Today, many urbanists look back at our built environment with bemusement. The outcome of over fifty years of post-war suburbanization has fundamentally reshaped America’s manmade landscape. From coast to coast, amorphous urban sprawl envelops America as far as the eye can see – and scholars have just begun to struggle to understand its causes and assess its impact. In this article I examine the phenomenon of urban sprawl and its relationship to exclusionary zoning. I argue that the Supreme Court in 1926 played a key role in enabling sprawl though its permissive zoning jurisprudence in Euclid v. Ambler. Had the Court scrutinized America’s early zoning laws with greater rigor, these laws could have been deemed constitutionally suspect – effectively stopping sprawl in its tracks. I conclude by exploring four significant flaws of the Euclid decision in light of the modern epidemic of sprawl.

CONTENTS

Abstract ........................................................................................................................................ 373
I. Introduction ................................................................................................................................ 373
II. Sprawl – Its Definition and Impact .................................................................................. 374
III. Exclusionary Zoning – A Foundation of Sprawl ...................................................... 379
IV. The Constitution of Sprawl ............................................................................................ 383
V. Village of Euclid v. Ambler Realty – The Birth of Euclidean Zoning ........................................ 387
VI. Euclid’s Four Flaws .......................................................................................................... 392
VII. Conclusion ......................................................................................................................... 402

I. INTRODUCTION

Today, many urbanists look back at our built environment with bemusement. The outcome of over fifty years of post-war suburbanization has fundamentally reshaped America’s manmade landscape. From coast to coast, amorphous urban sprawl envelops America as far as the eye can see – and scholars have just begun to struggle to understand its causes and assess its impact. An examination of the Constitutional foundations of urban sprawl, specifically the Supreme Court’s role in enabling pernicious exclusionary zoning in
Euclid v. Ambler, brings us one step closer to understanding this phenomenon.

The growth, and now dominance, of the suburban style development – and the concomitant decline and abandonment of traditional cities – has been attributed to many causes. Typical culprits include: the proliferation of the automobile, the interstate highway system, white flight, the Federal Housing Administration, aggressive suburban developers, increasing prosperity, the frontier mentality, and most critically for this study, exclusionary zoning. However, for all of the pontification that has occurred over the causes, controversies, and ills of urban sprawl, a focus on the role of the United States Supreme Court has been notably absent. As we shall see, in 1926 America’s High Court could have substantially prevented many of the most-frequently lamented characteristics of sprawl from coming into existence. Had the Court scrutinized America’s early zoning laws with greater rigor, it could have deemed them constitutionally suspect – effectively stopping sprawl in its tracks. In other words, the essential building blocks of sprawl would have, and could have, been declared unconstitutional. The Supreme Court, however, gave its constitutional blessing to what we now know as urban sprawl. America has not been the same since.

II. SPRAWL – ITS DEFINITION AND IMPACT

“Eighty percent of everything ever built in America has been built in the last fifty years, and most of it is depressing, brutal, ugly, unhealthy, and spiritually degrading.”

Urban sprawl in America has become the source of an increasingly visible and volatile public debate. The explosion of fragmented suburban municipalities, a hallmark of urban sprawl, has inspired political scientists such as J. Eric Oliver and Juliet F. Gainsborough to explore the political ramifications of suburban governance. Meanwhile, a cacophony of concerned voices from many other corners has grown in both volume and volatility. It is therefore worth briefly reviewing some of the most common arguments against sprawl. First, however, it might be helpful to arrive at a single definition of the phenomenon. The American Heritage Dictionary defines urban sprawl as “the unplanned, uncontrolled spreading of urban development into areas adjoining the

2 See J. ERIC OLIVER, DEMOCRACY IN SUBURBIA (2001).
edge of a city." The fact that the phrase “urban sprawl” or just “sprawl” appears to now be favored over “suburban sprawl” would seem to reflect the ostensible loss of distinction between what was once considered “urban” and what was referred to as “suburban.” Indeed, many newer American cities are themselves largely dominated by traditionally suburban characteristics (i.e., single-family dwellings segregated from other types of land uses). Joel Garreau coined the term “edge cities” to refer to vast, sprawling, suburban style areas of office parks and retail that now employ comparable numbers as the central core of traditional, dense cities.  

Oliver Gillham provides a much more inclusive definition of sprawl. “Sprawl (whether characterized as urban or suburban) is a form of urbanization distinguished by leapfrog patterns of development, commercial strips, low density, separated land uses, automobile dominance, and a minimum of public space.” 5 By leapfrog patterns, Gillham means that developments of industrial parks, shopping centers and residential subdivisions are placed in a noncontiguous pattern, leapfrogging over tracts of farmland and forest, and ultimately resulting in a “haphazard patchwork, widely spread apart.” 7 More to the point, a recent study quantifying the incidence and impact of urban sprawl identifies sprawl as development that spreads across the landscape at a rate that is far in excess of population growth. 8

Why should we be concerned about sprawl? Is it truly harmful? And if so, in what ways? The charges against sprawl are multiple and various, and they come from a wide array of social corners. They range from environmentalists who decry the damage done to the natural environment; to aesthetes troubled by the sheer characterless monotony of the suburban landscape; from public health advocates concerned about increasing rates of obesity and degraded air, water and food quality; to social scientists who observe a loss of community and social stratification resulting from suburbia’s dominance; from those who lament a drastic decline in Americans’ quality of life – as the average person is forced spend more and more time behind the wheel of her car and away from her family, and political commentators lament that

7 Id. at 4.
automobile dominance has resulted in American dependence on foreign oil; to those who blame sprawl for the troubled, poverty-ridden, and racially segregated state of America’s inner-cities.

Defenders of sprawl are much more likely to skip the use of the arguably pejorative label “sprawl” in the first place, instead opting for the more benign term “growth.” To the opposition, anti-sprawl sentiment is much more a reflection of a thinly disguised urban snobbery that carries a distinct aversion to all that is Middle-American, than a true concern with concrete harms. As Robert Bruegmann explains in his contrarian diatribe Sprawl: A Compact History:

...[A]lthough objective issues – the cost of low-density settlements or the effect of sprawl on commuting times or global warming – are clearly important, these are not, I believe, what has really driven and continue to drive the anti-sprawl crusade. What is actually at stake are much larger questions about planning and democracy, aesthetics and metaphysics, and different class-based assumptions about what makes a good urban environment. ⁹

Yet, regardless of how one chooses to frame the issue, there are some undisputable attendant ramifications of sprawl that are likely to give even the most skeptical contrarian pause. While the United States is fortunately a very large country with much room to grow, the amount of land swallowed by sprawling and inefficient land development is staggering. The National Resources Defense Council claims that Americans lose approximately 365 acres of open land to sprawl development each hour. ¹⁰ Aside from being derided as downright ugly – a built environment of repetitive, characterless subdivisions, strip malls, and office parks that lack any connection to their surroundings – sprawl development is anathema to pedestrian life. Walking in such an environment is not only unpleasant, but dangerous. Kunstler notes that Americans have become so accustomed to the dearth of foot traffic in suburbia that “[a]ny adult between eighteen and sixty-five walking along [a collector road] would instantly fall under suspicion of being less than a good citizen.” ¹¹

A car is essential in most parts of the United States. Proponents of sprawl development are likely to frame automobile use and ownership as a market-driven choice. Others, however, reject the dubious conventional wisdom that the “American Dream” necessarily preordained large lot

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¹¹ KUNSTLER, supra note 1, at 117.
sizes and profligate automobile use. They argue that the market is artificially skewed to favor sprawl development because of exclusionary zoning laws that explicitly outlaw higher density development.\textsuperscript{12} Those who are unable to drive – because they cannot afford a car, because they are under age, or because they are too old to drive safely – have few options and face the unenviable choice of putting themselves in danger by traversing a hostile network of roads on foot, becoming dependent upon others, or simply cutting themselves off from public life altogether. More than three million people are killed or injured each year as a result of automobile accidents, and the Centers for Disease Control attributes increasing rates of obesity and poor health to the decrease in walking resulting from auto dependence.\textsuperscript{13} Furthermore, the need to drive has dramatically increased the number of cars on the road, significantly contributing to rising air pollution and the greenhouse gasses that are a cause of global warming.

This new American landscape also serves to exacerbate social divides. Not only does the lack of pedestrian life limit one’s encounters with a broader range of society, sprawl has produced an increase in economically and racially stratified neighborhoods. “White flight” from the inner city, the massive out-migration of white middle class families to the suburbs, first accelerated after the Second World War. According to the 2000 census, “white flight” continues today, leaving the country more racially and economically segregated than ever before.\textsuperscript{14} At the same time, sociologists such as Robert Putnam identify the pattern of sprawl as a contributor to America’s reduced civic engagement and loss of community life.\textsuperscript{15}

The public is also forced to pay a hefty financial price tag for the expensive and inefficient roads and infrastructure necessary to accommodate the sprawling suburban lifestyle. The resultant rise in taxes has inspired tax revolts in many states as well as aggressive tactics by municipalities to attract “more commercial development to help foot the bill for money-losing residential subdivisions . . . .”\textsuperscript{16} This competition further feeds automobile-oriented sprawl. And the costs of sprawl are hardly limited to construction and maintenance of infrastructure – American petroleum consumption continues to rise, which is a burden not only for the impact it has on individual families’ pocket-books, but for the high cost of foreign policy necessary to keep the oil flowing.

\textsuperscript{13} Gillham, supra note 6, at 76.
\textsuperscript{14} Id.
\textsuperscript{16} Gillham, supra note 6, at 76.
In the past decade, growing concern about sprawl’s toll on America has led to a number of increasingly sophisticated quantitative academic studies. These studies seek to better define sprawl, assess its relative prevalence around the country, identify relationships between sprawl and its presumed causes, and draw correlations between sprawl and its adverse (as well as beneficial) impact. Measuring Sprawl and Its Impact was conducted in 2002 by Cornell professor of City and Regional Planning Rolf Pendall, University of Maryland’s Reid Ewing, and Don Chen of Smart Growth America. Rather than simply equating sprawl with population density, as many previous attempts to quantify sprawl had done, the 2002 Pendell study adopts a four-factor index to assess sprawl. In addition to residential density, the index includes “rigidly separated homes, shops, and workplaces; a network of roads marked by huge blocks and poor access; and a lack of well-defined, thriving activity centers, such as downtowns and town centers.” While this is by no means an exhaustive enumeration of the characteristics of sprawl, these four factors provide a useful quantifiable basis for assessing the relative level of sprawl in various metropolitan areas.

As might be expected, the 2002 Pendall study found that regions scoring high on the sprawl index consistently performed poorly, relative to their less-sprawling counterparts, on “travel and transportation outcomes.” The study found that people in sprawling regions drive a greater number of miles each day and own more cars per household. The higher vehicle ownership rates seem to confirm “that in sprawling areas where driving is the only way to get around, more households feel compelled to have a vehicle for each licensed driver.” Not surprisingly, the authors also found statistically significant correlations between the rate of sprawl and the likelihood that people will walk or take public transportation to work.

More troubling are the correlations the scholars found between sprawl, traffic fatalities, and poor air quality. In Riverside, California, the most sprawling region in the country, eighteen of every 100,000 residents are killed each year in traffic accidents; that number is less than half — fewer than eight — in the eight least-sprawling metropolitan areas. Likewise, there is a strong relationship between a region’s sprawl rating and dangerous air quality. Ozone levels, as measured by the Environmental Protection Agency’s standard of eighty parts per
billion averaged over an eight-hour period, can differ by forty-one parts per billion between the most-sprawling and least-sprawling areas.\textsuperscript{23}

The American Journal of Health Promotion revealed similarly troubling correlations in a related 2003 study. The study, entitled \textit{Relationship Between Urban Sprawl and Physical Activity, Obesity, and Morbidity}, used the same sprawl index as the 2002 Pendell study but focused on the health effects of sprawl. As might be expected, in a county-by-county analysis the study found that those residing in sprawling counties are more likely to walk less during their leisure time.\textsuperscript{24} The study also determined that the odds of suffering from hypertension are lower in more compact counties.\textsuperscript{25} Finally, the authors identified a highly significant positive correlation between the level of sprawl in a particular county and the body mass index of its residents.\textsuperscript{26} This finding is particularly pertinent in contemporary America, where obesity rates are reaching epidemic levels. In sum, the researchers found “support for the assertion that urban form can have significant (positive or negative) influences on health and health-related behaviors.”\textsuperscript{27}

\section*{III. Exclusionary Zoning – A Foundation of Sprawl}

Considering the growing belief that sprawl contributes to and exacerbates many social ills, one might wonder why Americans do not simply reverse course. Why not build our manmade landscape differently? One might imagine that the awareness of sprawl’s drawbacks might inspire more compact development rather than the sprawling homes on large lots that dominate new home construction. Indeed, there is growing interest among architects, developers, and potential residents in newly planned mixed-use communities that seek to emulate the pedestrian vitality of traditional downtowns – yet much of the demand for homes in mixed-use, pedestrian-friendly neighborhoods goes unmet. The Urban Land Institute, for example, has argued that contemporary Americans, if presented with the choice, “are more likely to choose higher-density housing in mixed density communities that offer vibrant neighborhoods over single-family houses far from the community core.”\textsuperscript{28} This option, however, is a rarity, particularly in newer, rapidly developing Sun-Belt areas of the country.

\begin{flushleft}
\textsuperscript{23} \textit{Id.} at 21.
\textsuperscript{24} Reid Ewing et al., \textit{Relationship Between Urban Sprawl and Physical Activity, Obesity, and Morbidity}, 18 \textit{AM. J. HEALTH PROMOTION} 47, 52 (2003).
\textsuperscript{25} \textit{Id.} at 53.
\textsuperscript{26} \textit{Id.} at 52.
\textsuperscript{27} \textit{Id.} at 56.
\textsuperscript{28} RICHARD M. HAUGHEY, \textit{URBAN LAND INSTITUTE, HIGHER DENSITY DEVELOPMENT: MYTH AND FACT} 6 (2005).
\end{flushleft}
Many homebuyers and developers unquestioningly remain loyal to the ideals established by a historical trajectory of low-density suburban subdivisions with strictly segregated land uses. Nevertheless, one of the most troubling and potent answers to the question of ‘Why sprawl?’ has less to do with the independent decisions of developers and homebuyers and more to do with the judicially determined legal foundations of America’s democracy. Local suburban governments – since well-before any local politician’s institutional memory could be expected to recall – have systemically guaranteed the dominance of sprawl. They have done so because the United States Constitution, by way of the Supreme Court, has permitted their actions.

Exclusionary zoning exists in the vast majority of American jurisdictions. It legislates minimum lot sizes and square footage of homes, specifies precisely who and how many people may live in particular residential areas, and meticulously maps out a voluminous array of single-use zones that define with specificity how structures can be used in each zone of a municipality. Defenders would be quick to praise the seemingly rational land-use allocation that partially explained zoning’s initial appeal. Zoning is orderly and tidy. Each type of use – whether it be an apartment building, a shopping center, a large single family home, or a government office – belongs and remains among its own kind; there is no mixing. A dark side of zoning, however, is revealed by its pernicious power to exclude. Exclusionary zoning, as the name would imply, has been widely criticized for the way it insidiously segregates society according to race, class, and lifestyle.

Zoning is clearly not the only cause of sprawl; sprawl is a complex phenomenon that is clearly the result of multifarious social and political factors. Even the very definition of urban sprawl is subject to debate. If we are to adopt the widely accepted definition discussed previously, however, there can be little doubt that there is a strong causal relationship between zoning and sprawl. The reason is simple. Zoning laws mandate development that falls squarely within the definition of sprawl. Three of the four characteristics used to determine the “sprawl index” in the Pendall and Ewing studies, for example, are directly controlled by local zoning codes. The ubiquitous imposition of minimum lot and house sizes and the prohibition of multi-unit buildings in suburban jurisdictions clearly implicate the first variable – residential density. The fact that homes, by legal fiat, must be large, single-family, and widely dispersed unquestionably fosters lower population density. Mandated residential segregation from other land uses and the use of separate zones for various types of businesses, institutions, and community gathering places clearly necessitates failure on the second factor, the “neighborhood mix of homes, jobs, and services.” Such

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29 See MEASURING SPRAWL, supra note 8, at 3.
zoning essentially guarantees that virtually all activities outside of one’s home will be carried out with the assistance of a car. The third category, strength of metropolitan centers, is described as “concentrations of activity that help businesses thrive, and support alternative transportation modes and multipurpose trip making. They foster a sense of place in the urban landscape.” Where land uses are separated by zoning laws, however, a single vital town “center” or even a few discrete “centers” are unlikely to appear. This is true particularly when zoned, separated land-use exists in conjunction with laws that mandate large numbers of parking spaces for each business and wide multi-lane roadways. Such requirements make it virtually impossible for pedestrians to comfortably navigate the area. Each office building or shopping center becomes an island unto itself, surrounded not by water, but asphalt.

Thus, two elements of the suburban model that are consistently cited by modern critics of sprawl as the most problematic — the dramatic separation of uses and the vast geographical separation between things — are frequently mandated by zoning codes. A number of quantitative studies have documented these close ties between sprawl development and local zoning laws. As a recent Brookings Institution report on land use regulations in the fifty-largest metropolitan areas concluded, “[t]he weight of the evidence suggests that places with stricter land use regulations differ systematically from those where they are less strict.” By classifying various local zoning regimes according to, among other factors, the degree to which the regulations are “exclusionary,” the Brookings study was able to determine correlations between exclusionary zoning and features of sprawl. Almost forty percent of all jurisdictions in the fifty-largest metropolitan areas in the United States are “low-density” by law, and most would bar a modest two-story “multi-family apartment development with 40 units . . . on a five-acre lot.” The survey also revealed that the maximum density in these districts has essentially stayed the same over the past decade. Thus, the recent wave of publicity surrounding sprawl and its potential harm appears not to have had much impact on local political behavior.

While the country as a whole may be increasingly aware of the problems associated with urban sprawl, the countless fragmented suburban municipalities that make up metropolitan regions are naturally intent on preserving high residential property values and have little

30 Id. at 11.
31 KUNSTLER, supra note 1, at 117.
33 ROLF PENDALL ET AL., supra note 32 at 6.
34 Id. at 10.
incentive to reform their zoning laws for the good of the whole. Undoubtedly, one of the most foundational motivations for exclusionary zoning is the perception that such ordinances maintain, if not bolster, residents' net worths. Even if the majority of citizens in a particular jurisdiction sympathize with the ills caused by sprawl, why would one privileged municipality volunteer to give up its gilded status with very minimal, in any, benefit in return? Because of the perverse and inequitable allocation of municipal power, residents of suburban locales face a distinct pressure to increase the level of exclusivity of their community. Indeed, a recent study by Jonathan Levine comparing the dominantly-sprawling Atlanta region with the Boston metropolitan area – a region offering a much greater mix of densities – found an acute unmet market demand for walkable mixed-use communities in Atlanta. Levine concludes “that the current land-use regime indeed zones out transportation and land-use choices that could satisfy a significant minority of households in U.S. metropolitan areas.”

In order to flourish or, at minimum, maintain the quality of life currently provided to residents, municipalities must be sensitive to the relationship between their tax base and the services they can afford to provide. A higher proportion of low-income residents leads to reduced tax revenue and higher expenditures on, in political scientist Paul Peterson’s words, “redistributive policies.” Thus, even in jurisdictions that have a propensity to be more inclusive, the “ripple effect” from exclusionary behavior by neighboring municipalities will likely compel these jurisdictions to protect themselves from lower income populations, which would be artificially diverted from elsewhere if they were to switch to a more inclusive zoning regime. A progressively-minded community is apt to become less welcoming of socio-economic diversity if it reasonably fears that it will bear radically disproportionate burdens relative to neighboring municipalities.

As Richard Briffault explains:

A locality that did not act to maximize its per capita tax base – that is, one wealthy enough or attractive enough to lure new residents or firms but that did not restrict land uses to exclude those in-migrants who did not contribute to local net wealth – would presumably sustain an influx of residents or activities that would lower the per capita tax base or, due to congestion and

36 Id.
37 PAUL E. PETERSON, CITY LIMITS (1981).
increased use of local services, increase the ratio of service costs to tax base.\textsuperscript{39}

The rational municipality will thus be compelled to impose and maintain exclusionary zoning policies. This snowball effect of exclusionary zoning perpetuates a tremendous outward pressure on residents who are precluded from buying homes in more centrally located suburbs due to the prohibitive price tag. New households are pushed farther and farther into the cheaper peripheral areas of the metropolitan region, exacerbating urban sprawl. As we shall see, it is a phenomenon that would not exist but for the permissive zoning jurisprudence of the Supreme Court.

IV. THE CONSTITUTION OF SPRAWL

Zoning is generally conceived of as an inherently political act -- one that appropriately sits in the lap of local legislators. Historically, state governments have delegated land-use decisions to local governmental subdivisions -- cities, counties, villages, townships or other similarly designated municipal jurisdictions. Surely there is some truth to the common contention that land-use regulation is peculiarly local. A state, let alone the national government, sits far removed from the idiosyncratic qualities that make each locality unique. Thus there is much to be said for governmental delegation that is sensitive to the need for proximity to a governing body’s constituents. Coordination of zoning policy between various municipalities has rarely been attempted by states, although increasingly, certain states are beginning to pay greater attention to the potential benefits of regional plans that acknowledge the inter-relatedness of a metropolitan area’s numerous jurisdictions.

Local politics, because of its more intimate scale, has a tendency to be much more personal than politics at the state and especially federal level. As the founding fathers understood, political passions can run hot, especially when the subject matter is one’s own back yard. The precarious balance of American federalism has always entailed some stepping-on-toes when it becomes necessary for the federal government to exert its influence over areas once thought to be exclusively the province of the states or vice versa. FDR’s New Deal is perhaps one of the most striking examples of the former. The devolution to the states of power over welfare and other social policies under Richard Nixon and Ronald Reagan is an illustration of the latter. Yet, while politicians of both national and local stripe can be aggressive in manipulating the constitutional boundaries of federalism for their own political ends, it is ultimately the courts that are responsible for drawing those lines in the first place. Without constitutional delegation from ‘we the people,’ politicians have no power at all. In the famous words of John Marshall,

\textsuperscript{39} Id. at 1136.
“It is emphatically the province and duty of the judicial department to say what the law is.”

There are many compelling constitutional and extra-constitutional reasons to believe that local politicians are not the appropriate decision makers when it comes to zoning -- particularly the carte blanche power they are afforded today. Why can municipal politicians not be trusted to resolve the issues presented by exclusionary zoning? First, as already mentioned, suburban politicians necessarily have an inherently skewed conception of the costs and benefits of exclusionary zoning. An elected official’s first priority is to her constituents, just as a Chief Executive Officer must place the interests of her stockholders first. In the case of the corporate CEO, this obligation is rooted in fiduciary duty; for the politician, it is a matter of self-preservation. Being reelected means being responsive to those responsible for putting you into office, not to the greater good outside the narrow confines of your elective jurisdiction. This is the nature of politics. Even if Mill’s utilitarian principle – the greatest good for the greatest number – would militate against a constituent-favoring decision, political pragmatism usually demands otherwise.

Additionally, as Henry A. Span explains, “those harmed by exclusionary zoning are diffuse, unorganized, and lacking in resources, while those benefited by it have greater resources and are represented by local governments under their control.” In other words, not only is there a motivational imbalance among local politicians, there is an overall imbalance in political power between residents of exclusionary jurisdictions who typically prefer to maintain their exclusive status quo, and would-be foes of exclusionary zoning. Those excluded by zoning are by definition political outsiders, lacking the constitutive benefits of those residing in the exclusive community. Fighting a political battle, particularly by those outside the battle lines, is a daunting challenge. Add to this the fact that those outsiders are likely to have a significant resource-deficit, and the prospects for success appear increasingly dim.

Highly regulated jurisdictions are much more likely to be occupied by politically influential, white, upper-income households. Those with an incentive to fight exclusionary policies predictably fall on the other end of the spectrum – they are more likely to be lower-income minorities and tend to be politically disempowered. The disadvantaged position of those harmed by exclusionary zoning is exacerbated by their diffusion. Would-be opponents of exclusionary zoning are not contained or united by the jurisdictional boundaries of offending municipalities; in fact, their

40 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
42 PENDALL ET AL., supra note 32, at 6.
only commonality is that they find themselves locked outside of these boundaries. They are less likely, in contrast with the residents who live within exclusive jurisdictions, to have the benefits of organization and proximity necessary for effectual collective political action. In sum, those who would attempt to work within the political system to affect change face the dual challenge of being both political outsiders and resource-poor.

Making matters worse, because much of the adverse impact of exclusionary zoning is cumulative, the tangible impact of a single jurisdiction’s zoning policies on the fortunes of the surrounding area and residents are often difficult to identify. Indeed, a successful political challenge of the exclusionary zoning laws in just one jurisdiction, while perhaps psychically rewarding for its opponents, would be unlikely to make a cognizable dent on the systemic effects of widespread exclusionary zoning. True amelioration of the damage done by exclusionary zoning practices requires constraints on zoning discretion that cross jurisdictional boundaries. One hard-fought political victory, in one hyper-exclusive jurisdiction, is hardly enough to remedy the extensive patchwork of exclusion. Simply put, the incentive to fight this battle politically is depressingly weak, and the likelihood that local politics will be an effective platform for remediying the ills of exclusionary zoning appears slim to none. Thus, even if opponents of exclusionary zoning can get beyond their outsider political status and disproportionate lack of resources, there is apparently very little to be gained by expending the high political, financial and other costs necessary to fight exclusionary zoning one jurisdiction at a time.

Political scientist Harold Lasswell famously defined politics as “who gets what, when, where and how.” In most respects, things have not changed since Lasswell first uttered these words – and they are particularly germane for those who profit from sprawl-like development. While the pressure on politicians to reverse exclusionary practices may be weak for the reasons discussed above, the same cannot be said for the political lobby intent on maintaining the zoning status quo. “Vast sums are spent supporting campaigns of local and state officials to ensure that current planning and zoning rules continue to favor sprawl land development.” Indeed, throughout the country, reports abound of anti-

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sprawl “smart growth” initiatives thwarted by pressure from powerful interests whose coffers are filled by sprawl development.45

In addition to the corporate element of the sprawl lobby, one cannot ignore the political power of suburban residents themselves. Where state governments attempt to wield their power to deter sprawl through restrictions on exclusionary zoning, influential residents of affluent suburbs have their own political weaponry. “Although they may not have otherwise organized at the state level due to their diffuseness, suburban homeowners have a pre-existing organization that can lobby on their behalf, namely, the local governments that they control.”46 Governments of localities that benefit most from exclusionary zoning are bound to exert formidable resistance against any state efforts to detract from their power, particularly because these very localities tend to be some of the most politically prominent. Indeed, a 1926 brief submitted to the Supreme Court foreshadowed the troubling implications of putting zoning in political hands. It asserted that the:

[w]orld has not reached a unanimous judgment about beauty, and there are few unlikelier places to look for stable judgments on such subjects than in the changing discretion of legislative bodies, moved this way and that by the conflict of commercial interests on the one hand, and the assorted opinions of individuals, moved by purely private concerns, on the other.47

The Constitution’s drafters positioned the Article III courts such that they would be relatively free of the vicissitudes of political passions and pressures – influences that invariably guide the behavior of other players on the political stage. The provision of an apolitical judiciary branch was of course fundamental to the genius of America’s founding fathers. Unlike local, state and federal legislators, the federal courts sit above the politics of exclusionary zoning. And the Supreme Court, at the pinnacle of the Article III hierarchy, is the ultimate arbiter of constitutional sanctity. The High Court sets the boundaries under which American politics must live. Where the balance of power between the states and the federal government is skewed, resulting in distortions of the ‘public good,’ the judiciary is equipped to re-calibrate that fragile equilibrium through constitutional interpretation. Where politics crosses the subtle yet inviolate boundaries of constitutional authority, only the courts are graced with the institutional posture to enforce the founders’ vision. Indeed, the notion that there are some areas where the government may

45 See id. (quoting newspaper reports from New Jersey, North Carolina, and Washington discussing the economic and political strength of sprawl lobbyist).
46 Span, supra note 41, at 24.
not constitutionally tread is firmly rooted in the Bill of Rights and the amendments that followed. Whether it be the right to keep the government from suppressing politically unpopular speech or the right not to have one’s home searched on a whim, the Constitution clearly sets limits on governmental behavior.

The Supreme Court is the only court in the nation that has the authority to determine, for all of America, just when the excesses of exclusionary zoning violate the letter and spirit of the United States Constitution. Yet for an institution with such profound power in this area, the Court’s role has received a surprising dearth of public attention. Perhaps this is due to a natural human tendency to focus on the foreground – the reality and politics of municipal zoning – while the background – the questionable constitutional jurisprudence that permits such zoning in the first place – recedes into the realm of the taken-for-granted. Nevertheless, it is simply impossible to understand the answer to the question “Why sprawl?” without first examining the actions of that organ of government that allowed it to be.

V. VILLAGE OF EUCLID V. AMBLER REALTY – THE BIRTH OF EUCLIDEAN ZONING

As we seek to explain the acres and acres of asphalt that now dominate the American landscape, one Supreme Court decision stands out. Rarely is it comprehended how radically different our public environment might be today had just two members of the United States Supreme Court in its 6-3 opinion, decided differently on the fateful day of November 22, 1926.

Controversy surrounded the legal legitimacy of rapidly proliferating, yet largely untested, local zoning ordinances in the early twentieth century. Prior to Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), lower courts had confronted the issue of zoning’s constitutionality, some upholding the view that a state’s police power was broad enough to impose significant restrictions on land use, others rejecting this view. There remained a high level of uncertainty regarding the constitutionality of comprehensive zoning statutes.48

The village of Euclid contained a mere five to ten thousand residents, yet was located immediately adjacent to the then rapidly growing city of Cleveland, Ohio. In 1926, unlike the early twenty-first century, the municipal tools used to resist unwanted development were in their infancy. Fearing industrial encroachment, Euclid enacted its first-ever comprehensive zoning code, covering its tidy twelve to fourteen

square miles, on November 13, 1922. The ordinance neatly divided the entire village into six “use districts.” As was typical at the time, Euclid’s zoned districts were cumulative. In other words, each successive zone could incorporate all of the uses allowed not only in its own district, but all those numerically below it. Present-day zoning ordinances take much from this Euclidian model, however, a larger number of zones are typically used. In contrast with the six zones in Euclid, today it is not uncommon to find twenty to twenty-five discreet use categories. And while the number of specified uses within each zone is fewer than in the early days of zoning, the allowance of special exceptions is quite common, typically granted by local zoning boards. Exclusive industrial and agricultural zoning is now preferred to cumulative zoning. Nevertheless, while modern zoning may be marked by a combination of both increased and reduced flexibility when compared with the particular formulation established in Euclid, Ohio in 1922, the general framework has remained the same.

The appellee in the Euclid case, Ambler Realty Company, owned a sixty-eight acre tract of land in the village of Euclid. Portions of the land fell on three zoning use categories, including the second, third and sixth most restrictive areas. The appellant claimed that the vacant tract of land had been held specifically for eventual development for industrial use, “for which it is especially adapted, being immediately in the path of progressive industrial development.” Indeed, Euclid was located just outside of a rapidly expanding industrial city and the appellant’s land rested along major railways and highways that industry had historically followed; had the village not constituted its own legal jurisdiction, it likely would have been subsumed into the dominant use in neighboring Cleveland. Limiting the use of much of the land to residential use rather than industrial use, the appellant contended, vastly reduced its market value. Moreover, at the time, it was far from clear that such an ordinance did not run afoul of the explicit property protections guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. In fact, this is precisely what a federal district court in Ohio concluded before the United States Supreme Court reversed its decision.

The Fifth Amendment of the United States Constitution states, “No person shall . . . be deprived of life, liberty, or property, without due
process of law; nor shall private property be taken for public use without just compensation.\textsuperscript{57} The Fourteenth Amendment likewise reads, “No State . . . shall deprive any person of life, liberty or property, without due process of law.”\textsuperscript{58} The crux of the issue was whether or not the significant reduction in market value imposed on the appellant by the zoning ordinance was justified by the state’s inherent constitutional “police power” and, if not, whether it constituted an unconstitutional deprivation of private property.

The appellant made a substantive due process claim. Substantive due process limits a state’s use of its police power where such power is in conflict with fundamental constitutional rights, here the right not to be deprived of one’s property under the Fourteenth Amendment. Substantive due process – whether addressing the right of bakers to contract freely,\textsuperscript{59} the right of women to have an abortion,\textsuperscript{60} or the right of homosexuals to engage in consensual intimate relations –\textsuperscript{61} invariably requires the Court to engage in a precarious balancing act. On one side is a local legislature’s constitutionally implied police power, on the other are the fundamental rights afforded by the Fourteenth Amendment. A state’s police power has generally been defined as including actions that maintain the health, safety and morals of its citizens – the so-called common good. Understandably, there have been a wide range of interpretations of just what powers fall under this potentially immense umbrella. Likewise, the task of determining what rights are to be considered “fundamental” has proved relentlessly controversial for the Court.\textsuperscript{62}

The police power provides persuasive justification where zoning ordinances seek to protect residents and pedestrians from the health hazards propagated by noxious industrial uses that pollute and injure the public environment. Early zoning measures such as the one in Euclid, Ohio were in part inspired by the hazardous conditions that became commonplace in crowded working-class urban neighborhoods in the wake of the industrial revolution. The District Court that first confronted Euclid, however, was concerned about the potential slippery slope of state police power. When the “seemingly absolute protection [of property under the Fourteenth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.”\textsuperscript{63}

\textsuperscript{57} U.S. CONST. amend. V.
\textsuperscript{58} U.S. CONST. amend XIV, § 1.
\textsuperscript{59} Lochner v. New York, 198 U.S. 45 (1905).
\textsuperscript{60} Roe v. Wade, 410 U.S. 113 (1973).
\textsuperscript{61} Lawrence v. Texas, 539 U.S. 558 (2003).
\textsuperscript{63} Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 312 (1924).
Furthermore, at what point does the police power become less about protecting citizens from tangible harm, and more about social exclusivity? In other words, what would prevent a municipality from cloaking discriminatory motivations in the veil of public health? For example, does the ordinance’s distinction between the most restrictive use district (allowing only for single-family homes) from the second and third most restrictive (extending permissible use to two-family dwellings and then apartment houses, hotels, churches and schools) truly reflect the village’s mandate to protect the health, safety and morals of its citizens? Or, in the alternative, might it merely reflect a particular aesthetic that happened to be in vogue at the time—that of strictly separating uses in an effort to distinguish one’s community from the “debased” mixed-use environments prevalent in the nation’s cities? Richard Epstein, the well known legal scholar and libertarian critic of zoning reasons that:

[i]t is not possible to quarrel with . . . disease prevention, nuisance control — that are said to motivate the zoning ordinance. But a list of ends does not respond to the overbreadth question . . . . There is no obvious need to segregate residential from commercial areas . . . [and] there is no obvious connection between the degree of separation and the degree of injury avoided.  

At what point, then, does the state’s implicit police power end and the founding fathers’ explicit protection of private property begin? Should the United States Constitution place any limits on a locality’s ability to impose its own notions of “rational land use?” These questions are strikingly pertinent today, as we begin to acknowledge the adverse impact of sprawl. In retrospect, the “rationality” of yesterday appears troublingly “irrational.”

In stark contrast to the District Court, the Supreme Court opted for a decidedly expansive view of the state’s police power. In reversing the District Court’s holding, the Supreme Court concluded that Euclid’s zoning “ordinance in its general scope and dominant features . . . is a valid exercise of authority.”65 The Court set the stage for its ruling by describing the vast changes that had occurred in society in the prior century. The Court explained, unlike the time when “urban life was comparatively simple,” increased density and complexity in America’s cities require “additional restrictions in respect of the use and occupation of private lands in urban communities.”66 It explicitly acknowledged that its holding might have come out differently had it occurred fifty to one-hundred years earlier. In other words, the Court ironically adopted what

65 Euclid, 272 U.S. at 397.
66 Id. at 386-87.
today might be termed a “living constitution” approach – a style of constitutional interpretation associated with the ostensible “liberal” wing of the Court – to arrive at a holding that promotes values decidedly associated with more conservative judicial perspectives, namely wealth promotion and preservation.

On its face, the *Euclid* decision does not give states and localities carte blanche to zone however they see fit. Despite the Court’s refusal to intervene in the zoning-related discretion of local legislators, in theory the Court rejects the notion that the judicial role in this area is irrelevant or inappropriate. The *Euclid* court seems to agree that it is the judiciary that is given the delicate task of determining precisely when states have stepped over the constitutional line. According to the Court, however, the line that “separates the legitimate from the illegitimate assumption of [police] power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.” The reality of this purportedly sensitive surgical process of judicial line-drawing, however, at least when applied to municipal zoning, turns out to be a mirage. Not only has the Court’s zoning jurisprudence subsequent to *Euclid* been widely permissive, the subtleties of the *Euclid* rationale itself belie the Court’s own assertion of judicial significance in the zoning arena.

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67 Id. at 387.
68 See Gorieb v. Fox, 274 U.S. 603 (1927) (upholding ordinance establishing building lines, and reserving authority in council to make exceptions); Zahn v. Bd. of Pub. Works of City of L.A., 274 U.S. 325 (1927) (holding that, where a zoning ordinance is not clearly arbitrary, a court will not substitute its judgment for judgment of municipal legislative body); Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding village zoning ordinance limiting, with certain exceptions, the occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons); James v. Valtierra, 402 U.S. 137 (1971) (upholding state constitutional provision which specified that no low-rent housing project should be developed, constructed or acquired in any manner by a state public body until the project had been approved by majority of those voting in a community election); Warth v. Seldin, 422 U.S. 490 (1975) (holding that not-for-profit corporation was without standing to challenge the constitutionality of town zoning practices which effectively excluded persons of low and moderate income from living in the town); Vill. of Arlington Heights v. Metro. Hous. Dev. Inc., 429 U.S. 252 (1977) (upholding zoning statute which barred the construction of a multi-family housing facility in the center of the neighborhood zoned for single-family dwellings); Agins v. City of Tiburon, 447 U.S. 255 (1980) (upholding a city’s open-space land zoning ordinances); City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003) (holding that subjecting a zoning ordinance to a city’s referendum process did not constitute arbitrary government conduct in violation of substantive due process).
The Euclid Court gave away the store when it established the following standard: “if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”69 This “fairly debatable” standard casts a wide net, particularly where the decision-makers, members of the judiciary, are themselves entrenched members of the middle and upper-middle classes – those who are the most-likely beneficiaries of exclusionary zoning. It is certainly reasonable to assume that the norms and lifestyles of judges and justices are likely to be consistent with the middle-class aesthetic zoning ordinances generally seek to preserve. Indeed, to this day, regulations serving to maintain middle-class, homogenous, quiet and “family-friendly” neighborhoods – even at the expense of other critical constitutional values – continue to be interpreted as “fairly debatable” uses of a state police power by middle-class judges across America.

The Court acknowledged, yet cavalierly dismissed, the prospect of overly-inclusive zoning regulations. It conceded the possibility that “not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate.”70 Yet, to the Court, this potential for error was not enough to cause the ordinance to be unconstitutional. It merely constituted “a reasonable margin to ensure effective enforcement.”71 Of course, with this reasoning embedded as a constitutional standard, it is hard to imagine any zoning ordinance that would not pass constitutional muster.

VI. EUCLID’S FOUR FLAWS

In light of the modern epidemic of sprawl, the Euclid decision might be said to have at least four significant flaws. In a 21st century mired in political concern over issues of global warming, environmental degradation, and depleted energy supplies, these flaws are as relevant and alarming as ever. They reflect a Supreme Court that was willing to balance fundamental constitutional protections with unsubstantiated and erroneous speculation about just what might positively influence the health, safety and welfare of a community. Much of the Court’s reasoning was based on tenuous and unsubstantiated justifications relied upon by state courts to uphold broad zoning powers. Unfortunately, while many of these rationales were either specious at the time, or are no longer applicable in modern America, as legal precedent the Euclid decision remains as vital as ever. And the likelihood of the current or future Supreme Court revisiting and revising the Euclid decision is quite small.

69 Euclid, 272 U.S. at 388.
70 Id.
71 Id.
First, the Court’s reasoning in *Euclid* is particularly problematic from the perch of constitutional theory. The majority rejected the property owner’s claim that industrial development reflected the rightful and natural use of his property. Because the suburb of Euclid abutted a major city, the company argued that such use emanated naturally from the City of Cleveland’s industrial growth and prosperity. The Court’s rationale for rejecting this claim is worthy of significant scrutiny. The Court’s rationale relied primarily upon the village’s ostensible political autonomy. Euclid, said the Court, “is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the State and Federal Constitutions.”\(^\text{72}\) According to the majority, the government of Euclid represents “a majority of its inhabitants … voicing their will.”\(^\text{73}\)

Of course, majority rule has never been the supreme principle of our constitutional framework. Indeed, a popular majority is frequently asked by our constitution to take a back seat in an effort to protect the interest of the minority from majority tyranny. It is the judiciary’s role to ensure that *even if* a majority of the population (here, the citizenry of Euclid) wishes to rationally advantage itself by shielding its status quo from the burdens borne by other segments of society – here, the pollution, noise and general unpleasantness that accompanies industrial activity – it must do so in a way that is consistent with the United States Constitution. In *Euclid* the Supreme Court absolved itself of its constitutional duty to scrutinize the actions of a privileged majority – a “majority,” that is, of a municipal micro-democracy.

The Court established a powerful precedent that a municipality such as Euclid, by virtue of its arbitrary jurisdictional boundaries, may have its cake and eat it too. It may partake of all of the benefits of its neighboring urban center, yet selectively reject the accompanying burdens. This is a principle that is all the more troubling, and impactful, in the modern era of ubiquitous municipal fragmentation. Citing the Supreme Court of Louisiana, the *Euclid* Court washed its hands of its responsibility to scrutinize political decisions for constitutional soundness.

It is not the province of the courts to take issue with the [city] council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot – not the court.\(^\text{74}\)


\(^{73}\) Id.

\(^{74}\) Id. at 393.
Unfortunately the citizens of Cleveland had no recourse at the voting booth. After *Euclid*, they were left with few viable avenues for challenging zoning laws in neighboring jurisdictions – laws that served to siphon wealthy and middle class citizens from their city. *Their* only option, as Ronald Reagan famously put it, was to vote with their feet. While public choice scholars such as Charles Tiebout and William Fischel might endorse such an idea,\(^75\) for those who cannot afford to flee the increasingly concentrated poverty of the city, Reagan’s ode to the democratic process hailed by the Court means very little. Granted, it is a difficult task for a court to draw the fine distinctions required to determine the point at which an otherwise autonomous political entity has crossed the constitutional line. However, the constitutional right to “life, liberty and property” would mean very little without a court willing to do this job.

Today, the results of this stilted calculus are all too clear. Older cities, such as Cleveland, live with the legacy of the *Euclid* decision every day, as they continue to bear a disproportionate share of burdens, while suburban jurisdictions utilize judicially blessed zoning ordinances to ensure that their majorities maintain an advantaged position. Granted, some suburbs are, and have always been, more privileged and exclusive than others. Indeed, as today’s dominant living arrangement, residents of suburbs are increasingly drawn from a wider range of socio-economic classes. Yet the suburbs – as relatively-small, autonomous residential jurisdictions independent from the central city – can harness their zoning power to limit growth according to the proclivities, preferences, and self-interest of their current, frequently homogenous, residents. It is much more difficult for a large heterogeneous city to reach a clear consensus outlining a single exclusionary path for growth.

City neighborhoods that might in many ways have had substantially similar conditions as those that prevailed in the Village of Euclid in 1926 – containing significant amounts of undeveloped land with a rural character – would not, like Euclid, easily be able to zone out undesirable and unwanted development. The political rules of the game are quite different when city neighborhoods seek to “maintain the character” of *their* community. Unlike the Village of Euclid, a discrete urban neighborhood that is part of a much larger city does not constitute a politically separable municipality. A majority of its inhabitants, as a small minority of the population of the city as a whole, is destined to be in a position of relative political weakness if it seeks to derive special benefits through zoning.

Unfortunately, the *Euclid* Court never addressed this troubling anomaly—the differing positions of suburban and urban neighborhoods. Yet, it is an issue that strikes at the very heart, not only of constitutional property rights, but of fundamental fairness. It is an oversight that contributes to the staggering level of inequality that exists to this day between large, older, pre-zoning cities and smaller, more homogenous suburban jurisdictions. Many large cities were simply too heterogeneous and too late to the zoning game to harness zoning’s power and achieve success in the competitive landscape of municipal gamesmanship. In contrast, majorities of citizens in suburban jurisdictions have for years taken advantage of an accommodating Supreme Court and utilized zoning ordinances to assist them in maintaining a relatively privileged status quo.

Indeed, the popularity of zoning laws, at the time of *Euclid*, has been widely attributed to the fact that they tend “to validate existing land use patterns by including them on the zoning map.” They do so even when pressures and market forces in a region would otherwise naturally lead to growth through increased density. For example, in California’s Silicon Valley, the explosive economic expansion resulting from the technology boom of the 1990’s occurred against a geographic backdrop of vast, previously developed 1960’s-era single-family-zoned neighborhoods. Rather than resulting in a rational increase in the area’s density, the boom helped establish one of the most notoriously unaffordable housing markets in the nation, a vast sprawl of residential neighborhoods into distant agricultural communities, and unprecedented commuting times.

The second major flaw of *Euclid* is the way the majority glossed over dubious assumptions about the constitutional validity of separated-use zoning schemes. These schemes not only seek, justifiably, to protect residential areas from the hazards of industrial use, but to unnecessarily segregate a full spectrum of uses from one another. At first, the Court did appear to express some reservations about zoning ordinances that strictly separate uses. However it ultimately applied little, if any, constitutional scrutiny to the supposedly “serious question. . . over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments.” Acknowledging that it was a question on which “this court has not thus far spoken,” the majority looked primarily to numerous and disparate state court decisions on the question of separated-use zoning. The Supreme Court determined that “those [state courts] which broadly sustain the power greatly outnumber those which deny it altogether or

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76 JUERGENSMEYER, supra note 48, at 23.  
77 LEVINE, supra note 12, at 173-74.  
78 *Euclid*, 272 U.S. at 395.  
79 *Id.* at 390.  
80 *Id.*
In other words, America’s highest court in the land assessed the constitutional merits of a practice with profound implications for the entire country, through a crude tallying of state court holdings and a subsequent recitation of their flawed arguments.

The Court also gave credence to unsubstantiated, and now outdated, claims about the purported safety benefits of separated-use zoning.82 Many of the justifications for separating businesses from residential areas that perhaps appeared persuasive in 1926 are flatly untenable today. Improvements in sanitation and technology make the Court’s assumption that “any business establishment is likely to be a genuine nuisance in a neighborhood of residences”83 thoroughly anachronistic. It is no longer necessarily the case that “places of business are noisy . . . apt to be disturbing at night . . . malodorous . . . unsightly [and] . . . apt to breed rats, mice, roaches, flies [or] ants.”84

It would be almost forty years until Jane Jacobs would point out the folly of assuming that separating residential uses from business results in a safer residential district.85 Jacobs proposes that “eyes on the street,” from citizens on the street throughout the day utilizing a variety of uses, produce a safe public environment.86 This is not possible without significant foot traffic. Where businesses are strictly separated from residences and vehicles are necessary for even the smallest of daily errands, pedestrians who accomplish daily tasks on foot no longer exist.

This is precisely why concentrated housing projects that attempted to deal with an impoverished urban population by effectively suburbanizing the city were such an abysmal failure. With the suburban model in mind, utopian planners sought to produce safety and tranquility by extracting urban residents from their mixed-use landscape and transplanting them into green residential towers in a park-like setting – isolated from all of the problems assumed to be attributable to the chaotic urban street.87 However, as Jacobs observed, urban housing projects became “worse centers of delinquency, vandalism, and general social hopelessness than the slums they were supposed to replace.”88 Unfortunately, Jacobs’ wisdom did not manifest into political wisdom until the late twentieth century, when cities across the country finally began to methodically

81 Id.
82 Id. at 393.
83 Id. at 393.
84 Id.
86 Id. at 35.
87 Id. at 270.
88 Id. at 4.
deconstruct the towering housing projects that for decades marked their city skylines with potent symbols of urban decay and blight.\textsuperscript{89}

The \textit{Euclid} Court quoted a holding by the Supreme Court of Louisiana which reasoned that “[a] place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where otherwise, a stranger would be under a ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection.”\textsuperscript{90} Of course, under Jacobs’ model, without these “loiterers and idlers” – and this is certainly a one-sided pejorative characterization – there would be no eyes on the street to observe the “suspicious stranger.” While the Supreme Court of 1926 cannot be faulted for failing to predict urban planning insights that would take another forty years to realize, the \textit{Euclid} Court can be criticized for allowing constitutional principles to be diluted on the basis of unsupported assumptions about land use planning that happened to be fashionable at the time.

The Court went on to explain that “the segregation of residential, business, and industrial buildings . . . greatly tend to prevent street accidents, especially to children.”\textsuperscript{91} What the court likely did not foresee was that as a result of increasingly diffuse homes separated by large plots of land – themselves geographically distant from retail – the usefulness of generously scaled sidewalks would greatly diminish. Today, the result is that fewer and fewer subdivisions even bother to include sidewalks, and those that do tend to be rather meager. Thus, ironically, in many ostensibly family-friendly suburban communities, children who seek to move beyond their own family’s cloistered lawn must, as social critic James Kunstler not-so-indelicately explains, “walk or ride their bikes in the same space [with] 4000 pound steel projectiles traveling in excess of twenty-five miles per hour.”\textsuperscript{92} As separated land use has made driving all but essential, the response by civil engineers has been to design roads that conform to the needs of cars, not of pedestrians. The generous width of suburban roads is intended to make driving safer – yet by standardizing a broad road width, cars can comfortably travel much faster, making life for the suburban child in a sidewalk-less subdivision treacherous.\textsuperscript{93}

Third, the High Court accepted spurious claims regarding the cost and traffic advantages of separated use development. It argued that the

\textsuperscript{90} \textit{Euclid}, 272 U.S. at 393.
\textsuperscript{91} Id. at 394.
\textsuperscript{92} KUNSTLER, supra note 1, at 116.
\textsuperscript{93} See id. at 115.
zoned separation of residential neighborhoods from commercial ones may result in a reduced expense for street paving. Once again, the Court’s failure in prescience is disastrous. Today, it is painfully clear that since we began segregating residential neighborhoods from each other and from the businesses residents depend upon, we have vastly increased the percentage of gross national product (“GNP”) spent on road construction and maintenance. Government subsidies for highways and parking today equal approximately eight to ten percent of American GNP. If one were to factor in soft costs such as emergency medical treatment and pollution cleanup attributable to these roads, the cost of the entire infrastructure necessary for zoned segregation would equal a nine dollar per-gallon fuel tax, or five thousand dollars per car, per year.

Why is sprawl so expensive? In the interest of maintaining strictly separated uses, suburban road systems utilize what engineers call a “sparse hierarchy.” And although this design may be appealing from a theoretical perspective, it essentially guarantees that more roads will be needed and that traffic will be increasingly congested. Fundamental to the sparse hierarchy model is the principle that each shopping mall, fast-food restaurant, apartment complex and cul-de-sac-plentiful subdivision should only be entered from one of a limited number of high-volume external collector roads. Travel from one component to another, regardless of how short the trip, requires use of a collector road. Unlike a traditional street grid, a sparse hierarchy typically provides only one route from point A to point B—all in an effort to separate everything from everything else. This single-route sparse hierarchy system results in the ubiquitous traffic tie-ups along collector roads that are now practically synonymous with the concept of sprawl, while at the same time relegating the vast majority of suburban streets to relative uselessness and isolation.

Unlike the sprawl pattern, in a gridded street network, expenditures on roads enhance the ability of all members of the driving public to get from one place to another regardless of where they live by providing multiple routes to the same destination. Andres Duany provides this striking illustration: “The efficiency of the traditional grid explains why Charleston, South Carolina, at 2,500 acres, handles an annual tourist load

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94 Euclid, 272 U.S. at 393.
96 See id.
98 See id.
99 See id.
of 5.5 million people with little congestion, while Hilton Head Island, ten times larger, experiences severe backups at 1.5 million visitors. Hilton Head, for years the suburban planners’ exemplar, focused all its traffic on a single collector road.\(^{100}\)

The now-standardized design of sprawl, with its almost religious rejection of gridded streets, requires a suburbanite seeking to run the simplest of errands to motor along a circuitous path of taxpayer funded pavement to reach even the most proximate of destinations. A resident living on a suburban cul-de-sac might reside a mere five hundred yards from the closest strip mall, yet be required to drive several miles to reach it. Walking along a narrow shoulder of a high-speed collector road is simply not an option unless the intrepid resident happens to be oblivious (or attracted) to the safety risks involved.

In addition to the inconvenience and inefficiency imposed on the individual, it is now a well-established mathematical principle of traffic generation that building a highway for the purpose of easing traffic on another highly congested road ultimately generates an aggregate increase in traffic on all roads.\(^{101}\) The same is true when it comes to adding additional lanes or “double-decking” pre-existing highways. Numerous studies have shown that increasing traffic capacity not only fails, in the long term, to mitigate high volumes of traffic; it actually causes people to drive a lot more.\(^{102}\) This phenomenon, commonly known as “induced traffic,” was strikingly illustrated by a University of California at Berkeley study. In just four years following every ten percent increase in road capacity, traffic increases an average of nine percent.\(^{103}\) The amount of traffic on any road represents an equilibrium – traffic volume tends to top out at a tipping point at which the frustration or reluctance to deal with heavy traffic surpasses the desire to drive (or the desire to live in a far-flung suburb that requires a long-distance commute). In other words, spending on extensive and ever-widening high-speed roadways only creates more demand for the same. It is a spiral without end, enabled by a Supreme Court decision based on profoundly faulty logic.

Furthermore, as these sprawling patterns progress, the costs of road building and maintenance invariably benefit a smaller and smaller percentage of the population. Unless one is a resident or visitor of a resident of a particular subdivision, driving on suburban roads will almost never assist one at arriving at a desired destination. By design, the curving streets found in suburban subdivisions know no north or south, east or west—perhaps as a way of deterring “outsiders” from venturing in. Regardless of the motivation, the result is clear: increased traffic,

\(^{100}\) *Id.* at 24.

\(^{101}\) KUNSTLER, supra note 1, at 99.

\(^{102}\) See DUANY ET AL., supra note 97, at 88.

\(^{103}\) See id. at 89.
increased tax dollars expended, and decreasingly useful roads. The *Euclid* Court could thus not have been more wrong when it concluded that “the zoning of a city into residence districts and commercial districts is a matter of economy in street paving.”  

Sprawl has created a system of roads that inverts a prototypical policy goal – it provides the largest benefit to the fewest people, at the greatest expense to all. By almost any definition this constitutes an irrational and inefficient allocation of taxpayer dollars.

The fourth flaw of the *Euclid* decision is that many of the true motivations that spurred the proliferation of zoning regulations went curiously unacknowledged by the Court. It is now well known that one of the most important goals of zoning restrictions was (and is) to stabilize, if not bolster, real estate values. While maximization of one’s wealth is an understandable and respectable goal, the claim that a government may constitutionally utilize its police powers to further the economic interests of a narrow class of citizens while sacrificing other constitutional values is a dubious proposition. The Court does not forthrightly acknowledge this aspect of its constitutional balancing test. Zoning achieves the goal of wealth protection for the middle and upper classes – albeit, occasionally accompanied by justifiable concerns for public health and safety – through an arguably severe intrusion into constitutional property rights enshrined in the Fifth and Fourteenth Amendments. Furthermore, by virtually guaranteeing an American landscape marked by social exclusivity and segregation, zoning laws give rise to Fourteenth Amendment equal protection claims.

The provision separating single-family dwellings from apartment houses in Euclid’s zoning code had nothing to do with segregating residences from unhealthy industrial uses and clearly served wealth-promoting, not health-related ends. Homeowner concerns for their own real estate values quite naturally lead to a preference for high-income, high-status neighbors – and apartment buildings are frequently associated with lower socio-economic classes. The prospect of lower income residents in one’s community breeds fear of sinking property values and leads to a natural desire to exclude. Had the Court honestly confronted the full range of motivations inspiring zoning laws, its constitutional balancing may have garnered a different result.

This is not to say that the *Euclid* Court ignores the question of zoned segregation of apartment buildings from single homes. It simply (and unpersuasively) re-characterizes the practice as a quasi-health related one in what is perhaps one of the more infamous and transparently classist lines in Supreme Court history. Avoiding direct

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104 *Euclid*, 272 U.S. at 393.
105 KUNSTLER, supra note 1, at 55.
acknowledgement of the people who reside within buildings, the Court characterizes apartments as “mere parasite[s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.” Of course, apartments themselves are residential, but those who tended to fill them were simply more likely to be of a “less-desirable” pedigree. Personifying a building itself as a nuisance may have been a more politically palatable legal argument, even in 1926, than explicitly justifying social exclusion. Unfortunately, this literary device was utilized to justify and vaguely-mask the underlying classism and racism that rested just below the surface of the opinion.

As Michael Allan Wolf explains: a “sentiment shared by many active in the Progressive movement that was underlying zoning and that contributed to its approval and popularity in the conservative climate of the 1920s [was] a decidedly negative view of the immigrants, particularly southern and eastern Europeans, who from the 1880s to the mid-1920s poured into America’s cities in ‘alarming’ numbers.” The newly-arrived immigrants and workers who typically filled the excluded apartment buildings of the day were no-less deserving of “open spaces” and “attractive surroundings” than the middle-class residents the zoning ordinances were designed to protect. The Court offers absolutely no evidence that apartment buildings and beautiful, open residential settings are somehow mutually exclusive. The unstated truth is that it is a particular type of person, not parasitic buildings, that zoning ordinances often seek to exclude. It is certainly arguable that intrusions into property rights of this magnitude (and turpitude) should not be tolerable under America’s constitutional framework.

Let us fast–forward more than eighty years from the Euclid decision. Today, dense urban neighborhoods that mix single-family townhouses with multi-unit apartment buildings such as Georgetown, in Washington D.C., Boston’s Beacon Hill and Society Hill in Philadelphia would be illegal if built in the vast majority of American residential jurisdictions. However, their desirability is unmistakable when judged by their impressive real estate values – generally much higher than their exclusionarily-zoned suburban brethren. Unfortunately, relatively few of these traditional, pre-zoning neighborhoods remain healthy and intact. As New-Urbanist architect Andes Duany points out, the enduring charm of a neighborhood such as Georgetown can be explicitly attributed, among other things, to its diversity of housing styles:

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106 **Euclid**, 272 U.S. at 394.
108 See KUNSTLER, supra note 1, 126.
For over a century, these blocks have housed people of widely divergent incomes. There are rental apartment buildings that house schoolteachers, clerks, and recent college graduates. There are town homes that house professionals, young families and retirees, some of whom may rent out basement apartments to secretaries, day care workers, and students. There are also a number of mansions that are home to some of the great fortunes of the Mid-Atlantic. These have carriage houses and garage apartments on their property that may house artists, architects, and other members of the intentionally poor. In this small part of Georgetown, a large part of American society is represented. . . Not only is a society healthier when its diverse members are in daily contact with one another, it is also more convenient.109

Many critics of sprawl have pointed to the adverse repercussions the strict economic segregation of housing has had on American society. Because suburban municipal jurisdictions must compete with each other to maintain their desirability and tax base – by attracting and holding onto wealthier residents – they have an all-too-apparent incentive to establish zoning regulations that exclude those of lesser means. Each municipality, and each of the various zoned districts of which it is composed, becomes its own cloistered socio-economic ‘pod.’ Of course, a vital democratic civil society, particularly one as pluralistic as our own, is dependent upon some degree of social interaction across these boundaries.

VII. CONCLUSION

Determining or enumerating with precision all of the causes of urban sprawl would be an impossible task. I do not seek to do so here. What is clear, however, is that “the direct result of the Court’s holding in Euclid v. Ambler was the continued, rapid proliferation of zoning ordinances throughout the United States.”110 In the vast majority of municipalities in America, zoning ordinances set in stone – in effect normalizing through legal mandates – some of the most pernicious patterns of suburban development. It has now been persuasively demonstrated that zoning laws artificially distort the real estate market – resulting in unmet demand for more densely populated neighborhoods.111 In other words, in the absence of zoning laws, market forces would likely produce a richer mix of residential densities. In 1926 the United States Supreme Court had the opportunity to stop these increasingly popular laws in their

109 DUANY, ET AL., supra note 97, at 46-47.
110 WOLF, supra note 107, at 30-31.
111 LENVINE, supra note 12.
tracks – on the firm footing of dubious constitutionality. Instead the Euclid Court chose to blur the distinction between justifiable health and safety related incursions into constitutional property rights and much more questionable police power rationales for mandating exclusionary residential housing patterns.

Today, states and municipalities continue to establish zoning ordinances without even a moment’s thought that their actions could be, or could have been interpreted to be, constitutionally suspect.\(^{112}\) Of course, the point here is not to criticize the Court for failing to accomplish the impossible – to predict how the world would look, to foresee what research would reveal nearly a century after its decision, or even to detect all of the unstated goals of social exclusivity that exist between the lines of most zoning codes. What is perhaps most troubling about Euclid’s legacy is that the Supreme Court’s zoning jurisprudence in the eighty-plus years following the decision only fortified the foundation laid by Euclid. The Court has had many opportunities to correct the increasingly-apparent flaws in the Euclid precedent, yet, it has largely acted only to reaffirm, if not bolster, the decision’s impact.\(^{113}\)

\(^{112}\) Increased scrutiny has been applied by the Court in recent decades to restrictions that affect so-called regulatory takings in cases such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). However, the Court has established such a high legal threshold that such challenges are only successful on the very margins. Thus, this line of cases has not likely resulted in any significant shift in the thinking of municipal authorities whose default assumption is that zoning is constitutional.

\(^{113}\) See note 66.