Texas Institute for Property Rights

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The Enemies of Property Rights: Zoning

Zoning is widely regarded as a necessary component of modern American communities. Few question its existence, but instead complain only when zoning interferes with their desired land use. Zoning is an effect. The cause is the view that the individual is subordinate to the community. Unfortunately, few, even the victims of zoning, challenge this premise.

Land-use regulations were first used in the United States in the late nineteenth century in San Francisco. The city restricted the location of public laundries, ostensibly as an issue of public safety. In truth, the measure was an attempt to segregate the city's unpopular Chinese population, which owned most of the laundries. In the early twentieth century, Los Angeles established residential and industrial zones, but the ordinance applied only to specific areas of the city.

During the 1910s, many Southern cities, such as Baltimore, Atlanta, St. Louis, Louisville, and New Orleans passed segregation laws that prohibited blacks from living in specific areas. Though most of these laws were eventually ruled unconstitutional by the courts, they were a harbinger of how zoning would later be used.

In 1916, New York City enacted the nation's first comprehensive zoning ordinance that applied to an entire city. Concerns about the increasing number of skyscrapers, which blocked views and limited sunshine, motivated the municipal government to restrict the height of buildings throughout the city. The ordinance also prohibited warehouses and factories from commercial areas.

Cities across the nation were soon enacting zoning ordinances. This was the Progressive Era, which was dominated by the belief that government planning and control would improve the lives of citizens. Zoning was the application of that belief to land use.

While there are many different types of zoning, the most common form designates a particular use for each parcel of land. For example, a parcel may be designated for single-family residential, multi-family residential, commercial, industrial, or a mixture. Since its introduction, zoning has steadily been expanded in power and in scope. Today, zoning can be used to control virtually every aspect of land-use within a community, from architectural styles to landscaping, from parking spaces to set backs (distance from the road), from the height of buildings to the paint colors that may legally be used.

Zoning is considered to be a part of government's "police power"—the ability to protect and promote health, safety, and morals. According to Wikipedia,

> In United States constitutional law, police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants….
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> Police power is exercised by the legislative and executive branches of the various states through the enactment and enforcement of laws. States have the power to compel obedience to these laws through whatever measures they see fit, provided these measures do not infringe upon any of the rights protected

> by the United States Constitution or in the various state constitutions, and are not unreasonably arbitrary or oppressive.[1]

Consider what this means: it is acceptable for laws to be arbitrary and oppressive, so long as they aren't unreasonably so. But what if "reasonably" arbitrary of oppressive laws interfered with your plans and desires? For more than a century, regulations on property have been stifling the freedom of individuals to flourish.

For example, in 1881, Kansas enacted a law that prohibited the manufacture of alcoholic beverages. Four years later, the state legislature added a provision that declared all places that manufactured, sold, bartered, or given away or kept for sale, barter, or use to be a nuisance. Violators were subject to fines and jail time.

Prior to the passage of these laws, Peter Mugler had built a brewery in Salina, Kansas. He continued to operate after the passage of the initial bill and was subsequently cited for violating the law and operating a public nuisance. The case eventually reached the United States Supreme Court in 1887, which upheld Mugler's conviction. In concurring with the Court's ruling, Justice Levi Woodbury wrote:

> The principle that no person shall be deprived of life, liberty, or property without due process of law was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment, and it has never been regarded as incompatible with the principle, equally vital because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.[2]

In other words, property cannot be used by right—as the owner chooses—but only as permitted by the community. If the community judges a particular use to be injurious, then it is justified in prohibiting that use. The Court declared that, when the principle that no individual should be deprived of life, liberty, or property without due process of law conflicts with the "peace and safety of society," the latter trumps the former. This gave communities the green light to regulate land use, and they soon began to do so.

In 1926, the first case testing the constitutionality of zoning reached the Supreme Court. In *Euclid v. Ambler*, the Court upheld the constitutionality of zoning, ruling,

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities….
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> And this is in accordance with the traditional policy of this Court. In the realm of constitutional law especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts

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[1] "Police power," Wikipedia, https://en.wikipedia.org/wiki/Police_power_(United_States_constitutional_law), accessed September 7, 2018.

[2] Mugler v. Kansas, 123 U.S. 623 (1887)

> to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.

In its ruling, the Court declared that a precise line between legitimate and illegitimate uses of the police power cannot be drawn with precision, nor can "general rules" be formulated for applying to future cases. In short, the Court declared that there are no principles by which to judge land-use regulations. We can only judge on a case-by-case basis by looking at the "circumstances and conditions" of a particular case.

A principle is a general rule that applies to an unlimited number of concrete situations. The principle that it is wrong to steal applies to a pack of gum, a pair of shoes, an automobile, and every other form of property. It is wrong to steal anything. And this applies in great cities and rural communities. It is wrong to steal, no matter the "circumstances or conditions." In Euclid, the highest court in the land proclaimed that it could not and would not apply principles to land-use and similar regulations.

Identifying principles is one of the fundamental purposes of the Court. The Court's rulings are the ultimate authority on the constitutionality of a law, and its rulings give guidance to legislators and lower courts as to what is and is not constitutional. When the Court declares that principles are impossible, that we must judge on a case-by-case basis, the legal system becomes a crap shoot.

Legislators have eagerly embraced this doctrine. They have expanded the restrictions on property use, arguing that such controls are necessary to protect the "health, safety, morals, and general welfare" of the public. And then they, along with the victims of those controls and regulations, must patiently wait for years until the Court rules on a particular case.

Because the Court has failed to identify any principles by which to determine whether a land-use regulation is legitimate or illegitimate, it has given legislators *carte blanche* to restrict and control the use of property in the name of the "public interest."

Like most of the legislation enacted during the Progressive Era, zoning gives the government almost unlimited powers in the name of "the public"—the group. But the member of that group—individual property owners—are stifled in their desire to flourish. When an individual cannot use his property as he desires in the pursuit of the values that he believes will make his life better, his well-being is sacrificed to the community. This is the principle underlying zoning. And it is the result of zoning in practice.

The Texas Institute for Property Rights provides analysis, training, and resources for legislators, businesses, organizations, and property owners.

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