

PROPERTY
N. GARNETT
SUPPLEMENTARY MATERIAL—SPRING 2008

I. WHY PROPERTY?

I. INTRODUCTION

Rerum Novarum

Encyclical Letter of His Holiness Pope Leo XIII issued on May 15, 1891.

To Our Venerable Brethren the Patriarchs, Primate, Archbishops, Bishops and other Ordinaries of Places Having Peace and Communion with the Apostolic See:

1. Once the passion for revolutionary change was aroused -- a passion long disturbing governments -- it was bound to follow sooner or later that eagerness for change would pass from the political sphere over into the related field of economics. In fact, new developments in industry, new techniques striking out on new paths, changed relations of employer and employee, abounding wealth among a very small number and destitution among the masses, increased self-reliance on the part of workers as well as a closer bond of union with one another, and, in addition to all this, a decline in morals have caused conflict to break forth.

2. The momentous nature of the questions involved in this conflict is evident from the fact that it keeps men's minds in anxious expectation, occupying the talents of the learned, the discussions of the wise and experienced, the assemblies of the people, the judgment of lawmakers, and the deliberations of rulers, so that now no topic more strongly holds men's interests.

3. Therefore, Venerable Brethren, with the cause of the Church and the common welfare before Us, We have thought it advisable, following Our custom on other occasions when We issued to you the Encyclicals "On Political Power", "On Human Liberty", "On the Christian Constitution of States", and others of similar nature, which seemed opportune to refute erroneous opinions, that We ought to do the same now, and for the same reasons, "On the Condition of Workers." We have on occasion touched more than once upon this subject. In this Encyclical, however, consciousness of Our Apostolic office admonishes Us to treat the entire question thoroughly, in order that the principles may stand out in clear light, and the conflict may thereby be brought to an end as required by truth and equity.

4. The problem is difficult to resolve and is not free from dangers. It is hard indeed to fix the boundaries of the rights and duties within which the rich and the proletariat -- those who furnish material things and those who furnish work -- ought to be restricted in relation to each other. The controversy is truly dangerous, for in various places it is being twisted by turbulent and crafty men to pervert judgment as to truth and seditiously to incite the masses.

5. In any event, We see clearly, and all are agreed that the poor must be speedily and fittingly cared for, since the great majority of them live undeservedly in miserable and wretched conditions.

6. After the old trade guilds had been destroyed in the last century, and no protection was substituted in their place, and when public institutions and legislation had cast off traditional religious teaching, it gradually came about that the present age handed over the workers, each alone and defenseless, to the inhumanity of employers and the unbridled greed of competitors. A devouring usury, although often condemned by the Church, but practiced nevertheless under another form by avaricious and grasping men, has increased the evil; and in addition the whole process of production as well as trade in every kind of goods has been brought almost entirely under the power of a few, so that a very few rich and exceedingly rich men have laid a yoke almost of slavery on the unnumbered masses of non-owning workers.

7. To cure this evil, the Socialists, exciting the envy of the poor toward the rich, contend that it is necessary to do away with private possession of goods and in its place to make the goods of individuals common to all, and that the men who preside over a municipality or who direct the entire State should act as administrators of these goods. They hold that, by such a transfer of private goods from private individuals to the community, they can cure the present evil through dividing wealth and benefits equally among the citizens.

8. But their program is so unsuited for terminating the conflict that it actually injures the workers themselves. Moreover, it is highly unjust, because it violates the rights of lawful owners, perverts the function of the State, and throws governments into utter confusion.

9. Clearly the essential reason why those who engage in any gainful occupation undertake labor, and at the same time the end to which workers immediately look, is to procure property for themselves and to retain it by individual right as theirs and as their very own. When the worker places his energy and his labor at the disposal of another, he does so for the purpose of getting the means necessary for livelihood. He seeks in return for the work done, accordingly, a true and full right not only to demand his wage but to dispose of it as he sees fit. Therefore, if he saves something by restricting expenditures and invests his savings in a piece of land in order to keep the fruit of his thrift more safe, a holding of this kind is certainly nothing else than his wage under a different form; and on this account land which the worker thus buys is necessarily under his full control as much as the wage which he earned by his labor. But, as is obvious, it is clearly in this that the ownership of movable and immovable goods consists. Therefore, inasmuch as the Socialists seek to transfer the goods of private persons to the community at large, they make the lot of all wage earners worse, because in abolishing the freedom to dispose of wages they take away from them by this very act the hope and the opportunity of increasing their property and of securing advantages for themselves.

10. But, what is of more vital concern, they propose a remedy openly in conflict with justice, inasmuch as nature confers on man the right to possess things privately as his own.

11. In this respect also there is the widest difference between man and other living beings. For brute beasts are not self-ruling, but are ruled and governed by a two-fold innate instinct, which not only keeps their faculty of action alert and develops their powers properly but also impels and determines their individual movements. By one instinct they are induced to

protect themselves and their lives; by the other, to preserve their species. In truth, they attain both ends readily by using what is before them and within immediate range; and they cannot, of course, go further because they are moved to action by the senses alone and by the separate things perceived by the senses.

Man's nature is quite different. In man there is likewise the entire and full perfection of animal nature, and consequently on this ground there is given to man, certainly no less than to every kind of living being, to enjoy the benefits of corporeal goods. Yet animal nature, however perfectly possessed, is far from embracing human nature, but rather is much lower than human nature, having been created to serve and obey it. What stands out and excels in us, what makes man man and distinguishes him generically from the brute, is the mind and reason. And owing to the fact that this animal alone has reason, it is necessary that man have goods not only to be used, which is common to all living things, but also to be possessed by stable and perpetual right; and this applies not merely to those goods which are consumed by use, but to those also which endure after being used.

12. This is even more clearly evident, if the essential nature of human beings is examined more closely. Since man by his reason understands innumerable things, linking and combining the future with the present, and since he is master of his own actions, therefore, under the eternal law, and under the power of God most wisely ruling all things, he rules himself by the foresight of his own counsel. Wherefore it is in his power to choose the things which he considers best adapted to benefit him not only in the present but also in the future. Whence it follows that dominion not only over the fruits of the earth, but also over the earth itself, ought to rest in man, since he sees that things necessary for the future are furnished him out of the produce of the earth. The needs of every man are subject, as it were, to constant recurrences, so that, satisfied today, they make new demands tomorrow. Therefore, nature necessarily gave man something stable and perpetually lasting on which he can count for continuous support. But nothing can give continuous support of this kind save the earth with its great abundance.

13. There is no reason to interpose provision by the State, for man is older than the State. Wherefore he had to possess by nature his own right to protect his life and body before any polity had been formed.

14. The fact that God gave the whole human race the earth to use and enjoy cannot indeed in any manner serve as an objection against private possessions. For God is said to have given the earth to mankind in common, not because He intended indiscriminate ownership of it by all, but because He assigned no part to anyone in ownership, leaving the limits of private possessions to be fixed by the industry of men and the institutions of peoples. Yet, however the earth may be apportioned among private owners, it does not cease to serve the common interest of all, inasmuch as no living being is sustained except by what the fields bring forth. Those who lack resources supply labor, so that it can be truly affirmed that the entire scheme of securing a livelihood consists in the labor which a person expends either on his own land or in some working occupation, the compensation for which is drawn ultimately from no other source than from the varied products of the earth and is exchanged for them.

15. For this reason it also follows that private possessions are clearly in accord with nature. The earth indeed produces in great abundance the things to preserve and, especially, to perfect life, but of itself it could not produce them without human cultivation and care.

Moreover, since man expends his mental energy and his bodily strength in procuring the goods of nature, by this very act he appropriates that part of physical nature to himself which he has cultivated. On it he leaves impressed, as it were, a kind of image of his person, so that it must be altogether just that he should possess that part as his very own and that no one in any way should be permitted to violate his right.

16. The force of these arguments is so evident that it seems amazing that certain revivers of obsolete theories dissent from them. These men grant the individual the use of the soil and the varied fruits of the farm, but absolutely deny him the right to hold as owner either the ground on which he has built or the farm he has cultivated. When they deny this right they fail to see that a man will be defrauded of the things his labor has produced. The land, surely, that has been worked by the hand and the art of the tiller greatly changes in aspect. The wilderness is made fruitful; the barren field, fertile. But those things through which the soil has been improved so inhere in the soil and are so thoroughly intermingled with it, that they are for the most part quite inseparable from it. And, after all, would justice permit anyone to own and enjoy that upon which another has toiled? As effects follow the cause producing them, so it is just that the fruit of labor belongs precisely to those who have performed the labor.

17. Rightly therefore, the human race as a whole, moved in no wise by the dissenting opinions of a few, and observing nature carefully, has found in the law of nature itself the basis of the distribution of goods, and, by the practice of all ages, has consecrated private possession as something best adapted to man's nature and to peaceful and tranquil living together. Now civil laws, which, when just, derive their power from the natural law itself, confirm and, even by the use of force, protect this right of which we speak. -- And this same right has been sanctioned by the authority of the divine law, which forbids us most strictly even to desire what belongs to another. "Thou shalt not covet thy neighbor's wife, nor his house, nor his field, nor his maidservant, nor his ox, nor his ass, nor anything that is his."

18. Rights of this kind which reside in individuals are seen to have much greater validity when viewed as fitted into and connected with the obligations of human beings in family life.

19. There is no question that in choosing a state of life it is within the power and discretion of individuals to prefer the one or the other state, either to follow the counsel of Jesus Christ regarding virginity or to bind oneself in marriage. No law of man can abolish the natural and primeval right of marriage, or in any way set aside the chief purpose of matrimony established in the beginning by the authority of God: "Increase and multiply." Behold, therefore, the family, or rather the society of the household, a very small society indeed, but a true one, and older than any polity! For that reason it must have certain rights and duties of its own independent of the State. Thus, right of ownership, which we have shown to be bestowed on individual persons by nature, must be assigned to man in his capacity as head of a family. Nay rather, this right is all the stronger, since the human person in family life embraces much more.

20. It is a most sacred law of nature that the father of a family see that his offspring are provided with all the necessities of life, and nature even prompts him to desire to provide and to furnish his children, who, in fact reflect and in a sense continue his person, with the means of decently protecting themselves against harsh fortune in the uncertainties of life. He can do this surely in no other way than by owning fruitful goods to transmit by inheritance to his children.

As already noted, the family like the State is by the same token a society in the strictest sense of the term, and is governed by its own proper authority, namely, by that of the father. Wherefore, assuming, of course, that those limits be observed which are fixed by its immediate purpose, the family assuredly possesses rights, at least equal with those of civil society, in respect to choosing and employing the things necessary for its protection and its just liberty. We say "at least equal" because, inasmuch as domestic living together is prior both in thought and in fact to uniting into a polity, it follows that its rights and duties are also prior and more in conformity with nature. But if citizens, if families, after becoming participants in common life and society, were to experience injury in a commonwealth instead of help, impairment of their rights instead of protection, society would be something to be repudiated rather than to be sought for.

21. To desire, therefore, that the civil power should enter arbitrarily into the privacy of homes is a great and pernicious error. If a family perchance is in such extreme difficulty and is so completely without plans that it is entirely unable to help itself, it is right that the distress be remedied by public aid, for each individual family is a part of the community. Similarly, if anywhere there is a grave violation of mutual rights within the family walls, public authority shall restore to each his right; for this is not usurping the rights of citizens, but protecting and confirming them with just and due care. Those in charge of public affairs, however, must stop here; nature does not permit them to go beyond these limits.

Paternal authority is such that it can be neither abolished nor absorbed by the State, because it has the same origin in common with that of man's own life. "Children are a part of their father," and, as it were, a kind of extension of the father's person; and, strictly speaking, not through themselves, but through the medium of the family society in which they are begotten, they enter into the participate in civil society. And for the very reason that children "are by nature part of their father...before they have the use of free will, they are kept under the care of their parents." Inasmuch as the Socialists, therefore, disregard care by parents and in its place introduce care by the State, they act against natural justice and dissolve the structure of the home.

22. And apart from the injustice involved, it is only too evident what turmoil and disorder would obtain among all classes; and what a harsh and odious enslavement of citizens would result! The door would be open to mutual envy, detraction, and dissension. If incentives to ingenuity and skill in individual persons were to be abolished, the very fountains of wealth would necessarily dry up; and the equality conjured up by the Socialist imagination would, in reality, be nothing but uniform wretchedness and meanness for one and all, without distinction.

23. From all these conversations, it is perceived that the fundamental principle of Socialism which would make all possessions public property is to be utterly rejected because it injures the very ones whom it seeks to help, contravenes the natural rights of individual persons, and throws the functions of the State and public peace into confusion. Let it be regarded, therefore, as established that in seeking help for the masses this principle before all is to be considered as basic, namely, that private ownership must be preserved inviolate. With this understood, we shall explain whence the desired remedy is to be sought.

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53. It is vitally important to public as well as to private welfare that there be peace and

good order; likewise, that the whole regime of family life be directed according to the ordinances of God and the principles of nature, that religion be observed and cultivated, that sound morals flourish in private and public life, that justice be kept sacred and that no one be wronged with impunity by another, and that strong citizens grow up, capable of supporting, and, if necessary, of protecting the State.

Wherefore, if at any time disorder should threaten because of strikes or concerted stoppages of work, if the natural bonds of family life should be relaxed among the poor, if religion among the workers should be outraged by failure to provide sufficient opportunity for performing religious duties, if in factories danger should assail the integrity of morals through the mixing of the sexes or other pernicious incitements to sin, or if the employer class should oppress the working class with unjust burdens or should degrade them with conditions inimical to human personality or to human dignity, if health should be injured by immoderate work and such as is not suited to sex or age -- in all these cases, the power and authority of the law, but of course within certain limits, manifestly ought to be employed. And these limits are determined by the same reason which demands the aid of the law, that is, the law ought not to undertake more, nor it go farther, than the remedy of evils or the removal of danger requires.

54. Rights indeed, by whomsoever possessed, must be religiously protected; and public authority, in warding off injuries and punishing wrongs, ought to see to it that individuals may have and hold what belongs to them. In protecting the rights of private individuals, however, special consideration must be given to the weak and the poor. For the nation, as it were, of the rich, is guarded by its own defenses and is in less need of governmental protection, whereas the suffering multitude, without the means to protect itself, relies especially on the protection of the State. Wherefore, since wage workers are numbered among the great mass of the needy, the State must include them under its special care and foresight.

63. Let it be granted then that worker and employer may enter freely into agreements and, in particular, concerning the amount of the wage; yet there is always underlying such agreements an element of natural justice, and one greater and more ancient than the free consent of contracting parties, namely, that the wage shall not be less than enough to support a worker who is thrifty and upright. If, compelled by necessity or moved by fear of a worse evil, a worker accepts a harder condition, which although against his will he must accept because an employer or contractor imposes it, he certainly submits to force, against which justice cries out in protest.

64. But in these and similar questions, such as the number of hours of work in each kind of occupation and the health safeguards to be provided, particularly in factories, it will be better, in order to avoid unwarranted governmental intervention, especially since circumstances of business, season, and place are so varied, that decision be reserved to the organizations of which We are about to speak below, or else to pursue another course whereby the interests of the workers may be adequately safeguarded -- the State, if the occasion demands, to furnish help and protection.

65. If a worker receives a wage sufficiently large to enable him to provide comfortably for himself, his wife and his children, he will, if prudent, gladly strive to practice thrift; and the

result will be, as nature itself seems to counsel, that after expenditures are deducted there will remain something over and above through which he can come into the possession of a little wealth. We have seen, in fact, that the whole question under consideration cannot be settled effectually unless it is assumed and established as a principle, that the right of private property must be regarded as sacred. Wherefore, the law ought to favor this right and, so far as it can, see that the largest possible number among the masses of the population prefer to own property.

66. If this is done, excellent benefits will follow, foremost among which will surely be a more equitable division of goods. For the violence of public disorder has divided cities into two classes of citizens, with an immense gulf lying between them. On the one side is a faction exceedingly powerful because exceedingly rich. Since it alone has under its control every kind of work and business, it diverts to its own advantage and interest all production sources of wealth and exerts no little power in the administration itself [sic] of the State. On the other side are the needy and helpless masses, with minds inflamed and always ready for disorder.

But if the productive activity of the multitude can be stimulated by the hope of acquiring some property in land, it will gradually come to pass that, with the difference between extreme wealth and extreme penury removed, one class will become neighbor to the other. Moreover, there will surely be a greater abundance of the things which the earth produces. For when men know they are working on what belongs to them, they work with far greater eagerness and diligence. Nay, in a word, they learn to love the land cultivated by their own hands, whence they look not only for food but for some measure of abundance for themselves and their dependents. All can see how much this willing eagerness contributes to an abundance of produce and the wealth of a nation. Hence, in the third place, will flow the benefit that men can easily be kept from leaving the country in which they have been born and bred; for they would not exchange their native country for a foreign land if their native country furnished them sufficient means of living.

67. But these advantages can be attained only if private wealth is not drained away by crushing taxes of every kind. For since the right of possessing goods privately has been conferred not by man's law, but by nature, public authority cannot abolish it, but can only control its exercise and bring it into conformity with the commonweal. Public authority therefore would act unjustly and inhumanly, if in the name of taxes it should appropriate from the property of private individuals more than is equitable.

II. ACQUISITION

6. Adverse Possession

CASE OF J.A. PYE (OXFORD) LTD v. THE UNITED KINGDOM

15 November 2005

(THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH REVERSED ON 30 August 2007)

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant company [Pye] is the registered owner of a plot of 23 hectares of agricultural land in Berkshire. ... The owners of a property adjacent to the land, Mr. and Mrs. Graham (“the Grahams”) occupied the land under a grazing agreement until 31 December 1983. On 30 December 1983 a chartered surveyor acting for the applicants wrote to the Grahams noting that the grazing agreement was about to expire and requiring them to vacate the land. In January 1984 the applicants refused a request for a further grazing agreement for 1984 because they anticipated seeking planning permission for the development of all or part of the land and considered that continued grazing might damage the prospects of obtaining such permission.

10. Notwithstanding the requirement to vacate the land at the expiry of the 1983 agreement, the Grahams remained in occupation at all times, continuing to use it for grazing. No request to vacate the land or to pay for the grazing which was taking place was made. If it had been, the evidence was that the Grahams would happily have paid.

11. In June 1984 an agreement was reached whereby the applicants agreed to sell to the Grahams the standing crop of grass on the land for £1,100. The cut was completed by 31 August 1984. In December 1984 an inquiry was made of the applicants as to whether the Grahams could take another cut of hay or be granted a further grazing agreement. No reply to this letter or to subsequent letters sent in May 1985 was received from the applicants and thereafter the Grahams made no further attempt to contact the applicants. From September 1984 onwards until 1999 the Grahams continued to use the whole of the disputed land for farming without the permission of the applicants.

12. In 1997, Mr Graham registered cautions at the Land Registry against the applicant companies’ title on the ground that he had obtained title by adverse possession. [The British courts ruled in favor of the Grahams, finding that they had gained title to the property by adverse possession under British law.]

JUDGMENT

I. ALLEGED VIOLATION OF ART.1 OF PROTOCOL NO.1 TO THE CONVENTION

34. The applicants submitted that they had been deprived of their land by the operation of the domestic rules on adverse possession in a manner incompatible with Art.1 of Protocol No.1. That provision reads as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

A. Submissions of the parties

35. The Government noted that the applicant companies bought the land in question between 1975 and 1977, when there was no doubt as to the content of the law of adverse possession. The applicant companies thus acquired their interest in the land subject to the pre-existing legal regime, which included the risk of losing it after 12 years' adverse possession by another. The application of that law in the present case was no more than the due operation of the pre-existing national legal regime, and not such as to engage Art.1 of Protocol No.1. It was contended that the applicant companies' interest in the land was equivalent to a defeasible interest: from the moment they acquired the property, their property right was subject to restrictions, qualifications or limitations imposed by the pre-existing legal requirements of the Limitation Act and their rights ceased to exist once those restrictions, qualifications or limitations took effect, after 12 years of adverse possession by another. The case represented nothing more than the due operation of a pre-existing legal regime under which the applicant companies' interest in the land was ultimately defeated pursuant to its own inherent defeasibility and was not such as to engage Art.1 of the Protocol. It would be an unwarranted extension of the scope of Art.1 to permit those in the applicants' position to argue that their rights were engaged since this would involve an attempt to convert a defeasible property right into an indefeasible one: this would offend against the clear principle that Art.1 protected existing rights and did not entitle a person to acquire new property rights.

37. In any event, the Government further submitted that as the interference with the applicant companies' peaceful enjoyment of their possessions was the result of the Grahams' actions, and not the State's, there could be no question of a breach of primary, negative obligations by the State. At most, the State's positive obligations were at issue. However, the

State was not required to protect a professional property developer from the entirely avoidable consequences of his failing to enter into contractual arrangements.

38. Assuming Art.1 of Protocol No.1 to be engaged, the Government submitted that broadly the same test should be applied for the compatibility with the Convention of limitation periods under that provision as under Art.6. In the application of such a test, the Government contended that the limitations pursued a legitimate objective, namely, the public interest in preventing stale claims being brought before the courts, and in ensuring that the reality of unopposed occupation of land and its legal ownership coincided. ... As to the relevance of compensation, the Government repeated that they had not benefited from the operation of the law on limitation periods in the present case, adding that even where an interference involved the complete loss of a person's economic interest in an asset for the benefit of the State, an absence of compensation might still be compatible with Art.1.

39. Finally, the Government noted that title could be obtained by adverse possession in a number of other jurisdictions, and that in no case was compensation paid to the displaced former owner. It referred specifically to the Northern Irish, Scottish, Irish, Hungarian, Polish, Swedish, Dutch, Spanish, German and French jurisdictions.

B. The Court's assessment

1. General principles

42. Article 1 of Protocol No.1 comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest....

43. The notion of "public interest" in the second sentence of the first paragraph is necessarily extensive. In particular the decision to enact property laws will commonly involve consideration of political, economic and social issues. The taking of property in pursuance of legitimate social, economic or other policies may be in the public interest even if the community at large has no direct use or enjoyment of the property.

46. An interference with the peaceful enjoyment of possessions must nevertheless strike a "fair balance" between the demands of the public or general interest of the community and the requirements of the protection of the individual's fundamental rights.... In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions or controlling their use. Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance, and notably, whether it does not impose a disproportionate burden on the applicant.

47. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Art.1 of Protocol No.1....

2. The applicability of Article 1 of Protocol No.1 in the present case

51. The Court does not share the Government's view that the operation of the legislation is to be regarded as an incident of, or limitation on, the applicants' property right at the time of its acquisition, such that Art.1 ceased to be engaged when the relevant provisions took effect and the property right was lost after 12 years of adverse possession. It is true that the relevant provisions of the legislation existed at the time the property was acquired by the applicants and that the consequences for the applicants' title to the land of 12 years' adverse possession were known. However, Art.1 does not cease to be engaged merely because a person acquires property subject to the provisions of the general law, the effect of which is in certain specified events to bring the property right to an end, and because those events have in fact occurred. Whether it does so will depend on whether the law in question is properly to be seen as qualifying or limiting the property right at the moment of acquisition or, whether it is rather to be seen as depriving the owner of an existing right at the point when the events occur and the law takes effect. It is only in the former case that Art.1 may be held to have no application.

52. [Adverse possession law is] in the view of the Court to be seen as "biting" on the applicants' property rights only at the point at which the Grahams had completed 12 years' adverse possession of the applicants' land and not as delimiting the right at the moment of its acquisition. Accordingly, the Court rejects the Government's argument that, on this ground, Art.1 was not engaged in the present case. Since the applicants' rights cannot therefore be regarded as defeasible rights at the moment of acquisition

3. The alleged interference with the applicants' Article 1 rights

56. As to the Government's argument that the interference with the applicants' peaceful enjoyment of the disputed land was brought about by the action of one party and the inaction of the other and that the State had no direct responsibility for such interference, the Court accepts that it was the Grahams' adverse possession of the land for 12 years which directly led to the applicants' loss of their title. However, the Court also observes that, but for the provisions of the 1925 and 1980 Acts, the adverse possession of the land by the Grahams would have had no effect on the applicants' title or on their ability to repossess the land at any stage. It was the legislative provisions alone which deprived the applicants of their title and transferred the beneficial ownership to the Grahams and which thereby engaged the responsibility of the State under Art.1 of the Protocol .

57. The Court accordingly finds that Art.1 of Protocol No.1 was engaged and that the operation of the relevant provisions of the Limitation Act 1980 and the Land Transfer Act 1925 in the present case constituted an interference by the State with the applicant companies' rights under that Article.

* * *

62. The Court accordingly considers that the applicants were "deprived of [their] possessions" by the contested legislation and that the case falls to be examined under the second sentence of Art.1. It recalls, however, that the three rules within that Article are not distinct or watertight in the sense of being unconnected and that the principles governing the question of justification are substantially the same, involving as they do the legitimacy of the aim of any interference, as well as its proportionality and the preservation of a fair balance.

5. Legitimate aim

65. The Government argues that the contested provisions governing the adverse possession of land serve two public interests—first, . . . they prevent uncertainty and injustice arising from stale claims; secondly, they ensure that the reality of unopposed occupation of land and its legal ownership coincide. . . . While the Court accepts the undoubted relevance and importance of these aims in the case of unregistered land, their importance in the case of registered land is more questionable. As Neuberger J. explained in his judgment in the present case, with one or two limited exceptions, the uncertainties which sometimes arise in relation to the ownership of land are very unlikely to arise in the context of a system of land ownership involving compulsory registration, where the owner of the land is readily identifiable by inspecting the proprietorship register of the relevant title at the Land Register. Similar statements appear in the Report of the Law Commission on registered land and in the judgment of Lord Bingham in the House of Lords, who observed that, while in the days before registration became the norm a result whereby an adverse possessor of land was rewarded by obtaining title could be justified as avoiding protracted uncertainty as to where the title to land lay, where land was registered it was difficult to see any justification for a legal rule which impelled such an unjust result.

66. The Government prays in aid the law and practice in other jurisdictions as confirming that the taking of property by adverse possession is a feature common to many legal systems. However, the Court considers that the comparative material must be viewed with some caution, it being unclear whether in all jurisdictions referred to the same system of compulsory registration of land is in place. In this regard, it is of relevance to note that in the Consultative Document of the Law Commission and Land Registry it is recorded that many common law jurisdictions which had systems of title registration had either abolished the doctrine of adverse possession completely or had substantially restricted its effects.

* * *

6. Proportionality

68. The Government, like Mummery L.J. in the Court of Appeal, places reliance on two factors in particular for contending that the system as it operated in the applicants' case was proportionate and struck a fair balance—the reasonableness of the period of 12 years for bringing proceedings and the fact that it was neither impossible nor difficult for a landowner to prevent a squatter acquiring title by adverse possession: a mere grant to the Grahams of authority to use the land subject to an acknowledgement of the applicants' ownership would have been sufficient to stop time running.

69. The Court accepts that the limitation period of 12 years was relatively long and that the law of adverse possession was well established and had not altered during the period of the applicants' ownership of the land. It is further accepted that it is a relevant consideration that, in order to avoid losing their title, the applicants had to do no more than regularise the Grahams' occupation of the land or issue proceedings to recover its possession within the twelve-year period.

70. The question nevertheless remains whether, even having regard to the lack of care and inadvertence on the part of the applicants and their advisers, the deprivation of their title to the registered land and the transfer of beneficial ownership to those in unauthorised possession struck a fair balance with any legitimate public interest served.

71. The Court notes in the first place that, not only were the applicants deprived of their property but they received no compensation for the loss. The result for the applicants was thus one of exceptional severity. . . .

72. The Court reiterates that the taking of property in the public interest without payment of compensation reasonably related to its value is justified only in exceptional circumstances. [T]his principle is not confined to the taking of property for public purposes but is equally applicable to the compulsory transfer of property from one individual to another. . . .

73. The lack of compensation in the present case must also be viewed in the light of the lack of adequate procedural protection for the right of property within the legal system in force at the relevant time. In particular, although it was--as shown by facts of the present case--open to the dispossessed owner of the land to argue after the expiry of the twelve-year that the land had not been adversely possessed, during the currency of that period no form of notification whatever was required to be given to the owner, which might have alerted him to the risk of losing his title. As Lord Hope observed in the House of Lords: "... the unfairness in the old regime which this case has demonstrated lies in the lack of procedural safeguards against oversight or inadvertence on the part of the registered proprietor".

74. The Government argues that the State has no duty to protect a person against his own negligence or inadvertence. The Court would, however, observe that such inadvertence would have had no adverse consequences for the applicants but for the contested statutory provisions. More importantly, it is clear that Parliament itself recognised the deficiencies in the procedural protection of landowners under the then current system by enacting the Act of 2002. The new Act not only puts the burden on a squatter to give formal notice of his wish to apply to be registered as the proprietor after 10 years' adverse possession, but requires special reasons to be adduced to entitle him to acquire the property where the legal owner opposes the application. The mere fact that a legal system is changed to improve the protection provided under the Convention to an individual does not necessarily mean that the previous system was inconsistent with the Convention. However, in judging the proportionality of the system as applied in the present case, the Court attaches particular weight to the changes made in that system, and to the view of the Law Commission and the Land Registry as to the lack of cogent reasons to justify the system of adverse possession as it applied in the case of registered land.

V. LANDLORD/TENANT LAW

3. Landlords' & Tenants' Rights and Duties

Smith v. Calif. Fair Employment and Housing Comm'n
Supreme Court of California
12 Cal. 4th 1143; 913 P.2d 909 (1996)

WERDEGAR, J.

The California Fair Employment and Housing Act (FEHA) declares it to be "unlawful . . . [f]or the owner of any housing accommodation to discriminate against any person because of the . . . marital status . . . of that person." The Fair Employment and Housing Commission (commission) ruled that a landlord violated the statute by refusing to rent an apartment to an unmarried couple. The Court of Appeal reversed, believing the state may not constitutionally apply FEHA to a landlord whose religious beliefs make it sinful to rent to an unmarried couple. We reverse the decision of the Court of Appeal.

I. FACTS

The relevant facts set out below are as found by the commission in its final decision.

"Respondent [Evelyn Smith] owns and leases four rental units located [in two duplexes] at 675, 677, 683 and 685 Eastwood Avenue, Chico, California. They are operated exclusively for business and commercial purposes, with income generated from the rentals reported as business income. The business is not organized or classified as a religious, charitable or other nonprofit concern. Respondent does not reside in any of the four units and visits the units occasionally to maintain them.

"When a vacancy occurs in one of the units, the unit is advertised for rent in local newspapers and is otherwise available to the general public. When prospective tenants inquire about a vacant unit, respondent tells them she prefers married couples. She prefers married couples because, for religious reasons, she opposes sex outside of marriage. However, since she has received so many calls from unmarried couples seeking to rent her units, she simply tells prospective tenants that she prefers to rent to married couples.

"Respondent is a Christian. She is a member of Bidwell Presbyterian Church in Chico and has attended there for approximately 25 years. Respondent believes that

sex outside of marriage is sinful, and that it is a sin for her to rent her units to people who will engage in nonmarital sex on her property. Respondent believes that God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.

"Respondent has rented her units to single, divorced and widowed persons. Respondent has no religious objection to renting to people who are single, divorced, widowed or married. Respondent would not rent to anyone who engages in sex outside of marriage, whether they are single, divorced, widowed or married. Respondent rents her units to people without regard to their race, color, national origin, ancestry, or physical handicap. Respondent rents her units without regard to the religious beliefs of tenants. She does not know the religious background of most of her tenants because she never asks them and only knows if they volunteer the information. Respondent has rented her units to males and females and does not discriminate on the basis of sex.

"From on or about March 29, 1987, to April 13, 1987, respondent advertised the availability of one of her units in the Chico Enterprise Record. Complainants [real parties in interest Gail Randall and Kenneth Phillips] saw the advertisement on April 1, 1987, and drove by the unit that night. Because of the particular location, attractive architecture, convenient location and well maintained premises, complainants took a special interest in the unit and the next morning called respondent and arranged to see it. During this telephone conversation respondent stated that she preferred to rent to married couples.

"On or about April 2, 1987, complainants met with respondent and were shown the premises, which they liked very much. Respondent told complainants that she would not rent to unmarried couples, and she asked complainants how long they had been married. Complainant Phillips falsely represented to respondent that he and complainant Randall were married. . . . Later, complainants called respondent and told respondent they were interested in renting the unit. They met with respondent on or about April 7, 1987. A lease agreement was executed between the parties on that date for the unit located at 677 Eastwood Avenue.

"Later in the day on April 7, 1987, complainant Randall called respondent and asked if respondent doubted that Randall and Phillips were married. Randall asked respondent if she wanted to see their marriage license. Respondent said, 'No.' Still later on the same day, complainant Phillips called respondent and told her that he and Randall were not married. Respondent told him that she could not rent to an unmarried cohabiting couple because that would violate her religious beliefs. Respondent said that she would return their deposit."

Randall and Phillips filed separate complaints against Smith with the

commission. Based on the complaints, the commission issued two accusations. As subsequently amended, the accusations alleged Smith had violated the [FEHA].

II. DISCUSSION

B. Does Federal or State Law Require the State to Exempt Smith From FEHA to Avoid Burdening Her Religious Exercise?

Having concluded that Smith violated FEHA, we must now determine whether the state is required to exempt her from that law to avoid burdening her exercise of religious freedom. ***

1. The First Amendment.

The First Amendment does not support Smith's claim. Her religion may not permit her to rent to unmarried cohabitants, but "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (Employment Div., Ore. Dept. of Human Res. v. Smith (1990) 494 U.S. 872, 879 [*Empl. Div. v. Smith*].) The statutory prohibition against discrimination because of marital status (Gov. Code, § 12955) is a law both generally applicable and neutral towards religion. The law is generally applicable in that it prohibits all discrimination without reference to motivation. The law is neutral in that its object is to prohibit discrimination irrespective of reason--not because it is undertaken for religious reasons. (See Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993) 508 U.S. 520, 566). Consequently, section 12955 does not violate the free exercise clause as interpreted in *Empl. Div. v. Smith*.

The foregoing principles reflect the latest evolution in the United States Supreme Court's understanding of the free exercise clause. While they bar Smith's claim under the federal Constitution to an exemption from FEHA, to assist in understanding her claims under the Religious Freedom Restoration Act and the California Constitution we review how the free exercise clause was interpreted in the past and how the high court arrived at the current understanding articulated in *Empl. Div. v. Smith*.

In the earliest cases arising under the free exercise clause, the high court held that, while freedom of religious belief was absolutely protected, the government might regulate conduct. That a generally applicable law incidentally burdened a person's right to freely exercise his or her religion was not considered a valid

objection to the law's enforcement. (E.g., *Reynolds v. United States* (1878) [upholding application of polygamy statute to person whose religious beliefs required polygamous marriages].)

The court later came to view the distinction between belief and conduct as an insufficient basis for resolving conflicts between religious exercise and generally applicable laws. (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 220 ["in this context belief and action cannot be neatly confined in logic-tight compartments"].) Thereafter, instead of simply distinguishing between belief and conduct, the court weighed the burden on religious exercise against the government's interest in applying the law. If the burden was substantial and outweighed the government's interest, the government was required to accommodate the religiously motivated conduct by exempting it from the law. If, on the other hand, the government's interest was of sufficient importance to outweigh the burden on religious exercise and could not be achieved by less restrictive means, no accommodation was required.

Governmental interests thought to be sufficient for these purposes were variously described as "compelling", "strong", "of the highest order", and "very high." [Citations omitted.] An accommodation was not required if the burden on religious exercise was not considered substantial. This approach to cases involving generally applicable laws that incidentally burdened religious exercise--balancing the state's interest against the burden on free exercise--came to be known as the "compelling interest" test after the language used in *Sherbert v. Verner*, *supra*.

In 1990, in the *Empl. Div. v. Smith* case, the high court abandoned balancing as a way of adjudicating religiously motivated challenges to generally applicable laws. The case was brought by employees of a private drug rehabilitation program, who were fired from their jobs and denied state unemployment benefits because they had used the drug peyote for sacramental purposes at a ceremony of the Native American Church. The employees challenged the denial of benefits as a violation of the free exercise clause. The Oregon Supreme Court ordered the benefits reinstated. The court reasoned the state's interest in preserving the financial integrity of the unemployment compensation fund did not outweigh the burden on the plaintiffs' religious exercise.

The United States Supreme Court reversed. Repudiating the balancing test set out in such cases as *Sherbert v. Verner*, *supra*, and *Wisconsin v. Yoder*, *supra*, the court explained: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." The court distinguished earlier cases granting exemptions for religiously motivated conduct as involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other

constitutional protections, such as freedom of speech and of the press [citations]." To the argument that, "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation", the court replied: "We have never held that, and decline to do so now".

Empl. Div. v. Smith disposes of Smith's claim under the free exercise clause of the federal Constitution. . . . In 1993, Congress restored the "compelling interest" test as a matter of statutory law by enacting the Religious Freedom Restoration Act. (42 U.S.C. § 2000bb et seq.) We shall address the act, as well as its application to this case, in the next section of this opinion.

2. The Religious Freedom Restoration Act.

The Religious Freedom Restoration Act (hereafter RFRA, or the act) provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subdivision (b)." Under subdivision (b), "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

In applying RFRA to this case, we look to the entire body of case law interpreting the free exercise clause prior to *Empl. Div. v. Smith, supra*. *** Read together, RFRA, the decisions interpreting RFRA, and the decisions interpreting the free exercise clause prior to *Empl. Div. v. Smith* prescribe the following analysis for cases in which a neutral, generally applicable law is claimed to burden the exercise of religion: (1) The burden must fall on a religious belief rather than on a philosophy or a way of life. (2) The burdened religious belief must be sincerely held. (3) The plaintiff must prove the burden is substantial or, in other words, legally significant. (4) If all of the foregoing are true, the government must "demonstrate[] that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling interest." (42 U.S.C. § 2000bb-1(b).) n20

[The California Supreme Court went on to hold that applying FEHA to the landlord in this case did not violate RFRA. The court reasoned that Mrs. Smith failed to make the requisite showing that renting to an unmarried couple would "substantially burden" her free exercise of religion.]

In Chicago, an Attempt to Upgrade a Neighborhood

The New York Times
September 10, 2000

By Robert Sharoff

A NEW housing development rising on the city's North Side is the first step in what city officials hope will be the transformation of one of Chicago's most notorious public housing projects into one that mixes the economic classes and makes the area more like Old Town or Lincoln Park, two gentrified neighborhoods it borders.

The public housing project is Cabrini-Green, which sits on a 70-acre parcel of land a stone's throw from tony areas like Michigan Avenue and the Gold Coast, but which for years has served as a symbol of urban blight and the failure of public housing policy.

City officials say the new project, called North Town Village, will be a model for other cities looking to redevelop blighted public housing projects.

"We feel we're at a critical point where we can move ahead with what is truly a great vision for redeveloping outdated public housing," said Christopher R. Hill, Chicago's commissioner of planning and development. "If it works here, it will work in other places. But this is the first."

The new project, which occupies seven acres that abut the northwest corner of Cabrini-Green, is to consist of 261 residences in a variety of low-rise buildings, mainly two- and three-story town houses and condominiums, with a few larger buildings. Some of the units will be for sale, and some for rent.

The building materials are mainly brick and stone and the architectural details in the Victorian or neo-Classical style. . . . Renderings show a design similar to a number of other housing developments, public and private, that have been built downtown in the last few years.

What is different is the location and the prospective tenant base. Although there are other new developments in Chicago neighboring large tracts of public housing, North Town Village is the largest, and the first to include three distinct components: market-rate units, "affordable" homes with income ceilings for tenants and public housing. The land, which is steps away from several of Cabrini-Green's high-rise towers, was sold by the city to the developers . . . in exchange for their commitment to go along with the city's plans for the area. That price is about half of the market price of similar property.

The development is designed to have 50 percent market-rate units, 30 percent public housing units and 20 percent low-income units. (The 40 low-income rental units are intended for families that make no more than 60 percent, or \$40,000, of the city's median income, and the 12 low-income units for sale are intended for families that make 120 percent, or \$81,000, of the median income.)

In a change that reflects the city's new approach to public housing, the Chicago Housing Authority will lease the public units from the developers but not manage them. Instead, the project will be managed by a private company. "We're getting out of the business of running and managing programs," said Terry Peterson, the authority's chief executive officer.

Prices for the 93 market-rate units that are for sale start at \$146,900 for a one-bedroom condominium and climb to almost \$500,000 for a three-story town house. "We have mixed all three income groups completely throughout the development," said Peter Holsten, president of Holsten Real Estate. "Every building has all three income groups in it. You'll have an expensive town house with a public housing family next door."

Harold Lichterman, president of Kenard, added: "There's no difference at all between the market rate and the affordable and public units. If the the market rate gets a fireplace, the public unit gets a fireplace."

The project is expected to cost about \$65 million; about half of the financing is being provided by grants and subsidies. "It's a very expensive project," Mr. Holsten said. "We're really trying to build a brand-new community here, and it's more than just bricks and mortar. We're putting a lot of energy into the people part."

The "people part" includes an extensive screening program for public housing families that includes drug testing, and a program designed to ease their entry into the private housing market, with neighbors from different economic classes. "For many of them, this will be their first private housing experience," Mr. Holsten said. "The program will teach them how to take care of their unit and what it's like to live in a private housing community."

Construction on North Town Village began last spring, and the project is expected to be completed in mid-2002. Some units will be ready for occupancy by next spring. Reaction from buyers of the market-rate units has been positive. The sales office opened in mid-June and all but six of the 93 market-rate units have been snapped up. . . .

The split between market-rate, public and low-income units is one the city sees as key to its larger goal of redeveloping the area. Cabrini-Green, built over 20

years beginning in 1942, has been a major trouble spot on the North Side for many years.

The heart of the complex is a series of 14 brick high-rises -- many of the "open gallery" variety, meaning that there are no internal hallways -- along with several blocks of row houses and smaller buildings. At its peak occupancy, the complex housed as many as 15,000 low-income tenants and was a hub of gang and drug-trafficking activity in the city. Things got so bad in the late 70's that Jane E. Byrne, then the mayor, lived in the complex for about a month in 1981 in an effort to restore order. Eight years ago, Cabrini-Green made national headlines when a 7-year-old boy who lived there was shot and killed by a sniper on his way to school.

Development in the area around the Cabrini-Green houses stagnated in the 80's, but in the 90's, as the downtown housing boom gathered force, developers began taking another look at the blocks surrounding the complex. "It's some of the best land in the entire city," said Harry Huzenis, a principal with Jameson Realty Group, a residential brokerage firm in the neighborhood. "It's more affordable than Old Town or Lincoln Park but it has a lot of the same advantages in terms of location," he said -- about 10 blocks from the Loop.

The sticking point for many developers and prospective homeowners, however, remains Cabrini-Green. In the mid-90's, the city unveiled a plan to redevelop the area that included demolishing many of the largest high-rises and turning over some of the land to private developers. . . . Two high-rises had already been torn down and several others had been boarded up when work came to a halt in the wake of a lawsuit filed by the Cabrini-Green Local Advisory Council, a tenants' group. The suit challenged the city's right to tear down the buildings without first guaranteeing residents equivalent or better housing in the neighborhood.

The lawsuit was resolved with the signing of a consent decree last month in which the city promised to build 700 units of public housing, including those in North Town Village, in an area bounded by North Avenue, Wells Street, Chicago Avenue and the Chicago River in exchange for the right to demolish three more high-rises.

"We got a good settlement," said Cora Moore, 62, president of the Local Advisory Council and a 40-year Cabrini-Green resident. "We want to live right here on the same land we've been living on all the time. We want a decent, sanitary place to live. Our goal has been accomplished."

If all goes according to plan, the units will be contained in low-rise buildings similar to those of North Town Village. "For the last 30 to 40 years," said Mr. Peterson of the Chicago Housing Authority, "we've isolated public housing

residents socially and economically. But the residents are ready for a change. We want to integrate them back into the fabric of the community."

V. LAND USE CONTROLS

2. Nuisance Law

Armory Park Neighborhood Association v. Episcopal Community Services

Supreme Court of Arizona

712 P.2d 914 (1985)

Feldman, J.

On December 11, 1982, defendant Episcopal Community Services in Arizona (ECS) opened the St. Martin's Center (Center) in Tucson. The Center's only purpose is to provide one free meal a day to indigent persons. Plaintiff Armory Park Neighborhood Association (APNA) is a non-profit corporation organized for the purpose of "improving, maintaining and insuring the quality of the neighborhood known as Armory Park Historical Residential District." The Center is located on Arizona Avenue, the western boundary of the Armory Park district. On January 10, 1984, APNA filed a complaint in Pima County Superior Court, seeking to enjoin ECS from operating its free food distribution program. The complaint alleged that the Center's activities constituted a public nuisance and that the Armory Park residents had sustained injuries from transient persons attracted to their neighborhood by the Center.

The superior court held a hearing on APNA's application for preliminary injunction on March 6 and 7, 1984. The residents testified about the changes the Center had brought to their neighborhood. Before the Center opened, the area had been primarily residential with a few small businesses. When the Center began operating in December 1982, many transients crossed the area daily on their way to and from the Center. Although the Center was only open from 5:00 to 6:00 p.m., patrons lined up well before this hour and often lingered in the neighborhood long after finishing their meal. The Center rented an adjacent fenced lot for a waiting area and organized neighborhood cleaning projects, but the trial judge apparently felt these efforts were inadequate to control the activity stemming from the Center. Transients frequently trespassed onto residents' yards, sometimes urinating, defecating, drinking and littering on the residents' property. A few broke into storage areas and unoccupied homes, and some asked residents for handouts. The number of arrests in the area increased dramatically. Many

residents were frightened or annoyed by the transients and altered their lifestyles to avoid them.

Following the hearing, ECS filed a motion to dismiss the complaint based on three grounds: 1) that compliance with all applicable zoning and health laws constituted a complete defense to a claim of public nuisance; 2) that there had been no allegation or evidence of a violation of a criminal statute or ordinance, which it argues is a prerequisite to a finding of public nuisance; and 3) that APNA lacked standing to bring an action to abate a public nuisance because it had neither pled nor proved any special injury differing in kind and degree from that suffered by the public generally.

Based on the hearing testimony, the trial court granted the preliminary injunction and denied ECS' motion to dismiss. In its order, the court noted that ECS could be enjoined because its activities constituted both a public and a private nuisance. . . . A divided court of appeals reversed the trial court's order. In the view of the majority, a criminal violation was a prerequisite to a finding of public nuisance; because plaintiff had alleged no criminal violation, the injunction was improperly granted. The majority also concluded that the trial court abused its discretion by finding both a public and a private nuisance when the plaintiff had not alleged a private nuisance. Finally, the court held that compliance with zoning provisions was a complete defense. The court vacated the order for preliminary injunction and remanded the matter to the trial court with directions to grant ECS' motion to dismiss. We granted review.

THE CONCEPT OF "NUISANCE"

Now considered a tort, a public nuisance action originated in criminal law. Early scholars defined public nuisance as "an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all her Majesty's subjects.'" PROSSER & KEETON ON TORTS, § 90, at 643 (5th ed. 1984). A private nuisance is strictly limited to an interference with a person's interest in the enjoyment of real property. The Restatement defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." § 821D. A public nuisance, to the contrary, is not limited to an interference with the use and enjoyment of the plaintiff's land. It encompasses any unreasonable interference with a right common to the general public.

We have previously distinguished public and private nuisances. In *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (1938), we noted that a nuisance is public when it affects rights of "citizens as a part of the public, while a private nuisance is one which affects a single individual or a definite number of persons in the enjoyment of some private right which is not common to the public." *Id.* at 123, 75 P.2d 34. A public nuisance must also affect a considerable number of

people. *Id.* See also *Spur Industries v. Del Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972). The legislature has adopted a similar requirement for its criminal code, defining a public nuisance as an interference "with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons" A.R.S. § 13-2917. n3

The defendant contends that the trial court erred in finding both public and private nuisances when the plaintiff had not asserted a private nuisance claim. The defendant has read the trial court's minute entry too strictly. While we acknowledge that public and private nuisances implicate different interests, we recognize also that the same facts may support claims of both public and private nuisance. As Dean Prosser explained:

When a public nuisance substantially interferes with the use or enjoyment of the plaintiff's rights in land, it never has been disputed that there is a particular kind of damage, for which the private action will lie. Not only is every plot of land traditionally unique in the eyes of the law, but in the ordinary case the class of landowners in the vicinity of the alleged nuisance will necessarily be a limited one, with an interest obviously different from that of the general public. The interference itself is of course a private nuisance; but is none the less particular damage from a public one, and the action can be maintained upon either basis, or upon both. (Citations omitted.)

Prosser, *Private Action for Public Nuisance*, 52 Va.L.Rev. 997, 1018 (1966).

Thus, a nuisance may be simultaneously public and private when a considerable number of people suffer an interference with their use and enjoyment of land. The torts are not mutually exclusive. Some of plaintiff's members in this case have suffered an injury to the use and enjoyment of their land. Any reference to both a public and a private nuisance by the trial court was, we believe, merely a recognition of this well-accepted rule and not error. However, both because plaintiff did not seek relief under the theory of private nuisance and because that theory might raise standing issues not addressed by the parties, we believe plaintiff's claim must stand or fall on the public nuisance theory alone.

STANDING

Defendant argues that the Association has no standing to sue and that, therefore, the action should be dismissed. The trial court disagreed and defendant claims it erred in so doing. Two standing questions are before us. The first

pertains to the right of a private person, as distinguished from a public official, to bring a suit to enjoin the maintenance of a public nuisance. The original rule at common law was that a citizen had no standing to sue for abatement or suppression of a public nuisance since

such inconvenient or troublesome offences [sic], as annoy the whole community in general, and not merely some particular persons; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, by what damnifies him in common only with the rest of his fellow subjects.

IV BLACKSTONE COMMENTARIES 167 (1966). It was later held that a private individual might have a tort action to recover personal damages arising from the invasion of the public right. However, the individual bringing the action was required to show that his damage was different in kind or quality from that suffered by the public in common.

The rationale behind this limitation was two-fold. First, it was meant to relieve defendants and the courts of the multiple actions that might follow if every member of the public were allowed to sue for a common wrong. Second, it was believed that a harm which affected all members of the public equally should be handled by public officials. Considerable disagreement remains over the type of injury which the plaintiff must suffer in order to have standing to bring an action to enjoin a public nuisance. However, we have intimated in the past that an injury to plaintiff's interest in land is sufficient to distinguish plaintiff's injuries from those experienced by the general public and to give the plaintiff-landowner standing to bring the action. This seems also to be the general rule accepted in the United States.

We hold, therefore, that because the acts allegedly committed by the patrons of the neighborhood center affected the residents' use and enjoyment of their real property, a damage special in nature and different in kind from that experienced by the residents of the city in general, the residents of the neighborhood could bring an action to recover damages for or enjoin the maintenance of a public nuisance.

DEFENDANT'S DERIVATIVE RESPONSIBILITY

Defendant claims that its business should not be held responsible for acts committed by its patrons off the premises of the Center. It argues that since it has no control over the patrons when they are not on the Center's premises, it cannot be enjoined because of their acts. We do not believe this position is supported either by precedent or theory.

In *Shamhart v. Morrison Cafeteria Co.*, 159 Fla. 629, 32 So.2d 727 (1947), the defendant operated a well frequented cafeteria. Each day customers waiting to enter the business would line up on the sidewalk, blocking the entrances to the neighboring establishments. The dissenting justices argued that the defendant had not actually caused the lines to form and that the duty to prevent the harm to the plaintiffs should be left to the police through regulation of the public streets. The majority of the court rejected this argument, and remanded the case for a determination of the damages. See, also, *Reid v. Brodsky*, 397 Pa. 463, 156 A.2d 334 (1959) (operation of a bar enjoined because its patrons were often noisy and intoxicated; they frequently used the neighboring properties for toilet purposes and sexual misconduct); *Barrett v. Lopez*, 57 N.M. 697, 262 P.2d 981, 983 (1953) (operation of a dance hall enjoined, the court finding that "mere possibility of relief from another source [police] does not relieve the courts of their responsibilities"); *Wade v. Fuller*, 12 Utah 2d 299, 365 P.2d 802 (1961) (operation of drive-in cafe enjoined where patrons created disturbances to nearby residents); *McQuade v. Tucson Tiller Apartments*, 25 Ariz.App. 312, 543 P.2d 150 (1975) (music concerts at mall designed to attract customers enjoined because of increased crowds and noise in residential area).

Under general tort law, liability for nuisance may be imposed upon one who sets in motion the forces which eventually cause the tortious act; liability will arise for a public nuisance when "one person's acts set in motion a force or chain of events resulting in the invasion." RESTATEMENT, *supra*, § 824 comment b. We hold, therefore, that defendant's activity may be enjoined upon the showing of a causal connection between that activity and harm to another.

The testimony at the hearing establishes that it was the Center's act of offering free meals which "set in motion" the forces resulting in the injuries to the Armory Park residents. Several residents testified that they saw many of the same transients passing through the neighborhood and going in and out of the Center. We find the testimony sufficient to support the trial judge's finding of a causal link between the acts of ECS and the injuries suffered by the Armory Park residents. The court of appeals thus erred by holding that there was no evidence from which the trial court could have concluded that ECS had engaged in conduct which would render it causally responsible for the interferences. The question is not whether defendant directly caused each improper act, but whether defendant's business operation frequently attracted patrons whose conduct violated the rights of residents to peacefully use and enjoy their property.

REASONABLENESS OF THE INTERFERENCES

Since the rules of a civilized society require us to tolerate our neighbors, the law requires our neighbors to keep their activities within the limits of what is

tolerable by a reasonable person. However, what is reasonably tolerable must be tolerated; not all interferences with public rights are public nuisances. As Dean Prosser explains, "[t]he law does not concern itself with trifles, or seek to remedy all of the petty annoyances and disturbances of everyday life in a civilized community even from conduct committed with knowledge that annoyance and inconvenience will result." PROSSER, *supra*, § 88, at 626. Thus, to constitute a nuisance, the complained-of interference must be substantial, intentional and unreasonable under the circumstances. RESTATEMENT, *supra*, § 826 comment c and § 821F. Our courts have generally used a balancing test in deciding the reasonableness of an interference. The trial court should look at the utility and reasonableness of the conduct and balance these factors against the extent of harm inflicted and the nature of the affected neighborhood.

The trial judge did not ignore the balancing test and was well aware of the social utility of defendant's operation. His words are illuminating:

It is distressing to this Court that an activity such as defendants [sic] should be restrained. Providing for the poor and the homeless is certainly a worthwhile, praiseworthy [sic] activity. It is particularly distressing to this Court because it [defendant] has no control over those who are attracted to the kitchen while they are either coming or leaving the premises. However, the right to the comfortable enjoyment of one's property is something that another's activities should not affect, the harm being suffered by the Armory Park Neighborhood and the residents therein is irreparable and substantial, for which they have no adequate legal remedy.

Minute Entry, 6/8/84, at 8. We believe that a determination made by weighing and balancing conflicting interests or principles is truly one which lies within the discretion of the trial judge. The evidence of the multiple trespasses upon and defacement of the residents' property supports the trial court's conclusion that the interference caused by defendant's operation was unreasonable despite its charitable cause.

The common law has long recognized that the usefulness of a particular activity may outweigh the inconveniences, discomforts and changes it causes some persons to suffer. We, too, acknowledge the social value of the Center. Its charitable purpose, that of feeding the hungry, is entitled to greater deference than pursuits of lesser intrinsic value. It appears from the record that ECS purposes in operating the Center were entirely admirable. However, even admirable ventures may cause unreasonable interferences. We do not believe that the law allows the costs of a charitable enterprise to be visited in their entirety upon the residents of a single neighborhood. The problems of dealing with the unemployed, the homeless

and the mentally ill are also matters of community or governmental responsibility.

ZONING

ECS argues that its compliance with City of Tucson zoning regulations is a conclusive determination of reasonableness. We agree that compliance with zoning provisions has some bearing in nuisance cases. We would hesitate to find a public nuisance, if, for example, the legislature enacted comprehensive and specific laws concerning the manner in which a particular activity was to be carried out. Accord RESTATEMENT, supra, § 821B comment f. We decline, however, to find that ECS' compliance with the applicable zoning provisions precludes a court from enjoining its activities. The equitable power of the judiciary exists independent of statute. Although zoning and criminal provisions are binding with respect to the type of activity, they do not limit the power of a court acting in equity to enjoin an unreasonable, albeit permitted, activity as a public nuisance.

The determination of the type of business to be permitted in a particular neighborhood, therefore, may be left to administrative agencies or legislative bodies. However, the judgment concerning the manner in which that business is carried out is within the province of the judiciary. RESTATEMENT, supra, § 821B comment f. Zoning provisions may permit one's neighbor to operate a business. This does not give him license to use one's yard, nor permit his customers to do so.

CRIMINAL VIOLATION

Occasionally we have indicated that conduct which violates a specific criminal statute is an element of public nuisance for civil tort claims. These cases did not face the issue whether a tort claim for public nuisance exists independent of statute. ECS argued that there is no criminal violation and that a tort claim for nuisance must be based on such a violation. The trial court did find that the consequences of ECS' activities fit within A.R.S. § 13-2917, which defines a criminal nuisance as an interference with the "comfortable enjoyment of life or property." We need not reach this issue nor need we rule on the constitutionality of the statute. We do not find it fatal that the plaintiff failed to allege a statutory violation. The statute in question adds little to APNA's claim. It does not proscribe specific conduct nor define what conduct constitutes a public nuisance, but only declares, in effect, that a public nuisance is a crime. We are squarely faced, therefore, with the issue of whether a public nuisance may be found in the absence of a statute making specific conduct a crime.

The Restatement states that a criminal violation is only one factor among

others to be used in determining reasonableness, including:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. (Emphasis supplied.)

§ 821B.

Our earlier decisions indicate that a business which is lawful may nevertheless be a public nuisance. For example, in *Spur Industries, supra*, we enjoined the defendant's lawful business. We explained that "Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public." 108 Ariz. at 186, 494 P.2d at 708. This rule is widely accepted.

We hold, therefore, that conduct which unreasonably and significantly interferes with the public health, safety, peace, comfort or convenience is a public nuisance within the concept of tort law, even if that conduct is not specifically prohibited by the criminal law.

CONCLUSION

The trial court's order granting the preliminary injunction is affirmed. By affirming the trial court's preliminary orders, we do not require that he close the center permanently. It is of course, within the equitable discretion of the trial court to fashion a less severe remedy, if possible.

3. **Easements**

Patterson v. Buffalo National River

United States Court of Appeals for the Eighth Circuit

76 F.3d 221 (1996)

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Jerry and Mary Lou Patterson appeal the district court's order granting summary judgment to the Buffalo National River ("BNR"). We reverse.

I.

Between 1939 and 1976, the Hall family owned a 159.49-acre tract of land in northern Arkansas. In 1976, they conveyed the north 79.49 acres of the tract to the United States, and that acreage was incorporated into the Buffalo National River project. The deed also purported to quitclaim all of the grantors' interest "in any means of ingress or egress." At the time of the transfer, a primitive roadway crossing the land ceded to the United States connected the land that the Halls retained with a public road. The plaintiffs contend that this roadway continues to be the only way to gain access to the south eighty acres.

In 1986, the United States National Park Service ("Park Service") denied the Halls access to their retained land over this roadway on the ground that the Park Service did not grant private road easements across park property. The Halls then sold their retained land to the Pattersons; the deed purported to include an easement by necessity across the adjoining 79.49 acres now owned by the United States. In 1987, Jerry Patterson wrote the Park Service to ask if he could use the roadway to gain access to his property, and the Park Service again denied the request.

In 1994, the Pattersons sued BNR, an agency of the United States, in Arkansas state court. They sought a declaration that they had an easement by implication or by necessity across the government's land and asked for an order permanently enjoining BNR from interfering with their use of that easement. . . . The district court held on summary judgment that . . . the Pattersons did not have an easement by implication or by necessity, because the 1976 deed released all such easements to the United States.

III.

The Pattersons . . . argue that the district court erred when it refused to grant a declaratory judgment to the effect that they have an implied easement by implication or by necessity across the land deeded to the United States. The district court denied the Pattersons' motion for summary judgment because it found that, even if the statute of limitations had not barred their action, the Halls' 1976 deed released any easement that they might have had across park property. The court reasoned that "the language of the conveyance at issue belies the existence of any intent on the part of the parties to provide the Halls with any means of ingress and egress to the remaining 80 acres." We disagree.

A.

Easements by implication and by necessity are appurtenant easements. That is, they benefit a particular parcel of land rather than a particular individual. As the Arkansas Supreme Court recently explained, "an easement appurtenant serves a parcel of land called the dominant tenement. The property on which the easement is imposed is the servient tenement." *Wilson v. Brown*, 320 Ark. at 243-44 In this case, the Pattersons claim that they have an easement appurtenant to the south 80 acres (dominant tenement) across the land purchased by the government (servient tenement).

Because appurtenant easements are attached to a particular parcel of land, they cannot be conveyed apart from the dominant tenement, but they can, of course, be extinguished by the execution of a written release to the owner of the servient tenement. See 2 A. James Casner, *American Law of Property* § 8.95 at 302 (1952). The government contends that the 1976 deed extinguished any easements across the land it purchased. We disagree. A document releasing an easement must meet the requirements of one creating an easement, *id.*, including a legal description of the interest conveyed. Because it is attached to the dominant tenement, we would expect a deed transferring an easement appurtenant to the property retained by the Halls to describe the south 80 acres. Because it does not, we think that the relevant portion of the deed is more plausibly read to quitclaim the Halls' rights in "any means of ingress and egress" to the property described in the document (*i.e.*, the property transferred to the government), not to the property that the Halls retained.

Furthermore, even if the deed had clearly purported to release all easements appurtenant to the south 80 acres, it would have conveyed nothing under Arkansas law. The relevant section purported to "quit claim" all interests in "means of ingress and egress." In Arkansas, deeds using this language are interpreted as quitclaims, and a grantor can by quitclaim convey only interests that he owns at the time that the deed is delivered. *Graham v. Quarles*, 206 Ark. 542, 547, 176 S.W.2d 703, 706 (1944) ("a quitclaim deed does not purport to convey any title except such as the grantor had at the time of its execution"); *Chavis v. Hill*, 216

Ark. 136, 138, 224 S.W.2d 808, 809 (1949) ("afteracquired property rights do not pass under a quitclaim deed").

Easements by implication and by necessity are created upon severance of ownership of a single parcel of land that was previously held by one owner. If it is necessary for the continued enjoyment of the dominant tenement, the dominant tenement acquires an implied easement over the servient tenement when the two are severed. *Greasy Slough Outing Club, Inc. v. Amick*, 224 Ark. 330, 337, 274 S.W.2d 63, 67 (1954). In other words, if the Halls were entitled to an easement by implication or by necessity over the land ceded to the government, they had no interest in the easement before the property was divided; the right arose after severance. See 2 Casner, *American Law of Property* § 8.26 at 250 (discussing quasi- easements, "a grantor could not, of course, have had, before his conveyance, an easement in the land conveyed"). Therefore, the Halls could not have released their easement to the government by quitclaim in the 1976 deed.

B.

Having found that the Halls did not relinquish their rights to any implied easements to which they might have been entitled, we now consider whether the Pattersons are actually entitled to an easement by implication or by necessity. The district court found, and the government does not dispute, that the roadway crossing park property continues to provide a way to gain access to the Pattersons' property. The court did not determine, however, whether the road was used continuously prior to severance or whether another reasonable means of gaining access to the Pattersons' property exists.

When an owner of a single parcel of land uses part of his land to benefit a second part, courts may find that a quasi- easement exists; the land benefited is called the "quasi-dominant tenement" and the property used is called the "quasi-servient tenement." When the parcel is divided, the quasi- easement becomes an "implied easement corresponding to a pre-existing quasi- easement" or, put more simply, an easement by implication. *Id.*, 307. The Arkansas Supreme Court explained this situation as follows: "Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, ... then, upon a severance of such ownership, ... there arises by implication of law a grant or reservation of the right to continue such use." *Greasy Slough*, 274 S.W.2d at 67 (internal quotes omitted). The law recognizes an easement by implication, however, only if the use of the quasi- easement prior to severance was "apparent, continuous, and necessary" and if a continuance of its use is essential to the further use and enjoyment of the estate retained. *Id.*

Easements by necessity share many of the characteristics of easements by implication. For instance, they arise when a parcel of land held by a single owner

is severed and the easement is necessary for the enjoyment of the dominant tenement, both at the time of severance and at the time the holder of the dominant tenement asserts the right to the easement. In contrast to an easement by implication, however, "an easement by necessity ... allows for a route of access where one previously did not exist." *Burdess v. U.S.*, 553 F. Supp. 646, 650 (E.D. Ark. 1982). Therefore, the Pattersons are entitled to an easement by necessity if crossing the government's land is necessary for access to their property.

We are unable to determine whether the Pattersons have an easement over the government's land, however, because several questions of material fact remain. For one thing, the Pattersons are not entitled to either type of easement unless they demonstrate that one is necessary, not simply convenient, in order to gain access to their property through the government's land. The Pattersons must show that "there could be no other reasonable mode of enjoying the dominant tenement." *Manitowoc Remanufacturing*, 307 Ark. at 277, 819 S.W.2d at 279. (The degree of necessity required is the same for easements [**13] by necessity and by implication. *Kennedy*, 741 S.W.2d at 628.) Although their land is surrounded on three sides by private landowners, the Pattersons claim that they are landlocked unless they can use the roadway in question. They assert that the nature of the surrounding terrain makes it virtually impossible to construct a road across another neighbor's property. The Arkansas Supreme Court has indicated that courts may consider terrain when determining necessity, but, of course, we leave it up to the trial court to weigh such evidence should it become necessary.

Furthermore, in order to claim an easement by implication over the existing roadway, the Pattersons must demonstrate that prior to severance the roadway was permanent and obvious and that the Halls' use of it was continuous and apparent. *Greasy Slough*, 224 Ark. at 337, 274 S.W.2d at 67. The government asserts that the roadway was not used at the time of the initial sale. Again, the district court may be called on to resolve these disputed facts on remand.

We are aware that the law of Arkansas may differ from that of other states, in that it partially conflates easements by necessity and easements by implication by imputing to each of them the characteristic that they arise only if they are necessary to the enjoyment of the land to which they are claimed to be appurtenant. See 2 Casner, *American Law of Property* § 8.26 at 250-51, § 8.43 at 263 (discussing other states' laws). But that is the clear purport of the Arkansas cases, by which, of course, we are bound in this diversity case. Different consequences, however, could follow depending on whether the Pattersons make out a case for an easement by implication or an easement by necessity. For instance, if the easement is found to be necessary to the enjoyment of the retained land, but the previous use of the land claimed to be servient proves not to have been continuous or apparent, then the Pattersons will be entitled to have an easement laid out, but not necessarily where they assert that the quasi- easement

was located. Furthermore, the nature and extent of the previous use of a quasi-easement will necessarily determine its scope and thus the traffic burdens to which the servient tenement can be subjected, but the same, of course, cannot be said of an easement by necessity, there being no prior use capable of giving it definition. There may well be other differences, but we leave these difficulties to the trial court to work out as the facts may require.

IV.

For the foregoing reasons, we reverse the order of the district court and remand the case to determine whether the Pattersons are entitled to an easement by implication or by necessity.

5. Zoning

City of Renton v. Playtime Theatres, Inc.

Supreme Court of the United States, 1986

JUSTICE REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Appellees, Playtime Theatres, Inc., and Sea-First Properties, Inc., filed an action in the United States District Court for the Western District of Washington seeking a declaratory judgment that the Renton ordinance violated the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court ruled in favor of Renton and denied the permanent injunction, but the Court of Appeals for the Ninth Circuit reversed and remanded for reconsideration. We noted probable jurisdiction, and now reverse the judgment of the Ninth Circuit.

In May 1980, the Mayor of Renton, a city of approximately 32,000 people located just south of Seattle, suggested to the Renton City Council that it consider the advisability of enacting zoning legislation dealing with adult entertainment uses. No such uses existed in the city at that time. Upon the Mayor's suggestion, the City Council referred the matter to the city's Planning and Development Committee. The Committee held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities. The City Council, meanwhile, adopted Resolution No. 2368, which imposed a moratorium on the licensing of "any business . . . which . . . has as its primary purpose the selling, renting or showing of sexually explicit materials." The resolution contained a clause

explaining that such businesses "would have a severe impact upon surrounding businesses and residences."

In April 1981, acting on the basis of the Planning and Development Committee's recommendation, the City Council enacted Ordinance No. 3526. The ordinance prohibited any "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. The term "adult motion picture theater" was defined as "[an] enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or [characterized] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein."

In early 1982, respondents acquired two existing theaters in downtown Renton, with the intention of using them to exhibit feature-length adult films. The theaters were located within the area proscribed by Ordinance No. 3526. At about the same time, respondents filed the previously mentioned lawsuit challenging the ordinance on First and Fourteenth Amendment grounds, and seeking declaratory and injunctive relief. While the federal action was pending, the City Council amended the ordinance in several respects, adding a statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet. . . .

In our view, the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc.*, supra. There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. *Id.*, at 72-73 (plurality opinion of STEVENS, J., joined by BURGER, C. J., and WHITE and REHNQUIST, JJ.); *id.*, at 84 (POWELL, J., concurring). The Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. *Id.*, at 63, and n. 18; *id.*, at 78-79 (POWELL, J., concurring).

Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See *Carey v. Brown*, 447 U.S. 455, 462-463, and n. 7 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 98-99 (1972). On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial

governmental interest and do not unreasonably limit alternative avenues of communication. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981).

At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theatres," but rather at the secondary effects of such theaters on the surrounding community. The District Court found that the City Council's "predominate concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves. But the Court of Appeals, relying on its decision in *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (CA9 1983), held that this was not enough to sustain the ordinance. According to the Court of Appeals, if "a motivating factor" in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F.2d, at 537 (emphasis in original). This view of the law was rejected in *United States v. O'Brien*, 391 U.S., at 382-386, the very case that the Court of Appeals said it was applying:

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . .
". . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."
Id., at 383-384.

The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views. As JUSTICE POWELL observed in *American Mini Theatres*, "[if] [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." 427 U.S., at 82, n. 4

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are justified without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis added); *Community for Creative Non-Violence*, supra, at 293; *International Society for Krishna Consciousness*, supra, at 648. The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Mosley*, supra, at 95-96.

It was with this understanding in mind that, in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to "content-neutral" time, place, and manner regulations. JUSTICE STEVENS, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication," 427 U.S., at 70, noting that "[it] is [the] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," *id.*, at 71, n. 34. JUSTICE POWELL, in concurrence, elaborated:

"[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. . . . Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. See, e. g., *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 509-511 (1969); *Procunier v. Martinez*, 416 U.S. 396, 413-414 (1974); *Greer v. Spock*, 424 U.S. 828, 842-844 (1976) (POWELL, J., concurring); cf. *CSC v. Letter Carriers*, 413 U.S. 548 (1973)." *Id.*, at 82, n. 6.

The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. See *Community for Creative Non-Violence*, 468 U.S., at 293; *International Society for Krishna Consciousness*, 452

U.S., at 649, 654. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in *American Mini Theatres*, a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 427 U.S., at 71 (plurality opinion); see *id.*, at 80 (POWELL, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial"). Exactly the same vital governmental interests are at stake here.

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See *Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 585 P. 2d 1153 (1978). The opinion of the Supreme Court of Washington in *Northend Cinema*, which was before the Renton City Council when it enacted the ordinance in question here, described Seattle's experience as follows:

"The amendments to the City's zoning code which are at issue here are the culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City. . . . [The] City's Department of Community Development made a study of the need for zoning controls of adult theaters The study analyzed the City's zoning scheme, comprehensive plan, and land uses around existing adult motion picture theaters. . . ." *Id.*, at 711, 585 P. 2d, at 1155.

"[The] [trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record." *Id.*, at 713, 585 P. 2d, at 1156.

"The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods." *Id.*, at 719, 585 P. 2d, at 1159.

We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's Northend Cinema opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [The] city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theatres*, 427 U.S., at 71 (plurality opinion). Moreover, the Renton ordinance is "narrowly tailored" to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

Respondents contend that the Renton ordinance is "under-inclusive," in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail. There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that "the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials." That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489 (1955).

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance

leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[ample], accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads."

Respondents argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. The Court of Appeals accepted these arguments, concluded that the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech. 748 F.2d, at 534.

We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres*, 427 U.S., at 71, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.*, at 78 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

In sum, we find that the Renton ordinance represents a valid governmental response to the "admittedly serious problems" created by adult theaters. See *id.*, at 71 (plurality opinion). Renton has not used "the power to zone as a pretext for suppressing expression," *id.*, at 84 (POWELL, J., concurring), but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in *American Mini Theatres*, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment. The judgment of the Court of Appeals is therefore Reversed.

Timothy J. Dowling,
Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment

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The sprawl debate sometimes suffers from the difficulty of proving the obvious. When skeptics suggest that concerns about sprawl are largely dust and nonsense, it is hard to know where to begin. The debate sometimes lacks precision because urban sprawl threatens so much: quality of life (particularly in our poorest neighborhoods), prime farmland, the environment, our historic and cultural heritage, and our sense of community.

Because sprawl's harmful effects are all-pervasive, there is a danger of forgetting what life was like without it. Over time, we might unthinkingly come to accept a ninety-minute daily commute, a smoggy horizon, lifeless central cities, and bloated property taxes as the natural order of things. Like the skeptical fish that questions whether there is any water in the tank, skeptics try to use sprawl's very pervasiveness to their advantage.

Sprawl unquestionably has an I-know-it-when-I-see-it quality to it. As with pornography, however, the difficulty in defining urban sprawl is no argument against attempting to control it. As we work to find solutions, a common definition is emerging - a definition that focuses the debate on low-density, land-consuming, automobile-dependent, haphazard, non-contiguous (or "leapfrog") development on the fringe of settled areas, often near a deteriorating central city or town, that intrudes into rural or other undeveloped areas.

The problem is not growth per se, but dysfunctional growth. The solution is not no growth, but smart growth achieved by directing development back to central cities and other areas that yield sustainable communities. Tax incentives, brownfield redevelopment, elimination of sprawl-enhancing subsidies, urban growth boundaries, transferable development rights, and many other initiatives comprise the smart growth agenda.

Evidence of sprawl surrounds us. For years, sprawl consumed nearly six million acres of farmland annually, and we continue to lose an estimated one million acres each year. In central California, sprawl threatens to destroy more than 3.6 million acres of our most productive farmland in the first half of this century. According to the American Farmland Trust, 80% of our fruits, vegetables, and dairy products are "in the path of sprawling development."

Sprawl leads to excessive dependence on automobiles, which imposes enormous costs and degrades our quality of life. The average daily round-trip commute for workers in Atlanta is 36.5 miles. The average speed on Los Angeles

freeways is expected to fall to eleven miles per hour during the next decade. In Washington, D.C., area residents waste about seventy-six hours each year in traffic jams at a cost of about \$1260 per person. Nationwide, the price tag for lost time and fuel due to sprawl-exacerbated congestion is \$72 billion per year. This congestion is literally driving us crazy, with steadily increasing road-rage incidents claiming more than 200 lives in recent years.

Try as they might, skeptics cannot credibly dismiss concerns about sprawl as the rant of environmental extremists. Indeed, business leaders are among the most effective voices for smart growth. Citing the enormous costs of sprawl in California, a 1995 landmark report sponsored by the Bank of America found that "unchecked sprawl has shifted from an engine of California's growth to a force that now threatens to inhibit growth and degrade the quality of our life." The report concludes that sprawl contributes to, among other ills, decreased employee productivity, higher business costs and taxes, and a decreased urban tax base.

Other industry executives agree. The Atlanta Chamber of Commerce has established a Smart Growth Partnership with the Urban Land Institute and The Georgia Conservancy because traffic congestion threatens Atlanta's economic vitality. In Silicon Valley, industry leaders are promoting smart growth to attract highly skilled workers to leading high-tech companies. Business executives in northwest Michigan are pursuing smart growth to preserve the natural environment and to protect the area's tourism industry.

The people who live with sprawl every day recognize it as a serious failure of public policy. Nationwide polls show strong public support for the protection of open space. In 1998, voters weighed in on more than 240 ballot initiatives designed to control sprawl, and they approved more than 70% of them. In one of the fastest growing counties in the nation, smart growth candidates recently prevailed in every contested county supervisor race. Thirty-four governors hailed open space protection and other smart growth initiatives in their 1998 inaugural or "state of the state" addresses. In the Commonwealth of Virginia, hardly a hotbed of radical activism, most people believe urban sprawl is destroying their cultural heritage and quality of life, and about 70% favor smart growth.

Skeptics respond that only a small percentage of the United States is developed. With so much open space available, they contend, the anti-sprawl movement must perforce be a subterfuge to expand government power at the expense of individual freedom. Those who make this argument would have more credibility if they resided in Death Valley or the other vast, uninhabitable terrain they include in their calculation.

More to the point, our concentrated population patterns cannot plausibly be used to justify the unplanned, myopic growth that is destroying our central

cities, prime farmland, and environment. The macro-statistics used by opponents of smart growth gloss over distinctions between the quality of the land we are losing and the land that remains. To be sure, we can convert some forestland and rangeland to cropland, but the highly productive, prime farmland we are losing today will be gone forever. The same holds true for environmentally sensitive land that falls victim to sprawl.

Skeptics also argue that the market is self-correcting because periods of great open space loss are sometimes followed by a period of reduced loss. Recently released statistics show just the opposite, with almost sixteen million acres of forest, cropland, and open space on private land lost to development from 1992 to 1997, more than double the annual loss rate experienced from 1982 to 1992. Moreover, even if accurate in isolated locations, this argument disregards the obvious truth that the rate of open space loss sometimes decreases in particular areas because once open space is lost, there is less to lose. To cite but one example, California has lost ninety percent of its original wetlands and ninety-five percent of its coastal wetlands. That the rate of wetlands and open space loss might be falling in certain areas is not necessarily cause to cheer.

One skeptic suggests that sprawl actually enhances air quality, arguing that although sprawl has increased since the 1970s, levels of carbon monoxide, lead, and other air pollutants have fallen. A better example of the post hoc, ergo propter hoc fallacy is difficult to imagine, for this reasoning attributes air quality improvements to sprawl simply because they followed (or coincided with) sprawl, with no accounting for the federal ban on leaded gasoline, more stringent air quality controls, and the many other factors that led to those air quality improvements. Moreover, emissions of one key precursor to ground-level ozone and smog, nitrogen oxide, increased 11% from 1970 to 1997, and the national average ozone level increased five percent in 1998. Although today's automobiles are more than 90% cleaner than the cars of the 1970s, millions of Americans still breathe unhealthy air in part because we drive more than twice as many miles as we did in 1970.

II. IS SMART GROWTH UN-AMERICAN?

Opponents of smart growth argue that even if sprawl causes harm, this harm simply manifests the aggregation of individual decisions made in the marketplace. They contend that our traditions require us to respect these individual choices because they reflect "the American dream."

Two responses are in order. First, sprawl does not reflect choices made in an unregulated marketplace but choices heavily influenced by huge government subsidies that encourage sprawl. Nearly eighty-five percent of federal transportation money "paves the way for sprawl." The federal tax code, floodplain

insurance subsidies, government funding for expansion of water and sewer facilities, federal mortgage subsidies and guarantees, federal urban housing programs, gasoline prices that fail to recover external costs, and other subsidies have long skewed marketplace decisions.

Some skeptics, while candidly acknowledging the existence of pro-sprawl subsidies, seem to suggest that smart growth advocates use them as a fig leaf to justify needless regulation. In fact, the bulk of the debate centers on these subsidies. Maryland's cutting-edge smart growth program now restricts state subsidies for roads, sewers, and schools to areas that will support sustainable communities. Milwaukee is reversing the pro-sprawl effects of the federal transportation subsidy by using that money to deconstruct a half-built section of city highway to make room for new homes and businesses. Many smart growth advocates would declare victory if we simply eliminated pro-sprawl subsidies, or counterbalanced them with sufficient incentives and controls to draw people back to central cities.

Second, recent research by Professor John Hart demonstrates that land-use controls have a rich tradition in the United States.⁴⁴ Colonial land-use regulation went far beyond the control of nuisances and included planning efforts remarkably similar to those used to combat modern-day sprawl. For example, the Massachusetts Bay Colony prohibited dwellings more than one-half mile from town meeting houses without approval by the court. Connecticut fashioned laws to address the depopulation of towns. Colonial land-use controls limited not only the amount, but also the sequence, of new development, much as modern smart growth initiatives seek to avoid "leapfrog development." These colonial regulations – "so numerous and varied, so widely distributed, that they cannot be viewed as anomalous" – confirm that local land-use planning has roots deep in the American tradition.

**Gregg Easterbrook,
*The Case for Sprawl***

The New Republic (March 15, 1999)

The ideal restaurant would have terrific food, moderate prices, and would be unpopular, so lines would never inconvenience diners. Legislatures could make restaurants less crowded by, say, mandating that some tables be kept vacant even

⁴⁴ See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996) (noting that land use was substantially regulated in colonial times).

when customers are queued. Those already seated would surely benefit. But others would stew over being denied service, while business and jobs would be lost.

It's worth remembering this as politicians begin to tackle the issue of suburban "sprawl," currently emerging as a primary topic in the run-up to Campaign 2000. Polling data and focus groups show that sprawl has hot political q-scores; last fall, state and local voters approved nearly 200 ballot measures to limit development or preserve green space. Vice President Gore has unveiled a "livability agenda" to ease traffic and other frustrations of suburban commuters. As Gore notes, "Parents want to spend more time with their kids and less time stuck behind a steering wheel." And Gore is hardly alone. New Jersey Governor Christine Todd Whitman, a Republican, is leading the charge for a \$1 billion program to set aside half the state's remaining wildland. Even Ralph Reed is touting sprawl politics.

Of course, everybody wishes there were fewer cars on the road, fewer strip malls, and less demand for living space or commercial square footage. But how do you discourage such things without denying a place at the table to those who have not yet been seated – especially in a country whose population is growing? If suburbs are where Americans choose to live – and that verdict is in, the suburban class now constituting the majority of Americans – then brainpower should be applied to making burbs as livable as possible. It's a good sign that policy organizations such as the Brookings Institution are turning their attention to such tasks as planning for "smart growth."

But, as an issue, sprawl can also sound awfully similar to exclusionary zoning and other pull-up-the-ladder ideas that comfortable communities have used in the past to keep out unwanted arrivistes – often minorities and immigrants. One person's greenspace preservation is another's denied housing permit. So here are a few qualms about the emerging national buzz on sprawl:

Sprawl is infuriating but not statistically significant. The footprint of the United States reflects an ever-bigger shoe size; the Chicago metropolitan area, for example, grew 46 percent from 1970 to 1990. The Sierra Club estimates that 400,000 acres per year are being converted to developed use. Yet are these figures really as worrisome as they seem? Four hundred thousand acres, for example, sounds like the circumference of the Crab Nebula but represents 0.02 percent of the U.S. land mass: 50 years of sprawl at the current rate would be required to consume a single percent of America's expanse.

Just 3.4 percent of the United States is urban, suburban, or otherwise "built up," according to federal figures. If roads are added to the calculation, the total concreteized area of the country rises to 4.8 percent. The forested portion of the United States is, by contrast, 20.4 percent, meaning there are four acres of

woodland for every acre of development. Even if the definition of "developed" is expanded in the most liberal way, to include all land used for crops or grazing, the United States is still two-thirds wild, one-third under the hand of man. Sprawl is a local problem, not an all-encompassing effect.

Recent concerns about agricultural land-use patterns, often spun in the media and by lobbyists as a crisis of "vanishing farms," also diminish on close examination. "Land in farms" fell 16 percent between 1964 and 1997, according to the Agriculture Department. But this much-cited category incorporates considerable acreage that owners were calling farms only for tax purposes. Since the 1960s, "total cropland" is down only about one percent, while "harvested cropland," or land under cultivation, is up eight percent. And production per acre – what matters most – is way, way up, thanks to high-yield crop strains.

Moreover, the trend line is toward the *decline* of sprawl, relative to people at least. David Rusk, a theorist of the smart-growth movement, estimates that U.S. metro development covered 208,000 square miles in 1950 and by 1990 had sprawled out to 345,000 square miles. But, through that period, the population of those areas rose from 84 million to 159 million. This translates to a 66 percent increase in physical area for a population increase of 89 percent. America isn't gobbling up more space per capita; it's gobbling less – mainly because developers are responding to market incentives to use land more efficiently. Sprawl theory assumes that builders despoil the land without restraint. Yet price is already an important restraint; land is an expensive resource.

People fled city centers because they wanted to. One motivator for suburban expansion was white desire to escape contact with blacks. As Brookings Review recently noted, "Race has been a major factor in the spatial configuration of our metropolitan areas." That aspect of sprawl does not reflect well on American society, but the rest of the phenomenon is mainly a voluntary choice. Blacks are now sprawling, too: mainly African American, middle-class burbs are expanding in Georgia, Maryland, and elsewhere. Detached homes, verdant lawns, lower crime rates--for many millions of Americans, including many millions of minority Americans, such things represent a lifelong dream. People of all races seek the sprawled areas because that's what they *like*.

People also sought the suburbs to escape the corruption and mismanagement of urban government – especially the disastrous inner-city school systems. Suburban government is usually clean and responsive, if ho-hum; if people like honest government supervising their driveways and lawns, why should public policy argue with that judgment? Intellectuals have long disdained the expansion of the burbs, despite works such as *The Levittowners* that demonstrate little urbansuburban distinction in sophistication. Of course, many suburbanites have trite values and nothing to say, but then the same goes for many who reside

in Upper West Side walk-ups and hold subscription seats for the opera. And, for reasons never entirely clear, twentieth-century liberalism swooned for Le Corbusier's contention that human beings deserve to be packed into high-density tower housing that rises from the landscape like so many vertical penitentiaries. Maybe there was once a reason to believe that such structures were the only way to bring decent living standards to the masses, but now it's clearly possible to bring detached homes to the masses. That's an important social achievement, not a cause for angst.

We know from the choices of housing buyers, and from the unhappiness of housing-project residents, that most Americans despise living in cramped quarters. Despite this, some sprawl theorists assert that, since the average density of an American metro area is one-fourth the density of metro areas in nations such as Germany, public policy should strive to force a dramatic compression of American living space. But if Germany, or any of many other European or Asian countries, had more land area, its citizens would clamor for detached homes and lawns, too. The fact that other nations lack the expanse in which to offer the majority of their citizens homeownership hardly means that America, blessed with such space, should prevent citizens from occupying it.

Sprawl has economic utility. Some cities have spread out in a jumbled, ill-thought-through manner that causes awful traffic bottlenecks, wasted fuel, and an excessively asphaltized ambiance. But it is not the case that tract housing, overpasses, multilane roads, malls, and other aspects of suburbia happen solely because of rapacious developers or civic pandemonium. Most happen because they are economically efficient.

Subdivision development is nowhere near as tasteful as an elm-shaded, turn-of-the-century Cape Cod in the university district, but it has the virtue of being affordable to many more families. Malls may be stupefying, but they are a furiously efficient means of retailing. Two-car, two-earner families with husband and wife commuting in opposite directions may lead to daily stress but might also be one reason for the American economy's flexibility. The United States has experienced unprecedented economic growth, low unemployment, and improvement in living standards during the very period of burb explosion and traffic jams. Maybe these factors are positively correlated, not negatively.

Consider the assumption that road construction is odious. Roads are not only much cheaper to build than mass transit systems; they are also more flexible. The excellent subway system in Washington, D.C., which I ride to work, is fixed in its downtown-outward configuration: tens of billions of dollars would be required to rebuild the system to reflect the between-burb commuting that has been the main urban transportation trend of the past 20 years. Roads, on the other hand, can reflect changes in commuter patterns instantly--people just point their

cars at different destinations.

Cars, in turn, are consumers of money and fossil fuel, and we belittle ourselves when we regard them as status symbols. But automobiles also promote economic efficiency and personal freedom; there are good reasons why even anti-sprawlers want to own one. As new cars approach negligible levels of pollution emissions, environmental objections to them decline. And an annoying little secret of suburban life is that, even with traffic congestion, it's almost always faster to get somewhere in a car than by riding public transit. Cars are ubiquitous partly because people make rational time-money tradeoffs regarding their use, and those sorts of judgments, though sometimes wrong on the micro scale, are usually logical on the macro scale.

Thus, the fact that the federal government spends about \$28 billion a year on road construction, compared with about \$6 billion on mass transit, isn't necessarily the outrage that current sprawl politicking suggests. It surely can be argued that shifting some spending toward mass transit makes sense, though such purposes can be far more quickly and flexibly achieved by better bus service than by the rail lines that urban planners adore. But roads and car culture aren't a crazed anti-people conspiracy. The challenge is to make roads and cars serve us better while bugging us less.

The Michigan Land Use Institute, an impressive new smart-growth organization, recently proposed a sensible middle course along these lines for Traverse City, Michigan. Local officials currently plan to bracket the metro area with a high-speed highway bypass. The Michigan Land Use Institute offered a detailed alternative plan for improving existing major arteries and left-turn lanes, speeding up traffic within the city but preventing cars from being sucked away from established commercial zones. Compromises like this admit that the automobile is here to stay as America's primary means of transportation but seek to adjust car culture to avoid construction that isn't really needed.

Sprawl is caused by affluence and population growth, and which of these, exactly, do we propose to prohibit? The Census Bureau projects that the American population will expand to 394 million by the year 2050, half again the level of today, with almost all that growth attributable to (legal) immigration, which currently runs at about 900,000 arrivals per year. Do we want to halt or deeply restrict immigration? Unless we do, the country's stock of houses, roads, commercial space, and other construction must substantially enlarge in decades to come.

Meanwhile, the reason Americans keep buying more housing, more SUVs, more swimming pools, and other space-consuming items is that they can afford these things. And so ... affluence is bad? The literature on sprawl is rife with

sarcastic references to the square footage of the typical new home and to the spread of McMansions – "spacious" is a sneer word in this context – as if cramped quarters or adjoining walls are what human beings ought to prefer, damn it! There are many philosophical reasons why people might be more content with a modest lifestyle. But these are arguments about materialistic culture and the modern soul, not about appropriate housing-lot size. If prosperity puts the four-bedroom house within reach for the typical person, it's hard to see why public policy should look askance at that.

Sprawl complaints might justify exclusionary zoning. If political opposition to sprawl leads to smarter growth, or more parks and wildlife habitats, or better bus service, or better traffic regulation, then the public good is served. The trouble is, some sprawl concerns would not serve the public good.

Aspects of environmentalism have long been criticized as using ostensible concerns about nature to serve private purposes such as property values. Sprawl theory is now being hailed as an alternative to this. Since every person, rich or poor, is equally inconvenienced by being stuck in traffic, *The New York Times* recently opined, Gore's livability initiative will "take the lingering elitist tinge off environmentalism." Actually, it's the other way around. Sprawl control has much greater potential to wander into have-and-have-not inequity than does, say, regulation of CFCs or dioxin.

In a passage of his 1992 book *Earth in the Balance*, Gore worries about a glade of trees removed to build a new housing subdivision near what was then his Virginia home. "As the woods fell to make way for more concrete," he writes, "more buildings, more parking lots, the wild things that lived there were forced to flee." When he wrote these words, Gore was himself living in a large suburban house built on cleared woodland and parking his car on concrete. Why are comfortable homes and long driveways all right for those who already possess them, but threatening when others ask for the same?

Adopting smart-growth policies and better transportation plans is something every community should do. But, if communities take the kind of steps that would really stop sprawl, they would confer a windfall on those already entrenched, while damaging the prospects of those who long to attain the detached-home lifestyle. It's not for nothing that the Supreme Court has long taken a dim view of regulations whose official purpose is to keep communities leafy and quiet but whose effective result is to lock in the favored at the expense of new arrivals.

Everybody wants symbolic action against sprawl, but real action would drive people crazy. Gore's "livability agenda" matches great p.r. ring with hardly any content. Its chief plank is federal support for about \$9.5 billion in local land-

preservation bonds. This is a fine idea, though a one-shot infusion that won't change the larger panorama of land-use politics. (For my own admittedly politically improbable proposal to require developers to preserve at least one acre of land for every new one they build on, thus making ever-greater increments of land preservation a permanent part of American public policy, *see* "Greener Pastures," *THE NEW REPUBLIC*, March 2, 1998.) The rest of Gore's initiative are inoffensive, small-change items, such as \$10 million to help schools become "community centered" or \$17.2 million for safeguarding ex-urban agricultural land – an amount that will buy roughly two farms per state.

Announcing the livability initiative, Gore mused about "the Lakota storytellers who described the vast clearness of the Western sky as a metaphor for inner courage." It's easy to see why he would rather discuss the Lakota than the emphatic actions that would really cut down on sprawl. One would be exclusionary zoning. Another would be the denial of environmental or sewer permits, which brings business expansion to a halt. Another would be revoking the hugely popular mortgage-interest deduction. Another real-world restriction would be raising gasoline taxes.

If mortgage interest were not tax-deductible, and gasoline prices were quadrupled (putting them on a par with Europe's), demand for those sinister spacious homes would wane, enthusiasm for public transportation would rise, and the market could be relied on to take care of the rest. But do you want to be the politician who advocates a \$3-per-gallon gasoline tax? Think of Bill Clinton's panicky 1996 retreat from a 4.3-cents-per-gallon gas-tax increase – not exactly a metaphor for inner courage. There is little chance any major candidate will advocate higher gasoline taxes during Campaign 2000. And, if the political world is afraid of this moderate reform – which would not imperil car culture, just trim some of the tonnage off our SUVs – where is the will for real change?

Other anti-sprawl proposals have similar implausibility quotients. Rusk and other theorists, for example, call for consolidating urban and suburban governments to prevent local entities from playing one off the other in development contests. It's an admirable idea, and a few cities and their suburbs have voluntarily combined, notably Indianapolis and Jacksonville. But, if you live in the ring burbs around Newark, Detroit, or Washington, D.C., you'd have to be dragged kicking and screaming into combination with their corrupt, incompetent governments. Some have proposed that combining the tax bases of suburban and urban jurisdictions would reduce sprawl contests and promote equity by improving schools in poorer neighborhoods. The latter goal is totally justified, but where is the political support for this idea? Tax-base sharing is currently foundering in Vermont, one of the most liberal states.

And, if you want decisive action against sprawl, don't you want land-use

planning? Imagine how poll numbers will shoot up for the candidate who proposes that! Regional land-use planning has done well by the city of Portland, which has both controlled its boundaries and seen its economy prosper. But Portland is a special case; its geography imposes physical limits on growth. Portland's high land values and high quality of life tell us land-use planning and prosperity are not incompatible, which is an important lesson for local officials who traditionally have felt compelled to approve any and all construction. But the kind of land-use planning that's worked in Portland may not work nationally, especially since Portland has pretty much closed its doors to population growth, which is not an option for the country as a whole.

Hey, these movie-theater lines are too long! You bet the lines at the movie theater are too long. My proposed solution is to forbid you from going to the movies. Your proposed solution is to forbid me. We both claim a noble public purpose – the shorter movie line. But sometimes what seems like concern for the public square is really a declaration of "me first."

Thoughtful study of smart-growth alternatives is in everyone's interest and will lead to improvements in suburban livability. But many of the people who now grouse about sprawl themselves live in spacious houses, own an SUV, owe their good fortunes to the growth economy, and would be entirely outraged if there were not ample roads, stores, restaurants, and parking wherever they went. They wish everybody else would get off the highway so that they can have the road to themselves. In this way, the sprawl issue touches on the selfish downside of democracy. Smart growth is a smart idea, but those who pursue it must be wary of favoring the enfranchised and the organized, which our politics does too much of already.