v. Cnty. of San Diego, 742 F.3d 1144 (9th Cir. 2014). A county policy requiring citizens to demonstrate “good cause” when applying for a license to carry a concealed weapon in public violates the citizens’ right to bear arms for purposes of lawful self-defense under the Second Amendment of the United States Constitution. Plaintiffs Edward Peruta, Michelle Laxson, James Dodd, Leslie Buncher, Mark Cleary, and the California Rifle and Pistol Association Foundation are San Diego residents who could not establish “good cause” as required under the policy. Defendants are the County of San Diego and its Sheriff, William Gore, who enforced the policy. Plaintiffs challenged a county procedure requiring applicants to provide supporting documentation of circumstances, distinguishable from those of the general public, which cause the applicant to be in harm’s way and therefore enable the applicant to demonstrate the “good cause” necessary to entitle one to carry a concealed weapon. Plaintiffs argued that the county’s definition of “good cause” infringed on the right to bear arms because it excluded the general desire to carry for self-defense. The United States Court of Appeals for the Ninth Circuit determined that the county policy infringed on Second Amendment rights because it does not allow responsible, law-abiding citizens to bear arms in public for the purpose of lawful self-defense. To reach this conclusion, the court applied the two-step inquiry that the United States Supreme Court adopted in District of Columbia v. Heller, 554 U.S. 570 (2008). The first step is to determine whether the restricted activity is within the scope of the Second Amendment; if so, the second step is to determine whether the challenged law infringed on that right. In the first step, the court used the methodology of the Heller court, analyzing the text and history of the Second Amendment rather than balancing the interest of the county policy. From this analysis, the court found that the restricted activity—a responsible, law-abiding citizen’s ability to carry a gun for self-defense outside the home—fell well within the scope of the Second Amendment. In the second step, the court did not apply a tiered-scrutiny approach. Instead, it paralleled Heller’s reasoning that if a law causes a destruction of the right, rather than a burden on the right, then it constitutes an infringement. The court determined that the regulation’s burden on the citizen was significant enough to constitute an infringement of the citizen’s right to bear arms. Next, the county argued that the “good cause” policy does not create an all-out ban on the right to bear arms but merely regulates the issuance of licenses. The court dismissed this argument because it destroyed the citizen’s right to bear arms under the guise of regulat-
ing licensing. Because California law banned open-carry entirely, the only other way to lawfully carry a weapon for self-defense was through a conceal-carry license. The court determined that, by limiting access to conceal-carry licenses to only a select few who qualified under the “good cause” policy, the county had limited access to many law-abiding residents, rendering the policy unconstitutional. The dissenting opinion used the same methodology but reached a different result, finding that the right to bear arms in public is not within the scope of the Second Amendment. (Charles T. Lee)

*State v. Jorgenson,* 312 P.3d 960 (Wash. 2013). Neither the Second Amendment of the United States Constitution nor the Washington state constitution is violated by a state law that prohibits possession of firearms by defendants who have been released on bond or personal recognizance pending trial because: (1) firearm rights guaranteed by the state constitution are subject to reasonable regulation pursuant to the state’s police power; (2) the state has an important interest in restricting potentially dangerous persons from using firearms; and (3) the law is narrowly tailored to achieve the state’s interest. Firearm owner Roy Jorgenson was convicted of two counts of second degree unlawful possession of a firearm after he posted bond for assault in the first degree for shooting another man. The firearm owner argued that the statute, which prohibits the possession of any firearm by a person who is “free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense,” violates the Second Amendment and the state constitution. *Wash. Rev. Code* § 9.41.040 (2014). The firearm owner further argued that the state’s constitution provides broader protection than the Second Amendment. The Washington court first resolves constitutional questions under the state constitution before turning to federal law. *O’Day v. King County,* 749 P.2d 142 (Wash. 1988). When comparing the scope of the state and federal constitutions, the court examined six factors: (1) the text of the state constitution, (2) differences in the text of parallel state and federal constitutional provisions, (3) the history of the state constitution, (4) preexisting state law, (5) structural differences between the state and federal constitutions, and (6) matters of particular state interest or local concern. *State v. Gunwall,* 720 P.2d 808, 812-13 (Wash. 1986). After application of the *Gunwall* factors, the court found that the state and federal constitutions should be subject to separate interpretation. In turning to the state constitution, the court held that firearm rights are subject to reasonable regulation pursuant to the state’s
police power. In *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court of the United States left such a police power largely intact. Although the Court in *Heller* rejected the use of a “freestanding ‘interest-balancing’ approach” to determine the scope of Second Amendment rights, this court read its constitution separately from the Second Amendment and applied such a test. The court found that the state law did not violate the firearm owner’s right to bear arms under the state constitution. The court reached this conclusion by applying a balancing test, which “balances the public benefit to prohibiting gun ownership . . . with the degree of frustration of the constitutional right.” *State v. Spiers*, 79 P.3d 30, 34 (Wash. Ct. App. 2003). First, the court weighed the public benefit of the law and found that the statute related to the goal of reducing the unlawful use of and access to firearms. Second, the court determined that the statute did not frustrate the purpose of the state constitution and was substantially related to its purpose of protecting the public from firearm violence because “the legislature limited this prohibition to a defendant charged with a specific serious offense, and only after a neutral judge [had] found probable cause to believe the defendant committed a serious offense” is his right limited. *State v. Jorgenson*, 312 P.3d 960, 965 (Wash. 2013). The court next considered the Second Amendment and whether the firearm owner’s rights had been violated. Applying intermediate scrutiny as the appropriate standard of review, the court found that the law is substantially related to an important government purpose, which is “restricting potentially dangerous persons from using firearms.” After application of intermediate scrutiny, the court found that the temporary restriction on the right to bear arms after a trial court had found probable cause to believe a serious offense had been committed did not violate the Second Amendment. The dissent wrote that the application of intermediate scrutiny denied Procedural Due Process and that strict scrutiny would have been the proper standard of analysis in deciding this case because the Second Amendment is a fundamental right according to the Supreme Court. (Corey Henry)

*Goodpaster v. City of Indianapolis*, 736 F.3d 1060 (7th Cir. 2013). A city ordinance that bans smoking in bars does not violate the Due Process, Equal Protection, Freedom of Association, or Takings Clauses of the United States Constitution under rational basis scrutiny because the plaintiffs failed to show that the ordinance did not serve a rational
government interest and because patrons of a bar are not of an intimate
association protected under the First Amendment. Plaintiffs are own-
ers of bars and restaurants who are subject to a 2005 Smoking Ordi-
nance that prohibits smoking in most publicly accessible buildings
in the City of Indianapolis. The Smoking Ordinance was amended
in 2012 to include bars and taverns. IND. MUN. CODE § 616-204
(2013). Among their first arguments, the bar owners contended that
the city ordinance violated substantive due process under the Four-
teenth Amendment to the United States Constitution. Next, the bar
owners argued that the city ordinance violates the Equal Protection
Clause of the Constitution. They maintained that, because smoking is
still legal in tobacco-specialty bars, their taverns are not granted
equal protection under the law. As a third argument, the bar owners
claimed that their First Amendment freedom of association was abro-
gated. Finally, the bar owners argued a violation of the Takings Clause
of the Fifth Amendment, alleging that the ordinance is a partial regu-
latory taking because it puts a financial hardship on their businesses.
Every constitutional argument failed. First, in response to the substan-
tive due process argument, the United State Court of Appeals for the
Seventh Circuit agreed with the district court that the bar owners failed
to meet the heavy burden of proving that the ordinance served no le-
gitimate governmental interest. The court of appeals applied rational
basis scrutiny in determining the outcome of its decision. The court
noted that, in order for the ordinance to receive a stricter standard of
review, the right to smoke must be deemed a “fundamental right” as
described in the Constitution. In the past, the United States Supreme
Court has determined that such fundamental rights should not be lib-
erally construed and thus declared that smoking should not receive
such special protection. Because the court is only applying rational
basis scrutiny, the burden of proving the reasonableness of the existing
law shifts from the city to the bar owners. The City articulated several
reasons the smoking ban could be rational, including: encouraging
smokers to quit, protecting the interest of non-smokers, and improving
tourism to the city. The bar owners failed to disprove all of these rea-
sons, thus barring recovery under the Substantive Due Process Clause.
When the court considered the equal protection argument, it applied
rational basis scrutiny. Bars are not a suspect or quasi-suspect class
(like that of race or gender), and the court found that, under rational
basis review, there was no reason to strike down the ordinance. The
court held that the City may have wanted to decrease second-hand
smoke while not completely eradicating all places of business that
specialize in tobacco; even if this rationale is somewhat illogical, it is sufficient to support the ordinance. In fact, the City did not argue that it passed the ordinance specifically to promote health or allow a cigar-shop exemption to improve business, but such an argument is not necessary under rational basis scrutiny. As long as the ordinance bears a rational relationship to a legitimate end, it will not be struck down. The bar owners also failed to establish that their freedom of association was violated because they failed to meet the requirements of proving that the group of people socializing at a bar reaches the level of either an intimate or expressive association, which the courts have protected in the past. The court concluded that, in order for the bar’s clientele to reach a level of intimate association, they must be exclusive, small, and have a distinct purpose other than drinking and socializing. Because the clientele at a bar have no purpose other than socializing, and because they are neither small nor exclusive, they are not a protected class. Moreover, the clientele is not an expressive association of people because coming together to smoke is not a right protected by the First Amendment. Here, the court analogized smoking to dancing, relying on the instructions of the court in *Dallas v. Stanglin*, 490 U.S. 19 (1989), which stated that expressive associations are only those groups of people who gather together for the purpose of engaging in First Amendment rights; the court held that dancing was not such a right. Finally, the court deemed that the ordinance did not violate the Takings Clause of the Fifth Amendment. While the court conceded that the bars are indeed facing a loss of sales, the bar owners failed to establish that the decrease in sales is significant enough to constitute a taking under the Fifth Amendment. Furthermore, the ordinance is set up to protect the common good and well-being of the public, and thus a small economic adversity makes it difficult for the court to find that the ordinance constitutes a taking. The court found no reason to strike down the city ordinance under the First, Fifth, or Fourteenth Amendments to the Constitution, affirming the district court’s ruling in favor of the City. (Amanda Hildebrand)

*Paul Stieler Enterprises, Inc. v. City of Evansville*, 2 N.E.3d 1269 (Ind. 2014). A city’s attempt to exempt riverboat casinos from a smoking ban otherwise applicable to all restaurants and bars violates the state constitution’s equal privileges and immunities clause. The plaintiff, Paul Stieler Enterprises, Inc., is one of the several bars and clubs bringing this action against the city. The city enacted an ordinance in 2012 to amend a 2006 smoking ban to include “[a]ll bars and tav-
“Terms” and “[a]ll restaurants and eating establishments, including but not limited to any coffee shop, cafeteria, sandwich stand, and any other eating establishment which gives or offers for sale food to the public, guests, or employees.” Evansville, Ind., Ordinance G-2012-1 § 2 (2012). The ordinance created an exemption to the smoking ban for riverboat casinos, however, prompting the bars and clubs to sue. The court addressed two questions in this case: (1) Does the exemption violate the equal privileges and immunities clause? (2) If it is in violation, should the amending ordinance be severed or completely stricken? The bars and clubs contended that the exemption gave casinos a privilege not provided to the other eating establishments, therefore violating the equal privileges and immunities clause because the only difference between the casino and the other establishments is that the casino is located on water. The city argued that the casino’s economic impact on the city justified its special treatment due to the revenue it provided for the city’s budget, which amounted to $12.8 million in 2011. When deciding whether an ordinance complies with the equal privileges and immunities clause, policy reasons are considered but are not decisive factors. Instead, the court focuses on whether the disparate treatment is “reasonably related to the inherent differences that distinguish the unequally-treated classes.” Paul Stieler, 2 N.E.3d at 1275. Here, the disparate treatment is permitting riverboat casinos to have smoking but banning it in all other bars and clubs. The only inherent difference between the two groups is their location: one group is on water whereas the other is on land. The city argued that casinos are different because they also have gambling permission under a statute, but the bars and clubs have this permission as well, making the only inherent difference the location. In addition to not finding a reasonable relation between the treatment and the difference in location, the court also could not find a reasonable relation between the treatment and the legislative intent behind the smoking ban, which was public health and not economic considerations. Therefore, the court held that the amending ordinance violated the Indiana Constitution because granting an exemption to the casinos from the smoking ban was not related to the differences between casinos and other eating establishments. As for the second issue, the severability of a statute depends on the legislative intent and the legal effect. The court, looking at the city’s statements and the absence of a severability clause in light of the fact the original 2006 ordinance did have a severability clause, concluded that the amending ordinance would not have been adopted without the casino
exemption. Thus the court reversed the trial court’s decision, struck the 2012 amending ordinance in its entirety, and restored the 2006 smoking ban. (Anne Marie Beckerle)

_Hagen v. City of Eugene_, 736 F.3d 1251 (9th Cir. 2013). A police officer’s speech is not afforded First Amendment protection when it concerns safety complaints that are made pursuant to official job duties. The plaintiff, Brian Hagen (“Officer”), was a police officer. The defendants were the City of Eugene, Oregon, the Eugene Police Department, and the officer’s three supervisors (“City”). The City appealed the United States District Court for the District of Oregon’s ruling that denied the City’s motion for judgment as a matter of law regarding the applicability of 42 U.S.C. § 1983, arguing that the officer’s speech was made pursuant to his duties as a police officer, and therefore fell outside the boundary for First Amendment protection. On appeal, the United States Court of Appeals for the Ninth Circuit held that speech “pursuant to the [the officer’s] official job duties” is not protected. In reaching this conclusion the court relied on the fact-intensive inquiry set forth in _Dahlia v. Rodriguez_, 735 F.3d 1060 (9th Cir. 2013), to determine when a public employee’s speech is pursuant to official job duties. Here, the court’s inquiry cited three pieces of evidence that indicated the officer’s speech was pursuant to his job duties. First, the court found that Officer’s complaints were directed at coworkers and superiors. Because the concerns were directed up the chain of command, and associated with the safety of other officers, the court reasoned that Officer was acting pursuant to the hierarchical nature of the department and in accordance with duties for which he was paid. Second, the complaints were specific in nature, rather than broad. The court stated that broad complaints are typically outside the duties of a public employee, whereas complaints specific to the duties being performed are integral to the efficient functioning of the department and within the official duties required by the job. Third, the court referenced the departmental requirement that safety concerns be reported. Because Officer’s reports were required to be submitted, the court held that the reporting of the complaints was undertaken pursuant to his official duties. The Officer argued that the frequency with which complaints were submitted and ignored removed the complaints from qualifying as reports, thus placing them outside his official job duties. The court dismissed this argument, finding that Officer’s safety complaints were “inextricably intertwined” with the duties of a police officer. Because Officer raised his concerns internally, within the chain of command, and in association with his
required duties as a police officer, the speech was made as a public employee and was not protected by the First Amendment. The court reversed the district court with instructions to vacate judgment in favor of Officer and to enter judgment in favor of the City. (Brandon C. Mason)

*Duke v. Hamil*, 997 F. Supp. 2d 1291 (N.D. Ga. 2014). The demotion of a police officer following his posting of an image of the Confederate flag accompanied by the phrase, “It’s time for the second revolution,” on the social media website Facebook does not violate the First Amendment because: (1) this type of speech impedes the government’s ability to perform its duties efficiently; and (2) the public manner, time, place, and context in which the speech was made outweighed the police officer’s right to free speech. The plaintiff, Rex Duke, a police officer of the Clayton State University Police Department (“police officer”), filed suit against the defendants, his supervisor Bobby Hamil, and the Board of Regents of the University System of Georgia (“university”), alleging that he was demoted in violation of the First Amendment of the United States Constitution as a means to “[p]unish [him] for privately advocating for his personal political beliefs, and [seeking] to restrain his ability to privately advocate for those personal beliefs.” *Duke*, 997 F. Supp. 2d at 1294. The police officer argued that his speech was constitutionally protected and that the speech was a substantial or motivating factor in the decision to demote him. The United States District Court for the Northern District of Georgia found that he did speak as a citizen on a matter of public concern because the statements were made on his personal Facebook page, which did not identify his employment, and the statement concerned political matters. However, the court concluded that the police officer’s free speech protection was outweighed by the government’s countervailing interest after assessing: “(1) whether the *speech at issue* impedes the government’s ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made.” *Martinez v. City of Opa-Locka*, 971 F.2d 708, 712 (11th Cir. 1992). There is a unique need of order and morale critical to successful police work that is different from other public employers and the court gives wide deference to the employer’s judgment as to what is appropriate. The public attention the speech received implicated the university’s reputation and affected the public’s trust, directly impeding the police department’s ability to perform its duties efficiently. The court found that the time and place
of the speech favored the police officer because he was off duty and off campus when he posted to his private Facebook account. However, the court determined his manner of using such a controversial symbol was likely to be offensive to members of the public. The officer argued that since his post followed the 2012 presidential election, given the context of his speech, it was protected as political speech occupying the highest rung on the hierarchy of First Amendment values. See Connick v. Myers, 461 U.S. 138, 145 (1983). However, the university argued, and the court agreed, that the politically charged context also heightens potential for the speech to damage the university’s interest. The court found that the university did not violate the First Amendment when it demoted the police officer to maintain both the university’s good working relationships and its reputation. (Charles Flanders)

Craig v. Rich Twp. High Sch. Dist. 227, 736 F.3d 1110 (7th Cir. 2013). A government employer may restrict speech that addresses a matter of public concern when the interest of the government employer outweighs the individual’s interest even where the speech occurred outside of work and on a topic unrelated to employment. Bryan Craig, the plaintiff, was a guidance counselor employed at Rich Central High School. While employed at Rich Central, the counselor self-published an extremely sexually explicit advice book titled, “It’s Her Fault.” The superintendent of Rich Township High School District 227 became aware of the book and the district discharged the counselor. The counselor sued the school district alleging retaliation for speech protected by the First Amendment to the United States Constitution arguing that his speech was protected by the First Amendment because his book was related to a matter of public concern. The school district contended that, even if the counselor’s speech was related to a matter of public concern, the government’s interest outweighed the counselor’s individual interest to publicize his views. The court stated a matter of public concern is anything related to general or legitimate news interest and is of value and concern. City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004). The matter may address any topic of small or great societal importance to any size segment of the public. Dishnow v. Sch. Dist. of Rib Lake, 77 F.3d 194, 197 (7th Cir. 1996). The inappropriate or controversial nature of the speech has no weight in determining if the speech is a matter of public concern. Rankin v. McPherson, 483 U.S. 378, 387 (1987). In general, a government employer is entitled to restrict speech if its interest in efficient and effec-
tive public service outweighs the employee’s right to express those views. Chaklos v. Stevens, 560 F.3d 705, 714 (7th Cir. 2009). If the speech occurs outside of and is unrelated to employment, the government must show that the restriction is justified by more than mere speculation. United States v. Nat’l Treasury Employees Union, 513 U.S. 454 (1995). If the speech occurs within the scope of employment, the appropriate test is the Connick-Pickering balancing test. The Connick-Pickering test assesses the employer’s main function and determines whether the speech actually interferes with or could reasonably be predicted to disrupt the employer’s main function. Rankin, 483 U.S. at 388. Here, the court found that the counselor’s speech engaged in a matter of public concern. Because the book involved adult relationship dynamics, it could be a subject of value to a segment of the public regardless of its inappropriateness or controversial nature. Next, the court found that the counselor’s book fell within the scope of his employment because the counselor consciously linked his book to his employment. He anticipated that his students might read his book when he referenced his job and repeatedly thanked his students throughout the text. Thus, the court applied the Connick-Pickering test and determined that two of the school district’s main functions were ensuring effective counseling services and preserving a safe space for students. A counselor’s role requires the utmost level of public trust, which, if lost, would harm the counselor’s ability to perform his job. Next, the court found that the school district could reasonably foresee that the counselor’s book would interfere with their governmental interest and counselor’s job performance. The counselor’s speech was likely to create discomfort and distrust from students because, within the book, the counselor admitted that cleavage and other female anatomy distracted him. Further, any member of the community, regardless of age could easily access or become aware of the book and its contents. The court held that the employer’s interest in maintaining the integrity of its counseling services far outweighed the counselor’s interest in publishing his views. (Christyona Pham)

Graziosi v. City of Greenville, 985 F. Supp.2d 808 (N.D. Miss. 2013). A police officer’s comments on a social media website are not protected under the First Amendment because the police officer is not a public employee engaging in public speech. Susan Graziosi (“Police Officer”) brought an action against the City of Greenville (“City”) alleging retaliation in violation of the First Amendment to the United
States Constitution when she was fired after she posted comments on the social networking website Facebook criticizing the police department and its chief. Both parties moved for summary judgment. In its evaluation, the United States District Court for the Northern District of Mississippi considered the factual circumstances to govern whether an employee’s speech was authorized as part of the individual’s course of employment, with the final determination a question of law. The court determined that the termination was not a violation of the Police Officer’s First Amendment right to free speech because the Police Officer did not establish each of the four elements required for this claim as set forth in Gibson v. Kilpatrick, 734 F.3d 395 (5th Cir. 2013). The Police Officer could not establish that: (1) she suffered an adverse employment decision; (2) her speech involved a matter of public concern; (3) her interest in speaking outweighed the government’s interest in promoting efficiency; and (4) the protected speech motivated the City’s conduct. The court held that venting on Facebook “cannot advance the [officer’s] free speech retaliation claim against the city or its police chief.” By adopting the standard used in Garcetti v. Ceballos, 547 U.S. 410 (2006), the United States Supreme Court established a method for whether public employees are expressing their personal beliefs. The Court determined that when employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes. Id. at 410. Therefore, the Constitution does not shield employee communications from employer discipline. Id. at 426. Furthermore, the court also applied the balancing test established by the Court in Pickering v. Board of Ed., 391 U.S. 563 (1968). The Pickering test determines whether the interest of the government employer “in promoting the efficiency of the public services it performs through its employees” outweighs the employee’s interests, as a citizen, “in commenting upon matters of public concern.” Pickering, 205 U.S. at 571. The court determined that, although the Police Officer spoke as an employee when she used language such as “we” and “our” to identify herself as a member of the police department, that evidence alone was not enough to establish that she was speaking on a matter of public concern. In granting the City’s motion for summary judgment, the court established that the City “had reason to fire the [officer] in order to promote the efficiency of the services of the police department” and that “outweighs [the officer’s] interests as a citizen in commenting upon matter of public concern.” Because the employer’s actions in question were considered authentic and legitimate, the Police Officer was then required to prove the legitimacy of her claim. Lack-
ing the proof to support her case, the Police Officer’s motion was de-
nied as a matter of law. (Arielle Spiridigliozzi)

Omnipoint Communications, Inc. v. City of Huntington Beach, 738 F.3d 192 (9th Cir. 2013). The Telecommunications Act of 1996 does not pre-
empt a local land ordinance where the ordinance is not a means to con-
trol local zoning or land use decisions, but instead allows voters to de-
cide their property rights as landowners within the municipality. The
plaintiff, Omnipoint Communications, doing business as T-Mobile
(“Corporation”), planned to construct two wireless communication an-
tennas at two different construction sites located in Huntington Beach,
California, one in Bolsa View Park and another in Harbour View
Park. The Corporation relied on the Telecommunications Act of 1996
(TCA), which encourages the development of wireless telephone
services, to preempt local ordinances that would otherwise block, or
delay, the construction of the antennas by requiring the local voters’
approval before constructing the antennas. Furthermore, the Corporation
relied on the limitations placed on local zoning and land use decisions
regarding the placement, construction, and modification set forth in
47 U.S.C. § 332(c)(7)(B). Specifically, Corporation contended that
§§ 332(c)(7)(B)(i) and (iv) limit the local government’s ability to regu-
late wireless telephone services unreasonably through legislation, and
§§ 332(c)(7)(B)(ii) and (iii) limit the local government’s ability to adju-
dicate the placement, construction, and modification of wireless services
facilities. The defendant City of Huntington Beach, California (“Munic-
ipality”) argued that a provision within a local ordinance requiring that
any structure built on any park or beach within the Municipality, costing
more than $100,000, should be subject to a direct vote of the citizens of
the Municipality. H U N T I N G T O N B E A C H, C A L., C H A R T E R § 6 1 2 ( b ) ( 2 0 1 1).
The Corporation’s original estimate for the antennas was $80,000 and
$60,000 for the two properties, but upon factoring the construction
costs the Municipality learned that the projects would cost more
than $100,000 each, triggering the local ordinance. Instead of seeking
voter approval, the Corporation filed a complaint with the United States
District Court for the Central District of California. The Corporation ar-
gued that the TCA preempted the local ordinance. The district court
ruled that the local ordinance was preempted by the TCA. The United
States Court of Appeals for the Ninth Circuit reversed, taking a close
look at the text of the TCA, § 332(c)(7), and the local ordinance, con-
firming that §§ 332(c)(7)(B)(i) and (iv) are inapplicable for preemption
because the local ordinance does not place any rules or legislation on
wireless service facilities but rather is a means for deciding if permission shall be granted to lease or sell the Municipality’s land. Additionally, the court held that §§ 332(c)(7)(B)(ii) and (iii) are inapplicable because the local ordinance is not an adjudicative function of the Municipality’s planning commission, but a property decision of the voters. Because the voters were deciding the fate of the Municipality’s property rights and not establishing zoning or land use decisions, the court held the local ordinance fell outside the preemptive scope of the TCA and cannot be preempted by § 332(c)(7)(B). (Gunner Sumy)

*Union Cnty. v. MERSCORP, Inc.*, 735 F.3d 730 (7th Cir. 2013). Mortgage assignments and the corresponding recording and transfer fees need not be paid to the county governments where the mortgages originate because: 1) the state’s recording statutes do not create a mandatory duty for a mortgagee to record mortgage assignments; and 2) the purposes of the recording statutes are to protect landowners’ claims to title and to provide notice of mortgage liens to subsequent purchasers; the recording statutes are not intended as a means to provide counties with additional sources of revenue. The plaintiff, the State Attorney for Union County, Illinois, brought this suit against MERSCORP. MERSCORP operates a national registry of mortgage assignments that allows financial institutions to securitize mortgages and trade them, keeping MERSCORP as the record holder. MERSCORP did not have a substantive interest in the mortgages; rather, it administered an online registry where it was “assigned” mortgages which it may record in its name, allowing these mortgages to be securitized and assigned to third-party financial institutions in order to facilitate investment. The subsequent trading of these securities was not recorded with Illinois counties. The suit was originally brought in an Illinois state court on behalf of every county in Illinois and was subsequently removed to federal court and consolidated as a class action suit. The plaintiff alleged that, after mortgages were securitized by the defendant and subsequently traded to other financial institutions, the defendant’s failure to record these mortgage assignments in the county offices where the mortgages originated unjustly deprived the plaintiff counties of recording fees. This argument was based on the Illinois statutory language, stating that “[a]ny instruments . . . affecting title to real estate . . . shall be recorded . . .” in the counties containing the real estate subject to these mortgages. 765 ILL. COMP. STAT. 5/28 (2014). The plaintiffs contended that this statutory language created
an affirmative duty which required the defendant to record all assignments of mortgage interests in the counties containing the affected real estate. The defendant countered with past Illinois Supreme Court cases which had held that recording requirements exist to give notice of claims to title and to protect record title holders, subsequent mortgagees, and purchasers for value against subsequent liens and assignments of interest. The defendant asserted that when read as a whole, recording statutes are intended to protect property interests, not to provide county governments with the means to generate revenue. *See Field v. Ridgeley*, 6 N.E. 156 (Ill. 1886) (reasoning that self-interest, rather than legal requirements, compel the recording of mortgage interests); *see also Haas v. Sternbach*, 41 N.E. 51 (Ill. 1894) (holding that failure to record a mortgage is not fraud per se). First, the United States Court of Appeals for the Seventh Circuit reasoned that the Illinois statutory language compelling the recording of mortgage liens in the county containing the subject real estate is only applicable to mortgages which are electively recorded by their holding institutions; these institutions electively record mortgage assignments only to protect their interests in these mortgages. Therefore, there is no duty to record successive assignments of mortgage interests independent of the mortgagee’s financial interest. Supporting this rationale, the court reviewed statutory provisions which imply that recording mortgages is elective, rather than mandatory. *See 765 Ill. Comp. Stat. 5/28* (banning conditions in real estate deeds which prohibit recording); 765 Ill. Comp Stat 5/30 (mortgages authorized to be recorded, and actually recorded, provide notice to subsequent purchasers). Second, the court determined that *Field* and *Haas* were interpreting Illinois statutes similar enough to the modern statutes that the courts’ holdings—recognizing mortgage recording as elective—control current law. Finally, because mortgage recording is elective and assignees of mortgage interests are not required to record these assignments, county governments are not entitled to this revenue. Thus, the court upheld the trial court’s dismissal of the case and refused to certify the question to the Illinois Supreme Court for a modern interpretation of the law on the basis that Illinois already has controlling precedent and will have the opportunity to review a “materially identical” lawsuit currently at the state trial level. (Jeffrey Esparza)

*In re Munce’s Superior Petroleum Prods.*, 736 F.3d 567 (1st Cir. 2013). A post-petition contempt fine assessed by a state court against a debtor-in-possession for violations of state environmental law is
entitled to administrative expense priority in bankruptcy proceedings because debtors-in-possession are required to comply with state environmental laws. The appellants, Munce’s Superior Petroleum Products, Inc. and Harold P. Munce (“corporation”), are involved in the distribution of fuel and the ownership and operation of convenience stores. The appellee, the New Hampshire Department of Environmental Services (“state”), licenses and extensively regulates environmental operations. Upon failure to comply with the state court injunction requiring the corporation to abide by state environmental law, the corporation was found in contempt and fined $194,219.70. The corporation filed for Chapter 11 bankruptcy. The state moved the bankruptcy court to classify the state court fine as an administrative priority claim pursuant to 11 U.S.C. § 503(b). The bankruptcy court granted the motion and the district court subsequently upheld the administrative expense priority determination; the corporation appealed. The corporation claimed that the fine arose from continuation of its pre-petition conduct failing to comply with the state court injunction and, therefore, the fine could not be given administrative expense priority. Moreover, the corporation reasoned that while “compensatory” fines may be given priority, punitive civil fines such as post-petition contempt fines may not. The state, in contrast, argued that the fine arose from a post-petition violation of the state court’s post-petition order. The United States Court of Appeals for the First Circuit held that the state court fine was for a post-petition violation of a post-petition order and rejected the corporation’s distinction between compensatory and punitive civil fines. Under the United States Bankruptcy Code, “‘actual [and] necessary costs and expenses of preserving the estate’ are entitled to administrative expense priority. . . .” 11 U.S.C. § 503(b)(1)(A) (2014). The United States Supreme Court has held that post-petition tort damages caused by a court-appointed receiver can be treated as “actual and necessary” costs of an estate and, therefore, can qualify for administrative priority. Reading Co. v. Brown, 391 U.S. 471, 485 (1968). The Court felt its decision in Reading Co. was consistent with the Bankruptcy Code’s statutory objective: “fairness to all persons having claims against an insolvent.” Id. at 477. The First Circuit has interpreted and applied the “fairness” rationale from Reading Co. in two environmental cases, In re Charlesbank Laundry, Inc., 755 F.2d 200 (1st Cir. 1985), and Cumberland Farms, Inc. v. Fla. Dep’t. of Envtl. Prot., 116 F.3d 16 (1st Cir. 1997). The First Circuit found the precedent set forth in those cases to be decisive. In Charlesbank Laundry, the court considered “whether a civil compensatory fine for viola-
tion of an injunction by a debtor corporation engaged in Chapter 11 reorganization qualifies for first priority treatment as an administrative expense. . . .” 755 F.2d at 201. The First Circuit held that the post-petition fine in Charlesbank Laundry fit within the Reading Co. framework and was entitled to administrative priority. However, the question remained as to how an interpretation of Reading Co. would apply to other types of fines, including those sought by government agencies. This question was answered in Cumberland Farms. There, the First Circuit held that a civil penalty imposed for violation of a state environmental law can be given administrative priority. 116 F.3d at 21. The court reasoned that “debtors-in-possession . . . do not have carte blanche to ignore state and local laws protecting the environment against pollution.” Id. at 20. Cumberland Farms made clear that fines for post-petition noncompliance with state environmental laws can be granted administrative priority and that such a grant would be an appropriate application of the Reading Co. “fairness” rationale. Following this precedent, the First Circuit affirmed the bankruptcy court’s decision granting post-petition contempt fines for the corporation’s violations of state environmental laws and ordered the corporation to pay the fine. (Brynne Krause)

Entergy Nuclear Vermont Yankee, L.L.C. v. Shumlin, 737 F.3d 228 (2d Cir. 2013). The federal Tax Injunction Act prevents claimants from challenging a state statute in federal court where: (1) the state statute creates a tax for purposes of the federal statute; and (2) the state provides a “plain, speedy, and efficient” mechanism for raising claimants’ objections. The plaintiffs, Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (“Company”), owned and operated a nuclear power plant in Vermont impacted by the state statute. The defendants were Vermont Governor Peter Shumlin, Vermont Attorney General William Sorrell, and Vermont Commissioner Mary N. Peterson (“State”). The Company challenged a state statute that assessed a generating tax of $0.0025 per kilowatt-hour on electricity produced by plants capable of generating 200,000 kilowatts or more. Vt. Stat. Ann. Tit. 32, § 8661 (2013). The Company’s nuclear plant was the only facility in the state affected by the tax. The Company filed suit in the United States District Court for the District of Vermont seeking a declaratory judgment that the tax was unconstitutional under the Supremacy, Equal Protection, and Contract Clauses of the United States Constitution. The State moved to dismiss the suit for lack of subject matter jurisdiction under 28 U.S.C. § 1341, the Tax
Injunction Act (“TIA”). The TIA denies federal courts the power to interfere with the collection of state taxes where the state courts offer a “plain, speedy, and efficient remedy” for relief. 28 U.S.C. § 1341 (2014). The court determined that the tax qualified as a state tax for the purpose of the TIA, and that the state provided a “plain, speedy, and efficient” mechanism for challenging the tax in state court as required. In determining that the statute created a tax, the court followed the *Travelers* test, which required that the tax “serve general revenue-raising purposes” and that the proceeds be deposited into the state’s general fund without earmark. *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 713-14 (2d Cir. 1993). The court held that the tax directed the funds into the state’s general fund without designation as to where the funds were to be spent, thereby qualifying as a tax under the TIA. The court went on to state that only the actual characteristics of the statute, not potential legislative intent or political context, determine its TIA status. Finally, the court found that the tax provided a framework for a “full hearing and judicial determination at which [a taxpayer] may raise any and all constitutional objections to the tax,” which fulfilled the “plain, speedy, and efficient remedy” requirement of the TIA. *See Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 512, 514 (1981). Specifically, two state statutes mapped out the steps required to request a hearing before the state commissioner regarding a taxpayer’s deficiency in payment and providing for judicial review of the commissioner’s determination regarding the tax. *Vt. Stat. Ann. Tit. 32 §§ 5883, 5885(b) (2013).* The court affirmed the lower court’s decision to dismiss the case for lack of subject matter jurisdiction, finding the TIA barred federal courts from considering this legal challenge. (Cole White)

*League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013). State legislators and their staffs have a legislative privilege based on separation of powers, however, this privilege is not absolute when the purposes of the underlying privilege are outweighed by the compelling, competing interest of upholding an explicit constitutional mandate. The plaintiffs, League of Women Voters of Florida (“voters”), are a nonpartisan political organization. The defendants are the Florida House of Representatives (“legislature”), one of the state legislative bodies responsible for the 2012 congressional apportionment plan. The voters claimed that the 2012 congressional apportionment plan was unconstitutional because the legislators violated the state constitution, which states that “no apportionment plan
shall be drawn with the intent to favor or disfavor a political party.” Fla. Const. art.III, § 20 (2010). The explicit constitutional mandate prohibited improper discriminatory intent in redistricting. To determine the intent of the legislators, courts must focus both on direct and circumstantial evidence. In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 617 (Fla. 2012). Based on communications between legislatures and partisan political organizations during the apportionment process, the voters subpoenaed several legislators to give a deposition to discover further evidence. The legislature argued that it has an absolute privilege against civil litigation when the case falls within the scope of a legislative duty. The Florida Supreme Court held that the legislative privilege is not absolute and is outweighed by the explicit prohibition in the state constitution against partisan gerrymandering and improper discriminatory practices. In reaching this conclusion, the court upheld the balancing approach applied by the state circuit court, which determined the necessity of the legislative privilege, is outweighed by the compelling, competing interest in prohibiting unconstitutional political gerrymandering. The Florida Supreme Court found, however, that the legislative privilege did protect the thoughts or impressions of individual legislators and staff. The court laid out a two part test to determine whether the privilege applies to protect the particular information sought or if it is outweighed by a competing, compelling interest. First, the court must determine whether the information is within the scope of the legislative privilege. The information sought by the voters, depositions of legislators, was within the scope of the privilege. Second, the court must determine whether the underlying policy of the privilege, here, the separation of power between branches of government and the ability of a legislator to be free from the burden of private litigation, are outweighed by a compelling, competing interest. The court found that the constitutional right of the voters to be equally favored in their representation by prohibiting partisan political gerrymandering is a competing, compelling interest that outweighs the legislative privilege. Although separation of powers is a fundamental function of state government, the legislative privilege is not absolute and must yield to compelling, competing interests based on public values. In its decision, the court also relied on the state’s strong deference for the policy of transparency in public records and the legislative process. (Allison Kleinow)
Blue Springs R-IV Sch. Dist. v. Sch. Dist. of Kansas City, 415 S.W.3d 110 (Mo. 2013) (en banc). A Missouri statute requiring accredited school districts to accept transfer students from unaccredited districts does not violate the Hancock Amendment to the Missouri Constitution because the statute does not mandate a new activity or service and does not increase the level of any activity or service. The defendants are the School District of Kansas City, Missouri; the State of Missouri; the Attorney General; and the Missouri State Board of Education. Taxpayers from several accredited Missouri school districts, including Blue Springs R-IV, Independence 30, Lee’s Summit R-VII, Raytown C-2, and North Kansas City 74, challenged a Missouri statute that ordered unaccredited school districts to pay tuition and provide transportation for its pupil residents who choose to attend school in an accredited district in the same or an adjoining county. Mo. Rev. Stat. § 167.131(1) (2014). The taxpayers argued that the statute violated Missouri’s Hancock Amendment, which prohibits the state from burdening counties with new or increased activities or services without providing full state funding. Mo. Const. art. X, § 16, 21. Taxpayers of the accredited districts argued that the statute requires the school districts to educate the transfer students at an increased level and with additional costs. Additionally, the taxpayers asserted that the increased activity and subsequent costs are not fully mitigated by adequate state financing. Conversely, the state defendants contended that the statute does not violate the Hancock Amendment because it does not mandate any new or increased activities or increase the cost of existing activities. The Supreme Court of Missouri analyzed the issue in light of its recent decision in Breitenfeld v. Sch. Dist. of Clayton, 399 S.W.3d 816 (Mo. 2013) (en banc), which was decided while Blue Springs R-IV was pending on appeal. The court reaffirmed the Breitenfeld decision, which held that § 167.131 does not violate the Hancock Amendment. Citing Breitenfeld, the court found that the statute only directs “which school districts will educate which students.” Blue Springs R-IV, 415 S.W.3d at 114. The court explained that the school districts are already required to provide free public education, so the statute does not impose a new educational activity. Additionally, the statute did not cause an increase in the level of educational services; instead, the statute merely reallocates existing educational activities. Even with more students who transferred from unaccredited districts, the accredited districts would only be increasing the level of a service already required by law. It would be no different, the court asserted, than the districts’ obligation to serve students who move into the district. Thus, the statute
does not violate the Hancock Amendment. Because the court did not find any new or increased level of activity in violation of the Hancock Amendment, it did not address whether the taxpayers or school districts incurred any subsequent costs. The court upheld the statute and reversed the previous decision against the state. (Robert Schaeffer)