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It's Been a Long Time Coming: A Short Manifesto for Urgently Needed Change in Land Use Law & Regulation

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**IT'S BEEN A LONG TIME COMING:
A SHORT MANIFESTO FOR URGENTLY NEEDED CHANGE IN
LAND USE LAW & REGULATION**

By Colin Crawford*

A favorite story of mine involving Julian Juergensmeyer found him at a cocktail reception in Wyoming, before a continuing legal education event at which he would speak the next day. Suddenly, a man behind him turned around and exclaimed, with a smile on his face: “you son of a b****! I swore to myself that I would never have to listen to your voice again!!” The man went on to explain that one summer years before he had driven across country playing bar review tapes. Julian’s dulcet tones were for him and thousands of others the “voice” of property law. Julian’s voice was the one this man associated with the tortures of property law, from estate and future interests to recording acts and lien theory. The anecdote is amusing, yes, but it is also a revealing one as to the breadth and scope of Julian’s influence in a number of related areas, including but not limited to property, land use, agricultural and environmental law. In a remarkable career that has spanned nearly 60 years, Julian has taught and lectured across the globe, has produced and collaborated on dozens of casebooks and treatises, has been a model of cross-disciplinary work between land use lawyers and land use planners, and has researched and generated a steady stream of scholarly work. It is no exaggeration to say that his voice - whether spoken or in print - has been one of *the* principal sources of thinking about the nature, variety and possibility of U.S. law on these topics and others.

Moreover, in a number of specific areas, Julian has been the leading voice and defender of land use innovations. I refer, for example, to his work on tax increment financing.¹ In addition, Julian has often critiqued and anticipated alternatives that the rest of the planning world was slow to tackle head on. For instance, his long-term concern with the negative consequences of urban sprawl and automobile-centered development,² recently led him to begin to research,

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¹ See, e.g., Julian Conrad Juergensmeyer, *Infrastructure and the Law: Florida's Past, Present and Future*, 23 J. LAND USE & ENVTL. L. 441, 449 (2008). See generally Julian Conrad Juergensmeyer, *The Development of Regulatory Impact Fees: The Legal Issues*, in *Development Impact Fees: Policy Rationale, Practice, Theory, and Issues* (Arthur C. Nelson, ed., 1988).

² Julian Conrad Juergensmeyer & Robert Mason Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415, 445 (1981)(exploring efforts to curb sprawl).

he told me, the possible benefits of self-driving cars as a way to reduce traffic and force land use efficiencies. Another example would be his focus on the possibilities of wind energy as a tool for delivering cleaner energy while also balancing its land use and environmental consequences.³ My point here is that Julian is often ahead of the curve and always on the lookout for novel solutions, long before many others.

In the spirit of Julian's curious mind and his encyclopedic knowledge of land use law, I therefore wish in this brief, reflective contribution, to take the opportunity to review some standard land use law wisdom. The moment to do so is upon us. We are, after all, as a planet at a reckoning as I write these words. Pandemic illnesses from Ebola and HIV to COVID-19, the hastening consequences for land and the environment of climate change, and global protests over racial and social inequity in the wake of brutal police killings in the United States, all demand that we re-examine and rethink some land use basics. Therefore, in what follows, I will briefly highlight five areas of land use orthodoxy that I suggest the current historical moment demands we revisit. I will, furthermore, try to do so in the spirit of Julian and his work, pushing and questioning, seeking for new alternatives.

Moreover, I will use Julian's classic land use treatise as a guide in working through these areas of consideration.⁴ The treatise documents the history and development of concepts related to land use planning and development regulation law. As such, it offers a template to critique and pick apart what works well and what we finally are beginning to recognize works less well. Julian's treatise is truly encyclopedic, documenting the strengths, the weaknesses and the sins of U.S. planning and development regulation law. And so provides a rich source for understanding not just the "how to" of U.S. land use law but also its origins and development over time. Finally, I should say that the focus here will be on concepts traditionally associated with U.S. land use law. However, again in the spirit of Julian's often comparative and international focus, I suggest that what I argue here for the U.S. has wide application elsewhere.

My five-part list for change in some of our land use basics is as follows: 1) replace zoning; 2) reject exclusion under any circumstances and enshrine inclusion as a central land use law principle; 3) promote density as a

³ See multiple contributions by him in Helle Tegner Anker, Birgitte Enelund Olsen & Anita Rønne, eds., *LEGAL SYSTEMS AND WIND ENERGY: A COMPARATIVE PERSPECTIVE* (2008).

⁴ Julian Conrad Juergensmeyer, Thomas E. Roberts, Patricia E. Salkin and Ryan Rowberry, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* (updated as of May 2020), available on Westlaw at [https://1.next.westlaw.com/Browse/Home/SecondarySources/RealPropertySecondarySources/RealPropertyTextsTreatises/LandUsePlanningDevelopmentRegulationLaw?originationContext=typeAhead&transitionType=CategoryPageItem&contextData=\(sc.Default\)#](https://1.next.westlaw.com/Browse/Home/SecondarySources/RealPropertySecondarySources/RealPropertyTextsTreatises/LandUsePlanningDevelopmentRegulationLaw?originationContext=typeAhead&transitionType=CategoryPageItem&contextData=(sc.Default)#).

fundamental goal; and 4) advocate a robust use of the land use “police power” and rethink limits on eminent domain powers; and 5) revisit and advance the need for federally directed land use regulation. These five suggestions, of course, are only a beginning and require much further elaboration than is possible here. They are offered more as a starting point for conversation and consideration than as a programmatic catalogue of reforms.

1. **Replace zoning.**

Zoning, the practice of dividing up land within a jurisdiction into areas for different uses based on their use, height, bulk and density⁵ is arguably the jewel in the crown of U.S. land use tools.⁶ The basic logic is solid enough: in light of urban and industrial growth, it became necessary, in the interests of protecting public health and welfare, to separate uses. As the Supreme Court of Illinois wrote in an early zoning case: “The constantly increasing density of our urban populations, the multiplying forms of industry, and the growing complexity of our civilization, make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly.”⁷ This position, deeply embedded in the DNA of contemporary zoning law and practice nearly a century later, is appealing on its face. However, even in its origins, one can begin to detect some less noble motivations behind the legally-constructed practice of zoning. The celebrated case of *Village of Euclid v. Ambler Realty*⁸, a U.S. Supreme Court decision read by nearly every U.S. law student, is often credited with cementing the role of zoning as a standard legal and planning practice. With apologies for lengthy quotations that I include because I think they merit reconsideration in full, the Supreme Court observed in part as follows:

The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits, and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety, and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of

⁵ *Id.* at 91.

⁶ Juergensmeyer et al, *supra* note 4 at Sec. 3.3.

⁷ *City of Aurora v. Burns*, 319 Ill. 84, 93 (1925).

⁸ *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations.⁹

On its face these words may appear neutral. No one wants to experience the possible physical harms and death of fire, much less see property destroyed by it, and surely all of us would agree that sanitary controls are a social positive.

On closer inspection, however, the quoted language contains troubling signs of the biases baked into land use law. Who or what, for example, are the “harmful” who must be destroyed? One possibility, first, is immigrants. Zoning law was developed in part as a response to population “congestion”, typically an early 20th century euphemism that conjured up crowded immigrant neighborhoods.¹⁰ Another phrase from the *Euclid* decision should also draw our attention, namely the “suppression of disorder.” The phrase was one in vogue during the post-Civil War period of Reconstruction, and referred to efforts to control Southern “outrages”, meaning racialized attacks like those perpetrated by the Ku Klux Klan.¹¹ One way land use has worked to “suppress disorder”, of course, is by a variety of tools that keep white and black citizens apart.¹² In other words, the *Euclid* language, whether consciously or not, contains coded references that prefigure the many ways that land use law has developed over generations not merely to control and separate uses but also to exclude and divide and impede opportunity for some.

This is to say that *Euclid* very much has its roots in and reflects early 20th century efforts to preserve racial and class privileges.¹³ Indeed, the *Euclid* decision continues in other ways that reveal its social, economic and racialized

⁹ *Id.* at 392.

¹⁰ Anne Fleming, *The Borrower's Tale: A History of Poor Debtors in Lochner Era New York City*, 30 LAW & HIST. REV. 1053, 1058 notes 21-22 and accompanying text (reporting high immigrant numbers documented in 1911 New York City Commission report on “congestion of population”).

¹¹ David Achtenberg, *A “Milder Measure of Villainy”: The Unknown History of 42 U.S.C. § 1983 and the Meaning of “Under Color of” Law*, UTAH L. REV 1, 21-22 notes 43-47 (1999).

¹² This was the point of the Louisville, Kentucky land use ordinance famously struck down by the United States Supreme Court as a violation of the 14th Amendment. *Buchanan v. Warley*, 245 U.S. 60, 70 (1917).

See generally Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning In Low-Income Communities of Color*, 77 Minn. L. Rev. 739 (1993).

¹³ Martha A. Lees, *Preserving Property Values – Preserving Proper Homes – Preserving Privilege: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas 1916-1926*, 56 U. PITT. L. REV. 367, 368 (1994)(quoting Kenneth Jackson’s *CRABGRASS FRONTIER* 242 (1985) to the effect that the main purpose of zoning in the 1920s and afterwards was to “preserv[e] residential class segregation and property values.”).

biases. For example, the opinion – and again, with apologies - I will quote at length - offered the following observation:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.¹⁴

The Court's characterization of apartment houses, which generally offer more affordable alternatives to single houses for those with lower financial resources, as "parasites" is striking,¹⁵ as is its suggestion that they thus "take advantage" of the privileges enjoyed by land users with greater resources. "Under these circumstances," the Court concluded, "apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."¹⁶ One might wonder what "different environment" the Court is suggesting here. My guess is that it is one without "open spaces and attractive surroundings."

To be sure, *Euclid* was not then and is not now the last word on zoning. Famously, two years after the *Euclid* decision, the Supreme Court "held a zoning ordinance invalid as applied to a particular parcel because it found that the public good was not promoted by the zoning classification."¹⁷ There have been regular critiques since then.¹⁸

My point here is to suggest how, since its origins, zoning and its judicial interpretation from the country's highest court on down to lesser courts and local governing bodies and planning agencies are deeply impregnated with

¹⁴ *Supra* note 8 at 394.

¹⁵ Cf. Sara C. Bronin, *Change Zoning Laws That Neglect Poor People*, *Courierjournal.com* (Louisville, KY), Wed., June 10, 2020, at 15A (observing that the "parasite" metaphor is, for "[t]oo many zoning officials today, especially those in suburban and affluent towns, seem to have adopted this point of view. They have come to define order as exclusion.")

¹⁶ *Supra* note 8 at 395.

¹⁷ Juergensmeyer et al, *supra* note 4 at Sec. 3.4. The case in question was *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

¹⁸ See, e.g., Bernard Siegan, *LAND USE WITHOUT ZONING* (1972)(arguing that planners are subject to capture from political interests, especially those with greater social and economic resources).

biases of race, ethnicity and income. Perhaps unsurprisingly, as it has been applied and developed in jurisdictions across the country for nearly a century, these features have become ever more salient in ways often invisible to the naked eye and often administered with no deliberate ill intent.¹⁹ And while *Euclid* is just one case, it is a pivotal one, and one that has generated progeny that continue to promote separation and discriminatory results.²⁰

A prime example are the effects of single- and limited-use zoning in exacerbating housing inequalities. The Chair of President Obama's Council of Economic Advisors, Jason Furman, observed, for instance, as follows: "[t]he artificial upward pressure that zoning places on house prices — primarily by functioning as a supply constraint — also may undermine the market forces that would otherwise determine how much housing to build, where to build, and what type to build, leading to a mismatch between the types of housing that households want, what they can afford, and what is available to buy or rent."²¹ More pointedly, the driving preference in most zoning codes for single-family homes, often with requirements for larger lots and high minimum square footage, discriminates against lower- and middle-income persons, many of

¹⁹ Rachael Watsky, *The Problems with Euclidean Zoning*, in Analysis, State Legislation, Boston U. Sch. L. Dome, July 19, 2018, available at <http://sites.bu.edu/dome/2018/07/19/the-problems-with-euclidean-zoning/> (last accessed June 30, 2020) (observing in part that "Euclidean zoning . . . can be helpful, as it enforces the separation of industrial land uses from residential land uses and can protect against pollution risks. However, Euclidean zoning has also exacerbated segregation issues, limited housing supply, and encouraged urban sprawl. Restrictions on minimum lot sizes, strict building codes, and other elements of Euclidean zoning have increased housing costs, limited new housing construction, worsened affordability issues, and increased the inequality divide in urban areas."). See also, e.g., Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459 (2009) (considering the external costs imposed by exclusionary zoning). Cf. Edward L. Glaser, *Houston, New York has a Problem*, CITY JOURNAL (Summer 2008) (documenting and evaluating reasons for middle-class exodus from dynamic urban centers like New York to less dynamic but more affordable cities like Houston), available at <https://www.city-journal.org/html/houston-new-york-has-problem-13102.html> (last accessed July 1, 2020).

²⁰ *Id.*

²¹ Quoted in Ilya Somin, *The Emerging Cross-Ideological Consensus on Zoning*, WASH. POST, Dec. 5, 2015, available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-consensus-on-zoning/> (last accessed June 30, 2020) (arguing that the heavily layered and byzantine zoning tools are leading no-regulation libertarian conservatives to unite with progressives concerned to decrease segregation and promote housing opportunity, among other goals). See also, e.g., Jay Wickersham, *Jane Jacob's Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547 (2001), (observing, *inter alia* that "Euclidean zoning and related subdivision regulations restrain density, separate primary uses, favor roadway designs based solely on traffic needs, and ignore the preservation of older buildings.").

whom are brown and black.²² Disturbingly, the racialized effects of zoning, moreover, are not facts of recent acknowledgement.²³

Moreover, more recently, commentators have observed other, if unintended, nonetheless negative consequences of our now standard set of zoning controls for the environment. Specifically, they have charted zoning's role in contributing to the greenhouse gas emissions that contribute to climate change. Because it spaces out and separates uses, routine zoning practices often thus has the effect of forcing people into cars to satisfy basic necessities, thus increasing combustion of fossil fuels.²⁴ Furthermore, the larger lot sizes encouraged by many zoning codes – as noted in the previous paragraph – prioritizes needlessly large environmental footprints; this fact can result in loss of greenspace and habitat. In short, nearly a century after the *Euclid* decision, the accumulated tool kit for zoning is today a practice deeply out of touch with our current needs and the realities of our social and environmental situation at this historical moment.²⁵

Once again, Julian's nearly 60 years as a land use scholar have allowed him to chronicle the recognition of those biases and efforts to correct them.²⁶ How then, might we begin to think about this situation today? I suggest we need

²² See generally, e.g., Richard Rothstein, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); Richard Florida and Citylab, *The Segregation That Zoning Inflicts on Cities*, *The Atlantic*, Jan. 5, 2016, available at <https://www.theatlantic.com/business/archive/2016/01/zoning-land-use-segregation/422595/> (last accessed June 30, 2020).

²³ See, e.g. Lees, *supra* note 13 at 367 et seq. (arguing that early 20th century proponents of laws protecting private residential districts were motivated by class, racial, and ethnic bias and by economic interests such as the desire to protect property values).

²⁴ Watsky, *supra* note 19 (remarking that Euclidean impedes the desire of “many people . . . to decrease their carbon footprint because they cannot get to the most basic goods and services, like groceries, schools, shopping, and work, without access to a car due to the enforced separation of uses within zoning districts. Separation of uses leads to urban sprawl, . . . [and] Increased urban sprawl has created patterns of development with extended infrastructure systems, increased impervious surfaces, and increased adverse impact on natural resources.”). But see, e.g., Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45 (1994)(arguing that “zoning can be a rational and justifiable public policy response to very real problems and can be made to work at least as well as any of the alternatives the critics propose.”); Lawrence Libby, *The Great Zoning Debate – More Heat than Light*, 38 LAND USE L. & ZONING DIG. 3 (1986)(maintaining that many critiques of zoning are overwrought and ignore its benefits).

²⁵ An article that examines all of the above factors is Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915 (2007)(identifying five negative externalities of Euclidean zoning: urban sprawl, racial and socio-economic segregation, environmental and energy problems, negative economic impacts, and overall reduced quality of life).

²⁶ See, e.g. Juergensmeyer et al, *supra* note 4 at Sec. 6.8.

to begin a radical overhaul of the byzantine zoning laws – beginning with Euclidean zoning - that began from a dark and troubled place of racial, ethnic and economic exclusion, and seek to develop wholly new tools based on principles of equity and inclusion.²⁷

How then to proceed? This brief article does not allow a full, detailed answer to the question. But I can at least begin to limn the contours of a reoriented land use law that promotes more equitable ends. In the dismantling of single- and limited-use zoning, with the manifold, negative external social and economic effects documented above, two principles will be especially important in crafting new land use tools responsive to our current moment. It is to them that I now turn.

2. **Include not exclude.**

First, a reimagined and reworked set of land use legal and regulatory tools need enshrine the principle of inclusion as a necessary feature. Exclusion, as any student of U.S. land use law knows, has a long, established history, in ways not so obvious at first glance (as in the language from *Euclid* quoted above), to some ways much more explicit. Among the more explicit tools one can cite, for instance, is the legally sanctioned practice of redlining that prevented prospective buyers – most typically black and brown prospective home buyers – from obtaining mortgage financing at advantageous rates, a practice eventually banned by the Fair Housing Act of 1968,²⁸ restrictive deed covenants that explicitly banned sale to persons based on personal characteristics, a practice that began to end as a result of a Supreme Court

²⁷ Commentators are beginning to suggest what needs to be done in this respect. See, e.g., Christopher Serkin & Gregg P. Macey, *Post-Zoning: Alternative Forms of Public Land Use Controls*, 78 BROOK. L. REV. 305 (2013). Among other changes, a rethinking of traditional zoning might allow for a revival of once cherished practices, like urban agriculture. See, e.g., Joshua Yellin, *The Intersection between Urban Agriculture and Form-Based Zoning: A Return to Traditional Planning Techniques*, 19 HASTINGS W. NW. J. ENV'T L. & POL'Y 83 (2013)(documenting, *inter alia*, how single-use Euclidean zoning led to the end of urban agriculture); Chelsea Smialek, *Take a Walk through the Cities' Gardens: Comparing Detroit's New Urban Agriculture Zoning Ordinance to Others of Its Kind*, 91 U. DET. MERCY. L. REV. 345 (2014); Kate A. Voigt, *Pigs in the Backyard or the Barnyard: Removing Zoning Impediments to Urban Agriculture*, 38 B.C. ENVTL. AFF. L. REV. 537 (2011).

²⁸ 42 U.S.C. Sec. 3604(b)(making it unlawful to “To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”) & 42 U.S.C. 3605(a) (“It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”). See also, e.g. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F.Supp.489 (S.D. Ohio, 1976)(finding discriminatory redlining in violation of Fair Housing Act.)

decision in 1948,²⁹ and laws and ordinances that often appear neutral on their face but exclude certain uses. Such banned uses typically impose disproportionate burdens on those with fewer economic resources, such as those who buy mobile homes,³⁰ or persons living in extended families³¹ or in group homes.³² Once again, on their face, such land use regulations may appear neutral. However, where, for instance, for complicated reasons of history and society fewer African American children are raised in a “typical” nuclear family with two married parents,³³ the effect – and perhaps the intent – of such regulations is punitive for some of the least privileged and least well-resourced in our society.

The efforts to turn back these and other exclusions merits celebration. However, the durability of so many techniques to limit access and opportunity to land and its benefits need give us pause. In addition, we should be troubled by the fact that challenges to inequitable and discriminatory land use laws are only effected by time-consuming and piecemeal changes. It is, therefore, time to demand that we reconsider the foundation on which these exclusionary land use practices are made. Indeed, it is telling that in the lengthy chapter on “Exclusionary and Inclusionary Zoning”³⁴ in the (once again, encyclopedic) Juergensmeyer treatise, only a short section is devoted specifically to *inclusionary* zoning, and then only to questions of set asides in development plans for low and moderate cost housing and housing trust funds.³⁵ This imbalance again undermines the basic inequities advanced and promoted by the labyrinth of U.S. land use regulation. What I am suggesting here is that it is time for a comprehensive overhaul that seeks to redress these inequities in a systematic fashion. It is time to develop a comprehensive and obligatory set of inclusionary land use tools.

3. Promote density.

A second objective of any reimagined set of land use regulations and tools must be a commitment to density, especially but not only for urban plans.

²⁹ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³⁰ Sara C. Bronin and Dwight H. Merriam, Rathkopf's *The Law Of Zoning And Planning* Sec. 45:13 (on exclusionary zoning).

³¹ Juergensmeyer et al, *supra* note 4 at Sec. 4.5.

³² Juergensmeyer et al, *supra* note 4 at Sec. 4.6.

³³ See, e.g. Pew Research Center Social and Demographic Trends, *Parenting in America: 1. The American Family Today*, available at <https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/> (December 17, 2015)(last accessed June 28, 2020).

³⁴ Juergensmeyer et al, *supra* note 4 at Chapter 6.

³⁵ *Id.* at Sec. 6.7. In the 2007 print version of the treatise, Chapter 6 is 49 pages long. Sec. 6.7 takes up a mere six pages.

The COVID-19 pandemic has, for the moment, meant that we are physically distanced and acutely aware of how proximity to one another can make us sick. As a result, the thought of promoting density at this moment in particular might strike some as strange.³⁶ Nonetheless, this is the moment to rethink the land use policies that have permitted sprawl and its attendant harms, such as habitat destruction, a side effect of which is the release of previously unknown pathogens.³⁷

The type of density that I am here arguing we seek to make a central part of our land use planning is one that does three things. First, the density argued for here must prioritize human uses and benefits other than purely financial gain. Second, the type of density contemplated here must seek to promote efficiencies in occupation of land. Third, the type of density identified here must promote environmental health, with the attendant benefits for public health. This might mean, for example, that we prioritize urban forms that integrate denser housing with public and green space – even space that allows for distancing when needed, as in the classic Shanghai *shikumen* courtyard form.³⁸

Promoting density of the type imagined here would have several advantages. First, in keeping with the argument for inclusion above, it is time to insist on urban plans that provide fair land use opportunities for all social actors. Because in the U.S. and globally we face a severe housing shortage, this is essential.³⁹ Indeed, the type of density suggested here might mean that a bill like the one recently proposed in the California legislature, which would allow multi-unit housing in all neighborhoods in the state, is now not only an appropriate but also an essential measure to adopt.⁴⁰ Second, the kind of density planning that focuses on providing workers of all types access to affordable housing would promote strong economic growth in the long-term because it would reduce high external financial and personal costs, like those imposed by

³⁶ A worry among the planning community that COVID-19-related fears would inhibit density-focused planning emerged early in the pandemic. See, e.g. Kevin Williams, *Rethinking the Blueprint for Denser Living*, N.Y. TIMES, Wed. May 6, 2020, at B7.

³⁷ See, e.g., Sonia Shah, *The Other Pandemic: Habitat Destruction*, THE NATION, March 16/23, 2020, at 6 (citing, in the U.S. example, consequences of suburban expansion like a rise in tick-borne disease).

³⁸ Richard Sennett, *How Should We Live? Density in Post-Pandemic Cities*, Domus 1046, May 9, 2020 (“Chinese urbanists long ago found such a flexible form in the shikumen courtyard; architects and planners need to find its contemporary equivalent.”). Full article available at <https://www.domusweb.it/en/architecture/2020/05/09/how-should-we-live-density-in-post-pandemic-cities.html> (last accessed June 29, 2020).

³⁹ See Williams, *supra* note 36 (estimating that in California alone there are 100,000 homeless persons). See also Adam Lashinsky, *Can San Francisco Be Saved?*, FORTUNE 64, 68 (graphically representing skyrocketing rates of homelessness in 10 U.S. cities).

⁴⁰ Alexei Koseff, *New Try for Denser Housing in State: Bill Would Nearly End Single-Family Housing*, S.F. CHRONICLE, March 10, 2020, at A1.

lengthy commutes. The ripple effects of stratospheric housing costs that bar many from the ability to live within a reasonable distance of their work is of particular concern at this historic moment; in times of pandemic, those we now identify as “essential workers”⁴¹ are also among those least able to keep pace with rising housing and other costs. Third, if constructed properly, familiarity of people of different backgrounds and traditions could breed the opposite of contempt and fear. At least, proximity could promote tolerance and understanding, and at best, appreciation for the rich value of difference. Fourth, the type of density considered here would reduce the infrastructure spending we will be required to make to meet the threat posed by climate change and gradually reduce our ever-expanding land footprint. Fifth, the type of density imagined here will require rethinking the very concept of density itself. Take the case of public transportation. As Sennett writes: “[t]he benefits of public transport consist of efficiently massing numbers of riders together, but that isn’t a healthy form of densification. Thus, planners in Paris and Bogotá are exploring so-called ‘15-minute cities’ in which people can walk or cycle to dense nodes in the city, rather than travel mechanically to dense centres.”⁴² That is, the type of density planning argued for here will, because it is prioritizing human uses and lives, seek to integrate better health and a more compact urban form. Sixth, density as a central goal of a revised approach to planning will advance the need for climate change mitigation, since it will demand expanded and more efficient infrastructure resources, such as improved public transportation.⁴³ Seventh but surely not finally, the type of density proposed here recognizes that the expansion of the human footprint is directly linked to the appearance of pathogens including COVID-19 that have jumped from both domesticated and also wild animals to humans.⁴⁴ This is to say that the type of density advanced here, for reasons of the preservation of the environments we inhabit and the health we enjoy in them need begin from a position of respect and humility in the face of nature’s power, majesty and its complexity.

⁴¹ See, e.g. Thomas B. Edsall, *Why Do We Pay So Many People So Little Money?*, N.Y. TIMES, June 24, 2020, available at <https://www.nytimes.com/2020/06/24/opinion/wages-coronavirus.html?searchResultPosition=8> (last accessed June 29, 2020).

⁴² Supra note 38.

⁴³ See, e.g. Edward Sullivan and A. Dan Tarlock, *The Western Urban Landscape and Climate Change*, 49 ENVTL. L. 931 (2019) (referring to transportation and land use as four of the “markers” of climate change, the others being “public services, and facilities and energy generation”); Alejandro E. Camacho, Melissa L. Kelly, Nicholas J. Marantz, and Gabriel Weil, *Mitigating Climate Change Through Transportation and Land Use Policy*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10473 (2019).

⁴⁴ Shah, supra note 37 (“The problem is the way that cutting down forests and expanding towns, cities, and industrial activities create opportunities for animal microbes to adapt to human bodies.”)

4. Robust use of the “police power” and rethinking eminent domain powers.

The remaking of U.S. land use cannot end, however, with substantial efforts to promote inclusion and density as goals. In the wake of the global protests that have rocked the world since the killings in the U.S. of George Floyd, Breonna Taylor, Ahmed Arbery and other African American men and women in the U.S., the suggestion to robustly use the “police power” may at a glance strike some as a horrifying suggestion. However, to clarify at the outset, I am using the term here in the sense that land use lawyers use it, referring to the powers used by the state – whether local, state or national – to regulate the public health and welfare.⁴⁵ Examples of the police power in the sense I am using it here would be construction and maintenance of streets, public lighting and even the provision of amenities like greenspace.

Moreover, I am aware that what I will proceed to propose here, in terms of U.S. land use law and especially land use-related jurisprudence, will be challenging in the extreme to achieve. Specifically, for nearly 30 years, the U.S. Supreme Court has advanced an individual property rights agenda that has severely tied the hands of environmentally and socially minded land use lawyers, planners and their allies to promote more inclusive, efficient and less ecologically damaging land use practices.⁴⁶ In particular, this judicially sanctioned limitation on the eminent domain powers of the state has relied upon a very broad understanding of the extent of private property rights and a correspondingly narrow view of the permissible extent of governmental controls absent payment of a significant, if not the entire, market value of the land subject to regulation.⁴⁷ The principal tool used to impose this analysis is the Takings Clause of the 5th Amendment to the U.S. Constitution, which of course prohibits the taking of private property for public use without just compensation.⁴⁸ To be sure, given the dictates of *stare decisis* judicial reasoning, among other factors, reversing the headlock that these decisions

⁴⁵ Juergensmeyer et al, supra note 4 at Sec. 3.5.

⁴⁶ Although land use lawyers may disagree as to the moment this trend began in earnest, I would date it to the case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)(finding that a state regulation prohibiting development of a barrier island was an unconstitutional taking of private property in violation of the 5th Amendment to the U.S. Constitution).

⁴⁷ To be sure, these judicial decisions do not exist in a vacuum but must be understood against the background of a vigorous property rights movement. See, e.g., Joseph L. Sax, *Why America Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513 (2005).

⁴⁸ See, e.g. *Id.* at 1019 (“We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”) On Takings jurisprudence see generally Juergensmeyer et al, supra note 4 at Secs. 10.2-10.10.

place on flexible land use management will not be easy. But if there is a time to rethink these decisions and begin that process, it is now.

A revised regulatory Takings jurisprudence would need to begin to reconceptualize more than a half-century of regulatory Takings cases and admit a larger degree of state regulation in the interest of the entire public. It should be advanced, moreover, with an aim to promote goals like inclusion and density, with appropriate and robust public participation in the crafting of the public interest, in order to reverse the dangers posed by climate change, increased viral and other diseases linked to land and climate disturbance and the subsequent, destabilizing social and economic events that follow. This is to say that the ownership “bundle of sticks” should not be a shield to any possible regulation, entitling the owner to compensation.⁴⁹ This would mean, for example, a reworking of the exasperating “total economic deprivation” test announced in a case like *Lucas*, which challenged a regulation that deprived of “total” economic use only if that was understood to mean to be able to develop land for its maximum economic benefit.⁵⁰ In short, this would be to argue for a U.S. version of a notion deeply entrenched in many civil law countries, that of the “social function of property.”⁵¹

There are sources in U.S. law for this kind of thinking, a thinking that prioritizes mutual benefits rather than advancing the interests of some groups only, if not often in the land use context. For instance, the Depression- and World War II-era case of *Wickard v. Filburn* famously upheld the imposition of a commodity price regulation that aimed to control very unstable food markets at that historical moment.⁵² To be sure, what I am arguing for here will not be easy. *Horne v. U.S. Department of Agriculture*, a case involving a crop regulation that bears more than a few similarities to the facts in *Wickard* was recently found to constitute an unconstitutional taking under the 5th Amendment to the Constitution.⁵³

⁴⁹ Indeed, I share the hope of those on the left and the right that a revised land use law set of tools would involve less regulation rather than more. See Somin, *supra* note 21.

⁵⁰ *Supra* note 45.

⁵¹ See generally Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 *FORDHAM L. REV.* 1089 (2011). Social function doctrine is, for example, constitutionally mandated in several countries in the Americas. See, e.g., Constitución Política de Colombia Art. 58 (1991); Constituição da República Federativa do Brasil Art. XXIII (1988).

⁵² *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* was a case that involved a challenge to the Commerce Clause of Art. 1 of the Constitution, and not on 5th Amendment Takings grounds. I am grateful to Julian for reminding me more than once of the message of *Wickard*.

⁵³ *Horne v. U.S. Department of Agriculture*, 576 U.S. 350 (2015).

There may, however, be hope. I note, for example, that on the day I write this, the Westlaw search engine records 17 “negative treatments” of the *Horne* case from lower federal and state courts – a surprisingly high number of exceptions to the ruling for a relatively recent case. This may indicate a sense that the economic-interest-equals-property right views of the Court’s majority since *Lucas* may be losing support.

However, a jurisprudential revolution that seeks to allow more robust regulation in the service of a broadly inclusive social interest will not be enough to reverse the byzantine patchwork of class- and race-protective regulations that constitute the current U.S. land use law landscape.⁵⁴ Change is needed at the legislative level as well, and it is to that subject that, to conclude, I now turn.

5. Time for Federal Land Use Regulation.

For years I have argued for federal control over land use⁵⁵ and in return have been assured by colleagues in the area with much deeper knowledge of the area – including Julian – that this will never come to pass. Land use, as they uniformly and unhesitatingly seek to remind me, remains one of the most solidly local legal powers in the U.S., although as Julian has noted, states have in some instances tried to restrict the extent of local powers with regard to land use.⁵⁶

The brutal truth, however, is that this hallowed feature of U.S. land use regulation, in addition to securing the inequities and discriminatory practices described above, promoting sprawl and the resulting environmental damage, also leads to erratic and inconsistent development. Consider the case of the Atlanta, Georgia metropolitan region. In Georgia’s most populous county, Fulton, in which most of the City of Atlanta sits, in an “R-4 Single Family Dwelling District,” the minimum lot area is 9,000 square feet. The minimum

⁵⁴ See generally Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1047-51 (1996).

⁵⁵ Of course there is some federal land use law - mostly for federal land. See, e.g., Denise A. Drago, *Federal Land Use Planning Primer Under FLPMA and NFMA*, 49 ROCKY MTN. MIN. L. FDN. INST. 16 (2003) (discussing requirements of Federal Land Policy and Management Act and National Forest Management Act). And Takings jurisprudence can arguably be classified as federal land use law. Brian W. Blaesser and Alan C. Weinstein, *Ch. 1: Overview of Constitutional Limitations*, *Federal Land Use Law & Litigation* (2019), available on Westlaw, <https://1.next.westlaw.com/Document/1eb69ba215d9111df996dc5a8dde60a93/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=%28sc.Category%29> (last accessed July 3, 2020).

⁵⁶ Juergensmeyer et al, *supra* note 4 at Sec. 3.5, n. 2.

front yard set-back is 35 feet and the minimum lot width is 70 feet.⁵⁷ By contrast, in neighboring Cobb County, Georgia requires minimum lot sizes that are larger, requiring more land. In Cobb County, in an “R-12 Single-Family Detached”, on the smallest possible lot size for that category (there are six total), the minimum lot area is 12,000 square feet. The minimum front yard set-back is 40 feet and the minimum lot width is 75 feet.⁵⁸ These differences are not, ultimately, trivial. House by house, block by block, they set patterns for ownership that, in places with larger lot sizes and larger minimum square footage requirements, can favor those with more resources, not to mention the corresponding heavier environmental footprint.

Moreover, these differences and the patchwork of inconsistent and varied land uses it promotes takes place and is replicated across the country, literally thousands of times, every single day. Given the concerns that have animated this short article, surely it is time to change that reality. I am confident that means can be identified to do so, and still respect the peculiarities of local geography and individual characteristics.

Fortunately, a good model exists to enable a move to a more federalized form of land use, and that is U.S. environmental law. Until the groundbreaking decade of the 1970s, environmental regulation was largely a state or local government matter.⁵⁹ However, as the environmental crisis worsened, the recognition that pollution does not respect jurisdictional boundaries led to a raft of federal legislation from 1969-1980 for federally overseen regulation of air, water, endangered species, solid and hazardous wastes and cleanup of past hazardous and toxic waste contamination, among other initiatives. This was the birth in the environmental area of the now familiar model of “cooperative federalism,” where, to simplify a complex story, the federal government is largely responsible for setting national pollution control and environmental

⁵⁷ Fulton County, Georgia Municipal Code, Appendix B, Art. VI, Sec. 6.6, available at https://library.municode.com/ga/fulton_county/codes/code_of_ordinances?nodeId=APXBZORE_ARTVISIFADWDIRE_6.6SIFADWDI (last accessed July 3, 2020).

⁵⁸ Cobb County, Georgia Municipal Code, Part I, Ch. 134, Art. Iv, available at https://library.municode.com/ga/cobb_county/codes/code_of_ordinances?nodeId=PTIOFCOC OCOGE_CH134ZO_ARTIVDIRE (last accessed July 3, 2020).

⁵⁹ Robert L. Glicksman, *From Cooperative to Inoperative Federalism: the Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 728 (2006) (“ Until 1970, however, the federal government did little to regulate activities responsible for causing pollution. Instead, state governments, acting pursuant to their inherent police powers, and local governments, to whom the states sometimes delegated the authority to regulate to protect the public health, the public safety, and the general welfare, took primary responsibility for that kind of regulation.”)

cleanup and management standards and the states are required to comply with them, subject to penalties or other administrative sanctions if they fail to do so.⁶⁰

To be sure, cooperative federalism in the environmental area is not problem-free.⁶¹ And while I agree with many of those critiques, they largely criticize limitations imposed by political, legislative and judicial actors on federal power in recent years, and therefore do not undermine the proposal advanced here, which is, namely, to impose consistent national land use standards that will advance inclusion, remedy inequity in land use opportunities and services, and promote equality of land use access.⁶² These goals will, this is again to suggest, if achieved, help combat the risks of climate change and its attendant plagues, as well as break down the central role of land use in creating a socially and economically unequal society. In short, my argument is that more coordinated, uniform land use regulatory laws and standards, made at the federal level, will assist us in taking a clearer-eyed look at the inequities and inconsistencies that characterize the patchwork of U.S. land use law.

6. Conclusion.

In 1964, the great Sam Cooke wrote a song that quickly became famous, “A Change is Gonna Come.” The song is said to have been written in response to Cooke’s anger that he and his band were turned away from a whites-only motel in Louisiana.⁶³ The song famously concludes with these words:

It's been a long, a long time coming
But I know a change is gonna come, oh yes it will

In that year, of course, Congress passed and the President signed into law the Civil Rights Act of 1964 which, among other things, banned discrimination in the provision of public accommodations like motels.⁶⁴ In the ensuing years, that statutory provision and many others like it were enforced and the injustice of separate but equal accommodations and services started to break down.

This short article suggests that we are now at a similar moment in our national life. Change is demanded in many ways, not least in land use law. It is my hope that we have the courage to make the needed changes argued for here,

⁶⁰ *Id.* at 731-733.

⁶¹ *Id.* at 755-778.

⁶² Moreover, this moment may be an opportunity to reflect and revise the errors increasingly evident in environmental cooperative federalism. See generally, *supra* note 58.

⁶³ *Negro Band Leader Held in Shreveport*, N.Y. TIMES, Oct. 9, 1963 (describing arrest of Cooke, his white and two associates for creating a “disturbance” when they were not allowed to register at the motel).

⁶⁴ 42 U.S.C. Sec. 2000a(b)(1)(1964).

and for others of a similar kind. It would be wonderful if future editions of the Juergensmeyer treatise were able to look back to the land use laws and regulations now in place as relics of a distant time and describe land use principles that sought above all to promote inclusion, equity and opportunity.