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"A FAIRLY HELPFUL CLEW": EUCLID'S DEPREDATION OF NUISANCE LAW AND A CALL FOR ITS REVIVAL

Charles Gardner, *Mercatus Center*

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ABSTRACT

The majority opinion in *Village of Euclid v. Ambler Realty Co.* famously invoked nuisance law as a "fairly helpful clew" in assessing the extent to which government could limit the rights of landowners. A close reading of the case, however, shows that the US Supreme Court's purported reliance on nuisance was largely superficial. Nuisance was a limited, time-tested doctrine that had traditionally accommodated the ordinary incidents of urban life and applied only in cases of serious harm or disturbance, but the Court instead deferred to contemporary planning assumptions about density and urban form, effectively validating a new regulatory approach that departed from the common law's traditional tolerance for urban complexity. This shift marked a turning point in American land use law, redirecting it from a system that mediated conflicts within a growing city to one that increasingly constrained the form and pace of urban development. Recovering nuisance law's historically grounded approach to managing urban externalities can illuminate an alternative framework for addressing the challenges of urbanization today.

Keywords: housing economics, land use, lot minimums, lot size, property law, public policy, real estate law, urban history, urban planning, zoning, zoning law

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AUTHOR CONTACT INFORMATION

Charles Gardner, Senior Research Fellow, Mercatus Center at George Mason University, cgardner@mercatus.gmu.edu

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"A Fairly Helpful Clew": *Euclid*'s Depredation of Nuisance Law and a Call for Its Revival

Introduction

In the urban context, an essential function of land use law throughout history has been reconciling the remarkable benefits of increasing proximity[1]—what we might also call agglomeration[2]—and the various tensions resulting from the process of attaining that proximity. Land use laws have recognized that cities and urbanization were essential to the generation of wealth, the projection of political power, the flourishing of culture, and the process of innovation,[3] and those laws have sought to devise a rule-based framework to allow cities to grow without being jeopardized by intractable political and interpersonal conflicts over scarce urban land, or stymied by serious threats to public health.[4]

A unifying principle among these various land use regimes in the historical record is that changes to the built environment are, in general, natural and beneficial.[5] According to that principle, the role of legal norms and regulations was to lubricate the machinery of urban growth by managing and mediating inevitable conflicts between adjacent landowners.[6] Market forces, if not fully understood, were implicitly accepted as legitimate, and the desires of city residents to enlarge their residences, to start and operate lawful businesses, or to move about the city were constrained only to the extent necessary to avoid genuine, significant, and sometimes even malicious harm to other property owners or the public.[7]

The Supreme Court's 1926 decision in *Euclid v. Ambler* was, from this historical perspective, simply the latest chapter in the millennia-old saga of managing the ordinary incidents of city growth. The court was abundantly aware that the United States, inheriting an English common law tradition that predated America's foundation by centuries, had its own doctrine addressing

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[1] *See* ALAIN BERTAUD, ORDER WITHOUT DESIGN: HOW MARKETS SHAPE CITIES (2018). Bertaud states that "[t]the essence of cities is neither their buildings nor their streets but their people, who, in close proximity, constantly stimulate one another with new ideas and invent better ways of doing things" (Acknowledgments, p. ix).

[2] *See, e.g.*, Edward L. Glaeser and Joshua D. Gottlieb, *The Wealth of Cities: Agglomeration Economies and Spatial Equilibrium in the United States*, 47 JOURNAL OF ECONOMIC LITERATURE, 983, (2009).

[3] *See, e.g.*, EDWARD GLAESER, TRIUMPH OF THE CITY (2011) and JANE JACOBS, THE ECONOMY OF CITIES (1969).

[4] Julian Ascalon's sixth century land use treatise, which addresses topics as diverse as setbacks for noxious uses and concern over diminution of property value resulting from vertical building additions, is one of the earlier surviving examples of an attempt to minimize the harm that might result from necessary change and growth of a city through equitable distribution of rights and responsibilities among the affected parties. Other land use regimes from cultures as varied as medieval Morocco to Song Dynasty China had similar objectives. *See* Besim Hakim, *Julian of Ascalon's Treatise of Construction and Design Rules from Sixth-Century Palestine*, 60 JOURNAL OF THE SOCIETY OF ARCHITECTURAL HISTORIANS, 4, (2001).

[5] *See* the discussion in section I, part A below for development of this point.

[6] This sort of regulation should be distinguished from urban planning, which is the intentional process of designing and creating urban infrastructure and of anticipating growth rather than managing existing conditions.

[7] Statements that urban life was subject to certain unavoidable inconveniences or annoyances for the benefit of overall public welfare are common in American nuisance cases. *See, e.g.*, *Appeal of Huckenstine*, 70 Pa. 102, 107 (1872): "If a man lives in town of necessity he must submit himself to the consequences of the obligations of trades which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town." *See also Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453 (1886): "The true theory of negligence is that damages resulting to another from the natural and lawful use of his land by the owner thereof are, in the absence of malice, *damnum absque injuria*."

land use conflicts: the law of nuisance.[8] Nuisance, which is included in cursory fashion in the Court's opinion as a "fairly helpful clew" to the Court's reasoning, has occupied a relatively modest role in the American land use discourse in the century since.[9] In recent years, however, scholarly attention has refocused on the law of nuisance, exploring how this venerable but neglected field of jurisprudence could be refashioned and reformed to serve as a viable alternative to so-called Euclidean zoning.[10] There is a certain irony here, since zoning's architects promoted zoning as a superior alternative to private land use management tools, including restrictive covenants and costly nuisance lawsuits.[11]

Recent scholarship has converged on a broad reassessment of *Euclid v. Ambler* and the intellectual foundations of American zoning, though critiques have varied. One of these is a constitutional critique, arguing that exclusionary zoning cannot be justified under modern takings doctrine.[12] A second strand focuses on *Euclid*'s reasoning and rhetoric and highlights how the decision's language, and particularly its treatment of apartments and density as quasi-nuisances, encoded social and racial assumptions that extended nuisance logic beyond its traditional limits or rested on empirically and conceptually flawed premises.[13] A third strand of scholarship situates zoning within a broader institutional shift away from nuisance and private ordering and emphasizes that prezoning land use conflicts were often managed through flexible, context-sensitive doctrines that zoning later displaced with categorical, ex ante rules.[14] A fourth line of critique, which goes far beyond the *Euclid* case to address zoning as a whole, has contended that the case helped enable sprawl and land use segregation that continue today.[15] Taken together, this literature reflects a growing consensus that, despite being foundational land use precedent, *Euclid* and its reasoning are ripe for thorough and critical reexamination.

This paper first sets out the history and background of the American experience with nuisance law, incorporating recent scholarship on developments in the decades leading up to zoning's adoption. Second, it critiques *Euclid*'s application of nuisance law and the promises of zoning's originators in light of that history. Finally, now that the *Euclid* decision has reached the century mark, it suggests how nuisance law's traditional approach to managing the natural process of urbanization rather than impeding it offers a way forward for American land use law. Proceeding through historical and doctrinal analysis of cases, treatises, and academic research, this paper adds to the recent and growing body of literature reevaluating *Euclid*, reconsidering the important role

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[8] *See Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387–88, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926).

[9] For example, a prominent textbook on American land use devotes only eight pages out of 918 to the law of nuisance and dismisses it as "inadequate to deal with the problems brought by a growing population and increased land development." See DAVID L. CALLIES, ROBERT H. FREILICH, AND THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 13 (4th ed. 2004). See also Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1612–13 (2021).

[10] Noah Austin, Note, *Resolving Land Use Conflicts Without Zoning*, 99 NOTRE DAME L. REV. REFLECTION 352 (2024).

[11] Edward M. Bassett, *Zoning* 317 (Russell Sage Found. 1940).

[12] *See* Joshua Braver and Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 103 TEX. L. REV. ___ (2024) and Matthew J. Ruppel, *A Taking by Any Other Name: Why Exclusionary Zoning Should Be Classified as a Per Se Taking,* 48 SEATTLE U. L. REV. 1 (2024).

[13] *See* Joe Hillman, *Careless Language: How Euclid v. Ambler Realty Stigmatized Affordable Housing*, HOUS. L. REV. (2022); Jade A. Craig, *"Pigs in the Parlor": The Legacy of Racial Zoning*, 40 MISS. C. L. REV. 5 (2022); Martin McPhee, *The Unconstitutionality of Residential Zoning*, ___ N.Y.U. UNDERGRADUATE L. REV. (2025).

[14] *See* Brady, *supra* note 9; Austin, *supra* note 10; and Joseph Mead et al., *Treating Neighbors as Nuisances*, 66 CLEVELAND ST. L. REV. 1, (2018).

[15] *See* Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision* Euclid v. Ambler *in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373 (2010).

of nuisance law in both legal and economic contexts, and considering what the next 100 years will hold for American zoning regulations.

I. Nuisance Law as a Property-Based Governance Tool

What is a nuisance under American law? According to the widely adopted definition in the Second Restatement of Torts, a private nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land."[16] The same standard is often formulated with more specificity in state court decisions,[17] or in the statutes of states that have formally codified a definition of private nuisance,[18] as a substantial or unreasonable interference with the interest of a private person in the use and enjoyment of his land. A public nuisance, by contrast, is "an unreasonable interference with a right common to the general public."[19] The application of these standards has resulted in a vast volume of case law that spans the length of American history.

A. The basic contours of American nuisance law

To constitute a private nuisance in an American urban context, a particular use of property either had to be unlawful or inherently and universally objectionable so as not to require a showing of particular harm (a per se nuisance), or, more commonly, had to involve a physical, olfactory, acoustical, or thermal invasion of another's property—such as toxic dust, foul odors, disturbing noises, vibrations, and heat—or certain other imminent harms to life and limb that cause demonstrable harm (a per accidens nuisance).[20] The essence of the nuisance per accidens has been the presence of some intrusion onto private property, viewed in the context of the particular location, that is both harmful and reasonably continuous, or at least recurring such that damages are continuous.[21]

The outer limits of the doctrine could sometimes encompass more ephemeral or purely visual stimuli, in the case of obscene or grotesque behavior or imagery.[22] But the ordinary incidents of city-building, such as obstruction of views, blocking natural light, generation of traffic, increasing population density even to the point of overcrowding, and carrying on of ordinary retail and service trades such as pharmacies, cafes, barbershops, clothiers, and others—notably, even where

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[16] 4 Restatement (Second), Torts § 821D, p. 100 (1979). The public nuisance for comparison is "an unreasonable interference with a right common to the general public."

[17] *See, e.g.*, *Hendricks v. Stalnaker*, 181 W. Va. 31, 380 S.E.2d 198, 198 (1989) ("A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land."); *Quintain v. Columbia Natural Res.*, 210 W. Va. 128, 556 S.E.2d 95, 104 (2001) (same). *See also Samaha v. Brooklyn Bridge Park Corp*., 230 A.D.3d 608, 610 (N.Y. App. Div. 2020) (stating that the elements of private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act . . . .").

[18] Cal. Civ. Code § 3479 (West 2024); Wash. Rev. Code §§ 7.48.120, .130 (2024); N.D. Cent. Code §§ 42-01-01, -02, -06 (2025); Mont. Code Ann. § 27-30-101 (2024); Ga. Code Ann. § 41-1-1 (2024); Okla. Stat. tit. 50, § 1 (2025); Nev. Rev. Stat. § 40.140 (2024); Ohio Rev. Code Ann. § 3767.01(C) (LexisNexis 2024); Idaho Code § 18-5901 (2024); Utah Code Ann. § 76-10-801 (LexisNexis 2024); 720 Ill. Comp. Stat. 5/47-5 (2024).

[19] 4 Restatement (Second), Torts § 821B, p. 100 (1979).

[20] *See, e.g.*, *McKeon v. Lee*, 28 How. Pr. 238 (1864) (damaging vibration); *Labadie v. Hawley*, 61 Tex. 177 (1884) (heat); *Bohan v. Port Jervis Gaslight Co.*, 122 N.Y. 18, 25 N.E. 246 (1890) (odors); *Herring v. Wilton*, 106 Va. 171, 55 S.E. 546 (1906) (noise); Stotler v. Rochelle, 83 Kan. 86, 109 P. 788 (1910) (fear of disease).

[21] *See* John C.P. Goldberg, *On Being a Nuisance*, 99 N.Y.U. LAW REVIEW 864, 879 (2022).

[22] *See* John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 266 (2001).

they might cause diminution of property values[23]—were never public or private nuisances,[24] and the very idea that they could be made so by other means attracted ridicule in the decisions of some state courts.[25] Even the English common law doctrine of ancient lights, an old rule protecting long-established access to sunlight, was rejected by the New York Supreme Court on the ground that "it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences."[26] The decisions of the 19th century are replete with similar statements about the necessity of growth and change in America and in American cities, and the need to limit even those modest exceptions to the law of nuisance that had developed in the older cities of England.[27]

Dwellings, unless accompanied by some particular aggravating factor usually unrelated to residential use, were emphatically not nuisances.[28] In comparison to some ancient and medieval land use sources such as the work of Julian of Ascalon[29] or the Laws of the Indies,[30] the cases took a light-touch approach toward urban conflicts, generally providing no remedy at law or equity for most urban activities, including issues involving the form and configuration of city buildings. This permissiveness would bring substantial benefits for American cities, but it would also give rise to a backlash that went too far in the opposite direction.

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[23] "A schoolhouse, hospital, livery stable or licensed drinking saloon, and many other kinds of businesses, tend to affect the desirability of a neighborhood as a place of residence, and consequently to depreciate the value of surrounding property; but the owners of such property are without legal remedy for their loss." *Alexander v. Stewart Bread Co.*, 21 PA. SUPER. 526, 531 (1902).

[24] *See, e.g.*, *Mohr v. Midas Realty Corp.*, 431 N.W.2d 380 (Iowa 1988) (blocking view of business not a nuisance); *Yeanos v. Skelly Oil Co.*, 220 Iowa 1317, 263 N.W. 834, 835 (1935) (traffic visiting gas station not a nuisance to adjoining business); *City of Chula Vista v. Pagard*, 115 Cal. App. 3d 785, 800, 171 Cal. Rptr. 738, 747 (Ct. App. 1981) (overcrowding by itself not a public nuisance).

[25] A well-known example is in the Texas Supreme Court's decision striking down zoning that excluded all commercial uses without distinction as to the externalities they generated. *See Spann v. City of Dallas*, 111 Tex. 350, 357–58, 235 S.W. 513, 516 (1921).

[26] *Parker & Edgarton v. Foote*, 19 Wend. 309, 318 (N.Y.1838).

[27] *See id.*, *see also Bell v. Ohio & P.R. Co.*, 25 Pa. 161, 176–77 (1855) and *Trs. of Columbia Coll. v. Thacher*, 87 N.Y. 311, 321 (1881).

[28] A search of both English and American case law from the colonial and post-independence period returns not a single example of multifamily housing being adjudged a per se nuisance. The impression of the case law is that nuisance law is intended to *protect* dwellings from harmful intrusions, not to proscribe dwellings themselves.

[29] *See* Hakim, *supra* note 4, at 16–20. Julian's ancient rules contained what by American standards were highly detailed rules and regulations for balancing the need for urban growth, and in particular the enlargement of residential buildings through upward additions, and the concerns of adjacent landowners, displaying a degree of sophistication far beyond that evidenced in most American nuisance decisions and related statutes and indeed in the *Euclid* decision itself.

[30] The Laws of the Indies and indeed the magnum opus of Spanish law, the La Siete Partidas, described by one legal commentator as the "Blackstone of Latin America," are difficult even to obtain in English translation. The former was first translated into English in the 1920s, and the latter in the 1930s, which remains the sole extant translation. The partial translation of the Laws was expanded in 1977, revealing a sophisticated city-planning document that contained nuisance provisions regarding noxious uses. *See* Axel I. Mundigo and Dora P. Crouch, *The City Planning Ordinances of the Laws of the Indies Revisited. Part I: Their Philosophy and Implications*, 48 THE TOWN PLANNING REVIEW 247, 255 (1977) (providing in translation that "The site and building lots for slaughter houses, fisheries, tanneries, and other businesses which produce filth shall be so placed that the filth can easily be disposed of."). Although some English cities regulated similar industries in the medieval period, there was no equivalent guidance at a national level until centuries later, and in the United States, apart from sporadic municipal laws, generalized regulation of noxious uses did not arrive until the era of environmental law.

B. Agrarian origins of the American nuisance doctrine

Why was American nuisance law such a seemingly blunt instrument for resolving urban disputes? One answer may lie in the setting in which that law originated. In comparison with other European regions, medieval England, where the legal concept of nuisance had its formative period,[31] was not a highly urbanized society: In 1300 CE, only 4 percent of its population dwelled in settlements of over 10,000 inhabitants, compared with 18 percent of the population in northern Italy.[32] England would not exceed an 18 percent urbanization rate until the late 18th century, long after the start of English settlement in North America.[33] Further, English towns and cities that did exist were able to spread beyond their city walls relatively early due to the lack of direct landward military threat, thereby establishing a precedent for lower-density residential development that naturally reduced proximity-related land use conflicts.[34] In a prelude to use-based zoning, certain noxious trades such as butchers, tanners, and fishmongers were relegated by edict to suburban areas, a practice that was feasible while cities were small and distances to marketplaces were short.[35]

In London, by far the largest city in England, and in some other larger towns and cities, the law of nuisance had begun to adapt itself to urban conditions by the late medieval period.[36] Even in those places, however, the adaptation process involved rediscovering principles long known in the cities of continental Europe. In common-law England there was a relative lack of influence of Roman civil law and its millennia or more of experience with large, dense, and complex cities throughout continental Europe.[37] Further, in England land use cases were typically resolved at a local level, with few rising to the level of national significance.[38] Accordingly, the land use law that England bequeathed to its American colonies was one that had predominantly evolved in an agrarian society of relatively small and low-density cities and had an experience with large-scale intensive urbanization that was of more recent vintage and lower profile than that in continental Europe.[39]

In North America, moreover, with the abundance of land, the primary issue appeared to be establishing rights to acreage and natural resources on a grand scale, rather than quibbling over small city lots. To the extent that London's experience was available as an example, it was seen as

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[31] *See, e.g.*, J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (5th ed. 2019); Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144 (1978).

[32] Paolo Malanima, *Decline or Growth? European Towns and Rural Economies, 1300–1600*, *in* 6 JAHRBUCH FÜR GESCHICHTE DES LÄNDLICHEN RAUMES 28, (Markus Cerman and Erich Landsteiner eds., 2009).

[33] *Id.*

[34] Rudolf Cesaretti et al., *Population-Area Relationship for Medieval European Cities*, 11 PLOS ONE 12 (2016), noting that "[w]ith few military threats, the suburban sprawl of most English cities remained unenclosed and largely uninhibited."

[35] *See* COLIN PLATT, THE ENGLISH MEDIAEVAL TOWN 57–58 (1986), and Natalie J. Ciecieznski, *The Stench of Disease: Public Health and the Environment in Late-Medieval English Towns and Cities*, 4 HEALTH CULTURE AND SOCIETY (2013).

[36] Natalie J. Ciecieznski, *Defining a Community: Controlling Nuisance in Late-Medieval London*, USF TAMPA GRADUATE THESES AND DISSERTATIONS (2009), https://digitalcommons.usf.edu/etd/1902. "The large population of London, including its crowded living space, led to many of its nuisances that did not have their counterparts in other, smaller English communities."

[37] *See* Mundigo and Crouch, *supra* note 30, noting the influence of Vitruvius' De Architectura on the development of Spanish laws on cities and city planning.

[38] Ciecieznski, *supra* note 27, at p. iii.

[39] *See* RONALD E. ZUPKO AND ROBERT AL LAURES, STRAWS IN THE WIND: MEDIEVAL URBAN ENVIRONMENTAL LAW- THE CASE OF NORTHERN ITALY (1996). Cases from ancient Italy addressing nuisance in the context of multi-story apartment buildings with ground-floor commercial uses and multiple residential tenants, an urban form almost unknown in England until the 18th century, were reported as early as the third century of the common era. *See* Dig. 8.5.8.5 (Ulpian), and n.32.

one to be avoided: William Penn's plan for Philadelphia famously contemplated avoiding the ills of urbanism by applying rural principles to city-building, a conceit that was distinctively English and did not bode well for American urbanism.[40]

C. The doctrine in 18th- and 19th-century America

For American jurists of the early independence period, the state of the art on nuisance was found in Blackstone's Commentaries of the 1760s, which offered the pithy but vague adage of *sic utere tuo, ut alienum non laedas*, meaning to use one's own property so as not to injure another's.[41] Blackstone's chapter on nuisance was brief and established only three principles that had clear application to the development of cities: (1) the overhanging of roofs, which Blackstone conceded was also in the category of trespass; (2) the doctrine of ancient lights, which represented a simplistic attempt to manage landowner conflicts, but which most American courts nonetheless rejected; and (3) "corrupting the air with noisome smells," such as those emitted by offensive trades such as tanneries.[42] It was published a decade prior to the enactment of the Building Act 1774, ambitious legislation in part intended to address disputes between adjoining landowners, but which applied only to London and environs and, as it was issued the same year as the Intolerable Acts, attracted little attention from American policymakers.[43]

It was with this limited background that the American courts embarked upon the most consequential century for change to the urban environment in human history. Over the course of the 19th century and into the early 20th, two conflicting currents were evident. First, courts on the whole refused to apply traditional principles of nuisance law to the developing industrial cities of the United States, thereby rejecting the English doctrine of ancient lights and declining to expand the list of medieval-era occupational nuisances to new industrial activities on public policy grounds.[44] In turn, lacking protection from the courts or from the law, private landowners stepped into the void to establish, through restrictive agreements including nuisance covenants, prohibitions on not only industrial uses, but even multifamily homes.[45]

As to the first of these trends, the supreme court of Pennsylvania, in a case involving a claim of nuisance arising from the operation of a railroad, articulated a prevailing pro-growth sentiment of the time. The common law, the court stated, was a flexible doctrine, and should not be

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[40] SAMUEL M. JANNEY, THE LIFE OF WILLIAM PENN: WITH SELECTIONS FROM HIS CORRESPONDENCE AND AUTOBIOGRAPHY 175 (1852). Penn advised large setbacks to avoid conflicts, a recommendation that belied a lack of appreciation as to the reason cities had throughout all human history been built closely together: "Let every house be placed, if the person pleases, in the middle of his plat, so that there may be ground on each side for garden or orchards or fields, that it may be a green country town which will never be burnt and always be wholesome."

[41] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 13 (1768). *See also* HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 289 (8th ed. 1884). The precise Latin phrase appears to have medieval rather than Roman origins, though the general concept has Roman precedents. *See* Dig. 8.5.8.5 (Ulpian) (observing that a cheese shop leasing the ground floor of an apartment building in the city of Minturnae could be enjoined from emitting smoke into the apartments above, and employing the Latin formulation "*in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat*," which can be rendered "one is allowed to do on his own [property] to the extent that he emits nothing onto another's [property]." Incorporation of this principle into English law, though without Blackstone's exact wording, came at least as early as Aldred's Case (1610) 9 Co. Rep. 57b, 77 Eng. Rep. 816 (K.B.).

[42] *Id.* Blackstone noted that "the nuisances which affect a man's dwelling may be reduced to these three . . . ."

[43] Building Act 1774 (14 Geo. 3. c. 78).

[44] Christine Meisner Rosen, *"Knowing" Industrial Pollution: Nuisance Law and the Power of Tradition in a Time of Rapid Economic Change, 1840-1864*, 8 ENVIRONMENTAL HISTORY 565 (2003).

[45] *See* Brady, *supra* note 9, at 1609.

employed to hinder the tremendous economic growth that the nation was enjoying in the mid-19th century, even if that meant certain persons had to endure inconveniences and harms that seemed to be no less than those created by noxious medieval occupations:

> It should be borne in mind that we live in an age and a country of progress and improvement, in all the business departments of life. New branches of business are constantly springing up on every hand. The inexhaustible resources and capabilities of the country are being rapidly developed, by the ingenuity, energy, and enterprise of our citizens. The unparalleled increase and improvement in agriculture, commerce, and manufactures, demand increased facilities in travel and transportation. These, and many other considerations, require the modification of former rules, and judicious application of the expansive principles of the common law to the altered condition of the country and the necessities of the public. The common law is said, and with great truth, to be the perfection of human reason. It is the embodied justice and wisdom of each successive age, moulded and formed into a system adapted to the habits and wants of the current times.
>
> These remarks are made for the purpose of showing, that what would at one time have been held to be a nuisance, might not, and probably would not, be so considered now. Private interest and comfort must often yield to public necessity or convenience. This, we apprehend, must be the case here.[46]

It was not only starry-eyed optimism that led courts to these conclusions. The rate of change, one author has argued, was so rapid as to outpace the ability of the doctrine of nuisance to adapt, with some judges simply failing to appreciate or understand the serious environmental harms caused by industrial activities.[47] Unlike the byproducts of the butcher, tanner, or tallowmaker, which were obvious, offensive, but generally biodegradable, the pollution caused by new industries could sometimes be subtler and more persistent, with harmful compounds silently leaching into soil and groundwater in ways that nuisance law and the courts themselves were ill suited to address. From a more generous perspective, however, we can view these courts' unwillingness to expand the nuisance doctrine as a reflection of their understanding that nuisance was already an exception to the right of free use of property, that injunctive relief was a more extraordinary remedy than the award of damages, and that any genuine harms that did issue could be resolved in civil courts that, by the late 1800s, typically offered remedies at both law and in equity.[48]

With the courts as yet unwilling to confront industrial activities under nuisance, was it within the power of local governments to simply declare, in derogation of the common law, certain activities or building types to be nuisances? According to the United States Supreme Court, the answer is no, as the Court held in an 1870 decision that concerned a Milwaukee wharf and has never been expressly overruled. "It is a doctrine not to be tolerated in this country," the Court wrote, "that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself."[49] In Milwaukee's case, the city council had in fact legislated the establishment of a wharf and dock

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[46] *Bell v. Ohio & P.R. Co.*, 25 Pa. 161, 176–77 (1855).

[47] Rosen, *supra* note 44, at 588–89.

[48] For example, New York state abolished its Chancery Court system in 1846, combining the courts of common law and equity into a single New York Supreme Court. Accordingly, a plaintiff could now commence an action both for damages and injunctive relief in the same action and in the same court.

[49] *Yates v. City of Milwaukee*, 77 U.S. 497, 505, 19 L. Ed. 984 (1870).

line running along the length of the Milwaukee River, lending its action more an exercise of the police power—meaning the state's authority to regulate for public health, safety, and welfare—than a singling out of a particular property, but this was not deemed sufficient by the Court.[50] Perhaps most interesting of all, the Court stated that the deprivation of a mere property right constituted a compensable taking: that is, a government action requiring compensation to the property owner. This was a line of reasoning that, if carried forward, might have proven fatal for the enterprise of zoning.[51] As it happened, *Euclid* did not address a takings theory in its decision, possibly on the basis that the Constitution's Takings Clause had not yet been applied to state and local governments, yet this was no barrier to the Court's holding in Yates.[52] During that time other state court decisions that unambiguously applied state constitutional takings provisions had little difficulty finding partial deprivation of rights, such as those imposed by uniform setback lines, to be compensable takings.[53]

Because their efforts to regulate city growth using the law of nuisance and the exercise of local power were blunted by the courts, owners turned to private covenants to assert control over adjacent properties. Multiplying in cities in the 19th century, these covenants not only barred noxious uses from certain properties, they also sought to bar the emerging typology of the "tenement house," a rental apartment building, on grounds that had more to do with the economic or familial status of the occupants of such buildings than anything inherent in their form or the activities conducted within them.[54] When higher-quality tenements, the so-called "apartment houses," arrived in New York City in the 1870s, covenants sometimes expanded their reach to limit construction to single-family homes, due in part to growing anxieties over multifamily living in general, notwithstanding the incomes of the residents.[55] Even so, American courts in the 1880s began to respond by invalidating covenants on the basis of changed circumstances and public policy, thereby refusing to enforce restrictions on commercial and multifamily uses in areas with rapidly rising land values due to urban growth and the expansion of mass transit.[56] The courts continued to recognize their role as facilitators of general public welfare and of individual rights

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[50] "[W]e are of opinion that the city of Milwaukee cannot, by creating a mere artificial and imaginary dock line . . . . deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose." *Yates v. City of Milwaukee*, 77 U.S. 497, 505, 19 L. Ed. 984 (1870).

[51] The court stated that "[t]his riparian right [i.e. the natural right to construct a dock or wharf] is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation." *Yates v. City of Milwaukee*, 77 U.S. 497, 504, 19 L. Ed. 984 (1870). This principle was circumscribed in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) and fully repudiated by the court over a century later in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), a case in which *Yates* is never mentioned. *See also Camfield v. United States*, 167 U.S. 518, 523–24, 17 S. Ct. 864, 866, 42 L. Ed. 260 (1897), in which the Court made favorable mention of a Massachusetts Supreme Court case upholding a state statute regulating spite fences. Nonetheless, the law addressed in *Camfield* fundamentally involved mediating disputes between adjoining property owners, a subject that had been part of nuisance law for centuries.

[52] *See* Braver and Somin, *supra* note 12, at 8–9.

[53] *See, e.g.*, *City of St. Louis v. Hill*, 116 Mo. 527, 22 S.W. 861 (1893).

[54] *See* Brady, *supra* note 7, at 1637–58; *see also* Jonathan L. Hafetz, "*A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOME & L. 175, 234–35 (2002).

[55] *See, e.g.*, *McDonald v. Spang*, 105 N.Y.S. 617 (Sup. Ct. 1907). In construing a private restriction against a requirement for single-family homes, the court noted that "[p]erhaps two-family houses may not be as desirable in a residence district like this as a one-family house. Nevertheless that fact cannot make them legally 'objectionable.'"

[56] *See Trs. of Columbia Coll. v. Thacher*, 87 N.Y. 311, 321 (1881).

to own and use real property, and were unwilling to let the dead hand of a prior covenanter bind a property in perpetuity and in defiance of the will of the current owner.

D. The courts chart a new course

Nonetheless, after 1900, a progressive Supreme Court began nudging lower courts away from this pro-property-rights mentality as cities began an overdue reckoning with the effects of urbanization, densification, industrialization, and, ultimately, mass motorization, the element that played such a prominent role in the *Euclid* decision.[57] The Supreme Court's validation of building height limits, a device with an ancient pedigree,[58] nonetheless implicitly overruled Blackstone's principle of *cujus est solum, ejus est usque ad coelum*, which went unmentioned in the opinion (*Welch v. Swasey*).[59] Upholding Little Rock's exclusion of livery stables, which although of common convenience were prone to noise and odors, was a definite departure from traditional nuisance principles, as medieval cities had rarely classified the mere keeping of animals as objectionable per se.[60] The approval of Los Angeles's blanket exclusion of brickworks, a neither particularly noisy nor odorous use that was essential to the physical development of the city, was even more notable.[61] In 1922, the landmark takings case of *Pennsylvania Coal Co. v. Mahon* effectively modified the holding in *Yates v. City of Milwaukee* by raising the bar for what could be considered a taking.

Separately, the Supreme Court had long been using America's tortured relationship with alcohol to expand nuisance beyond its origins. As early as 1821, the Court upheld Virginia's classification of "tippling houses" as nuisances, a holding not completely inconsistent with nuisance law but one that had been addressed with more sympathy and nuance more than a thousand years earlier in Julian of Ascalon's treatise.[62] In *Mugler v. Kansas*, the Court went further, upholding a Kansas state law classifying breweries as nuisances on the ground that prohibition of "noxious" uses was a proper exercise of the police power and did not require compensation. Since the brewery was not serving beer on the premises and not discharging inebriated patrons into the public space, this was more dubious.[63]

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[57] For an example of this sentiment, *see, e.g.*, J.S. Young, *City Planning and Restrictions on the Use of Property*, 9 MINN. L. REV. 518 (1925), stating that "[t]he industrial revolution has made the modern city and because the municipality is chiefly the result of economic forces, insufficient thought has been given to the city as a comfortable place in which to live. Little attention has been given to the adequate development of streets, parks, rapid transit, general transportation, public buildings, restricting the height, bulk and different purposes of varying kinds of structures . . . ." Whether this statement was true or not, it reflected the conventional wisdom of the time.

[58] *See* Ramon A. Klitzke, *Roman Building Ordinances Relating to Fire Protection*, 3 THE AMERICAN JOURNAL OF LEGAL HISTORY 173, (1959).

[59] *Welch v. Swasey*, 214 U.S. 91, 92, 29 S. Ct. 567, 567, 53 L. Ed. 923 (1909).

[60] *Reinman v. City of Little Rock*, 237 U.S. 171, 172, 35 S. Ct. 511, 511, 59 L. Ed. 900 (1915).

[61] *Hadacheck v. Sebastian*, 239 U.S. 394, 404, 36 S. Ct. 143, 143, 60 L. Ed. 348 (1915).

[62] *See* Hakim, *supra* note 3, at 10–13. Rather than simply banning taverns outright, ancient Ascalon's rules provided that tavern-keepers were prohibited from providing outdoor seating, and that drinking must be conducted within the establishment.

[63] *See Murphy v. United States*, 272 U.S. 630, 631, 47 S. Ct. 218, 218, 71 L. Ed. 446 (1926); *Van Oster v. State of Kansas*, 272 U.S. 465, 47 S. Ct. 133, 71 L. Ed. 354 (1926); *Druggan v. Anderson*, 269 U.S. 36, 38, 46 S. Ct. 14, 14, 70 L. Ed. 151 (1925); *Samuels v. McCurdy*, 267 U.S. 188, 191, 45 S. Ct. 264, 264, 69 L. Ed. 568 (1925); *Ex parte Grossman*, 267 U.S. 87, 45 S. Ct. 332, 69 L. Ed. 527 (1925); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 119, 43 S. Ct. 504, 505, 67 L. Ed. 894 (1923); *St. v. Lincoln Safe Deposit Co.*, 254 U.S. 88, 89, 41 S. Ct. 31, 31, 65 L. Ed. 151 (1920). Most of these cases are downstream of the Court's holding in *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 273, 31 L. Ed. 205 (1887), also a case involving the declaration of intoxicating liquors to be a nuisance, and which forms a distinct and tightly circumscribed area of case law. An even earlier example is *Cohens v. State of Virginia*, 19 U.S. 264, 331, 5 L. Ed. 257 (1821), noting that "Congress imposed a tax on licenses to

Most significantly, just one year prior to the arguments in *Euclid*, the Court in the case of *Samuels v. McCurdy* was asked to determine whether the seizure under state law of a Georgia resident's private liquor collection deprived the resident of his property without due process.[64] This would be the last instance in which the Court addressed nuisance prior to *Euclid*. The Court struggled with the question of compensation in a case that was plainly a seizure of property. It satisfied itself, however, that no compensation could be due (though it appears none was claimed) because alcohol produced for consumption "was a kind of property which because of its possible vicious uses might be denied by the state the character and attributes as such . . . ."[65] The Court did not specify the "vicious" uses to which the plaintiff's liquor cabinet might be put, leaving that matter to the imagination of readers, but the private possession of alcohol was clearly not a nuisance even under the traditional standard of the doctrine. The Court was, in essence, subsuming nuisance under the police power and engaging in a form of legal legerdemain in which the word "nuisance" was given lip service, while the rational basis test, a highly deferential standard of review, was the standard actually applied, thereby concealing the fact that the court had lowered the standard under which property rights had previously been protected. The very same analytical approach would occur the following year in *Euclid*, though *Samuels* is not cited there.

Even so, these cases were all limited on their facts to alcohol and depended for their holdings on the apparently undisputed fact that alcohol was a menace to health and social mores. The holding could and would be expanded into the notion that where a substance is sufficiently harmful to the public, its mere existence can be deemed a nuisance. This notion, uncontroversial today, nonetheless rested at the time on the existence of a clear and substantial evidentiary basis for the harmfulness of the banned substance or activity. Mere declaration of an apparently harmless use, as in *Yates*, supra, was arbitrary and would not suffice.

E. Mr. Bassett and the tarnished origins of the zoning concept

These holdings provided encouragement to a cadre of attorneys and planners, including such men as Edward Bassett, Harland Bartholomew, and Alfred Bettman, who had been preparing and implementing a regulatory device that, they claimed, would supersede the law of nuisance and allow a final and comprehensive reckoning with the purported ills of the city.[66] That device would not reform the 700-year-old law of nuisances, which Bassett derided as the province of "ancient law books,"[67] but would aim to supersede it completely, replacing nuisance's rudimentary but

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sell spirituous liquors by retail; but that did not prevent the State governments from regarding tippling houses as nuisances, and punishing those retailers of spirits who were not licensed tavern keepers."

[64] *Samuels v. McCurdy*, 267 U.S. 188, 193, 45 S. Ct. 264, 265, 69 L. Ed. 568 (1925).

[65] *Samuels v. McCurdy*, 267 U.S. 188, 198, 45 S. Ct. 264, 267, 69 L. Ed. 568 (1925). The plaintiff apparently did not raise a takings claim in his pleadings, and the Court did not address whether its compensation analysis was proceeding under the state or federal constitutions, though a case cited in support, *Gardner v. People of State of Michigan,* 199 U.S. 325, 330, 26 S. Ct. 106, 108, 50 L. Ed. 212 (1905), expressly cited to the 14th amendment.

[66] In his publication *Constitutional Limitations on City Planning Powers*, Bassett states that "[w]e can all remember when it would have seemed absurd for a city to restrict the height and arrangement of buildings on private property," but took solace in the *Welch v. Swasey* decision for upholding the power of cities to outlaw unrestricted heights of buildings, which Bassett conceded was formerly "[o]ne of the sure proofs that this was a free country . . . ." Edward M. Bassett, *Constitutional Limitations on City Planning Powers*, 5–6 (1917).

[67] *Id.* at 10.

equitable scheme for balancing rights to the city with a scheme of unprecedented severity and rigid inflexibility.

The justifications for this device, zoning, were set out by Bassett in terms that today read as classist and patronizing. According to Bassett, in a sentiment expressed throughout his writings, "It was precarious [under the law of nuisance] for a citizen to erect an expensive private home in a large city because his open places were an invitation for an invasion of buildings of a different class."[68] He claimed without citation or evidence that "private restrictions did not restrict and sometimes did harm."[69] Evincing a bias against density, he claimed that "[i]mproper congestion of population instead of distribution became the rule" under the law of nuisance, again without citation, evidence, or any attempt to define, even in the broadest terms, what Bassett thought "improper congestion" actually meant. There was no mention whatsoever of the cost of housing or any concern at all for the needs of lower-income people who Bassett seemed to think were always threatening to "invade" the domain of prominent New York attorneys such as himself. Throughout Bassett's various writings justifying the zoning idea, there is in general a conspicuous absence of any citations to scholarship, economic thought, or other quantitative analysis, and, instead, a heavy dose of what appear to be his own personal biases and grievances against the changes he perceived in the rapidly growing city of New York, where he worked. What any of this had to do with abating nuisances either of a public or private nature was not clear, nor was there any attempt to balance the right of affluent persons to be free from proximity to those of lesser means with losses to the public welfare, as nuisance law had by the 19th century evolved to do through the doctrine of reciprocity of advantage.[70]

Bassett was, of course, far from the only supporter of the new idea. A voluminous literature exists on the advocacy of the emergent planning profession, the appeal of the idea to businessmen and those involved in economic development, the support of real estate developers eager to co-opt the regulatory power of the state to enhance the marketability of their product, the anxieties of ordinary citizens alarmed by the demographic changes wrought by the early 20th century wave of international immigration, the Great Migration, and, perhaps above all, the sudden proliferation of the automobile, a nuisance of a very public sort that was resistant to all efforts to tame it.[71]

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[68] Bassett was fond of using the word "invasion" to characterize what we might today characterize as the process of residential or commercial filtering, a process that he gave no indication of understanding from an economic perspective. Notwithstanding this, as a lawyer and a man careful with his words, he managed to suppress any explicit segregationist sentiments until his autobiography, when he lamented that a Brooklyn neighborhood had become "occupied by negroes," a change that he "always thought . . . might have been prevented" with better planning. EDWARD BASSETT, AUTOBIOGRAPHY OF EDWARD BASSETT 119 (1935).

[69] Bassett, *supra* note 56, at 7. In *McDonald v. Spang*, 105 N.Y.S. 617 (Sup. Ct. 1907), *see supra* note 45, a court refused to construe a restriction as forbidding the construction of duplexes, a pro-property rights holding that also vindicated the necessity of urban change and evolution. If this was the sort of "harm" Bassett had in mind, and single-family zones were apparently of foremost concern to him, this was surely a matter of opinion, not objective fact.

[70] An outstanding example of this reciprocity of advantage analysis is in fact found in the lower court decision in *Euclid*, *Ambler Realty Co. v. Vill. of Euclid, Ohio*, 297 F. 307, 312, 2 Ohio Law Abs. 451 (N.D. Ohio 1924), rev'd, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

[71] For a brief sampling of this literature, see RICHARD BABCOCK, THE ZONING GAME (1966), SEYMOUR TOLL, ZONED AMERICAN (1969); NOLAN GRAY, ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT (2022), William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, Urban Studies, 41 URBAN STUDIES JOURNAL LIMITED 317 (2004); PETER NORTON, FIGHTING TRAFFIC (2011); Marina Moskowitz, *Zoning the Industrial City: Planners, Commissioners, and Boosters in the 1920s*, 27 BUSINESS AND ECONOMIC HISTORY 307 (1998); Tianfang Cui, *Did Race Fence Off the American City? The Great Migration and the Evolution of Exclusionary Zoning* (Feb. 21, 2024), https://www.tom-

All of these factors have been written about elsewhere and go beyond the scope of this article, but from the perspective of nuisance law, the concept of zoning represented a genuine break from the past. In essence, it would reverse the traditional presumption of innocence that nuisance granted to ordinary human activities, and instead declared that all activities not expressly allowed were not only prohibited but outlawed, often on pain of criminal punishment rather than mere abatement.[72] What remained was for the United States Supreme Court, through the *Euclid* decision, to place its stamp of approval on this form of zoning.

II. *Euclid*'s Disingenuous Surrender

The tale of the *Euclid* decision has been told many times and in greater detail than is possible here, and this paper will not address in detail the well-known facts of the case, the arguments before the Court, or the procedural peculiarities involved in the case's resolution. What is of interest is the Court's purported reliance on nuisance in reaching its conclusions. It should be mentioned, however, that the particular parcel in dispute in *Euclid* did not contain any single-family districts, and the most restrictive zoning of the plaintiff's property, according to the Court, allowed duplexes.[73] The Court's consideration of residential exclusion in what was predominantly a case about the exclusion of industrial uses seems to have been premised on the most restrictive residential zone excluding what the Court referred to as "apartment houses," a category that did not include mere duplexes.

Justice George Sutherland, the author of the *Euclid* opinion, had no judicial experience prior to his appointment to the Court in 1922, and it appears he had never in his career authored a decision on matters of nuisance law.[74] The Samuels case discussed previously, which did examine nuisance in the context of alcohol confiscation but was not cited in *Euclid*, was authored by Chief Justice Taft. Nonetheless, the way Samuels deployed the concept of nuisance was seemingly influential in Sutherland's reasoning, as he wielded nuisance in the same manner in his written decision.

The substance of the decision starts with a peculiar assertion from Sutherland:

> Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.[75]

This statement is the inverse of what was said by the Pennsylvania Supreme Court in 1855's *Bell v. Ohio & P.R. Co.*, quoted supra. Sutherland provided no citation for these claims and did

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cui.com/assets/pdfs/LotsEZ_Latest.pdf; William Mathews, *Three Essays in Economic History* [Doctoral dissertation, University of Pittsburgh] (2024), D-Scholarship@Pitt, https://d-scholarship.pitt.edu/46070/.

[72] Reported zoning cases frequently involve criminal sanction of builders and landowners for the heinous crime of providing dwellings for people of modest means to inhabit. In one extraordinary California case, an owner was jailed for *selling* cottage homes to his fellow citizens by way of subdivision. *Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 98, 222 P.2d 439, 441 (1950).

[73] *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 382, 47 S. Ct. 114, 116, 71 L. Ed. 303 (1926). The Court stated that "[a]ppellee's tract of land comes under U-2, U-3 and U-6."

[74] Sutherland was sworn into office on October 2, 1922, prior to which he had a career in Utah politics as a United States Senator and member of the United States House of Representatives, and until being voted out in 1916, had not practiced law full-time since 1896, the year Utah became a state. He had remained active in law, however, even while in elected office. *See* JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE (1951).

[75] *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386–87, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926).

not deign to disclose which "problems" he believed were "developing" as of 1926 that had not been present in earlier times. In light of the centuries of history of nuisance law outlined above, city living had always presented complex problems resulting from the proximity inherent in urbanization. This was precisely why nuisance law had such a long, complex, and fascinating history. Nor was it at all clear that with the passage of time greater restrictions would be required. In the United States, by 1926, advancements in fire safety, medicine, water treatment, and sanitation had nearly resolved millennia-old health concerns stemming from population density, thereby allowing more freedom, not less, in the use of property.[76]

Having shown his hand in this fashion, Sutherland turned to assess the City of Euclid's zoning ordinance. He began with the observation that "all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare . . . ."[77] So far, so good, but how is a justice to know whether an assertion of state power with regard to real property is not in furtherance of the public welfare? What else but the common law of nuisance? "In solving doubts, the maxim 'sic utere tuo ut alienum non laedas,' which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew," Sutherland wrote.[78]

Would Sutherland naturally set out the elements of nuisance per se and nuisance per accidens in Ohio, and apply these to the City of Euclid's zoning classifications? Would he cite to the Supreme Court case of *Camfield v. U.S.*, which had provided the most fulsome explication of *sic utere*, and which had provided a clear list of those phenomena which had traditionally constituted nuisances?[79] Would he review the many reported state, federal, and international cases on nuisance to determine whether the uses prohibited had ever been deemed nuisances under either doctrine? No. While Sutherland implicitly conceded that apartment houses and ordinary commercial trades were not nuisances per se, could local governments work an end run around this by simply declaring them illegal? The *Yates* case cited supra had held they could not, but in *Euclid*, the Court held that they could. This reduced the entire doctrine of nuisance to a tautology: A nuisance is simply whatever government declares to be a nuisance.

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[76] For thorough treatment of the tremendous strides in public health enabled by advances in sanitation, *see, e.g.*, John Duffy, The Sanitarians: A History of American Public Health (1990) and Martin V. Melosi, The Sanitary City: Urban Infrastructure in America from Colonial Times to the Present (2000).

[77] *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926) (emphasis added).

[78] *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926). It seems probable that Sutherland's use of this phrase in this context arose out the Minnesota Supreme Court's holding in *State v. Houghton*, 144 Minn. 1, 19–20, 176 N.W. 159, 162 (1920), where the court—upholding zoning on rehearing—stated that "[c]ourts have often resorted to the rule, *'Sic utere tuo alienum non laedas,'* in administering justice between property owners. Why should not the Legislature also make use of this rule?" The *Houghton* case not only is cited in *Euclid* but is the subject of a full paragraph in the opinion, in which Sutherland places particular importance on it as an example of a court that had "reversed [its] former decisions holding the other way." *Vill. of Euclid, Ohio v. Ambler Realty Co.*, *supra*, at 391. Sutherland's use of the phrase did include the Latin conjunction "*ut*" which the Minnesota court had erroneously omitted, and which had been included as part of the phrase since at least Blackstone's time.

[79] *Camfield v. United States*, 167 U.S. 518, 522–23, 17 S. Ct. 864, 866, 42 L. Ed. 260 (1897), stating that the "right to erect what [one] pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. Ever since Aldred's Case, 9 Coke, 48, it has been the settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery, or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable, or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property." *Camfield* is not cited in *Euclid*.

The climactic point of this legal sophistry occurs toward the end of the opinion, where, without citing a single case in the 700-year history of nuisance law, Sutherland makes the claim that apartment houses could in some circumstances "come very near to being nuisances."[80] He did not cite a case in support of this proposition, most likely because there were no such cases. Dwellings, as detailed above, had never in the entire corpus of Anglo-American law been found to be nuisances, whether per se or per accidens, except perhaps in the case of the narrow and use-unrelated exception of the doctrine of ancient lights, which, as noted above, had been repudiated by American courts a century prior to *Euclid*. And even if Sutherland had intended to reverse a century of jurisprudence and reinstitute the doctrine of ancient lights without expressly stating so, banning apartment houses would not have been a rational means of doing so, since the doctrine was about form, not use. A suburban apartment building might be a squat two stories tall, while an urban townhouse might be four stories tall, all of which might be entirely irrelevant in an unbuilt area, or in one in which no windows of sufficient antiquity are present.

It seems reasonably clear that Sutherland was not genuinely applying nuisance principles, but a version of the rational basis test. The lower court, by contrast, had no qualms in scrutinizing the zoning law in terms of substantive due process and had also performed a clear and concise analysis of nuisance law under the reciprocity of advantage rule.[81] Displaying a practiced familiarity with the history and purpose of nuisance, Judge Westenhaver wrote:

> In the average reciprocity of advantage there is a measureless difference between adjoining property owners as regards a party wall or a boundary pillar, and the owners of property restricted as in this case. In the former there may be some reciprocity of advantage, even though unequal in individual cases. In the present case, the property values are either dissipated or transferred to unknown and more or less distant owners.[82]

Nuisance, in short, was a flexible device for managing and balancing ordinary conflicts between adjacent landowners, not a justification for outlawing entire classes of innocent and lawful activities. The reason that nuisance had been recruited as an interpretive principle in the first place in such cases as *Mugler* and *Samuels* was because the cases involved property rights and the application of the Fourteenth Amendment's requirement of compensation, and that to avoid the conclusion that property had been taken, it was necessary to appeal to the so-called "nuisance exception," as it was later articulated.[83] If takings of real property could be excused by

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[80] *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L. Ed. 303 (1926).

[81] *Ambler Realty Co. v. Vill. of Euclid, Ohio*, 297 F. 307, 316, 2 Ohio Law Abs. 451 (N.D. Ohio 1924), rev'd, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

[82] *Ambler Realty Co. v. Vill. of Euclid, Ohio*, 297 F. 307, 316, 2 Ohio Law Abs. 451 (N.D. Ohio 1924), rev'd, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

[83] *See, e.g.*, *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 892 (5th Cir. 2004) ("[U]nder federal law, even if the current value of the claimant's property has been destroyed, the claimant cannot recover if the 'background principles of the State's law of property and nuisance' would have prohibited that activity as a nuisance (the 'nuisance exception')."). For an early example, *see Mugler v. Kansas*, 123 U.S. 623, 669, 8 S. Ct. 273, 301, 31 L. Ed. 205 (1887) ("The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.")

any plausible reason, Judge Westenhaver wrote, it would "extend the police power until private property is destroyed and the guaranties of the Constitution are annihilated."[84]

In sum, Sutherland had played a disingenuous game to reach his conclusion, justifying an uncompensated taking of property by feigning nuisance principles, when in fact he had applied a version of the rational basis test to justify the prohibition of simply *existing*, as a human being of presumed lower economic status, in an apartment. The result was a holding which took the time-honored law of nuisance, effective in managing urban conflicts for centuries, and used it as the instrument of its own demise. Even more consequentially, as noted at the outset of this article, nuisance was a doctrine that was intended to arbitrate what we might today consider "NIMBY" (Not in My Backyard) concerns with a narrowly tailored approach that favored growth, yet *Euclid* affirmed its replacement with a regime that locked land use patterns into place potentially for all time, a practice that the courts of the 19th century had found contrary to public policy.[85] As the *Euclid* case turns 100, can we turn back to those nuisance principles, still a part of our common law, for potential alternatives to a zoning system that has long since run its course?

III. Untying the Zoning Straitjacket: Taking Inspiration from Nuisance to Unshackle American Cities

Criticism of Euclidean zoning is long-standing, dating back even before Judge Westenhaver's decision, but it has proliferated in the first quarter of the 21st century, with a wealth of literature vindicating the role of cities as drivers of economic growth and identifying zoning as a primary culprit in America's ongoing housing crisis.[86] Numerous alternatives have been proposed, of which few have been implemented in more than a handful of locales and have yet to shake the foundations of Euclidean zoning.[87] This section details and reviews alternative approaches and concludes with a recommendation that attempts to reconcile the best features of zoning and nuisance.

A. Performance-Based Zoning. Performance-based zoning controls and regulates development based on measurable outcomes or impacts such as such as noise, traffic, emissions, density, light, or environmental effects rather than on predefined land use categories. In doing so, performance-based zoning attempts to institutionalize the principles of nuisance by subjecting every proposed use to a heightened version of a common law nuisance analysis. Although this seems promising and in theory should allow needed growth and change over time, in practice, it has proven administratively complex and costly, and few American localities have adopted it in recent years.[88] Further, many of the elements of performance-based zoning have already been layered onto existing Euclidean zoning schemes by way of procedural devices such as special exceptions and

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[84] *Ambler Realty Co. v. Vill. of Euclid, Ohio*, 297 F. 307, 312, 2 Ohio Law Abs. 451 (N.D. Ohio 1924), rev'd, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

[85] *See Trs. of Columbia Coll. v. Thacher*, 87 N.Y. 311, 321 (1881).

[86] *See, e.g.*, EDWARD GLAESER, TRIUMPH OF THE CITY (2011); KEVIN ERDMANN, SHUT OUT: HOW A HOUSING SHORTAGE CAUSED THE GREAT RECESSION AND CRIPPLED OUR ECONOMY (2019); SHANE PHILLIPS, THE AFFORDABLE CITY (2020); JENNY SCHUETZ, FIXER-UPPER (2022); M. NOLAN GRAY, ARBITRARY LINES (2022); RICHARD D. KAHLENBURG, EXCLUDED (2023); JAMES S. BURLING, NOWHERE TO LIVE (2024); and EZRA KLEIN AND DEREK THOMPSON, ABUNDANCE (2025).

[87] Sonia Hirt, *Form Follows Function? How America Zones*, 28 PLANNING PRACTICE & RESEARCH 204 (2013).

[88] *See* J. Marwedel, *Opting for Performance: An Alternative to Conventional Zoning for Land Use Regulation*, 13 J. PLAN. LIT. 220 (1998).

conditional use permits, thereby resulting in more rather than less cost, delay, and uncertainty.[89]

B. Form-Based Zoning. With a nod to the much older model of city building contained in ancient sources such as those by Vitrivius, Julian of Ascalon, and others, form-based zoning seeks to forestall disputes by setting clear rules and norms governing the form and appearance of the built environment, rather than the uses that take place within the walls of the structures built under those rules.[90] These codes have been more popular than performance-based codes, with over 400 localities having adopted a form-based code as of 2019.[91] Unlike those older codes, however, form-based codes typically retain separate zones with uniformity within those zones, often modeled very closely on preexisting Euclidean zones, and most importantly do not typically provide a mechanism for incremental increases in density as the ancient codes did. A form-based code, when examined in detail, may simply look like a translation of a Euclidean code into a different language, while the underlying message remains much the same.

C. Non-Zoning. A reasonable question at this point might be to ask why an alternative is needed at all. Houston, Texas, the only major American city without Euclidean zoning, has accommodated rapid urban growth without being overwhelmed by a flood of nuisance suits and relies instead on private covenants for land use control.[92] Once zoning is removed, however, what remains is not an absence of, but rather a uniformity in, land-use regulation, and a uniform regime can be either very permissive or highly restrictive. In Houston, a major constraint on development in former years was lot size minimums, which existed independent of Euclidean zoning.[93] One of the selling points of Edward Bassett's Euclidean zoning that had the ring of truth was that it would allow a single jurisdiction to accommodate both high- and low-density districts within its borders, because if this were not permitted, zoning would still exist, but only according to municipal boundaries, as nothing would prohibit different localities from imposing their own uniform land use regimes.[94] Accordingly, simply abolishing zoning—i.e., requiring just one zone—would raise a new set of questions and challenges for most American cities and would not end the discussion. The results might very well be unpredictable and not necessarily what was hoped for.

D. Land Value Zoning. An innovative concept not yet implemented by any US locality, land value zoning proposes that land use entitlements follow imputed land values, thereby

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[89] For an example that shows the spread of this practice as early as the 1980s and before, *see Governor's Office of Planning and Research, The Conditional Use Permit* (1997).

[90] *See* Emily Talen, *Design by the Rules: The Historical Underpinnings of Form-Based Codes*. 75 J. AM. PLAN. ASSOC. 144 (2009).

[91] *See* PLACE MAKERS TOOLBOX, https://placemakers.com/codes-study/, (last visited April 20, 2026).

[92] For a discussion of the merits of this system, which were rejected by zoning's founders, *see* BERNARD SIEGAN, LAND USE WITHOUT ZONING (1972).

[93] *See* Emily Hamilton, *The Effects of Minimum-Lot-Size Reform on Houston Land Values*, Mercatus Center, January 9, 2024.

[94] Bassett, *supra* note 11, at 323. Bassett's concern that, without low-density single-family zoning, affluent residents would "[leave] the city to settle with their families in outlying villages" was characteristically classist and elitist, but did reflect an understanding of comparative advantage, and that a uniform rule of land use in urban areas might incentivize the incorporation of a multitude of small suburban jurisdictions for the sole purpose of establishing their own more restrictive uniform land use regimes. Of course, even with zoning enacted in every American city apart from Houston, this occurred anyways for reasons above and beyond simply land use. *See Milliken v. Bradley,* 418 U.S. 717 (1974) for one important historical marker in a history that has been written about extensively.

creating a sort of pressure relief valve—guided by objective economic data obtained through impartial appraisal—that periodically up-zone areas of increasing demand. This approach would balance the need for short-term predictability with the necessity of long-term change. The implementation of such a system would require further study, and its political feasibility remains largely unknown.

E. Reformed Euclidean Zoning. In the years since 2020, with housing prices soaring across the United States, over 30 states, in an effort to limit how restrictive local zoning can be, have enacted legislation that revisits the original grants of the zoning power to the states (by way of the Standard State Zoning Enabling Act). Examples of such laws include those requiring that localities allow smaller minimum lot sizes, allow residential uses in commercial zones, and not prohibit duplexes in residential zones, among others.[95] Rather than removing the power to zone, this approach sets a higher floor for local governments, limiting their power to use zoning for the exclusionary purposes that men like Edward Bassett touted.

F. Other Approaches. In addition to the above, there are many variants and sub-variants, including the pragmatic and flexible approaches of the Planned Unit Development (PUD) and Texas's Municipal Utility District (MUD) that allow developers greater say in design and density of projects and that create a framework for infrastructure funding more conducive to popular support for growth.[96] Devices such as the PUD, MUD, and others such as incentive zoning and inclusionary zoning, generally sit alongside traditional Euclidean zoning.

Of these approaches, reforming Euclidean zoning appears to have the greatest promise for continued implementation in the years ahead and at the widest possible scale. It has the advantage of being at the state level, and it avoids fighting battle after battle at the municipal level. In asking how state policymakers can craft these policies, the common law of nuisance can, if we approach it honestly, in light of its history and with the benefit of the past 100 years of urbanism in America and elsewhere, provide a "fairly helpful clew" in formulating policy. If the courts will not, or at least are not yet prepared to, apply the doctrine of regulatory takings to zoning and to reinvigorate the holding in Yates, legislators can use nuisance principles to inform the establishment of reasonable limits on the local zoning power. A foundational principle must be that residential use, as a general matter, is not a nuisance, and that any suggestion to the contrary in *Euclid*, based upon the number of dwelling units in a structure or the tenure of those units, is in contravention of centuries' worth of English and American common law. This principle can be reconciled without difficulty with reasonable limits on building form, just as it is under the land use regimes of other countries such as Japan, France, and many others.[97] The joinder of form-based codes with a reformed Euclidean framework would come very near to this balanced approach so common and popular elsewhere in the world.

A second principle is that ordinary retail uses that do not involve the generation of any of the traditional indicia of private nuisance should be by default welcome in all areas where residential housing is also allowed. The arrival of the automobile introduced a new and potentially hazardous element to high-volume retail and service establishments, as alluded to in *Euclid*, but so long as

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[95] See Eli Kahn and Salim Furth, Framing Futures: Pro-Housing Legislation Goes Vertical in 2025, Mercatus Center (2025).

[96] For a primer on MUDS, on which there are few academic resources, see Municipal Utility District (MUD) Basics, https://services.austintexas.gov/edims/document.cfm?id=227010, (accessed April 20, 2026).

[97] Sonia Hirt, ZONED IN THE USA (2012).

motor vehicles themselves are not deemed a public nuisance and indeed are welcomed on public streets, their potential harms should not be imputed to the stores that rely on them for arrival of their customers. Designing safe streets, with safe traffic speeds and with vehicles that present minimum hazard to pedestrians and other motorists, is the responsibility of transportation planners and federal regulators.

Other elements of nuisance law, in combination with modern environmental laws and performance standards, can be applied to inform regulation of large-scale manufacturing and industrial uses. They can also sit comfortably alongside private covenants, which nonetheless should, in accordance with public policy, be subject to modification upon changed conditions, or dissolution upon some degree of majority agreement among those subject to the covenants.

Using nuisance law in this manner will help give structure and direction to reform efforts. It will also anchor those efforts in centuries of familiar precedent that reflect efforts to reconcile genuine disputes among neighbors rather than to enlist the power of the state for exclusionary ends. Finally, refinements to the law of nuisance itself, as suggested by some commentators, could make nuisance a more effective tool for resolving present-day complaints over development.[98]

Conclusion

The common law of nuisance developed out of a need to balance the expectations of existing property owners with the fundamental need of the city to change and grow in the interest of public welfare. Long before the term "NIMBY" was coined, nuisance provided an outlet for inevitable discontent over neighborhood evolution and a forum for resolution of complaints that maintained a pro-property rights orientation. Over the centuries, the doctrine continued to be refined and clarified, though due to its roots in agrarian England, remained somewhat underpowered in dealing with the conflicts in the growing cities of industrial America. It is not a relic of the past, however, or a curiosity of "ancient law books," but the living tradition of our common law heritage. Its principles can help lend not just a "clew," but weight, authority, and analytical clarity to current-day zoning reform efforts. The erroneous conclusions in *Euclid* can also be seen in a clearer light when we appreciate and understand those legal traditions. And, as a common law doctrine, it can continue to be refined to better serve the needs of American cities over the next century.

[98] *See* Austin, *supra* note 10.