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LOTTING LARGE: THE PHENOMENON OF MINIMUM LOT SIZE LAWS

Paul Boudreaux

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LOTTING LARGE: THE PHENOMENON OF MINIMUM LOT SIZE LAWS

*Paul Boudreaux**

ABSTRACT

A dominant feature of American metropolitan areas is large lot zoning—the policy through which only house lots of a minimum size are permitted. This practice of “lotting large” contributes greatly to the sprawling nature of American suburbs. By restraining the supply of housing, large lot zoning laws please existing suburban homeowners. But they harm all other segments of the American populace, including the million new households who seek a home in the United States each year. This article explains how courts have been unwilling or unable to impose any meaningful restraints on local governments. It develops a simple economic model that shows that the constitutional law of regulatory takings provides an impetus for localities to choose large lot zoning over other methods of controlling housing density. Using these lessons, the article charts a path toward reform, through which local governments are encouraged to curtail their reliance on the outmoded practice of lotting large.

I. INTRODUCTION

Which legal policy has the greatest impact on how we physically construct our communities? The answer may well be the land use policy that requires that house lots be a certain minimum size: large lot zoning. The practice of “lotting large” is responsible, to an extent, for the creation of the typical sprawling American suburb, an auto-dependent culture, and housing prices beyond the reach of many moderate-income households. Remarkably, however, the phenomenon of large lot zoning, to which courts have almost uniformly deferred, has received little scrutiny in the legal literature.

This article seeks to correct the omission and offer a path for reform. It sets forth a simple economic model by which the widespread popularity of large lot zoning is explained by a community’s desires to restrain population density, in a manner that is defensible under the constitutional law of regulatory takings. The United States, which in the twenty-first century adds a million new households each year, can no longer afford to bow to the parochial wishes of existing homeowners for large lot zoning. The practice both restrains the free market from building new housing and raises the costs of all categories of homes. The only effective legal solution is for state governments to restrain local governments from lotting large, while still protecting them from property rights challenges.

This article proceeds in the following manner. Part II exposes the widespread phenomenon of large lot zoning, and endeavors to explain why such constraints are inefficient and deleterious policy choices. Part III discusses the deferential judicial

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review of lotting large, while Part IV sets forth a simple economic model of local preferences for large lot zoning. Part V charts a path toward legal reform, through which state law might compel local governments to eschew large lot zoning in certain areas, while moderating local political objections.

II. THE PHENOMENON: MANDATING LARGE LOTS FOR SHRINKING AMERICAN HOUSEHOLDS

Large lot zoning laws are a ubiquitous phenomenon of the American suburban scene. This is an ironic development, considering the nation's changing demographics and social geography, in which the average household size is shrinking and the amenities desired by the large families in the 20th century now longer hold sway.

A. American Exceptionalism

American metropolitan areas are constructed differently from those in other nations. American suburbs are more sprawling—meaning fewer houses in a given area. Even compared to the affluent nations of Western Europe, in which automobiles are as popular as they are in the United States, American suburbs are less densely populated.¹ American suburbs typically contain large suburban lots, especially those that are miles from the central city. As a result, American metropolitan areas are less dense than those in other wealthy nations.² Measured by “footprint”—that is, the extent in square miles—eight of the nine largest urban areas in the world are in the United States.³ The distinction is so stark that the world's metropolitan areas might be divided into two almost distinct categories:

1. The prevalence of large-lot zoning, which requires that population be spread out, discourages use of public transportation, which in turn leads to its lower availability, thus creating a vicious circle. Among affluent nations, the number of motor vehicles per person range from 500 to 800 vehicles per 1000 persons. See World Bank, *Motor Vehicles (Per 1,000 people)* (2010), <http://data.worldbank.org/indicator/IS.VEH.NVEH.P3>.

2. The average density of U.S. urban areas is approximately 3,100 persons per square mile, by far the smallest in the world. In comparison, the European Union nations as a whole is approximated at 7,300 persons per square mile. The data are drawn from Demographia, *Demographia World Urban Areas* 133 (11th ed. 2014), <http://www.demographia.com/db-worldua.pdf>. This report attempted to calculate both population and urban size of “continuously built up land mass of urban development.” This assessment yields smaller areas than other calculations of metropolitan areas, which often are determined by political boundaries. *Id.* at 2. The densities for big urban areas (with more than 2 million persons) range in the United States from a high of about 6,300 persons per square mile in the Los Angeles area (which is dense because of its large population and geographic constraints) to only 2,200 for Boston (which has sprawling suburbs, despite its dense central city) to 1,800 in notoriously sprawling Atlanta. By contrast, the large European urban areas are significantly denser, such as London (15,100 per persons per square mile), Paris (10,000), and Milan (7,200). The world's densest urban areas are in developing nations, with the highest density being Dhaka, Bangladesh, with 114,000 persons per square mile. The world's least dense urban area is Knoxville, Tenn., with only 1,300 persons per square mile. *Id.* at 16-17.

3. *Id.* at 94. The non-American exception is Tokyo, which is by far the most populous urban area in the world. *Id.* The United States holds only three of the world's fifty most populous areas: New York, Los Angeles, and Chicago. *Id.* at 16-17.

sprawling American metros and more compact metros in other nations.⁴

A number of factors contribute to this American exceptionalism. First, the United States has been, and remains, one of the wealthiest nations in the world.⁵ Wealth tends to correlate with owning a home, with a larger home lot, and an automobile, all of which encourage a suburbanized, spread-out metro population.⁶ Second, American social policy has long been to foster homeownership, through steps such as the mortgage interest tax deduction⁷ and government-sponsored corporations such as Fannie Mae and Freddie Mac, which stimulate home lending.⁸ Third, the United States has spent lavishly on roads and suburban infrastructure, which allows metropolitan development to expand.⁹ Fourth, the United States recognizes a constitutional right of a landowner to use his or her land profitably, thus leading to suburban construction even in locations far from the central city.¹⁰ Fifth and relatedly, the United States tends to eschew rules, such as Britain's "greenbelts," that legally restrain development within metropolitan borders.¹¹

But large lot zoning laws also contribute to the sprawling American suburban

4. Of the 922 metro areas in the world with more than 500,000 people, the great majority of the least-dense metro areas are in the United States. *Id.* at 16-17.

5. According to one prominent study, throughout the 20th century the United States had the highest gross domestic product per capita of any large country in the world. *See Growth of World Population, GDP and GDP Per Capita before 1820*, app. B tbl. B-21 (1998), http://www.ggdcc.net/maddison/other_books/appendix_B.pdf.

6. *See generally, A Suburban World*, THE ECONOMIST, Dec. 6, 2014, available at <http://www.economist.com/news/leaders/21635486-emerging-world-becoming-suburban-its-leaders-should-welcome-avoid-wests> (discussing the role of wealth in encouraging suburban development).

7. 16 U.S.C. § 163(h)(3) (2012); *see also* Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347 (2000) (discussing the adverse incentives created by the deduction).

8. John Griffith, 7 Things You Need to Know About Fannie Mae and Freddie Mac, CENTER FOR AMERICAN PROGRESS (Sept. 6, 2012), <https://cdn.americanprogress.org/wpcontent/uploads/2012/09/GriffithFannieFreddieBrief.pdf> (assessing a variety of policy issues associated with the mortgage agencies).

9. Joseph Henchman, *Gasoline Taxes and User Fees Pay for Only Half of State & Local Road Spending*, THE TAX FOUNDATION (2014), <http://taxfoundation.org/article/gasoline-taxes-and-user-fees-pay-only-half-state-local-road-spending> (survey concluding that about half of road spending comes from user fees and another half from government expenditures).

10. *See* U.S. CONST. amend. V (the right against uncompensated "taking" of private property); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007-09 (1992) (government must compensate a landowner when a regulation has removed "all economically beneficial uses" of land); *see also* discussion at Part IV, *infra*.

11. These restraints, around cities such as London, Oxford, and Cambridge, make it difficult to build suburban developments. Rowan Moore, *Is It Time to Rethink Britain's Green Belt?*, THE GUARDIAN, Oct. 19, 2014, <http://www.theguardian.com/politics/2014/oct/19/is-it-time-to-rethink-the-green-belt>. They are a major reason that British housing is among the most expensive in the world. Paul Cheshire, *Why House Prices Are So Expensive in the UK*, THE GUARDIAN, May 12, 2014, <http://www.theguardian.com/housing-network/2014/may/12/why-house-prices-so-expensive-uk>.

The only American city that follows a similar path is Portland, Oregon, whose three-county "urban growth boundary" has been assessed with mixed conclusions. For a favorable view, *see* Wayne Senville, *Urban Growth Boundaries*, PLANNERSWEB (August 12, 2013), <http://plannersweb.com/2013/08/urban-growth-boundaries>. For a critical view, asserting that the greenbelt simply pushes development to distant suburbs outside the control of the Portland Metro authority, *see Portland: Urban Growth Boundary Keeps Out Growth*, DEMOGRAPHIA, <http://www.demographia.com/db-porugbmigr.pdf> (last visited Sept. 2, 2015).

landscape. By requiring that house lots be a minimum size, these laws necessarily restrain the number of housing units (houses, apartments, or mobile homes) in a given area.¹² Consider an area of 100 acres. With small house lots of a quarter-acre each, this area might hold up to 400 houses. With apartment buildings, the number could be even higher. But with a large-lot zoning law that commands that lots be a minimum of two acres, the 100 acres may hold, by law, no more than 50 housing units.

Research has failed to reveal any national survey of the total extent of large-lot zoning acreage in the United States. This lack of information is due, in large part, to the fact that zoning in the United States remains a decidedly local matter.¹³ But an area-by-area study undertaken for this article shows an unvarying pattern. From big metro areas, such as New York and Los Angeles, to small ones, such as Knoxville and Boise, large lot zoning laws restrain density—especially in large stretches of affluent suburban counties.

The table below seeks to show the ubiquity of lotting large. It includes examples of large-lot zoning in the 15 largest metro areas in the nation. In each instance, the example chosen was in a “popular” suburban region—that is, an affluent area in which demand for housing is relatively strong and housing prices relatively high.¹⁴ Each suburban area revealed the practice of large lot zoning.¹⁵

12. A law that imposes a minimum size of X acres per lot over a space of A acres restricts the number of housing units to A/X. Without such a law, there is no limit on the number of housing units within A.

13. Zoning laws in the United States are nearly almost always created by local governments. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION* LAW 16-27, 43-53 (2d. ed. 2007) (discussing the development of zoning as a matter of local government regulation). Neither the federal nor state governments compile data concerning types of zoning. The local control of zoning is one reason that many scholars and commentators tend to ignore it – “merely” local laws might not seem as significant as federal or state laws. Nor are local governments required to publish their laws, codes, and ordinances in any uniform method or format, which complicates a national survey. Moreover, for large counties with large populations, publication of a zoning map is difficult to render in anything other than a large chart, because of the existence of hundreds of separates zones. Online, one must search for a specific location in order to ascertain the applicable zoning.

14. The jurisdictions were chosen by the author through personal knowledge of the various American metropolitan areas.

15. This even includes the Houston metro area, which is famously unique for the fact that both the central city and the surrounding Harris County do not hold traditional zoning laws. See John Mixon, *Four Land Use Vignettes From Unzoned Houston*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 159 (2010) (discussing how land use works in Houston, without a comprehensive zoning law). But neighboring Fort Bend County, which is rapidly growing and includes many of the region’s most affluent suburbs, does allow zoning; the chart gives data for the wealthy suburb of Sugar Land, which imposes extensive large-lot zoning. See sources in table 1.

Table 1. Examples of Large Lot Zoning in Suburbs in the Nation's 15 Largest Metro Areas.

Metro Area	Zoning Jurisdiction	Large Lot Zoning Example
New York	Town of Cortlandt, N.Y.	R-80: 80,000 sq. ft. minimum ¹⁶
Los Angeles	Orange County, Cal.	E1 "Estates" District: 1 acre minimum ¹⁷
Chicago	Du Page County, Ill.	R-1: 100,000 sq. ft. minimum ¹⁸
Dallas	Denton, Tex.	RC: 2 acre minimum ¹⁹
Houston	Sugar Land, Tex.	R-1E: 1.5 acre minimum ²⁰
Washington, D.C.	Fairfax County, Va.	3-P00 R-P: 10 acre minimum ²¹
Boston	Norfolk Town, Mass.	R-3: 55,000 sq. ft. minimum ²²
San Francisco	Marin County, Cal.	R-1: 7,500 sq. ft. minimum ²³

16. CORTLANDT, N.Y., ZONING REGS. §§ 307-17 (2015), <http://ecode360.com/attachment/CO0244/CO0244-307c%20Table%20of%20Dimensional%20Regs.pdf> (map: <http://www.townofcortlandt.com/documents/zoning%20map/zoning041808-100.pdf>).

17. ORANGE CNTY., CA., ZONING CODE § 7-9-65.8 (2005), http://www.lardnerklein.com/jthg_report/jthg_sign%20ordinances/OrangeSec.%207-9-144.2_Permitted_signs.pdf.

18. DU PAGE CNTY., ILL., ZONING ORDINANCE § 37-701.3 (2015), https://www.municode.com/library/il/dupage_county/codes/code_of_ordinances?nodeId=CH37DUPACOOOR_ARTVIIREDI_PT2DIRE_37-701.3LORESIWIWEDI.

19. DENTON, TEX., DEV. ORDINANCE § 35.2.2 (2015), https://www.municode.com/library/tx/denton/codes/development_ordinances (map: <http://maps.cityofdenton.com/publicmaps/> (Select "map" > "map contents" > "zoning"))).

20. SUGAR LAND, TEX. LAND DEV. CODE § 2-65 (2015), https://www.municode.com/library/tx/sugar_land/codes/land_development_code?nodeId=SUHITA_CH2ZORE_ARTIIZODILAUS_PT2REESDI_S2-65DIRE (map: http://interactivemaps.sugarlandtx.gov/zoningdistricts/#map/e_-10653100,3446680,-10640049,3452154,102100).

21. FAIRFAX CNTY. ZONING ORD. PT. P (2015), <http://www.fairfaxcounty.gov/dpz/zoningordinance/articles/art03.pdf> (map: <http://www.fairfaxcounty.gov/dpz/comprehensiveplan/compplanmap20131107.pdf>).

22. *Master Plan Town of Norfolk*, TOWN OF NORFOLK MASSACHUSETTS, pg. 15, (2007), http://www.virtualnorfolk.org/public_documents/norfolkma_planning/masterplan11-15-07.pdf (map: http://www.virtualnorfolk.org/public_documents/norfolkma_planning/2014_Norfolk_Zoning_Map.pdf).

23. MARIN CNTY., CAL., DEV. CODE § 22.02.020, at I-10 (2015), http://www.marincounty.org/~media/files/departments/cd/planning/currentplanning/publications/marin-county-development-code/devcode_2013.pdf.

Phoenix	Maricopa County, Ariz.	R1-35: 35,000 sq. ft. minimum ²⁴
Seattle	King County, Wash.	RA-2.5: 1.875 acre minimum ²⁵
Riverside/San Bernardino	Riverside County, Cal.	R-1: 7,200 sq. ft. ²⁶
Miami/Ft. Lauderdale	Miami-Dade County, Fla.	EU-1: 2.5 acres ²⁷
Detroit	Macomb County, Mich.	R-S-1: 30,000 sq. ft. minimum ²⁸
Philadelphia	Buckingham Township, Pa.	R-1: 1.8 acre minimum ²⁹

From the ubiquity of the phenomenon, one might infer that prohibitions against small lots are an inherent part of land use zoning. But this is not the case. In the landmark case of 1926 that signaled a green light for zoning laws, *Village of Euclid v. Ambler Realty Co.*,³⁰ the suburb of Euclid, Ohio imposed minimum lot sizes, the largest of which was only 5,000 square feet (less than 71 feet on each side).³¹ But the lot requirements were not the focus of the constitutional inquiry.³² It is true that the Court presciently considered—and approved—the practice of what some call today “snob zoning”—that is, the favoring of zoning for wealthy homeowners and the exclusion of low-cost housing.³³ Reasoning that a “nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of

24. MARICOPA CNTY., CAL., ZONING ORDINANCE 1 (2014), http://www.maricopa.gov/planning/resources/ordinances/pdf/reform_ordinance/zoning%20ordinance.pdf (map: <http://gis.rdsa.maricopa.gov/plannet/>).

25. KING CNTY., WASH., ZONING CODE § 21A.12.030 Densities and dimensions - residential and rural zones (2015), http://www.kingcounty.gov/council/legislation/kc_code/24_30_Title_21A.aspx.

26. *Article II – Land Use Districts*, CITY OF SAN BERNARDINO, CALIFORNIA, 11-2 (2015), <http://planning.rctlma.org/Portals/0/zoning/ordnance/Ord.%20348.4791%20clean%20version.pdf>.

27. MIAMI-DADE CNTY., FLA., ZONING DIST. ART. XXII (2015), https://library.municode.com/HTML/10620/level2/PTIICOOR_CH33ZO.html#TOPTITLE.

28. MACOMB CNTY., MICH. ZONING ORD. § 10.0504. (2015), [https://www.municode.com/library/mi/macomb_township_\(macomb_co.\)/codes/zoning?nodeId=ZONING_ORDINANCE_ARTVR EOMISUDIS_S10.0504SILI](https://www.municode.com/library/mi/macomb_township_(macomb_co.)/codes/zoning?nodeId=ZONING_ORDINANCE_ARTVR EOMISUDIS_S10.0504SILI) (map: <http://www.macombcountymi.gov/MCPED/documents/planning/macomb%20county%20generalized%20land%20use%20map%202004.pdf>).

29. BUCKINGHAM TWP., VA., ZONING ORDINANCE, § 802 (2010).

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

31. *Id.* at 381-82.

32. The Court relied on an analogy to the traditional common law doctrine of “nuisance” – by which English and American courts had for centuries enjoined certain unpleasant uses of land, *id.* at 387-88, along with the related Latin maxim *sic utere tuo ut alienum non laedas*, *id.* at 387, – in English, “use your property in such a fashion so as not to disturb others.” DUHAIME’S LAW DICTIONARY, DICTIONARY OF LATIN LAW MAXIMS & TERMS, *Sic Utera Tuo Ut Alienam Non Laedas*, <http://www.duhaime.org/LegalDictionary/Category/LatinLawTermsDictionary.aspx>.

33. See, e.g., Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992) (discussing the phenomenon).

the barnyard,”³⁴ the Court concluded that apartment buildings in the suburbs may be barred because they “come very near to being nuisances.”³⁵ Although we may recoil today at this condescension, the Court did not explicitly rule that small lots likewise should be outlawed as being legally odiferous in the suburbs.

The typical rationales for lotting large, as discussed in Part III, do not depend directly on *Euclid*’s analogy to nuisances. Rather, as analyzed in Part IV, the practice of large lot zoning is best explained by the desire of existing homeowners to restrain population density. This recognition will help lead to wise recommendations for reform, analyzed in Part V. Before these steps, however, it is worthwhile to identify the putative drawbacks of the policy of large lot zoning.

B. The Harms of Lotting Large: Cost, Spillover, Segregation, and Sprawl

Laws requiring minimum lot sizes have received remarkably little attention in the legal literature, and only slightly more in the economic literature. Economists have recognized that laws restricting the supply of housing drive up costs, which in turn deter some potential migrants seeking housing in a desirable suburban area.³⁶ But the role of large lot zoning in the modern debate over so-called “affordable housing” has been modest. This is because much of the debate concerns housing for the poorest segments of the population, who often rely on subsidies or publicly built housing units.³⁷ By contrast, lotting large affects all segments of the population.

The most thoughtful assessment of large-lot zoning remains the work in 1969 by David Schoenbrod, then a recent graduate of the Yale Law School, and later Professor Schoenbrod.³⁸ Writing at a time that is now closer to *Euclid* than it is to today, Schoenbrod cogently and concisely summed up some of the impetuses for large lot zoning and its economic implications, and offered some intelligent ideas for reform.³⁹ This article updates these arguments, with more current studies, for 21st century America. Specifically, it identifies four significant concerns about the effects of large-lot zoning: cost, spillover, segregation, and sprawl.

34. *Euclid*, 272 U.S. at 388.

35. *Id.* at 395.

36. The most prominent economist writing about the exclusionary effects of zoning has been Professor William Fischel. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 3-4 (2001) (local government land use laws are driven by the preferences of current homeowners); William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317 (2004). A study of the most famous political and litigation dispute over exclusionary zoning is CHARLES M. HAAR, *SUBURBS UNDER SIEGE* (1998) (a history of the politics and law surrounding New Jersey’s relevant litigation).

37. A landmark step in the effort to foster affordable housing for poor people was the litigation concerning the exclusionary zoning practices of Mt. Laurel, New Jersey. In one of the New Jersey Supreme Court decisions on the matter, the court identified techniques such as removing restrictions on apartment construction, offering subsidies, mandating that a developer “set aside” a fraction of units in a complex for low-cost housing, and encouraging the construction of mobile homes. *S. Burlington Cnty. NAACP v. Mount Laurel Twp.* [hereinafter *Mt. Laurel II*], 456 A.2d 390, 442-51 (N.J. 1983) (discussing a variety of “affirmative measures” to provide low-cost housing).

38. David S. Schoenbrod, *Large Lot Zoning*, 78 YALE L. J. 1418 (1969).

39. See *id.* at 1432-1441 (discussing ideas for reform).

1. *Large-lot zoning increases the cost of housing.*

A regulation that makes it unlawful to build small house lots inflates the cost of housing in a jurisdiction.⁴⁰ Legally restraining supply increases cost.⁴¹ This straightforward observation has been echoed by more focused analyses in the decades since Schoenbrod's article.⁴² For example, a recent Harvard economic study concluded that "minimum lot size, which remains the most powerful and widespread form of land-use control," drives up the costs of housing.⁴³ Restrictive laws in the Boston area, whose suburbs were at the vanguard of large lot zoning, have made it all but impossible to build new housing units near the city, even during the early 21st century housing boom.⁴⁴ A result is that house prices in the Boston area have become among the most expensive in the nation.⁴⁵

40. See *id.* at 1418 (referring to phenomenon created by those excluded by large-lot zoning as "[b]idding up housing prices wherever they go"); *id.* at 1421 ("market value of each homeowner's property will rise as the lot size minimum is increased"). Schoenbrod's conclusions were based on a simple economic analysis of the concepts of supply and demand. See *id.* at 1420-1424 (explaining how an increase in desirability – in other words, demand – increases prices).

41. See *id.* at 1422 fig. 1 (demonstrating homeowner satisfaction, which correlates with value, increases with lot size, although with diminishing returns). In terms of economics, government regulation of supply pushes the supply curve to the left, thus raising prices. See Al Ehrbar, *Supply*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS <http://www.econlib.org/library/Enc/Supply.html> (last visited Oct. 30, 2015) (explaining the basics of supply and demand, including that prices rise when supply is limited by some outside factor).

42. See Jenny Schuetz, *Guarding the Town Walls: Mechanisms and Motives for Restricting Multifamily Housing in Massachusetts* 3 (Joint Ctr. for Hous. Studies at Harvard Univ., W06-3, 2006), available at <http://www.jchs.harvard.edu/research/publications/guarding-town-walls-mechanisms-and-motives-restricting-multifamily-housing> (large lot rules will result in "greater values" for houses). For a recent empirical economic study of the effect on prices of large-lot zoning, and the conclusion that the policy does indeed have an "economically significant [upward] impact on house prices," see Maurice Dalton & Jeffrey Zabel, *The Impact of Minimum Lot Size Regulations on House Prices in Eastern Massachusetts*, 41 REGIONAL SCI. & URB. ECON. 571, 583 (2009). The question of how large-lot zoning laws affect the price of *land per acre* is less clear. See Hans R. Isakson, *Analysis of the Effect of Large Lot Zoning*, 26 J. REAL ESTATE RESEARCH 397 (2004).

For a subtle economic argument, under sets of limited assumption, that large-lot zoning is economically efficient in certain instances, see Arthur M. Sullivan, *Large-Lot Zoning as Second-Best Policy*, 24 J. REGIONAL SCI. 581 (1984). The scholar Charles Tiebout argued that restrictive zoning, along with other local regulations, can be efficient in that it allows for a marketplace among prospective residents. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLIT. ECON. 416 (1956) (creating a model of inter-municipal competition).

43. BRYCE WARD, JENNY SCHUETZ & EDWARD GLAESER, *How large lot zoning and other town regulations are driving up home prices*, COMMONWEALTH (Jan. 1, 2006), <http://commonwealthmagazine.org/uncategorized/how-large-lot-zoning-and-other-town-regulations-are-driving-up-home-prices/>.

44. *Id.* at 2. Ward, Schuetz & Glaeser noted that the Boston area granted only 8,204 building permits for new single-family houses in 2004, a peak year of the nation's housing boom, largely because of restrictive laws, in comparison to 31,741 in the Phoenix area. Prices in Phoenix were less than half those in the Boston metro region. *Id.* at 1-2.

45. In 2005, the median price of a single-family house in the Boston area was higher than \$400,000 (\$30,000 over what seems significantly different). *Id.* at 1. By 2010, it was still nearly \$350,000. THE BOS. FOUND., THE GREATER BOSTON HOUSING REPORT CARD 2012, at 43, tbl. 3.2 (2012). Of the dozens of towns in the Boston area, those with minimum lot sizes larger than 70,000 (measurement?) encompass ten percent of the region's land, but only four percent of the region's total population. Ward, Schuetz & Glaeser, *supra* note 43, at 1.

2. *Large-lot zoning adversely affects people other than the suburb's existing homeowners.*

The upward pressure on housing prices affects the “utilities”—that is, the happiness—of diverse categories of persons differently. Recognizing this contrast was among Schoenbrod’s most significant contributions.⁴⁶ For persons who own homes when a restrictive zoning law is imposed, the price increases positively affect their utilities, because their homes are likely to rise in value, no matter the lot size. Their homes become a scarce and thus relatively more valuable commodity. Accordingly, the new law tends to be welcomed by entrenched homeowners, who enjoy the resultant constraints on congestion and density.⁴⁷ This “amenity effect” increases the desirability of houses in this regulated community, thus further driving up its prices—to the greater joy of the existing homeowners.⁴⁸

By contrast, the price bump impairs the utilities of persons who seek to buy or rent a house in this suburb.⁴⁹ They seek scarce commodities, the prices of which have been inflated by the government regulation.⁵⁰ Moreover, persons who are dissuaded or who are unable financially to migrate to these suburbs see their utility decrease; they are compelled to settle for a lesser choice.⁵¹ Schoenbrod surmised that such excluded home seekers “will probably live in the central city.”⁵² While such an assumption might have been reasonable in 1969, when the stereotypical migrant to a suburb was from the crowded central city, most suburban home seekers in the current century move from other suburbs.⁵³ As discussed below, a more likely scenario in today’s America is that home seekers who are dissuaded by large-lot zoning will move further out, to a more distant suburban jurisdiction

46. See Schoenbrod, *supra* note 38, at 1419-26, 1432 (explaining the “satisfaction” and other benefits conferred by large-lot zoning laws on existing wealthy homebuyers, as opposed to other citizens).

47. Schoenbrod, *supra* note 38, at 1420. The perceived social benefits of large-lot zoning are discussed in greater detail in Part IV, *infra*.

48. See Paul D. Gottlieb, Anthony O’Donnell, Thomas Rudel, Karen O’Neill, and Melanie McDermott, *The impact of large-lot zoning and open space acquisition on homes building in rural communities*, at 5 (2009) http://www.academia.edu/8112691/The_impact_of_large-lot_zoning_and_open_space_acquisition_on_home_building_in_rural_communities (discussing the “amenity effect” and its shift of the demand curve to the right, increasing prices).

49. The price increase affects both homebuyers and renters to whom owners pass along some of the added cost.

50. See Schoenbrod, *supra* note 38, at 1424-26 (explaining the decreased utility of persons who buy houses after the price increase, with the total community’s utility expressed by curve B in figure 2). Schoenbrod posited that total utility of homebuyers is maximized at point M, in which the average lot size is smaller than the existing homebuyers’ preference for imposing laws to create an average lot size of Z. See *id.* (explaining figure 2).

51. See Schoenbrod, *supra* note 38, at 1426-29 (showing the decreased utility to dissuaded home seekers as curve C in figure 3).

52. *Id.* at 1427.

53. See, e.g., Wendell Cox, *Special Report: Move to Suburbs (and Beyond) Continues*, NEW GEOGRAPHY (July 30, 2013) <http://www.newgeography.com/content/001666-special-report-move-suburbs-and-beyond-continues> (citing data from Texas and elsewhere); Joel Kotkin, *The Geography of Aging: Why Millennials are Moving to the Suburbs*, NEW GEOGRAPHY (Dec. 9, 2013) <http://www.newgeography.com/content/004084-the-geography-of-aging-why-millennials-are-headed-to-the-suburbs> (an argument by a critic of the popular notion that today’s Americans prefer the cities to the suburbs).

where housing is cheaper because it is less conveniently located.

Finally, a suburb's lotting large adversely affects the utility of persons wholly outside the regulated suburb, even if they hold no desire to move to the suburb. The constrained supply of housing in the regulated suburb pushes unmet demand to other jurisdictions.⁵⁴ The demand for housing in other jurisdictions increases, thus driving up costs in these locations.⁵⁵ This adverse impact on other jurisdictions is a reason that one suburb's adoption of large-lot zoning laws may encourage neighboring governments to follow suit.⁵⁶ In sum, we may safely conclude that large-lot laws decrease the economic utility of all relevant segments of the community, except for the homeowners who live in the community at the time the restrictive law is imposed.

3. Large-lot zoning exacerbates social segregation.

A corollary of the cost effect of lotting large is that it often exacerbates segregation by wealth and by race. Indeed, the exclusion of less affluent persons might form another reason for a snobbish suburb to adopt such a law in the first place.⁵⁷ This is an example of "exclusionary zoning," by which a jurisdiction's laws, intentionally or not, exclude persons of modest incomes.⁵⁸ Moreover, segregation by income is likely to be mirrored by segregation by race, simply because black and Latino American households tend to have lower incomes than white (and Asian) households.⁵⁹ A suburb that imposes a two-acre house lot minimum, for example, should expect that its population would be somewhat less black or Latino than if it allowed for apartments with multiple units per acre.⁶⁰

A law that creates a "disparate impact" on a protected race, even if the effect is

54. See Ward, Schuetz & Glaeser, *supra* note 43, at 4-5 (explaining the spillover effect).

55. See Schoenbrod, *supra* note 38, at 1427-29 (explaining that exclusion from the regulated suburb causes increased demand elsewhere).

56. See *id.* at 1426 ("That the hypothetical suburb competes with others impels it to make full use of its powers to raise the minimum lot size.").

57. See *id.* at 1426 ("The suburb that falls behind in the zoning race may quickly become a target for mass developers catering to the less wealthy spectrum of the homebuying market, thus burdening it with unusually fast development and a loss of relative prestige."); Schuetz, *supra* note 43, at 1 (noting hypothesis that "residents prefer to live with neighbors of the same social class or race, so that affluent or largely white suburbs will seek to exclude lower-income households of people of color through restrictive zoning.").

58. Perhaps the most famous exemplar of exclusionary zoning has been the epic litigation in New Jersey, beginning in the late 1960s, from the town of Mt. Laurel. See generally CHARLES HAAR, *supra* note 36 (analyzing the Mt. Laurel saga and applauding the "audacious judges" who fought exclusionary zoning).

59. U.S. BUREAU OF THE CENSUS, INCOME AND POVERTY IN THE UNITED STATES: 2013 5 fig. 1 (2013) (income data by race), available at <http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>.

60. Matthew Resseger, *The Impact of Land Use Regulation on Racial Segregation: Evidence from Massachusetts Zoning Borders*, at 33 (2013), http://scholar.harvard.edu/files/resseger/files/resseger_jmp_11_25.pdf. Resseger concluded that "blocks zoned for multi-family housing have black population shares 3.36 percentage points higher and Hispanic population shares 5.77 percentage points higher than single-family zoned blocks directly across a border from them." *Id.* at 1. For an earlier study that reached a similar conclusion about the racial effects of lotting large, see Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLANNING ASS'N 125 (2000), available at http://www.tandfonline.com/doi/abs/10.1080/01944360008976094#.VMZup_7F_To.

not intended, may violate the U.S. Fair Housing Act's prohibition of conduct that "make[s] unavailable or den[ies] . . . a dwelling . . . because of race."⁶¹ By contrast, a claim under the U.S. Constitution's "equal protection" guarantee must prove an intent to discriminate.⁶² Because few local governments act overtly enough to show intent to discriminate, most challenges to the racial aspects of zoning rely on the theory of disparate impact. Nonetheless, lower courts appear to be uneasy with *prima facie* housing cases that rely solely on statistical evidence of adverse impact.⁶³ Accordingly, discrimination laws are uncertain tools, at best, to wield against large-lot zoning laws.

4. Large-lot zoning harms the environment by spurring sprawl.

There is little doubt that large-lot zoning laws in suburban jurisdictions exacerbate the phenomenon of suburban "sprawl" and its attendant environmental harms. As explained below, this is because constraining construction in a jurisdiction tends to push the demand for housing to places further from the city center. Indeed, while lotting large is not the sole contributor to suburban sprawl, it appears to be among the most significant.

Perhaps the earliest significant discussion of the connection between lotting large was raised by John Anderson in 1974.⁶⁴ Published during the first flush of the green movement, when many Americans first heard the terms "environmental" and "ecology,"⁶⁵ the study cited a contemporary federal court decision, *Steel Hill Development Incorporated v. Town of Sanbornton*, that upheld large lot zoning in a rural New Hampshire town.⁶⁶ The government relied on, and the court approved,

61. Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S.Ct. 2507, 2526 (2015) (establishing the cognizability of a "disparate impact" claim under the statute); 42 U.S.C. § 3604(a) (2014).

62. Vill. of Arlington Heights v. Metro. Hous. Dev. Auth., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" of the 14th Amendment.).

63. See Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290, 1291-93 (7th Cir. 1977) (discussing various factors). Challenging lotting large simply because it makes housing more unaffordable for people of color can be countered by the argument that the practice makes housing more unaffordable for similarly situated white persons. See, e.g., Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1230 (10th Cir. 2007) (holding that the plaintiffs "would need to show that the new regulations increase the cost of a dwelling by some amount and then show that this increase disparately impacts the ability of members of the protected group to buy a dwelling—that is, to the extent that the higher price reduces the size of the purchaser market for the dwelling, the reduction is disproportionately high for the protected group.").

64. John Anderson, *Environmental Considerations: New Arguments for Large Lot Zoning*, 7 URB. L. ANN., 370 (1974).

65. Most of the nation's leading environmental statutes were adopted from the years 1969 to 1976, including: the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f), enacted in 1969; the Clean Air Act, 42 U.S.C. §§ 7401-7671(q), signed into law in 1970; the Clean Water Act, 33 U.S.C. §§ 1251-1387, adopted in 1972; the Endangered Species Act, 16 U.S.C. §§ 1531-1544, established in 1973; and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901-6992, which regulates hazardous waste disposal, and which was enacted in 1976. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 7401-7671, which authorizes the cleanup of hazardous waste sites, was signed into law in 1980.

66. See Anderson, *supra* note 64, at 370-375 (discussing *Steel Hill Dev., Inc. v. Town of Sanbornton*, 338 F. Supp. 301 (D.N.H.), *aff'd*, 469 F.2d 956 (1st Cir. 1972)). When presented with a

the rationale that the law would serve both aesthetic and ecological interests, such as avoiding pollution and soil erosion.⁶⁷ This case and others signaled the rise of putatively environmental rationales for large-lot zoning, which today are routine, especially as “open space” and “traffic congestion” are characterized as environmental concerns.⁶⁸ But the skepticism of marshaling the environment to justify lotting large also began with *Steel Hill*. While the federal appellate court noted approvingly the goals of preserving small-town “character” and “charm,”⁶⁹ it also concluded: “[W]e have serious worries whether the basic motivation of the town ... was not simply to keep outsiders, provided that they wished to come in quantity, out of the town.”⁷⁰

From these observations, we may develop a useful generalization about the effects of large-lot zoning: A town’s lotting large will limit the population and consequent environmental harms within its jurisdictional bounds, but it will increase population and environmental injuries outside its boundaries. Consider a metropolitan area with a strong demand for new housing. By constraining new construction, a suburb’s large-lot zoning law will foster the utility of current residents inside this jurisdiction, who welcome the preservation of the local “character” and the avoidance of environment impacts that new migrants typically create. But the demand for new housing in the metropolitan area remains. Persons stymied by the suburb’s restraint on new construction turn to other locations.⁷¹ Today, we may state with confidence that most excluded home seekers will move *further out* to distant suburbs with relatively favorable prices or favorable zoning laws.⁷²

There are many reasons why today’s home-searchers may prefer distant suburban homes to central city ones. First, despite the much-ballyhooed revival of certain popular cities in the 21st century, especially among young professional apartment dwellers, a majority of Americans still hold a preference for a single-family house, the vast majority of which exist in suburban areas.⁷³ Many central

proposal to build a “large” housing development, the town of Sanbornton hurriedly adopted a large-lot zoning ordinance that required lots of at least three acres, thus squelching the financial viability of the housing development’s proposal. *Id.* at 370.

67. See Anderson, *supra* note 64, at 373, 379, citing *Steel Hill Dev. Inc.*, 338 F. Supp. at 305-07. It is worth noting that the U.S. District Court never used the words “ecological” or “environmental.”

68. See Part III for a discussion of the rationales employed to justify large-lot zoning.

69. *Steel Hill Dev’t, Inc. v. Town of Sanbornton*, 469 F.2d 956, 959-61 (1st Cir. 1972).

70. *Id.* at 962.

71. This is not meant to imply that all migrants to a metropolitan area seek housing in new developments, of course. Many will choose older housing, as previous residents move away. But an inevitable overall effect of a good economy or a growing population is to increase the demand for new housing.

72. For a contrasting view from 1969, see Schoenbrod, *supra* note 38, at 1427 (asserting that excluded person will probably “live in the central city”).

73. See, e.g., NAT’L ASS’N OF REALTORS, NATIONAL COMMUNITY PREFERENCE SURVEY (2013), <http://www.realtor.org/sites/default/files/reports/2013/2013-community-preference-analysis-slides.pdf> (survey from a somewhat biased source); Kris Hudson, *Generation Y Prefers Suburban Home Over City Condo*, WALL ST. J., Jan. 21, 2015 (survey concluding that 66% of Millennials prefer a house in the suburbs than an apartment in the city); Pamela Engel & Rob Wile, *11 American Cities That Are Shells Of Their Former Selves*, BUSINESS INSIDER, June 26, 2013, <http://www.businessinsider.com/american->

cities remain tarred with a reputation for crime and poor schools.⁷⁴ And of course zoning laws in cities make new construction of largely undeveloped areas—“infill”—difficult in many places.⁷⁵ Moreover, while some home-seekers are current residents of the central city, many others live in other suburbs, and thus have few ties to the central city. Finally, central cities—almost all of which are dwarfed in population by their suburbs, which cover much larger areas—are simply too small to encompass more than a fraction of the nation’s growing 21st century population.⁷⁶

Portland, Oregon, and the Virginia suburbs of Washington D.C., two economically vigorous American metropolitan areas, serve as examples of the effect of lotting large in pushing new housing further out. Portland is surrounded by an “urban growth boundary.”⁷⁷ The boundary has acted, since 1980, as a super large-lot requirement, of sorts, by preserving farmland and making new housing construction difficult outside the boundary, which cuts across the three Oregon counties.⁷⁸ The intent of the boundary was to control suburban sprawl.⁷⁹ The city also has been a vanguard for urban infill.⁸⁰ But, according to a notable 2004 study,

cities-in-decline-2013-6 (highlighting the number of major American cities that are not experiencing a revival).

74. See, e.g., EDWARD GLAESER, TRIUMPH OF THE CITY 3-7 (2011) (discussing the poor reputation that cities earned in the 20th century).

75. See generally MATTHEW YGLESIAS, THE RENT IS TOO DAMN HIGH (Simon & Schuster 2013) (discussing the legal barriers to infill in cities in high demand, such as New York).

76. For example, the nation’s most populous city, New York, holds only about 8.4 million persons in a metro area of more than 19 million people. Most other examples are more extreme. Boston, for example, has fewer than 700 thousand people in an area of 4.6 million persons. Compare data at U.S. Bureau of the Census, *Annual Estimates of the Resident Population for Incorporated Places Over 50,000*, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>, and U.S. Bureau of the Census, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2013 - United States -- Metropolitan and Micropolitan Statistical Areas*, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. Even the nation’s most notable exemplar of urban growth over the past half-century – Phoenix – has experienced a slowdown in population growth of its central city. Like many western cities, Phoenix encompasses a large area: more than 500 square miles. The city’s population grew by more than 300,000 in the 1950s. But the first decade of the new millennium saw Phoenix grow by fewer than 125,000 persons, despite the fact that most of this decade witnessed a housing boom. U.S. Bureau of the Census, *Statistical Abstract of the United States* 34 tbl. 27 (2011), <http://www.census.gov/compendia/statab/2012/tables/12s0027.pdf>. Most of the new residents of the Phoenix metro area moved to suburban locations. The population of Maricopa County, Ariz., which encompasses most of the Phoenix metro area, grew by more than 700,000 during the decade, of which fewer than one in five was attributable to the central city. Census Viewer, *Population of Maricopa County, Ariz.*, <http://censusviewer.com/county/AZ/Maricopa>. Put simply, the city of Phoenix is finally filling up.

77. Metro, *Urban Growth Boundary*, <http://www.oregonmetro.gov/urban-growth-boundary>. “Metro” is the name of the multi-county governmental body that is responsible for the urban growth boundary around Portland.

78. *Id.* (discussing the history of Portland’s Urban Growth Boundary).

79. 1000 Friends of Oregon, *Oregon Cities Grow More, Expand Less than National Average* (April 5, 2012) <http://www.friends.org/latest/oregon-cities-grow-more-expand-less-national-average>.

80. See *id.* (Referring to “investments in existing neighborhoods”); City of Portland, *Infill Design*, <http://www.portlandoregon.gov/bps/34024?>. For many years, up until 2012, Portland held a free downtown public transportation area, called “Fareless Square.” Mason Walker, *The death of Portland's Fareless Square will have consequences*, PORTLAND BUS. J., Sept. 12, 2012, <http://www.bizjournals.com/portland/blog/sbo/2012/09/the-death-of-portlands-fareless.html?page=all>.

Portland's growth boundary has not slowed down the process of suburbanization of its metro population.⁸¹ Rather, it has simply pushed suburbanization across the border to suburbs in Washington state.⁸²

Another example is the Virginia suburbs of Washington, D.C., including Loudoun and Fairfax Counties, which are among the most affluent jurisdictions in the nation.⁸³ Fairfax, which touches Washington, D.C., holds more than a million people, while adjacent Loudoun is still significantly rural.⁸⁴ Satellite images available on Google Earth show the effect of Fairfax's lotting large at its western boundary with Loudoun County, about twenty miles from downtown Washington.⁸⁵ On the Fairfax side, where housing is constrained by large-lot zoning, houses are far apart and are separated by extensive lawns and woods. Immediately across the border in Loudoun County, dense suburban housing on curving streets pushes right up the boundary. It appears clear that Fairfax's stricter large-lot zoning laws have pushed new construction out to the more distant suburban county.⁸⁶

Having argued above that lotting large tends to shift housing development further out, this section can now proceed to assigned to large-lot zoning some of the blame for the *environmental* ills that are associated with suburban sprawl. The essence of this environmental critique is that sprawling areas consume more resources.⁸⁷ Low density development is the culprit.⁸⁸ Lotting large is a

81. MYUNG-JIN JUN, *The Effects of Portland's Urban Growth Boundary on Urban Development Patterns and Commuting*, 41 URB. STUD. 1333, 1333 (2004) ("Intermetropolitan comparisons do not support the conclusion that Portland's UGB has been effective in slowing down suburbanization, enhancing infill development and reducing auto use.").

82. *Id.* at 1346 ("Portland's UGB has had little effect on drawing new residential development into the UGB, but significant impact on diverting new growth into Clark County, Washington."). Indeed, the population of Clark County, Wash. has more than doubled since 1980. See *Clark County, Washington*, WIKIPEDIA (Aug. 30, 2015, 2:11 PM) http://en.wikipedia.org/wiki/Clark_County,_Washington (displaying compilation of census data).

83. Tom Jackman, *The rich State of NoVa: Loudoun, Fairfax, Arlington top wealthiest U.S. counties list (with P. Wm. rising)*, WASH. POST, Sept. 20, 2012, http://www.washingtonpost.com/blogs/the-state-of-nova/post/the-rich-state-of-nova-loudoun-fairfax-arlington-top-wealthiest-counties-list-with-pwm-alex-rising/2012/09/20/b9bca078-032a-11e2-91e7-2962c74e7738_blog.html (citing recent census estimates).

84. *Northern Virginia counties are 'the engines' of state's growth*, USATODAY, <http://usatoday30.usatoday.com/news/nation/census/profile/VA> (last visited Oct. 29, 2015) (citing Virginia county population numbers).

85. GOOGLE EARTH, <http://www.earth.google.com> (search for the location "39°02' N, 77°21' W", display "Borders and Labels"). This image shows that, immediately, along the boundary, denser housing development commences. Panning out shows with greater clarity the effect of Fairfax's tighter zoning laws.

86. In fact, Loudoun's population grew by 30,735 more people than Fairfax's did from 2000 to 2010. Compare the census figures compiled at *Fairfax County, Virginia*, WIKIPEDIA (Aug. 31, 2015, 2:18 PM) http://en.wikipedia.org/wiki/Fairfax_County_Virginia, with those at *Loudoun County, Virginia*, WIKIPEDIA (Aug. 29, 2015, 10:38 PM) http://en.wikipedia.org/wiki/Loudoun_County,_Virginia.

87. 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, 373-77 (2010) (discussing a litany of environmental and social harms of sprawl); Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 346-64 (2000) (focusing on economic disruptions); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183,

contributing factor to the spread out use of land and low density. By definition, it takes more land to provide for 1,000 households in a jurisdiction with a one-acre minimum lot size law than in a community that allows small lots or apartments. Even Schoenbrod (who assumed that most home seekers that are frustrated by lotting large would resort to city living) recognized that large-lot zoning “rapidly consumes what little countryside exists within a reasonable distance from the central city.”⁸⁹ It is true that large lot laws typically result in some form of “open space,” in the sense of lawns and woods. But because these lands belong to a variety of private homeowners—each of whom is likely to wish for an expanse of grass and a driveway among other things—lotting large results in a checkerboard land use, not in large, unbroken expanses of meadows, forests, or wetlands.⁹⁰ For nature and wildlife, large and uninterrupted areas are preferable to a patchwork.⁹¹ This is why suburbs are characterized as a good place for deer, squirrels, and sparrows, but a poor place for other species.⁹²

Similarly, although lotting large is sometimes employed as a method of preventing farmland from being developed into dense housing,⁹³ the laws typically do little to ensure the preservation of viable farms.⁹⁴ Few successful farms can

191-93 (1997) (focusing on social issues); *see also* SIERRA CLUB, *SPRAWL COSTS US ALL: HOW YOUR TAXES FUEL SUBURBAN SPRAWL* (2000), <http://vault.sierraclub.org/sprawl/report00/sprawl.pdf> (discussing a litany of putative ills of sprawl that impose “costs” on the environment and society).

88. *See, e.g.,* E.P.A., *Urban Sprawl*, ALMANAC OF POLICY ISSUES (2003) http://www.policyalmanac.org/environment/archive/urban_sprawl.shtml (defined as “low density, automobile dependent development”); ANDRES DUANY & ELIZABETH PLATER-ZYBERK, *SUBURBAN NATION* 3 (2001) (critiquing low density development as the quintessence of unwise suburban sprawl); *see also* Richard B. Peiser, *Density and Urban Sprawl*, 65 LAND ECON. 193, 193 (1989) (arguing that density and contiguous development do not always coincide).

89. Schoenbrod, *supra* note 38, at 1431.

90. The satellite image of western Fairfax County, Va., at 39°02' N, 77°21' W, shows a typical large lot landscape of a patchwork of lawns and woods. GOOGLE EARTH, *supra* note 85. For a discussion of the adverse effect on undeveloped natural land, *see* Tim Evans, Op-Ed, *Large-Lot Zoning Responsible for Rapid Loss of Open Lands*, THE RECORD (Bergen Cnty., N.J.), July 31, 2011, <http://www.njfuture.org/news/op-ed-articles/large-lot-zonin/>.

91. In biogeography, the debate is referred to as “SLOSS,” or “single large or several small?” Tormod Vaaland Burkey, *Extinction in Nature Reserves: The Effect of Fragmentation and the Importance of Migration Between Reserve Fragments*, 55 OIKOS 75, 75 (1988). Most writers have advocated the former. *See id.* (noting the benefits of single large); Jared M. Diamond, *The Island Dilemma: Lessons of Modern Biogeographic Studies for the Design of Natural Reserves*, 7 BIOLOGICAL CONSERVATION 129, 129 (1975) (“Larger reserves . . . can hold more species.”); *see generally* ROBERT H. MACARTHUR & EDWARD O. WILSON, *THE THEORY OF ISLAND BIOGEOGRAPHY* (1967) (identifying the importance of the question whether species richness is fostered better by one large or several small “islands” of populations).

92. U.S.D.A., SOUTHERN FOREST RESOURCES ASSESSMENT, EFFECTS OF URBANIZATION ON FOREST WILDLIFE 7 (2013), <http://www.srs.fs.usda.gov/sustain/report/terra3/terra3-13.htm> (discussing that fragmented landscape decreases the number of species in favor of a handful of “edge” species such as deer and squirrels).

93. *See, e.g.,* C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143, 146-47 (Pa. 2002); *see also* other examples in Part III, *infra*.

94. The mean size of a crop farm in the United States was 235 acres in 2011. JAMES M. MACDONALD, PENNI KORB, & ROBERT A. HOPPE, U.S. DEPT. OF AGRIC., FARM SIZE AND THE ORGANIZATION OF U.S. CROP FARMING 4 (2013), <http://www.ers.usda.gov/media/1156726/err152.pdf>.

prosper on only an acre or two.⁹⁵ Indeed, even when governments label a zoning district as “agricultural,” they often require merely a large lot, not that the owners must be farmers.⁹⁶

By spreading houses out, lotting large also necessitates more automobile travel. Due in part to these zoning patterns, Americans move more by car and truck than do people in other nations.⁹⁷ This results in more air pollution, more pavement, higher auto-maintenance costs, and more time spent sitting in traffic congestion.⁹⁸

Despite the auto emission constraints of the U.S. Clean Air Act,⁹⁹ the United States emits more carbon dioxide from vehicles per person than any other wealthy nation.¹⁰⁰ Moreover, by encouraging bigger houses, large lot zoning increases the amount of energy needed to heat, cool, and light.¹⁰¹ American houses are significantly larger than those in other rich nations. At more than 2,400 square feet,¹⁰² the average new American house is nearly double the size of its counterparts in affluent countries such as Sweden, Germany, and Britain.¹⁰³ The combination of longer travels and larger houses contributes to America’s standing as one of the worst offenders in the greenhouse gas pollution that is changing the globe’s climate.¹⁰⁴ For example, the typical American was responsible, as of 2010,

95. The average farm in the United States is 441 acres. Agric. Council of Am., *Agriculture Fact Sheet*, <http://www.agday.org/media/factsheet.php> (2015).

96. For example, Sacramento County, Cal., allows lots as small as one acre in its “Agricultural/Residential Zoning District” designated as “A-1.” Sacramento Cnty., Cal., *Summary of Zoning Classifications*, 1 (2007) <http://www.per.saccounty.net/LandUseRegulationDocuments/Documents/ZoningCodes/ZoningClassSummary.pdf>.

97. See Office of Highway Policy Info., *Annual Automobile Vehicle Miles of Travel (VMT) per Capita and Number of Automobiles per Capita 1997*, FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/ohim/onh00/bar4.htm> (last modified Feb. 20, 2015) (higher mileage for American drivers than for those in other wealthy nations).

98. For a wide-ranging discussion of the costs of the automobile-dependent culture, see generally JANE HOLTZ KAY, *ASPHALT NATION* (1997); SIERRA CLUB, *CLEARING THE AIR WITH TRANSIT SPENDING*, 5-8 (2001), <http://vault.sierraclub.org/sprawl/report00/sprawl.pdf> (discussing sprawl’s exacerbation of air pollution).

99. Clean Air Act, 42 U.S.C. §§ 7521-7590 (2006).

100. Adam Millard-Ball & Lee Schipper, *Are We Reaching Peak Travel? Trends in Passenger Transport in Eight Industrialized Countries*, 31 *TRANSPORT REV.* 357, 360 fig. 1 (2011).

101. See Barry Fischer, *America’s energy distribution: the top 1% of homes consume 4 times more electricity than average (and why it matters)*, OPOWERBLOG.COM (March 6, 2013), <http://blog.opower.com/2013/03/americas-energy-distribution-the-top-1-of-homes-consume-4-times-more-electricity-than-average-and-why-it-matters/> (last visited Oct. 29, 2015) (citing a variety of statistics showing that larger houses use more electricity).

102. Christopher Ingraham, *The McMansion is back, and bigger than ever*, WASH. POST., Feb. 26, 2015, <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/02/26/the-mcmansion-is-back-and-bigger-than-ever/> (last visited Sep. 5, 2015) (citing Census data).

103. Lindsay Wilson, *How big is a house? Average house size by country*, SHRINK THAT FOOTPRINT, <http://shrinkthatfootprint.com/how-big-is-a-house> (citing 2009 data). Only Australia, a country with a much lower national population density, holds somewhat larger houses. *Australia & U.S. Have Largest Houses*, DEMOGRAPHIA, <http://www.demographia.com/db-hsize.pdf> (2013).

104. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2014: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS 2* (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf (“Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history.”).

for about double the amount of greenhouse gas pollution as counterparts in Britain, Japan, and Germany.¹⁰⁵

Lotting large also imposes financial strains on local governments, which often must pay for the infrastructure of new roads, sewer lines, and schools to serve areas that are far away from existing services.¹⁰⁶ Although “impact fees” on developers may recover some of the cost to local governments, as do property taxes,¹⁰⁷ these collections often do not fully recoup the financial expenses incurred by governments that must serve housing that is built far from existing infrastructure.¹⁰⁸

Finally, sprawling development contributes to a variety of social ills, according to some commentators.¹⁰⁹ By discouraging pedestrianism and by encouraging a sedentary lifestyle inside large houses, sprawl contributes to the nation’s epidemic of obesity.¹¹⁰ Denser housing, by contrast, encourages walking and exercise. Similarly, the separation of households may add to a sense of social isolation—a point recognized by Betty Freidan in *The Feminine Mystique*, a groundbreaking 1963 criticism of postwar American suburbia,¹¹¹ and by others since then.¹¹²

In the litany of arguments against suburban sprawl, some may be more convincing than others. But there is little dispute as to a solution to the putative ills of suburban sprawl. Nearly all critics recommend some variant of the idea of “smart growth”—that is, generally, a greater density of housing development on a smaller amount of land.¹¹³ This, of course, is precisely what large lot zoning laws prevent.

105. See WORLD BANK, *CO₂ emissions (metric tons per capita)*, http://data.worldbank.org/indicator/EN.ATM.CO2E.PC?order=wbapi_data_value_2010+wbapi_data_value+wbapi_data_value-first&sort=desc (2015).

106. See generally SIERRA CLUB, *supra* note 87, at 3-5 (summarizing data for utilities, schools, fire, and police, and other costs usually born by local governments).

107. See Am. Planning Ass’n, *Policy Guide on Impact Fees* (1997) <https://www.planning.org/policy/guides/adopted/impactfees.htm> (discussing the theory and practice of the fees).

108. See SIERRA CLUB, *supra* note 87, at 10-12 (comparing costs to government with money received from impact fees and taxes). For a survey of the nation’s impact fees, showing the tremendous variety and variability of the practice, see Duncan Assoc., *National Impact Fee Survey*, http://impactfees.com/publications%20pdf/2012_survey.pdf (2012).

109. See Freilich & Peshoff, *supra* note 87, at 191-93 (analyzing sprawl’s effects on community, traffic, and “quality of life”); *Sprawl Costs*, NEW URBANISM, <http://www.newurbanism.org/sprawlcosts.html> (last visited Oct. 3, 2015) (discussing isolation and obesity).

110. Howard Frumkin, *Urban Sprawl and Public Health*, 117 PUBLIC HEALTH REPORTS, 205 (2002), http://www.cdc.gov/healthyplaces/articles/Urban_Sprawl_and_Public_Health_PHR.pdf.

111. See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963) (arguing that post-war suburban housewives led dull and unfulfilling lives).

112. See Freilich & Peshoff, *supra* note 87, at 191-93 (arguing that sprawl discourages community involvement); Frumkin, *supra* note 110, at 207-09 (discussing the adverse effects on “social capital”).

113. For a sampling of the legal literature on “smart growth,” see Michael Lewyn, *You Can Have It All: Smart Growth and Property Rights Too*, 80 TEMP. L. REV. 1093, 1104-14 (2007) (discussing the centrality of density in “smart growth”); Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 254 (2002) (advocating for density). For a sampling in the world of urban planning, see Smart Growth America, *Encourage cities and counties to permit more multifamily and higher density housing*, <http://www.smartgrowthamerica.org/guides/smart-growth-at-the-state-and-local-level/housing-policy/encourage-cities-and-counties-to-permit-more-multifamily-and-higher-density-housing/>; Nat’l Ass’n of Realtors, *Creating Great Neighborhoods: Density in Your Community* (2003) <http://www.epa.gov/smartgrowth/pdf/density.pdf> (written with the cooperation of the U.S. Env’t. Prot. Agency).

C. The Irony of Large Lots for Smaller American Households

A full assessment of lotting large must take into account the recent and profound changes in the United States population. The nation's population continues to grow, as it always has.¹¹⁴ As of 2015, the American population of more than 320 million swells by one person every fifteen seconds, and more than two million new persons per year.¹¹⁵ About half of this growth is attributable to more births than deaths, and half to migrants from other nations (illegal migration makes the total figure somewhat unreliable).¹¹⁶ Each year, more than two million Americans turn eighteen years old, and two million others turn twenty-one.¹¹⁷ Unlike in Britain, in which there is a movement to cap its population,¹¹⁸ Americans appear to welcome perpetual growth. Political liberals favor looser immigration laws, while political conservatives support the suppression of abortion.¹¹⁹ Economists note the economic advantages of a rising population, especially with the increase of younger workers, whose taxes pay for the benefits awarded to the swelling ranks of retirees.¹²⁰ These new Americans need housing.

Exacerbating the need for new housing in the United States is the decreasing size of the typical household—a term that refers to one or more persons living as a unit. The average size of a household has fallen from more than 3.5 persons in 1950, at the dawn of mass suburbanization and adoption of large-lot zoning laws, to about 2.5 persons, as of 2013 data.¹²¹ The most common composition of a household today is one person living alone; the share of single-person households has risen from only 13 percent in 1960 to more than 27 percent as of 2015.¹²² The boom in single-person households is driven both by the fact that more young people choose to live alone and that elderly people are living longer. Fewer than

114. U.S. Bureau of the Census, *Population Clock*, <http://www.census.gov/popclock> (accessed Feb. 17, 2015).

115. *Id.* The net growth of one person every 14 seconds, *id.*, yields a yearly increase of more than two million persons.

116. *Id.*

117. *Id.* The age distribution shows that, for all ages below sixty-five, the share of persons for each age is greater than one percent of the population of more than 320 million or, accordingly, more than three million persons for each age.

118. See ROSAMUND MCDUGALL, *THE UK'S POPULATION PROBLEM* (2010), https://www.populationmatters.org/wp-content/uploads/population_problem_uk.pdf (discussing the concerns over Britain's population growth).

119. For a discussion of the standard positions on issues among the American political spectrum see Allen Clifton, *The Differences Between Liberals and Conservatives on Key Issues*, FORWARD PROGRESSIVES (Apr. 11, 2013), <http://www.forwardprogressives.com/the-differences-between-liberals-and-conservatives-on-key-issues/>.

120. See, e.g., DAVID E. BLOOM, DAVID CANNING, & JAYPEE SEVILLA, *THE DEMOGRAPHIC DIVIDEND* (2002) (RAND Corporation report on the economic benefits of a large and growing population); Bernardo Villegas, *Benefits of Large and Young Population* (2009), bernardovillegas.org (young people tend to work harder and pay more taxes than do older people).

121. U.S. BUREAU OF THE CENSUS, *HOUSEHOLD SIZE: 1940 TO PRESENT* (2014), <https://www.census.gov/hhes/families/files/graphics/HH-6.pdf>.

122. U.S. BUREAU OF THE CENSUS, *HOUSEHOLDS WITH ONE PERSON, 1960 TO PRESENT* (2014), <https://www.census.gov/hhes/families/files/graphics/HH-4.pdf>.

half of all households include any minor children.¹²³

As a result of the shrinking household size, the total number of American households rose to more than 116 million in 2010¹²⁴—twice the number in 1960.¹²⁵ The most compelling statistic is that *the United States adds, in the 21st century, more than one million new households each year*.¹²⁶ Each of these million new households needs some housing in which to live. Because of the steadily rising number of households, in a nation of a fixed size,¹²⁷ American legal policies need to permit the construction of new housing. However, our zoning laws remain largely predicated on a *Euclid*-era notion of deference to the wisdom of local laws to restrain new housing, in order to further the welfare of affluent families with children. The persistence of this ideal, which is elaborated in Part III, comes at the expense of other segments of the growing and changing American society.

III. JUDICIAL DEFERENCE TO LOTTING LARGE

As with many areas of social and economic regulation, American courts defer to laws requiring large lots.¹²⁸ Courts typically uphold such laws, as long as the government offers some rational reason for them.¹²⁹ Because of the entrenched nature of this attitude, courts are unlikely to serve as the vehicle for reform of lotting large.

The idea of intensive regulation of buildings and houses began in the “Progressive Era” of the early 20th century.¹³⁰ The notion of segregating permissible land uses through “zones” quickly was adopted by places as small as

123. U.S. BUREAU OF THE CENSUS, HOUSEHOLDS AND FAMILIES: 2010 [hereinafter HOUSEHOLDS AND FAMILIES: 2010], fig. 1 (2012).

124. *Id.* at tbl.2, <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

125. There were fewer than fifty-three million households in 1960. U.S. BUREAU OF THE CENSUS, HOUSEHOLDS BY SIZE: 1960 TO PRESENT (2004), <http://www.census.gov/population/socdemo/hh-fam/tabHH-4.pdf>.

126. HOUSEHOLDS AND FAMILIES: 2010, *supra* note 123, tbl. 2, <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> (showing that the number of households rose by more than 11 million in the ten years from 2000 to 2010). One more recent estimate put the number of households at more than 122 million in 2013. U.S. BUREAU OF THE CENSUS, INCOME AND POVERTY IN THE UNITED STATES: 2013, at 23, tbl. 2 (2014), <http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>.

127. Because of sea level rise, the size of the United States is in fact shrinking slightly and will continue to do so. Sam Roberts, *Don't Worry, Census Says, but the U.S. Is Shrinking*, N. Y. TIMES, April 29, 2011, http://www.nytimes.com/2011/04/30/us/30land.html?_r=0 (citing census data about a slowly shrinking land mass).

128. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (deference to “economic” regulation); *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (an example of the deferential “rational basis” review in cases that do not implicate strict scrutiny based on race or gender discrimination).

129. *See, e.g., Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080-81 (2012) (holding that a review court must apply a “rational basis” review in an equal protection challenge to a social or economic regulation, under which the government will prevail if there is “a plausible policy reason” for the choice).

130. The term “Progressive Era” was coined in honor of the Progressive Party, founded by former President Theodore Roosevelt, who ran unsuccessfully for re-election in 1912. *See generally* G.E. MOWRY, THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT (1946) (discussing its formation and ideals).

Euclid, Ohio, whose zoning ordinance was scrutinized and upheld by the U.S. Supreme Court in 1926.¹³¹ In addition to zoning different uses, the Euclid ordinance imposed minimum sizes of houses and house lots.¹³² Through its clear discrimination against apartments and small houses, Euclid not only slowed its population growth,¹³³ but also discouraged potential migrants with low incomes. Indeed, a U.S. District Judge initially ruled against the constitutionality of the zoning law, concluding that its effect was to “classify the population and segregate them according to their income or situation in life.”¹³⁴

The Supreme Court that decided *Euclid* was noted for its conservative skepticism of Progressive era legislation, most notably *Lochner v. United States*.¹³⁵ But the Court diverged from its *laissez faire* reputation in upholding zoning regulations.¹³⁶ The landmark opinion was notable for its sympathy for the affluent suburban homeowner who wished to keep annoyances far away. Zoning laws, according to the Court, further the “health and safety of the community.”¹³⁷ Discrimination against apartments was justified because such buildings “destroy[]” the “residential character of a neighborhood” and “come very near to being nuisances,”¹³⁸ such as the pig in the parlor.¹³⁹

The Court also approved of the notion that local laws should be decided by current residents of the jurisdiction, not by metropolitan interests: “[T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with . . . authority to govern itself as it sees fit.”¹⁴⁰ Through this milestone decision, which was the only high court ruling on land use law for more than half a century, the Court gave its imprimatur to two hallmarks of suburban zoning law: that a locality may ignore the potential housing needs of its region, and that a suburb may discriminate against modest-cost housing. The *Euclid* decision opened the door for local governments to be ever-more intrusive in crafting laws that favor the social and economic desires of its current residents.

Although the first instance of a large-lot zoning law is obscure, cases

131. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 379-80 (1926).

132. To 21st century eyes, the minimum requirements seem small: houses in A-4 could be as small as 900 square feet (and only 700 square feet for corner lot houses). *Id.* at 381-82. These limits, in an age of large families, are a testament to the early 20th century acceptance of a more cramped living style than is associated with 21st century suburban ideals of large rooms, home-theater systems, and enormous chairs. Today, most zoning laws on house sizes restrict the *maximum* bulk and heights, in order to provide space and light for neighbors.

133. The population numbers show Euclid’s rapid transformation from a small town to a suburb in the early 20th century. In 1910 it held only 1,953 persons; ten years later, it held 3,363 persons. During the boom years of the 1920s, auto-driven suburbanization pushed the population up to 12,751. *Euclid, Ohio*, WIKIPEDIA, https://en.wikipedia.org/wiki/Euclid,_Ohio (last visited Sept 16, 2015) (displaying a compilation of decennial census figures).

134. *Ambler Realty Co. v. Vill. of Euclid, Ohio*, 297 F. 307, 316 (D. Ohio 1924), *rev’d*, 272 U.S. 365 (1926).

135. *Lochner v. N.Y.*, 198 U.S. 45 (1905) (striking down a law that limited working hours for bakers).

136. *Euclid*, 272 U.S. at 365.

137. *Id.* at 391.

138. *Id.* at 394-95.

139. *Id.* at 388.

140. *Id.* at 389.

challenging minimum lot size laws were first decided by courts in the 1940s.¹⁴¹ The most notable was *Simon v. Town of Needham*, decided in 1942.¹⁴² Needham is a suburb of Boston, about twelve miles west of the city center.¹⁴³ As a New England “town,” it holds a fairly large area of nearly thirteen square miles, which encompassed some farmland; like most suburban areas, it experienced rapid growth in the early twentieth century.¹⁴⁴ The town imposed a 7,000-square foot lot size minimum in 1931; ten years later, it changed the minimum for the south side of town to one acre (43,560 square feet).¹⁴⁵ The dramatic legal change occurred only days after the plaintiff’s purchase of land on the south side, with a plan to subdivide the land into small house lots.¹⁴⁶

In approving the zoning change, the state court echoed the reasoning in *Euclid*. It was the prerogative of the town’s government to decide what is best for the town, in spite of property rights arguments.¹⁴⁷ The court reasoned that restraints on new construction “prevent[ed] overcrowding,” “avoid[ed] congestion,” and ensured “adequate light, air and sunshine.”¹⁴⁸ To these assertions, the court added a fiscal rationale that became more appealing to later generations: that the town government probably would need to furnish “water, light, sewer and other public necessities” to the new houses.¹⁴⁹ This justification for restrictive laws—that governments must provide costly “infrastructure” or “capital facilities” for new houses—would become a bedrock argument for tighter laws on home building in the second half of the twentieth century.¹⁵⁰

141. However, in the 1920s, there were examples of laws imposing maximum household density for apartment buildings; these laws were, in effect, restrictions on height and bulk, rather than on lot size. See, e.g., *Barker v. Switzer*, 209 A.2d 151 (N.Y. 1924) (striking down a maximum of 10 units per acre in close-in suburb New Rochelle, N.Y., because New York state’s enabling law did not at the time allow for such restraints). In the 1920s, the U.S. Department of Commerce published a Standard State Zoning Enabling Act, which was a model for state laws to grant to local governments broad powers, including the power to regulate for “open spaces” and “the density of population.” See U.S. Dep’t of Commerce, *Standard State Zoning Enabling Act* § 1 (1926), <https://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

142. *Simon v. Town of Needham*, 42 N.E.2d 516 (Mass. 1942).

143. Interestingly, the Massachusetts high court referred to the town’s area in acres, not square miles – a practice typical of farmers, not city dwellers. *Id.* at 517.

144. Needham’s population grew from about 5,000 persons in 1910 to about 12,500 in 1940. *Needham, Mass.*, WIKIPEDIA, http://en.wikipedia.org/wiki/Needham,_Massachusetts (last updated Aug. 22, 2015) (displaying a compilation of decennial census population data).

145. *Id.* at 561.

146. *Simon*, 42 N.E.2d at 517. Tellingly, the court did not comment on the timing of events – the plaintiff’s contract to purchase the land in “early June,” followed by the radical change in the zoning law on “June 21” – other than to take pains to point out that the plaintiff’s purchase was not recorded until July. *Id.*

147. *Id.* at 517.

148. *Id.* at 518. The court did not note whether there was evidence presented as to the effect of houses on small lots on the supply of “air, light, and sunshine.”

149. *Id.*

150. See, e.g., DAVID L. CALLIES, ROBERT H. FREILICH, & THOMAS E. ROBERTS, *LAND USE* 521, 770-74 (6th ed. 2012) (setting forth arguments that restrictive land use laws on house construction are justified because of the infrastructure costs to the government generated by such houses). This justification may prove to be time bound. In the early days of American settlement, homesteaders did not rely on government infrastructure; they drew water from wells or streams, they lighted their houses with candles or oil, and they disposed of their waste in pits on their land. In the twenty-first century,

The *Needham* court also relied on an argument that perhaps would have appealed to the affluent justices who decided *Euclid*: that it is pleasant to live on a large lot. The court wrote that “[t]he advantages enjoyed by those living in one family dwellings located upon an acre lot might be thought to exceed those possessed by persons living upon a lot of ten thousand square feet.”¹⁵¹ This is no doubt true, but this argument is at best an example of paternalism, and at worst a fatuity. It may be restated as follows: Law should restrain people from making frugal choices because it is more enjoyable to be extravagant.¹⁵²

The court then turned to a more telling argument: “The benefits derived by those living in such a neighborhood must be considered with the benefit that would accrue to the public generally who resided in Needham by the presence of such a neighborhood.”¹⁵³ In other words, the presence of large lots increases the property values of nearby lots. This observation helps understand the popularity of lotting large among local governments. True, the court recognized the potential for zoning to become a tool of the wealthy, asserting that a law “cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who [are barred by restrictive laws] . . . for the purpose of protecting the large estates that are already located in the district.”¹⁵⁴ Nonetheless, applying an attitude of deference, under which a single justifiable rationale is sufficient, the court upheld the restriction.¹⁵⁵

The *Needham* court also addressed a critical concern that was all but ignored in *Euclid*: the fact that *all* suburban jurisdictions in a metro area may choose to lot large. Of the eight towns near Needham, six held laws requiring minimum lot sizes.¹⁵⁶ This might have led to a worry that the poor and middle-class were, in effect, being zoned out of much of suburban Boston.¹⁵⁷ But, ironically, the state

many suburban jurisdictions require developers either to build the infrastructure themselves, or to pay an “impact fee” to cover the costs, or both. See, e.g., Ronald Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177 (2006) (discussing broadly the practice of fees).

151. *Simon*, 42 N.E.2d at 518.

152. Surely, it may be “better” to buy a luxury sedan than an inexpensive coupe, because of the former’s greater comfort, better safety features, and higher resale value; but it would be folly for government to prohibit a citizen from purchasing a small vehicle, if only because many people cannot afford the larger car.

153. *Simon*, 42 N.E.2d at 518.

154. *Id.* at 519.

155. *Id.* at 519-20.

156. *Id.* at 518.

157. The fact that one suburb’s desire for restraints on housing may be replicated among others, resulting in region-wide restrictions, has been recognized by many courts. See, e.g., *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 487 (Cal. 1976) (“[M]unicipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.”); *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 723 (N.J. 1975) (recognizing the problem of replication of exclusionary zoning laws across suburbs). The reference to suburbs as “islands” that act in little regard for the region’s housing needs is a nod to a famous and influential article. Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969). Among other things, this article helped popularize the term “exclusionary zoning,”

court used this fact to help justify the law, concluding that “it is persuasive that many other communities when faced with an apparently similar problem have determined that the public interest was best served by the adoption of a restriction”¹⁵⁸ The fact that a phenomenon is widespread may assure a judge that one instance is not revolutionary, but it does nothing to ensure that the law is either constitutional or wise, especially when the law harms “discrete and insular minorities”¹⁵⁹ who cannot even vote for the representatives that have enacted the law.¹⁶⁰

As a whole, however, the reasoning in *Simon v. Town of Needham* set a template for courts in the second half of the twentieth century. Applying deferential scrutiny, courts have almost uniformly accepted local governments’ assertions that lotting large serves the public welfare by restraining congestion, limiting public infrastructure costs, offering a pleasant environment, and propping up local property values. Most of these cases have arisen in affluent suburbs that faced the prospect of significant population growth.¹⁶¹

For example, the Supreme Court of New Jersey in 1952 affirmed lotting large in Bedminster Township, which is about 50 miles west of Manhattan.¹⁶² Noting the precedent of *Euclid* for addressing “urban problems,” the court wrote that, “[a]s much foresight is now required to preserve the countryside for its best use as has been needed to save what could be salvaged of our cities.”¹⁶³ The court did not address the fact that the United States was experiencing a baby boom—the nation’s population would more than double from 1950 to 2010¹⁶⁴—and that its new

which encompasses all efforts of a government to use its land use laws to keep out those whom it does not want.

158. *Simon*, 42 N.E.2d at 518.

159. This is famous language from *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), which set forth the foundation for “strict scrutiny” of laws that adversely affect racial minorities.

160. Local governments are elected by the current citizens of the suburb, not by those who might wish to move to the suburb. Thus, for example, a schoolteacher who was hired by the growing school system of Needham in 1940, and who might have been frustrated by an inability to find a house or apartment in Needham on a single schoolteacher’s salary, had no recourse through the ballot, because this schoolteacher was not eligible to vote in Needham’s elections.

161. For example, a New York court in 1950 summarily upheld a two-acre minimum ordinance, relying on deference to “an elastic application of the police power” and to the town’s judgment as to the “character of the village.” *Dilliard v. Vill. of N. Hills*, 276 A.D. 969, 969 (N.Y. App. Div. 1950). Later that year, another New York court upheld a 20,000 square foot lot minimum. *Gignoux v. Vill. of Kings Point*, 99 N.Y.S.2d 280 (1950). This panel concluded that it was “wholly understandable” for the locality to provide “a relief from the densely populated areas adjacent to a great city,” *id.* at 284, and applauded the municipality’s efforts to “preserve the exclusive, high class and rural aspects of the community” — a remarkable ideal for a town that is literally adjacent to Queens, New York City. *Id.* at 286. Similarly, the Supreme Court of Missouri in 1952 upheld a series of lotting large requirements, up to three acres, in the rich St. Louis suburb of Ladue, Missouri, reasoning that an “intrusion of smaller lots into such an area will have the effect of materially impairing the value of the buildings already constructed.” *Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 776 (Mo. 1952) (*en banc*). The court also concluded that the plaintiff’s plan to subdivide dozens of acres would “unbalance” the city’s plan for schools, police, and other city services. *Id.* at 776.

162. *Fischer v. Bedminster Twp.*, 93 A.2d 378, 383-84 (N.J. 1952). Bedminster is in Somerset County, NJ.

163. *Id.* at 382-83.

164. U.S. Bureau of the Census, *Resident Population Data*, <http://www.census.gov/2010census/data/apportionment-pop-text.php> (1950 population was only 151,325,798).

citizens would need someplace to live, especially in the suburban areas of its largest city. But the court's reference to preserving the countryside hinted at a new ground—environmental protection—that would constitute yet another arrow in the quiver of legal arguments to justify lotting large. The environmental revolution of the 1960s and 1970s¹⁶⁵ would give governments a new basis for validation—one that appealed to liberals, and that balanced the property-values justification that appealed to conservatives.

Challenges to minimum lot sizes have diminished in number in recent decades, simply because the battles have been fought and won by the governments.¹⁶⁶ Lotting large has become a settled part of the American social framework, like political platitudes about the “middle class” and formulaic Hollywood movies. Because facial challenges to lotting large are doomed to failure by the deference granted to government under “rational basis” review,¹⁶⁷ landowners who chafe at large lot zoning must look for other methods of attacks. In addition to a procedural

165. See, e.g., Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L. J. 395 (1995) (discussing the “environmental revolution” of the late 1960s and early 1970s).

166. In the 21st century, facial challenges are disposed of quickly through the incantations of the public welfare benefits of restraining traffic congestion and preserving nature and farms. Two examples from the new millennium will suffice. In a recent case from Highland Park, Ill., an affluent suburb north of Chicago, existing homeowners brought a variety of constitutional challenges to the city's denial of an application to build a house on a small lot adjacent to their home lot. *LaSalle Nat. Bank v. City of Highland Park*, 799 N.E.2d 781 (Ill. App. Ct. 2003). The Court upheld the government, noting the presumption of validity and the principle that “economic regulation” will be upheld if there is “any reasonably conceivable state of facts that could provide a rational basis.” *Id.* at 799. Minimum lot sizes are rational, the court reasoned, because they “prevent congestion and promote safety.” *Id.* at 797 (citing *Reitman v. Village of River Forest*, 9 Ill.2d 448, 453, 137 N.E.2d 801 (1956)). In a case from Bedford, Massachusetts, outside Boston, a court upheld a challenge to a law requiring lots of at least 26,000 square feet, no part of which may occupy a wetland area. *Zanghi v. Bd. of Appeals of Bedford*, 807 N.E.2d 221 (2004). The court approved of the “meritorious goals” to “protect against flooding and to maintain water quality.” *Id.* at 225.

167. Like most social and economic regulation, zoning laws typically are reviewed, in facial challenges, through a rational basis test. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926) (applying a “rational relation” test, in the landmark zoning case). Traditional rational basis review is a very deferential standard, under which a challenged law is to be upheld “if any state of facts reasonably can be conceived that would sustain it” *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). A recent example of a challenge to agriculturally oriented lotting large arose in Lancaster County, Pa., where a court upheld a 25-acre minimum, despite the argument of the landowner that the law effectively blocked population growth. *Penn Street, L.P. v. East Lampeter Twp. Zoning Hearing Bd.*, 84 A.3d 1114 (Comm. Ct. Pa. 2014). A more interesting recent case, involving farm protection, arose in rural Umatilla County, in northeastern Oregon. *Thompson v. Land Conservation and Dev. Comm'n*, 204 P.3d 808 (Or. Ct. App. 2009). There, the government decreased a minimum lot size from 160 acres to only 40 acres, in order to facilitate vineyards and wineries. Challengers asserted that this kind of agriculture harmed the traditional farming practice of dry land wheat farming, noting that the state regulations required zoning that protected “existing” farming enterprises. *Id.* at 829 (citing Ore. Admin. Reg. § 660-033-0100). The Court concluded that “existing” included all pre-existing farm operations, not just the traditional dominant type of agriculture. *Id.* at 815. This ruling acknowledged the need for zoning laws to change with a changing economy. Had a developer sought to argue that Oregon's population growth justified small house lots in Umatilla County, however, the result might have been different.

challenge,¹⁶⁸ a landowner might argue that a specific application to its land amounts to a “taking” that requires just compensation under the U.S. Constitution’s Fifth Amendment.¹⁶⁹ A regulation that “goes too far”—in the infamously amorphous words of the Supreme Court, penned by Justice Oliver Wendell Holmes, Jr., in 1922—may be considered a compensable taking.¹⁷⁰ In *Penn Central Transportation Co. v. City of New York*, the Court offered factors to apply, the most significant of which is whether the regulation has “interfered” with the landowner’s “investment-backed expectations.”¹⁷¹ Accordingly, if a landowner makes irretrievable investments in reasonable anticipation of being able to build a certain density of homes, and the government then imposes a lower density requirement that causes the landowner to lose a significant amount of the investment, such a landowner might plausibly assert a fair claim for compensation.¹⁷²

The most interesting legal challenge in the new millennium arose in Bedminster Township, Pennsylvania,¹⁷³ a 31-square-mile suburb north of Philadelphia. The township in 1996 enacted a complicated new ordinance, ostensibly to preserve farmland.¹⁷⁴ For tracts of land greater than ten acres, a landowner was required to set aside at least half of farmable land for agricultural purposes; the landowner could build a house lot of at least one acre on the remainder of the tract, but could not build in wetland areas or floodplains.¹⁷⁵ An owner, whose plans to develop a subdivision were upset, challenged the change in law.¹⁷⁶ The state supreme court approved of the principles of both farmland preservation and minimum lot sizes, rejecting an assertion that lotting size requires

168. For example, the zoning might not have been imposed in accordance with the authorization to local governments under state law, or that the government did not conduct a required public hearing before adopting a change.

169. U.S. CONST. amend. V (“nor shall private property be taken for public use without just compensation”). Most state constitutions set forth rights similar to the Fifth Amendment’s takings clause. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999) (discussing state takings clauses).

170. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

171. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

172. See *Florida Rock Indus. v. U.S.*, 45 Fed. Cl. 21, 43 (1999) (finding a “taking” under the *Penn Central* factors, including the upsetting of investment-backed expectations); see also Steven J. Eagle, *The Four-Factor Penn Central Regulatory Test*, 118 PENN ST. L. REV. 601 (2014) (scrutinizing the factors and their applications, from a law and economics perspective). A recent example arose in Glenn Heights, Texas, a rapidly growing little suburb south of Dallas. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004). Although Texas is known for its relatively loose zoning laws – and low housing prices – the city in 1997 tightened a minimum lot size requirement from 6,500 square feet to 12,000 square feet. *Id.* at 664-665. A developer that had previously notified the city of an intention to subdivide 194 acres, sued, arguing that the tighter lotting large law was a compensable taking, in large part because it upset the owner’s investment-backed expectations. *Id.* at 666. The Supreme Court of Texas ruled for the city, holding that the change did not interfere with sunk costs, calling the owner’s investment “speculative.” *Id.* at 678.

173. Bedminster Township, Pa., is not adjacent to Bedminster Township, N.J., which was the site of a significant lotting large case in the 1950s. Perhaps the name “Bedminster” encourages laws to ensure a “bedroom” character.

174. *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 146-47 (2002).

175. *Id.* at 148.

176. *Id.* at 148-50.

an “extraordinary justification.”¹⁷⁷ But the court also ruled that the combination of restrictions—including the fact that the one-acre minimum size was chosen simply because it was a “good number,” according to township officials—was unjustified under state law.¹⁷⁸ The court concluded that the township “is no longer attempting to preserve agriculture, but rather, is improperly attempting to exclude people from the area and, in so doing, is unreasonably restricting the property rights of the landowner.”¹⁷⁹ It was an uneasy form of reasoning to link a developer’s right to build to the exclusionary effects on people who were not even parties to the litigation. But Pennsylvania holds one of the nation’s strongest sets of laws requiring governments to foster housing of various types, including apartments and mobile homes.¹⁸⁰ In any event, the impact of the intriguing *Bedminster* decision has been diminished by subsequent cases. The Pennsylvania Supreme Court has re-affirmed that the practice of lotting large is presumed to be valid.¹⁸¹

This survey of case law reveals that facial constitutional challenges to lotting large are likely to result in dead ends. The *Euclid* deference to governments in exercising their broad “police power”—other than in cases of explicit discrimination against suspect classes—is consistent with American constitutional law.¹⁸² Moreover, if a court accepts as valid justifications for the avoidance of traffic congestion, the preservation of “open space,” or quiet “character,” then almost any instance of lotting large will be defensible. Even a local politician who supports lotting large because of a desire to exclude poor persons or people of color, is likely to be savvy enough to mask this preference with more acceptable and readily available public welfare arguments.

IV. A SIMPLE ECONOMIC MODEL OF LOTTING LARGE

Why is large lot zoning so ubiquitous as a method of land use regulation? To answer this question, this Part develops a simple economic model for a typical suburban jurisdiction. The suburb both faces demand for housing from prospective migrants and contains a significant amount of “undeveloped” land—that is, land on

177. *Id.* at 151-53. The landowner relied on language in the Appeal of the Township of Concord, 439 Pa. 466, 268 A.2d 765 (1970), to the effect that one-acre lots are sufficiently large for any house, and that laws requiring larger lots need “extraordinary justification” because of their potential for exclusion. *Id.* 766-70. This case did not recognize that large lot laws exist, not to give adequate room for a house, but rather to dampen population growth. Indeed, a large lot can be built comfortably on much less than one acre.

178. *Id.* at 157-58.

179. *Id.* at 158-59.

180. 53 Pa. Stat. § 10604(4), (5) (2015).

181. *In re* Petition of Dolington Land Group, 839 A.2d 1021 (Pa. 2003) (upholding a complex land use ordinance and casting doubt on the viability of the *Bedminster* decision as significant precedent). A lower Pennsylvania court upheld a 40-acre minimum, designed to preserve farms, and a one-acre lower limit for single-family houses. *McGonigle v. Lower Heidelberg Twp. Zoning Hearing Bd.*, 858 A.2d 663, 668-70 (Pa. Commw. Ct. 2004). Most recently, a lower court upheld a 25-acre minimum, imposed to protect agriculture, despite the challenger’s reliance on the *Bedminster* case. *Penn Street, L.P. v. East Lampeter Twp. Zoning Hearing Bd.*, 84 A.3d 1114, 1142-44 (Pa. Commw. Ct. 2014).

182. *See, e.g.,* *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (observing deference given to “economic” regulation); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (serving as an example of the deferential “rational basis” review in cases that do not implicate strict scrutiny based on race or gender discrimination).

which new single-family homes, apartments, or mobile homes, could be built.¹⁸³

A. Current Residents' Preference for Low Density

Let us assume that the county contains X number of acres of undeveloped land. Law may regulate the maximum number of housing units that may be constructed on this land.¹⁸⁴ Without any legal restriction, the land could be built up with large multi-family units. To use an extreme example, Stuyvesant Town/Peter Cooper Village in lower Manhattan holds more than 11,000 apartments on 80 acres, or about 140 units per acre.¹⁸⁵ Accordingly, the number of housing units on the undeveloped area could rise to 100X or more. Suburban counties, even populous ones, are typically much less dense, of course. For example, Westchester County, New York, located north of the city, holds less than 1.4 units per acre.¹⁸⁶ The most populous suburban county in the nation, Orange County, California, has about 2.0 units per acre.¹⁸⁷

Lot size zoning laws, by definition, restrain the number of housing units per acre.¹⁸⁸ The phenomenon of “large lot zoning” typically refers to laws that require one acre or more per lot. Accordingly, it is more useful for this study to employ a

183. The distinction between developed and undeveloped suburbia is often significant under law. For example, the famous “Mt. Laurel” doctrine, adopted by the New Jersey Supreme Court in 1975, imposed a duty of each “developing” locality to provide a “fair share” of low-cost housing. *S. Burlington County NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 715-23 (N.J. 1975) [hereinafter *Mt. Laurel I*]. This doctrine represented the high-water mark of state constitutional efforts to prevent localities from using zoning to exclude. The “developing” town limitation allowed many towns to argue for a loophole; the distinction was removed in later opinions during the massive, multi-decade litigation. *Mt. Laurel II*, 456 A.2d 390 (N.J. 1983).

184. It would be a mistake to assume that an in-demand jurisdiction will continually grow in population. In cities, for example, all developable land may become occupied, thus making it physically (or legally) impossible for the number of housing units to grow, unless the city allows for greater density in already built-up areas. This could be achieved by changing zoning to allow for apartments on land previously zoned for single-family houses, or by allowing tall apartments where small apartments have stood. For example, the population of the square-mile City of London England, fell from more than 100,000 in 1851 to only about 7,000 today, not because it is economically depressed, but because its land is now mostly occupied by offices, not housing. *ENCYCLOPEDIA BRITANNICA, CITY OF LONDON*, available at <http://www.britannica.com/EBchecked/topic/346913/City-of-London>.

185. Charles Bagli, *Stuyvesant Town, Bastion of Affordable Housing, Is on Way Back to Auction*, N.Y. TIMES, May 13, 2014, <http://www.nytimes.com/2014/05/14/nyregion/stuyvesant-town-lender-prepares-to-foreclose-on-a-loan-for-the-complex.html>. The “acre” (which encompasses 43,560 square feet, or a square of about 208 feet on each side) is the unit used most often in land use and housing law. Six hundred and forty acres make up a square mile, which is the unit most typically used for entire cities and suburbs.

186. U.S. Bureau of the Census, *State and County Quick Facts: Westchester County, N.Y.*, <http://quickfacts.census.gov/qfd/states/36/36119.html>. Similarly, the large and affluent Cobb County, Georgia, north of Atlanta, holds about 1.3 units per acre. U.S. Bureau of the Census, *State and County Quick Facts: Cobb County, N.Y.*, <http://quickfacts.census.gov/qfd/states/13/13067.html>.

187. U.S. Bureau of the Census, *State and County Quick Facts: Orange County, Cal.*, <http://quickfacts.census.gov/qfd/states/06/06059.html>.

188. The numbers in this paragraph ignore small complications of, for example, whether streets are included in the calculations of units per acre. Moreover, most suburban jurisdictions require that new housing developments include significant acreage of “open space” – woods, fields, ponds, etc. – and other acreage not part of the housing units. These requirements decrease further the number of allowable units per acre.

term that refers to “acres per lot,” rather than “lots per acre.” Let us define N as the minimum number of acres per lot permissible under the law. N is the “minimum lot size.”¹⁸⁹ The number N runs counter to density; a high N allows fewer houses in a given area than does a low N . Accordingly, the fraction A/N represents the maximum number of houses that is permissible in an area encompassed by an acreage expressed by A . If $A = 100$, a hypothetical zoning law that assigns $N = 2$, ensures a maximum of 50 houses in the area. When $N = 1$ in the same area, 100 houses are allowed. If $N = 20$, only five houses are permissible.¹⁹⁰

As explained in Part III, American land use law typically permits wide discretion in assigning N (the minimum lot size). Many localities, especially “in demand” suburbs, have reasons to impose a high N . Local governments are responsive exclusively to their current residents.¹⁹¹ They are not responsible for considering the interests of prospective migrants, persons in other areas of the state, or any other notion of public welfare beyond its own borders.¹⁹² As noted above, local governments often act to avoid high density, thus offering an “amenity” to current residents.¹⁹³ One motivation is to preserve the relative quiet and “character” of a community.¹⁹⁴ As Schoenbrod reasoned in 1969: “Fewer new neighbors mean less noise, less traffic, and more open space”—in the sense of more lawns and fewer buildings, and fewer automobiles on the local streets.¹⁹⁵ Fewer cars mean somewhat cleaner air, while fewer people means less garbage and fewer people crowding local parks and trails.

Next, restraining the number of new houses legally constrains supply in the jurisdiction, thus increasing the value of the existing homes of the current

189. For the example of four units per acre, $N = 1/4$. For a minimum of two acres per lot, $N = 2$.

190. Zoning law may allow more than one unit per acre, of course. When one acre lawfully holds five units, as with a neighborhood of small single-family houses, $N = 1/5$. With an area zoned for multifamily housing (that is, apartments or condominiums), one acre might lawfully hold 30 units; here, $N = 1/30$.

191. Schoenbrod, *supra* note 38, at 1420 (“Present law authorizes suburbs to zone, and homeowners alone control the suburb’s decisions.”). In the landmark case, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court reasoned:

But the village, though physically a suburb of Cleveland, 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. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines.

Id. at 389; *see also* FISCHER, *supra* note 36, at 4 (arguing that “homevoters” push local governments to regulate in a manner that maximizes the value of their homes).

192. *See Euclid*, 272 U.S. at 389 (observing that a suburb need respond only to its own wishes).

193. *See* Gottlieb et. al., *supra* note 48, at 5; William T. Bogart, *What Big Teeth You Have! Identifying the motivations for exclusionary zoning*, 30 URB. STUD. 1669 (1993) (identifying various motivations, including psychological reasons).

194. *See, e.g., Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 959-61 (1st Cir. 1972) (lotting large to preserve the rural “character” of the town); *Elbert v. Vill. of N. Hills*, 28 N.Y.S.2d 317, 319 (1941) (citing the desire for preserving “quietude and rural character”).

195. Schoenbrod, *supra* note 38, at 1420; *see also* Soc’y of Plan. Officials, *Minimum requirements for Lot and Building Size*, AM. PLAN. ASS’N, <https://www.planning.org/pas/at60/report37.htm> (1952) (observing that lotting large “may eliminate congestion”).

residents.¹⁹⁶ Prospective homebuyers have fewer choices than they would under a free market and will bid up the prices of the relatively scarce houses in existence.¹⁹⁷ In addition, the inflated prices for the relatively scarce existing houses make it more difficult for persons of modest incomes to migrate to the area. This appeals to “snob zoning”¹⁹⁸ and those who wish to exclude racial minority households, who tend to have lower incomes.¹⁹⁹ Moreover, to the extent that new housing increases the costs of public infrastructure, such as roads, sewers, and schools, current residents have an incentive to oppose density in order to avoid higher taxes.²⁰⁰

These factors are sometimes characterized by the catchall acronym NIMBY, meaning “not in my backyard.”²⁰¹ Although this acronym is useful, it can seem overly glib, thus obscuring the significance of the phenomenon by which a locality’s residents seek to restrain population density in their jurisdiction.

B. Lotting Large as the Preferred Tool

Law offers existing residents a variety of tools to restrain population density. Let us define *D* as the population density of a city, town, or county. *D* may be limited by a number of factors. We can express *D* as a function of various factors as follows: $D = f(a, b, c, d, e \dots)$. This section identifies five factors as potential policy choices to restrain density. They are: (a) a jurisdictional population limitation; (b) a cap on new housing; (c) geographic prohibitions on new housing; and (d) a household population limit; in addition to (e) large lot zoning. As explained herein, lotting large is the option that is most likely to be effective in checking population density, and most likely to withstand a legal challenge.

1. Jurisdictional Population Limitations.

Perhaps the most straightforward option to control density would be to impose

196. See Ward, Schuetz, & Glaeser, *supra* note 43, at 4-5 (noting that large lot zoning laws drive up prices in both the jurisdiction in which they are adopted, and neighboring ones that feel added pressure from home buyers who are stymied from buying in the first area).

197. See Schoenbrod, *supra* note 38, at 1421 (“The market value of each homebuyer’s property will rise as the lot size minimum is increased.”).

198. One of the first instances of the usage of this common characterization was Peter J. Adang, *Snob Zoning – A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507 (1963-1964).

199. The most famous spotlight on the exclusionary effects of restrictive zoning laws on people of color and poor people was the famous decades-long litigation involving Mt. Laurel, N.J. Here, the New Jersey Supreme Court in 1975 declared that black, Hispanic, and poor persons were effectively “barred” from the suburb outside Philadelphia because of the town’s large lot zoning requirements. *Mt. Laurel I*, 336 A.2d 713 (N.J. 1975); see also Matthew Resseger, *The Impact of Land Use Regulation on Racial Segregation: Evidence from Massachusetts Zoning Borders* 33 (2013) (unpublished job market paper) (available at <http://scholar.harvard.edu/resseger/jmp>) (concluding that minimum lot sizes do restrain the number of black and Hispanic families).

200. See, e.g., *Mt. Laurel I*, 336 A.2d at 723 (referring to the desire to avoid higher taxes necessitated by new housing, especially for schools); DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, *CASES AND MATERIALS ON LAND USE* 199-200 (5th ed. 2008) (developing the argument that existing residents “subsidize” newcomers through taxes that pay for infrastructure).

201. See, e.g., Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495 (1994) (identifying various groups that suffer when restraints are imposed).

a firm limit on population. While such a law theoretically could be justified under the expansive interpretation of a government's police power,²⁰² it likely would run afoul of other constitutional norms. Any attempt to control births would probably violate the right to privacy, including the right to reproduce.²⁰³ It is unlikely that an American government would attempt a step in the direction of China's infamous one-child policy.²⁰⁴ Likewise, a blanket prohibition against new migrants—perhaps ameliorated by a waiting list that would be activated upon the death of an existing resident—probably would violate the right to travel.²⁰⁵ The Supreme Court struck down, as violating the commerce power, California's attempt in the 1930s to limit the migration of "Okies" and other poor migrants fleeing the "Dust Bowl" of the central United States.²⁰⁶

2. Caps on New Housing.

A more palatable method of imposing a permanent restraint on density would be to cap the number of housing units, as opposed to people. Yet again, this step faces obstacles. Probably the most notable example was taken by Boca Raton, Florida, a wealthy suburb north of Miami, in the 1970s.²⁰⁷ A referendum approved by city voters capped the maximum number of housing units at 40,000 and required the city government to deny any building permit that would push the total over the cap. The government implemented this policy with a variety of restraints,

202. The police power encompasses any law that would further the health, safety, or general "welfare" of the public. *See, e.g.,* *Town of Dillon v. Yacht Club Condo. Home Owners Ass'n*, 325 P.3d 1032, 1044 (Colo. 2014); *Farley v. Graney*, 119 S.E.2d 833, 854 (W. Va. 1960). The United Kingdom, for example, has been engaged in a debate whether it should attempt to place some sort of cap on its population, which as of 2015 was about 63 million; some argue for a cap of about 70 million. Mark Easton, *What is the UK's optimum population?*, BBC NEWS, July 16, 2012, <http://www.bbc.com/news/uk-18854762>. A strict limitation on population growth might well foster the general welfare of the current residents, who would not have to face the prospect of increased road traffic or the costs of greater infrastructure.

203. *See* *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (establishing a right not to reproduce through aborting a pregnancy).

204. *See* Kenneth Pletcher, *One-Child Policy*, *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/1710568/one-child-policy> (last visited Nov. 5, 2015). China announced in 2015 an end to the controversial policy. Chris Buckley, *China Ends One-Child Policy, Allowing Families Two Children*, N.Y. TIMES, Oct. 29, 2015, http://www.nytimes.com/2015/10/30/world/asia/china-end-one-child-policy.html?_r=0.

205. *See* *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (discussing the development of the "right to travel"); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (vindicating the right to travel, interpreting the right to equal protection); *Crandall v. Nev.*, 73 U.S. 35 (1868) (first statement of the right to travel).

206. *Edwards v. Cal.*, 314 U.S. 160, 168 (1941). For a brief discussion of the history leading up to *Edwards*, *see* Constitutional Rights Foundation, *Dust Bowl Exodus: How Drought and the Depression Took Their Toll* (2005), <http://www.crf-usa.org/bill-of-rights-in-action/bria-21-3-a-dust-bowl-exodus-how-drought-and-the-depression-took-their-toll.html>. There is little doubt that some 21st century residents of California or Colorado lament the inability to bar out-of-state migrants.

207. *City of Boca Raton v. Boca Villas Corp.*, 371 So.2d 154, 155 (Fla. Dist. Ct. App. 1979).

including tougher large lot laws.²⁰⁸ But a state appellate court struck down the cap, concluding that there was little or no evidence that infrastructure, schools, or other city services could not handle further population growth.²⁰⁹ In doing so, the court *sub silentio* reversed the usual presumption in favor of the validity of zoning laws and placed the burden on the city government to justify it, which the government apparently did not do vigorously.²¹⁰

More popular than a cap on the number of housing units is a rationing of new housing. The most famous early example was in Ramapo, New York, in the late 1960s. The suburb adopted a quota system for new housing permits, under which proposed units received points for their proximity to existing infrastructure, such as schools, roads, and sewer roads.²¹¹ The New York courts approved the plan, in part through a finding that the town was committed to building new infrastructure to allow for population growth.²¹² A similar approach was taken by Livermore, California, near the San Francisco Bay area.²¹³ Although the Supreme Court of California upheld a moratorium on new housing until the city improved its infrastructure, the plan withstood a withering dissent from Justice Mosk, who wrote that Livermore's action "invokes an elitist concept to construct a mythical moat around its perimeter, not for the benefit of mankind but to exclude all but its fortunate current residents."²¹⁴

A service-based moratorium may be fiscally sound, but it provides no long-term guarantee of checking density. Indeed, Livermore's population has more than doubled since its temporary stop-growth plan.²¹⁵ A firmer means of controlling population is to impose an annual quota on new housing units. This approach was once adopted by Petaluma, California.²¹⁶ Although the U.S. Court of Appeals for the Ninth Circuit warned that "municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region,"

208. *Id.*

209. *Id.* at 155-57.

210. *Id.* at 156-60. For the rule that local laws adopted pursuant to the police power are presumed to be valid, *see, e.g.*, *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (zoning); *Unverferth v. City of Florissant*, 419 S.W.3d 76, 95 (Mo. Ct. App. 2013) (traffic laws). Had Boca Raton defended the voter-approved cap more vigorously, perhaps with time-tested arguments that it sought to restrain auto traffic and provide for open space and a suburban character, the analysis might have been different.

211. *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 365-71 (1972).

212. *Id.* at 382.

213. *Associated Home Builders etc., Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976). The city was once a small agricultural center, but by the 1970s was faced with a wave of population demand from people seeking reasonably priced houses in pleasant neighborhoods within driving distance of San Francisco Bay.

214. *Id.* at 492 (Mosk, J., dissenting).

215. *Compare* Bay Area Census, *City of Livermore 1970 Census*, <http://www.bayareacensus.ca.gov/cities/Livermore70.htm> (last visited Dec. 15, 2015), *with* Bay Area Census, *City of Livermore 2010 Census*, <http://www.bayareacensus.ca.gov/cities/Livermore.htm> (last visited Dec. 15, 2015).

216. *Constr. Indus. Ass'n of Sonoma Cnty. v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975). Once a "small town," the city was absorbed into the San Francisco Bay metro area. *Id.* at 900. The local government imposed a cap of only 500 housing permits per year, which was considerably smaller than the number granted just before the new law. *Id.* at 900-02.

it upheld Petaluma's quota.²¹⁷ Using language that could have been written in the 1920s, the court concluded: "[T]he concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."²¹⁸ But this slow-growth technique still allows for a perpetual, creeping population increase; Petaluma now holds more than twice as many persons as it did when the quota law was adopted.²¹⁹

3. *Geographic Prohibitions of New Housing.*

Another technique would be to ban entirely new construction in certain areas or zones. But this potentially powerful tool for restricting density runs afoul of the sole reference in the U.S. Constitution to "property"—the Fifth Amendment right against the government's uncompensated "taking" of property.²²⁰ The most notable example of a blanket geographic ban on new housing was a 1988 South Carolina law that prohibited any new construction within a certain distance of the Atlantic shoreline.²²¹ A real estate developer named David Lucas, who had spent nearly a million dollars to buy two empty beachfront lots in the midst of a developed coastal community, was in effect prevented from building anything.²²² This ostensibly dramatic consequence compelled the Supreme Court, in an opinion by Justice Antonin Scalia, to establish a fairly clear principle of regulatory takings law: when a regulation removes "all economically beneficial uses" of the land, the government has, in effect, "taken" the land and must provide just compensation.²²³ The state agency ended up paying the landowner and then selling the land.²²⁴ The "total taking" principle set forth in *Lucas v. South Carolina Coastal Council* stands as a formidable roadblock to regulations on density.²²⁵ The principle encourages governments to avoid, at all costs, any regulation that might be characterized as "total" with regard to a landowner. By contrast, a regulation that allows a landowner *some* economically beneficial use of the land—even if the income is only a small fraction of what might accrue if it were unregulated—does not trigger

217. *Id.* at 908.

218. *Id.* at 908-09. The Court was swayed in part by a lack of evidence that the quotas were designed to limit minority persons, thus eliminating a potential claim of unconstitutional discrimination. *Id.* at 908.

219. See BAY AREA CENSUS, *City of Petaluma, 1970 -1990*, <http://www.bayareacensus.ca.gov/cities/Petaluma70.htm> (last visited Oct. 1, 2015); BAY AREA CENSUS, *City of Petaluma, 2000-2010*, <http://www.bayareacensus.ca.gov/cities/Petaluma.htm> (last visited (Oct. 1, 2015).

220. U.S. CONST. amend. V.

221. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007-09 (1992) (discussing South Carolina's Beachfront Management Act, S.C. Code Ann. § 48-39-250 (Supp.1990)).

222. *Id.* at 1008.

223. *Id.* at 1019. The only circumstance in which the government may avoid liability is when the government is regulating something that "inheres" in the landowner's title to begin with, such as the traditional principle that one may not use one's land to create a nuisance. *Id.* at 1028.

224. GIDEON KANNER, NOT WITH A BANG, BUT A GIGGLE: THE SETTLEMENT OF THE LUCAS CASE ch. 15 (David L. Callies ed. 1996).

225. Commentators summarize the holding in *Lucas* as the "total taking" principle. See, e.g., John J. Delaney, *What Does It Take to Take? A Post-Dolan Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 URB. LAW. 55, 64 (1995) (referring to "total taking").

Lucas compensation.²²⁶ Rather, such regulations are analyzed under the much more forgiving—for the government—*Penn Central Transportation Co. v. New York City* test.²²⁷

4. Household Population Limitations.

Another technique to slow population density would be to restrict the number of persons who may live in a household. But this, by itself, would not limit new housing construction. And it also would encounter some of the same constitutional dilemmas that complicate population caps. Although they are enforced fitfully, many jurisdictions ostensibly regulate the “overcrowding” of houses and apartments.²²⁸ But any law that purports to restrict related persons from living together would be on constitutional thin-ice. The most famous example was *Moore v. City of East Cleveland*, in which the U.S. Supreme Court struck down, through substantive due process, an ordinance that prevented a grandmother and two grandchildren from living together in a single house.²²⁹ Accordingly, while governments may permissibly zone out group houses and other unwanted living arrangements,²³⁰ restrictions on household composition are unlikely to be very effective at limiting density.²³¹

226. In *Euclid*, the landowner asserted that the zoning law decreased the value of its property by significantly more than 50 percent. 272 U.S. at 384. An even more dramatic example was *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), in which the landowner received no relief, even after an assertion that the value of its land fell by more than 80 percent because of the land use law. *Id.* at 405.

227. 438 U.S. 104 (1978). The *Penn Central* decision set forth factors for a court to consider in a non-total regulatory takings claim, the most important of which is whether the regulation upset “significant investment-backed expectations.” *Id.* at 124. An extensive recent survey concluded that *Penn Central* claims that rely solely on financial loss are a “difficult sell.” Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGICAL L.Q.* 307, 371 (2007).

228. For a critical analysis of such laws, and the controversy that arose in Manassas and Prince William County, Va., where occupancy limits were enforced most often against Latino migrants to the suburban areas in the years 2005-2008, see PAUL BOUDREAUX, *THE HOUSING BIAS* 11-60 (2011).

229. 431 U.S. 494, 497 (1977). The court reasoned that “[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.” *Id.* at 504.

230. See *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding an affluent suburb’s ban on group houses of unrelated people, in an enforcement action against a group of college students who had rented a house).

231. A related concept would be to restrict the maximum size of a house. Indeed, “area” limits on the bulk of buildings are ubiquitous in zoning law. See, e.g., JULIAN CONRAD JURGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 83, at 4:14 (3d ed. 2013) (discussing laws limiting floor-area ratio). But with the average household in the United States falling to 2.5 persons, and most households holding only one or two persons, see sources cited *supra* notes 121-125 and accompanying text, such restrictions are unlikely to be successful in limiting new construction. An interesting side note concerns laws that impose minimum sizes on houses and apartments. One notable early case struck down a law imposing minimum sizes and minimum costs, reasoning that “[n]o person under the zoning power can legally be deprived of his right to build a house on his land merely because the cost of that house is less than the cost of his neighbor’s house.” *Lionshead Lake Inc. v. Wayne Twp.*, 80 A.2d 650, 653 (1951). A thoughtful report of the American Planning Association in 1952 gave almost as much attention to minimum house size laws as to minimum lot size laws. AM. PLANNING ASS’N, *supra* note 195, at 6-13. It noted the exclusionary effect of such laws against households with lower incomes, referring to the problem of “snob” zoning. *Id.* at 10-12. In any event, house size laws are less popular today than lot size laws, perhaps because of the

5. Large Lot Zoning.

In contrast to the other policy options, large lot zoning offers a relatively clear path for local governments to control both population and housing density. Unlike population caps, it is not susceptible to constitutional claims of the right to reproduce or travel. Unlike moratoria, it may be permanent. Unlike quotas or household composition limitations, it may guarantee a long-term restriction on the population density. And unlike geographical bans on new housing, lotting large avoids the ominous prospect—to government—of a *Lucas* taking.

The centrality of *Lucas* in this simple model is worth exploring in further depth. The “total taking” doctrine from *Lucas* triggers compensation whenever a government prevents an owner from building anything on its lot, regardless of its size.²³² By contrast, a regulation that allows *some* valuable use of the land does not implicate *Lucas* and is unlikely to trigger compensation, even if the regulation is extensive, covers a large tract of land, and imposes a significant loss of potential revenue to the landowner.²³³ For example, imagine that a government approved the subdivision of a large parcel of land into 1000 small house lots, which are sold to a variety of buyers, including real estate speculators who decide to wait before building. Later, the government began to worry about the effect of so many new houses on the erosion of a local river and auto traffic on a small rural road. If the government attempted to change its land use laws, to prevent even a small share of the undeveloped house lots from being built, it would make itself vulnerable to *Lucas* takings claims by each restrained landowner. By contrast, if the government recognized concerns over dense development before the large parcel were subdivided, it could impose large lot zoning that allowed for only a handful of lots on the big parcel. Because the large landowner in this instance would be able to make *some* money from the big parcel, the large lot law would be invulnerable to a *Lucas* claim. This would be true even though the lotting large regulation might require the large parcel owner to build fewer houses and make less money than it could in the example of the post-subdivision regulation of a few small lots.

When the law of takings and other constitutional rights is combined with the deference that courts have granted to lotting large, it is safe to reach this conclusion: *Large lot zoning is the most attractive and most defensible method for a local government, spurred by its existing homeowners, to use law to avoid density and to slow population growth.* The widespread popularity of the phenomenon of lotting large, discussed in Part II, helps confirm the validity of this simple economic model.

The incentive for each suburb to lot large creates a policy conundrum, however, for the general welfare of the metropolitan area. As each suburb adopts large lot zoning and restrains new construction, the prices for housing of all types

relative ease of justifying the lot laws and the effectiveness of lot laws in ensuring low population density, which might be more important to current residents than ensuring the wealth of new migrants.

232. The holding in *Lucas* included no restriction as to the size or value of the lot. 505 U.S. at 1019.

233. In *Lucas*, the Court noted the oddness of the principle by which a total taking automatically triggers compensation, but a 90 percent taking does not necessarily result in any compensation. 505 U.S. at 1016 n.7. For anything less than a total taking, courts should apply the *Penn Central* factors. 438 U.S. at 124.

rise in all jurisdictions across the area. Households with modest incomes find it more difficult to afford decent housing and resort to steps such as long commutes to distant locales—thus exacerbating the metro’s suburban sprawl—and agreeing to sizeable mortgage loan commitments that they may not be able to repay, as so many Americans did in the “housing boom” years of the new millennium.²³⁴

A solution for a metropolitan area would be to allow for smaller lots and more density, in closer-in suburbs. But each individual jurisdiction has an incentive to eschew such a choice. This is a prime example of a “prisoners’ dilemma,” in which the best solution for a group is stymied by the preferences of individuals to follow their own self-interest, even though the eventual result is worse for each individual in the group.²³⁵ No single individual can avoid the dilemma; the participants are trapped, even if they recognize its existence.²³⁶ One solution to the dilemma is for all of those in the group to co-operate and work together to achieve the optimal solution.²³⁷ To achieve this, the members must agree that the cooperative solution would be superior to the self-centered choices.²³⁸ In the case of large lot zoning, individual suburbs are unlikely to abandon their parochial interests. Alternatively, an outside party might force the participants to follow a united path that leads to the betterment of the group, even if the parties do so unwillingly. In the case of land use, law should look to this latter policy option: using *state* law to compel local governments to abandon, or at least moderate, their minimum lot size laws.

V. CRACKING LARGE LOT ZONING

Large lot zoning is an example of the contentious topic of “exclusionary zoning”—laws that prevent people from living in a community, whether or not by design.²³⁹ Large lot zoning is perhaps the most significant, and underappreciated,

234. See Adam J. Levin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L. J. 1177, 1212-13 (2012) (discussing the evidence that restraints on supply raises housing costs in certain areas, which encourages risky mortgages). For a report asserting that the housing bubble was spurred largely by fraud about household income, on behalf of both borrowers and lenders who quickly sold the loans to gullible investors, see Atif R. Mian & Amir Sufi, *Fraudulent Income Overstatement on Mortgage Applications during the Credit Expansion of 2002 to 2005* (working paper 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561366; Binyamin Appelbaum, *How Mortgage Fraud Made the Financial Crisis Worse*, N.Y. TIMES, Feb. 12, 2015, <http://www.nytimes.com/2015/02/13/upshot/how-mortgage-fraud-made-the-financial-crisis-worse.html>.

235. See Avinash Dixit and Barry Nalebuff, *Prisoners’ Dilemma*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/PrisonersDilemma.html> (explaining the game and its implications.)

236. *Id.*

237. *Id.*

238. *Id.*

239. The literature on exclusionary zoning is vast and takes on many angles and dimensions. Perhaps the leading economic commentator has been Professor Fischel. WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985); William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317 (2004). For a good discussion of the topic from the planning perspective, see JONATHAN LEVINE, *ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE* (2005) (analyzing the topic from a variety of angles, including transportation). For my contribution, which included a number of vignettes, see PAUL BOUDREAUX,

manifestation of the phenomenon. Because exclusionary zoning remains a powerful and immovable force in American law—90 years after the trial judge in the landmark *Euclid* case recognized that zoning tended to “classify the population and segregate them according to their income or situation in life”²⁴⁰—this article cannot offer a silver bullet. In the current climate of American law and politics, the hopes for overcoming large lot zoning are slim. This observation may be disappointing both for the reader and for the millions of Americans who are adversely affected by lotting large.

But this article can point the way to legal approaches that are more likely than others to hold some chance of success. Three elements are essential. First, the effort must recognize that local governments, spurred by their current residents, will resist mightily any attempt to force housing density upon them. The most infamous example of this obstacle was the decades-long litigation that arose from Mt. Laurel, New Jersey.²⁴¹ The laws of this suburb, which included both large lot zoning and a complete prohibition against apartments,²⁴² were challenged as violating the New Jersey Constitution's duty of governments to act for the welfare of the public.²⁴³ The state supreme court famously held that each jurisdiction must provide realistic “opportunities” for offering a “fair share” of the region’s low-cost housing needs.²⁴⁴ Eight years later, however, the controversy returned to the court, which noted that its order had “threaten[ed] to become infamous,” because of local opposition.²⁴⁵ With a massive and detailed order, the court clarified its earlier decree and imposed a series of tasks,²⁴⁶ including the remarkable step of assigning only specific judges to oversee compliance.²⁴⁷ After local governments resisted mightily,²⁴⁸ mayors threatened to go to jail rather than comply, the New Jersey legislature softened the duties through a statute and a regulatory agency that would certify local government plans.²⁴⁹ For decades, cities and towns have struggled with the complex and controversial rules, which are constantly being challenged and litigated. The story is well told in Professor Charles Haar’s *Suburbs Under*

THE HOUSING BIAS (2011). For a sampling of other significant legal contributions, see Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographic Scale*, 40 FORDHAM URB. L.J. 1667 (2013) (showing that the practice is not limited solely to growing suburbs); Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1 (2001) (discussing judicial approaches); Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623 (1987) (discussing development in the aftermath of the *Mt. Laurel* litigation).

240. *Ambler Realty Co. v. Vill. of Euclid*, Ohio, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

241. *S. Burlington Cnty. N.A.A.C.P. v. Mount Laurel Twp.*, 456 A.2d 390 (1983) (setting forth a requirement of affirmative steps to ensure the availability of low-cost housing); *S. Burlington County N.A.A.C.P. v. Mount Laurel Twp.*, 336 A.2d 713, 724-25 (N.J. 1975) (imposing a “fair share” duty).

242. 336 A.2d at 718-23.

243. *Id.* at 725-29 (interpreting the requirements of the New Jersey Constitution).

244. *Id.* at 724-25.

245. *Mt. Laurel II*, 456 A.2d at 410.

246. *Id.* at 418-59.

247. *Id.* at 459 (referring to the assignment of certain judges to *Mt. Laurel* litigation).

248. HAAR, *supra* note 36, at 30-36 (discussing the resistance to the *Mt. Laurel* doctrine).

249. New Jersey Fair Housing Act, N.J. Rev. Stat. §§ 52:27D-301 to 52:27D-309.9 (2015).

Siege.²⁵⁰ In the new millennium, Republican Governor Chris Christie's administration attempted to disband the agency and delayed implementation of some court orders; the exasperating story was still bubbling in the year 2015.²⁵¹

The prospect of stricter judicial review of large lot zoning is likely to face similar obstacles. Zoning is simply too complex and too site-specific for general-interest judges to be able to scrutinize. It is not feasible for a court to judge the wisdom of steps taken by a local government to zone, for example, a particular area with a one-acre minimum, a quarter-acre minimum, or for multi-unit apartments. One idea is to reverse the presumption of validity and require governments to convince a court why an "exclusionary" zoning technique is justified.²⁵² But this is bound to be a dead end. All zoning is, by definition, exclusionary, in that it legally prevents something from being built.²⁵³ It is unworkable to expect a judge to decide the multifaceted issues of, for example, whether two-acre minimum zoning, or a large apartment block, is appropriate for an area just off a freeway but near a stream that is home to an imperiled species of fish, and to repeat this analysis for dozens of sites in each jurisdiction. The inability of the court system to rule on the wisdom of each and every detail of statutes and regulations is one reason why courts defer to legislative and regulatory judgments, with or without a formal doctrine telling them to do so.²⁵⁴ The lesson from New Jersey's tale of judicial remedies is that law must expect local governments to resist and take advantage of any opportunity to use their discretion and avoid real compliance. The only approach that might succeed is for state (or metropolitan) governments to restrain local government's desire and power to lot large.²⁵⁵

250. See generally HAAR, *supra* note 36 (discussing a history of the politics and law surrounding the Mt. Laurel doctrine).

251. Samantha Marcus, *N.J. Supreme Court losing patience with Christie administration's affordable housing inaction*, NJ.COM, Mar. 10, 2015, http://www.nj.com/politics/index.ssf/2015/01/nj_supreme_court_losing_patience_with_christie_administrations_affordable_housing_inaction.html; Brent Johnson, *N.J. affordable housing council fails to adopt Christie's new rules despite Supreme Court deadline*, NJ.COM, Oct. 25, 2014, http://www.nj.com/politics/index.ssf/2014/10/nj_affordable_housing_council_fails_to_adopt_new_rules_despite_supreme_court_deadline.html#incart_m-rpt-2.

252. See, e.g., Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, 12 J. AFFORDABLE HOUSING & CMTY. DEV. L. 229 (2003) (arguing for a reversal of the presumption for large lot zoning greater than one acre when there is proof of "exclusionary intent").

253. A pithy summary is: "[z]oning, thy name is exclusion." Donald Hagman, *Taking care of One's Own Through Inclusionary Zoning: Bootstrapping Low- and Moderate-Income Housing by Local Government*, 5 URB. L. & POL'Y 169 (1982). The paraphrase is to WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 2 ("Frailty, thy name is woman!").

254. See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) [hereinafter *Chevron*] (federal courts must defer to reasonable interpretations of regulations by federal agencies tasked with administering them); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978) (In response to an invitation to deny an injunction against the government, despite a clear violation of the endangered species law, stating "But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities.").

255. The most notable examples of a higher government imposing direct orders on functions that traditionally have been under local control were the federal orders for local governments to desegregate their schools by race. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30-31 (1971).

Second, a reasonable legal approach to lotting large must be reconciled with the constitutional right to compensation for a regulation that imposes a *Lucas*-type “total taking.” As explained in Part IV, lotting large is so appealing to local governments because, compared to other options, it is foolproof. When justified by court-approved “welfare” interests such as avoiding congestion or placing added burdens schools and sewers—and what new housing does not do so?—large lot zoning imposes simple and permanent restraints on housing construction, over almost any area that a government wishes to limit. Lotting large—which regulates the size of lots but still ensures that each lot may contain one buildable house—avoids the likelihood of a successful takings claim. Advocates of “smart growth” and “new urbanism” may tout the benefits of dense, clustered development instead of sprawling suburbs,²⁵⁶ but a law that prevents an owner of a parcel from building something valuable on it will likely generate a *Lucas* claim. Any reasonable idea for reform must take into account the powerful impetus that takings law gives to large lot zoning.

Third, a reform should directly combat the principal harms of lotting large: suburban sprawl and higher housing costs. With these concerns in mind, many initiatives of “inclusionary zoning” for low-cost housing are likely to be insufficient.²⁵⁷ Government may create affordable housing by building units itself or through financial incentives to developers.²⁵⁸ The most common inclusionary zoning practice is a “set aside,” under which new housing developments must include some low-cost housing units, as a condition to the government's approval to subdivide and build.²⁵⁹ An advantage of a set-aside is that it necessitates no out-of-pocket expenditures by a cash-strapped local government and takes advantage of the private profit motivation to build low-cost housing; if a developer does not agree to build the inexpensive units, it cannot construct the bigger, profit-generating houses.²⁶⁰ But inclusionary techniques do little to discourage localities from imposing minimum lot sizes. Indeed, a set-aside requirement might in some instances increase the local political pressure for lotting large in undeveloped parts

(ordering school busing to achieve desegregation); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (holding that racial segregation was unconstitutional).

256. See, e.g., Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257 (2006) (setting forth principles of new urbanism, which favors dense, mixed-use construction); SMART GROWTH AM., *What is “smart growth?”* <http://www.smartgrowthamerica.org/what-is-smart-growth> (2015) (discussing smart growth ideas).

257. See, e.g., Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996) (arguing that inclusionary zoning laws will increase the affordability of housing across income levels); GERRIT KNAAP, STUART MECK, TERRY MOORE & ROBERT PARKER, AM. PLAN. ASS'N, ZONING AS A BARRIER TO MULTIFAMILY HOUSING DEVELOPMENT (2007), http://www.huduser.org/Publications/pdf/zoning_MultifmlyDev.pdf; *Update On Inclusionary Zoning*, NAT'L ASS'N OF HOME BUILDERS (May 2011), <http://www.nahb.org/en/research/~media/7F9C87D9172E4DC68A144B9C646A43A8.ashx> / (discussing “best practices” for inclusionary zoning).

258. See *Mt. Laurel II*, 456 A.2d 390, 442-51 (1983) (discussing a variety of “affirmative measures” to provide low-cost housing, including subsidies, incentives, and set-asides).

259. See, e.g., Dietderich, *supra* note 257 at 77-95 (discussing the economics of “set asides”).

260. See Nicholas Benson, *A Tale of Two Cities: Examining the Success of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado*, 13 J. GENDER RACE & JUST. 753, 759-64 (2010) (analyzing attributes of a successful mandatory set-aside program).

of the jurisdiction, thus exacerbating sprawl.²⁶¹ Moreover, by imposing costs on housing developers—some set-aside housing may create a monetary loss to the developer—inclusionary zoning may push up the costs of market-rate housing and discourage investment in new housing developments that are needed for a growing nation.²⁶²

Toward a Path Forward. What would a plausible legal reform look like? It certainly would have to be accomplished at the state or national level. Absent a state law banning the practice of lotting large, a reform would have to take small steps. Taking a cue from *Mt. Laurel*, a reform would impose upon local governments a mandatory obligation, with little wiggle room for delay or obfuscation. And taking a lesson from *Lucas*, an effective solution would recognize that local governments are loathe to adopt land use restrictions that might trigger “total takings” claims.

There are many potential approaches for state laws to curb large lot zoning, in that they are easy to conjure up. But it is difficult to imagine how they could be politically appealing in a nation that has so long been dedicated to the *Euclid* ideal of local control and its lodestar of the welfare of current residents. Schoenbrod suggested in 1969 that a state could impose a presumptive ceiling on large lot size—perhaps one acre—and then create a state review agency that would hear local appeals for larger lot size requirements or for smaller ones, depending on local circumstances.²⁶³ Applying the lessons of the *Mt. Laurel* story, I fear that such a state agency might become a rubber stamp for local governments that are determined to lot large. Alternatively, state law could establish a system by which local governments and developers would bid against each other over the right to build more densely; such a system would help reveal the depth of the demand for dense housing, on the construction side, and the depth of the support for lotting large, on the government’s side.²⁶⁴ State law could require suburbs to subsidize a certain amount of low-cost housing in locations that were formerly lotted large,²⁶⁵ it could also award builders a density bonus for successful litigation against localities that have unreasonably delayed their legal obligations.²⁶⁶ Or a state could calculate the number of housing units that it might expect to need in the near future

261. See Emily Washington, *How Affordable Housing Policies Backfire*, MARKET URBANISM (May 29, 2014) <http://marketurbanism.com/2014/05/29/how-affordable-housing-policies-backfire> (discussing the politics of inclusionary zoning and its potential to “backfire” in certain instances).

262. See Benjamin Powell & Edward Stringham, “*The Economics of Inclusionary Zoning Reclaimed*”: *How Effective Are Price Controls?*, 33 FLA. ST. U. L. REV. 471 (2005) (developing economic arguments that inclusionary zoning drives up the cost of housing); Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981) (asserting that set-asides act as “taxes” on housing construction and drive up the costs of housing for “moderate-income” and other people).

263. Schoenbrod, *supra* note 38, at 1438-41. Some of the criteria for deviation from the presumptive ceiling, such as proof of the effect on existing home prices, would seem to be extremely speculative and subject to a potential for great mischief. Indeed, the presumption of a one-acre lot law would allow zoning that is far less dense than typical in many suburban subdivisions.

264. See Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459 (2009) (discussing the working of a proposed auction for dense, affordable housing).

265. See *Mt. Laurel II*, 456 A.2d 390, 443-45 (1983).

266. *Id.* at 452-53.

and assign to regional authorities (composed of an entire metropolitan area) a legal obligation to override local zoning and provide for a variety of costs and local needs.

Using the simple economic model of the preference of localities for lotting large, here is the skeleton of a new idea. Unlike other ideas, this concept would not directly restrain large lot zoning, but would ameliorate some of its most harmful effects, including its incentive to sprawl and its constraints on low-cost housing. State law could assign each locality an obligation to allow for a certain number of additional housing units—along the lines of the “fair share” calculation—beyond the number of housing units that would be permissible under the locality’s restrictive zoning. The locality would have to meet its obligation by rezoning—perhaps in an area close to the central city or close to existing infrastructure. If there were unmet demand for housing in the area, developers might be willing to pay a small “impact fee” for the right to build housing units in greater numbers than usual for an in-demand suburban area.²⁶⁷ Part or all of the funds raised by this fee could be paid to existing owners in *other* areas of the jurisdiction, where new housing could be limited even more stringently. These other areas could be chosen by the local government because of an especially strong reason to avoid new construction. These reasons could include special ecological or environmental concerns, the unusual expense of building infrastructure, or the existence of a cherished agricultural landscape.

For example, state law could require an affluent suburban county to provide for 2,000 new housing units. This requirement might conflict with existing zoning, including lotting large, that previously has made new construction difficult. The county could meet the state law requirement by rezoning a close-in neighborhood for 2,000 new townhouses. A developer of these townhouses might be willing to pay an impact fee for a permit to build them. At the same time, the county could ameliorate the potentially alarming increase in its density by downzoning a more distant area of farms and forests. If the distant area had been zoned with large lot restrictions, the law could be amended to prohibit *any* new housing from being built in the area for a number of years. The county government could use the funds from the townhouse impact fee to pay the owners of the farms and forests for the tighter restrictions. This technique would be a variant of the popular land use regulatory method of granting a regulated landowner a transferable development right.²⁶⁸ Moreover, because the regulated farm and forest landowners have

267. Many local governments impose “impacts fees” on new housing development, in order to recoup some of the infrastructure costs, such as for roads and schools, that the new development forces the government to spend. For a discussion of the history and practice of impact fees, see Paul Boudreaux, *The Impact Xat: A New Approach to Charging for Growth*, 43 U. MEM. L. REV. 35 (2012) (arguing that impact fees too often serve in effect as taxes on new population, not as a means of steering growth); see also Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE: J. POL’Y DEV. AND RES. 139, 143-148 (2005), <http://www.huduser.gov/periodicals/cityscape/vol8num1/ch4.pdf> (surveying the literature and discussing the effect of impact fees on housing affordability).

268. A transferable development right may be awarded to a regulated landowner; the right to a certain amount of construction may be sold to landowners in other areas in which the government wishes new construction to be channeled. See, e.g., Dwight H. Merriam, *Reengineering Regulation to Avoid Takings*, 33 URB. LAW. 1 (2001) (analyzing the technique to avoid a takings claim); John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75 (1973) (discussing the

generated some money from their properties, the government might be able to withstand *Lucas* “total takings” claims from the owners of the more tightly regulated lands.²⁶⁹

Through such a system, the local government’s objection to dense housing might be assuaged. The new housing units required by state law would meet some of the housing demand in the metropolitan region. But they would be compensated for, in part, by a decrease in the prospect of new housing, in the immediate future, in the suburban outskirts.²⁷⁰ Thus, the opposition to new housing from existing county residents might be somewhat softened. At the same time, demand for new housing would be shifted from the distant areas toward more compact, close-in development. This is the definition of controlling suburban sprawl. Such an approach would not be politically easy, but the idea might point the way toward overcoming the great affinity that local governments hold for minimum lot size laws.

VI. CONCLUSION

This article has endeavored to show that the practice of large lot zoning is both ubiquitous and iniquitous. It is ironic that a nation supposedly committed both to property rights and to housing affordability exploits a legal practice that runs afoul of both principles. Large lot zoning restrains landowners who wish to build, drives up the costs of housing by restricting supply, and pushes demand to suburban outskirts. These phenomena result in the additional irony that American metropolitan areas are the most sprawling in the world, but ones in which housing costs are stubbornly expensive. Both property rights and affordability take back seats in our system of local control of land use law. Dominating all else is that local governments cater to the desires of existing homeowners to restrain new construction, which enhances the values of the existing houses and avoids the annoyances of greater density to the existing homeowners. In few other areas of American law is the free market so strangled as it is in the market for suburban housing.

Absent a legal revolution that frees housing construction from the domination

then-new idea); see also *Penn Central Trans. Co.*, 438 U.S. at 137 (referring to the grant to the regulated landowner of transferable development rights, which “mitigate[d]” the “financial burdens” on the landowner, according to the court).

269. There is an argument that a payment to a landowner is insufficient to avoid a *Lucas* “total takings” claim. Absent the payment, a total regulation would necessitate “just compensation.” If the payment were viewed as a form “compensation,” as opposed to the earning of income from the land, it is unlikely to be sufficient to meet the “just compensation” obligation of providing the fair market value of the regulated land. See *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 747-48 (1997) (Scalia, J., concurring in the judgment and concurring in part with the majority opinion) (citation omitted).

270. In a sense, the system for encouraging new housing closer in and discouraging it in more distant areas, while not increasing the overall density of the suburb too significantly, resembles the idea of the “bubble” in the federal Clean Air Act, which allows a polluting source to increase, without added regulations, the pollution in one section of a factory if it reduces the pollution in an older, dirtier section of the factory by more. This system, set forth in 42 U.S.C. § 7411(a)(4) (2006) (the definition of “modification”), was approved by the U.S. Supreme Court in the famous case that set forth the principle of deference to agency’s interpretation of a statute, *Chevron*, 467 U.S. 837 (1984).

of local parochialism, there is no easy solution to the social and economic distortions caused by lotting large. This is especially distressing, considering that each year the United States generates a million new households, each of which needs a house, apartment, or mobile home. This article has highlighted the economic incentives for large lot zoning, and the formidable roadblock that the *Lucas* takings principle plays in further encouraging governments to lot large. The article suggests a framework for a legal system that would move the nation away from the adverse effects of large lot zoning, while at the same time discouraging sprawl, avoiding constitutional claims, and providing new housing for a growing nation in the locations where it is most needed.

