THE INFLUENCE OF THE METROPOLIS ON CONCEPTS, RULES AND INSTITUTIONS RELATING TO PROPERTY†

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Men come together in cities in order to live: they remain together in order to live the good life.

Aristotle, quoted in Lewis Mumford, The Culture of Cities 492 (1938).

It was recognized that the survival of the community (Neolithic) lay in the union of its members who were brought closely together by the need for combined action against the dangers outside the settlement stockade.


The task assigned me is to "stimulate thought and raise questions of significance" about "The Influence of the Metropolis on Concepts, Rules and Institutions Relating to Property." As I now reflect upon "metropolis" and "property," and their possible interrelations, and the tremendous number of questions of significance which these interrelations raise with respect to the future, I find that the flood of associations very nearly paralyzes thought. Hence I propose, after some brief effort to indicate what a comprehensive inquiry might include, to cut the subject down to consideration principally of the impact of the modern American metropolis upon certain aspects of land law. It is hoped, however, that the framework and method of inquiry suggested may be adaptable to comparative study through different times and across nation-state boundaries.¹

For convenience in exposition, the discussion will be organized under the following main headings:

I. A Conception of Property.

II. The Metropolis as a Community.

III. Possible Impacts of the Metropolis upon Property.

IV. An Hypothesis about the Impact of the Modern American Metropolis upon Land Law.

V. Trends toward Rationalization in Land Law.

VI. Future Perspectives.

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I. A Conception of Property

It is customary among lawyers today to define property in terms of legally protected interests with respect to resources. Thus, the Restatement of Property uses the word "property" to "denote legal relations between persons with respect to a thing," with "a thing" being understood to include not only physical objects but also intangibles, and clarifies the relevant legal relations as rights, privileges, powers, immunities and interests. A right is defined as "a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act"; a privilege, as "a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act"; a power, as "an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act"; an immunity, as "a freedom on the part of one person against having a legal relation altered by a given act or omission to act on the part of another person"; and an interest, as "generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them." Similarly, Noyes, building upon the Restatement in his comprehensive study of The Institution of Property, attempts a high degree of precision:

Property is any protected right or bundle of rights (interest or "thing") with direct or indirect regard to any external object (i.e. other than the person himself) which is material or quasi-material (i.e. a protected process) and which the then and there organization of society permits to be made the object of that form of control, either private or public, which is connoted by the legal concepts of occupying, possessing or using.

Comparable definitions abound in the legal literature.

The difficulty with definitions of this type is not that they are inaccurate but that they are left incomplete and ambiguous. It may be observed, by appro-
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appropriately detailed examination, that both these definitions and all that great body of supporting concepts and rules which is commonly labelled "the law of property" purport, in a single indiscriminate reference, to describe, to predict, and to prescribe the responses of certain official decision-makers to the competing claims of people for the control and enjoyment of resources (including goods and services). To make the words in these definitions and rules most completely meaningful an observer must, therefore, locate both decision-makers and competing claimants in the total social process of people applying institutions to resources for the production of values and keep quite distinct the descriptive, the predictive, and the prescriptive functions of such words.8

The general inquiries necessary to achievement of this comprehensive orientation may be briefly indicated. With respect to any particular community, the important initial questions are these: What people, make what claims, to what resources, in pursuit of what values? What, in detail, are the specific practices by which people allocate, plan, develop, and employ resources in the production, distribution, and consumption of values? With this beginning orientation in fact, the important questions of legal policy may next be raised: How is com-

any use of any other resource. The only escape from this circular superficiality of "property" is to justify decisions by value judgments or policy norms stated in terms sufficiently precise that their compatibility with basic democratic values can be confirmed or disconfirmed by observation of their consequences. McDougal, Municipal Land Policy and Control 13, n. 19 (Practicing Law Institute, 1946). Elaboration is offered in McDougal and Haber, Property, Wealth, Land: Allocation, Planning and Development 28 (1948) (hereinafter cited as McDougal and Haber):

"The terminology of the Restatement is much indebted to Hohfeld, Fundamental Legal Conceptions (1923) Chapters I and II.

"As analytical tools for making description of official behavior more precise and for exposing the ambiguities of higher level abstractions, such as property or ownership, the terms of this analysis can be made to serve policy purposes. When, however, they are proffered not as convenient descriptive terms, but rather as absolutes with alleged predictive or prescriptive powers they become confusing and inimical to rationality. It must always be remembered that, on the level of the authoritative doctrine which they compose, these terms are tautologous: The plaintiff has a right because he gets official protection; he gets official protection because he has a right. Outside the confines of authoritative doctrine, whether an official grants or denies protection depends upon many variables, environmental and predispositional.

"It is the relevance of these other variables which requires a more discriminating breakdown than Hohfeld's simple dichotomy between 'operative facts' and 'legal concepts.' It is the judge or other official who makes facts 'operative' and his selection of what facts are significant is as much a part of the response, which an observer seeks to predict, guide, or control, as any other part of his 'opinion.' The Hohfeld dichotomy fails also to account for policy standards or norms, among the most influential of the variables which today affect official response.

"It is believed that adequate theory for describing the flow of official responses must make at least the following discriminations: The facts as seen by a disinterested observer; the claims of the parties, their versions of the facts, their demands, and their identifications; the standards invoked by the parties, including both technical legal doctrine (in terms of rights, powers, privileges, immunities, and so on), on a higher level, of property, ownership, possession, estate, fee simple, and so on) and policy propositions which can be given operational indices of community values; the response of the official in terms of the facts regarded as significant or insignificant, the standards accepted or rejected, and the particular demands granted or denied; and the effects of official response on the distribution of values in the community. A complete analysis, following the formula that response is a function of environment and predisposition, would of course include environmental factors other than the particular controversy and such predispositional factors as attitudes, skills, class, and character."
community coercion organized and applied for regulating and policing peoples' claims and practices with respect to resources? Who are the decision-makers? What authority is conferred upon them? What community prescriptions are projected? How do decision-makers in fact apply, define, redefine, and create prescriptions in their regulation and policing of claims and practices? What are the variables which appear to influence decision and what is the role among other variables of the concepts and rules labelled "property law?" What are the effects upon individual and community values achieved by decision-makers and how compatible are these effects with the values for which the community maintains the decision-makers? What are the variables which are likely to affect future decision and how can these be manipulated to secure decisions more in accord with community values?7

The conception of property we recommend, therefore, includes the traditional notion of "legally protected interests with respect to resources" but seeks to extend this notion to the whole pattern of practices, the whole flow of decisions, by which community coercion is organized and applied in regulating and policing claims and practices with respect to resources. From this perspective, the concepts and rules commonly called "the law of property" become a subject of study as but one of many variables that may effect decision and cannot be regarded as adequate intellectual tools for performing any one, much less all, of the functions of describing, predicting, and prescribing decisions. For the performance of such functions, there is need of new and comprehensive theory which will both assign a proper relevance to traditional concepts and rules and escape the confusions and irrationalities of their ambiguities.8

It may perhaps be added that the common debate about what doctrines, practices, or resources are appropriately labelled "property" doctrines, practices or resources is largely futile.9 From the perspective of description, the relevant inquiries are: With respect to what claims and practices, about what resources,

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7 Cf. 1 Powell, The Law of Real Property c. 2 (1949). Professor Powell writes: "Furthermore statesmanship in the law of the land requires perspective, a comprehension of the workings of the whole social organism, an awareness of the processes of evolution which are constantly at work in even the least regenerate of the fields of law." Ibid., at 2.

8 These themes are developed in McDougal and Haber.

9 Cf. the remarks of Judge Frank in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (C.A.2d, 1953), in protecting the grant of an exclusive right to use a ball player's photograph in connection with sales of chewing gum. Undoubtedly influenced by metropolitan perspectives, Judge Frank explains his decision as follows:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in
have decision-makers in fact applied "property" doctrines to achieve what effects? What other doctrines have been applied in comparable contexts to achieve either equivalent or opposed effects? From the perspective of prediction, the necessary inquiry is what doctrines, whether called "property" or other, and what other predispositional and environmental factors are likely to affect decision? From the perspective of prescription, the important inquiry is what doctrines and institutions, whether called "property" or other, are most likely to influence decisions in accord with clarified values?

II. THE METROPOLIS AS A COMMUNITY

The conception of the metropolis suggested in the prospectus for our conference is that of "the large urban center which has become or is developing a dominating influence both within and outside the western world." Similar conceptions in terms of large aggregations of people, contiguity, intensity of interaction, and division of labor appear to be common stock among contemporary sociologists. One recent writer offers typical, but especially comprehensive and perspicuous summary:

A metropolitan community is an organization of many subdominant, influent, and subinfluent communities, distributed in a definite pattern about a dominant city, and bound together in a territorial division of labor through a dependence upon the activities of the dominant city. Subdominant communities produce surpluses for exchange throughout the area. They aid in the interchanging which takes place between the central city and the rural populations. The metropolitan community is not independent of the physical environment, but is, rather, an adaptation to the environment. It utilizes the techniques of production and exchange which are common to populations with industrial-commercial cultures in order to exploit environmental resources and maintain maximum security against catastrophe. Many other conditions of life undoubtedly are subject to control or modification by the central city. The complete structure of the metropolitan community may include the functions of finance, government, education, religion, and innumerable other aspects of the institutional composition of the individual hinterland community. 10

It seems to be generally agreed, further, both that the metropolis so conceived has come in many countries to dominate all life, rural as well as urban, 11 and newspapers, magazines, busses, trains, and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

10 Bogue, The Structure of the Metropolitan Community: A Study of Dominance and Sub-Dominance 61 (1950). For comparable conceptions see Gras, An Introduction to Economic History (1922); McKenzie, The Metropolitan Community (1933); Hallenbeck, American Urban Communities (1951); Wirth, Urbanism as a Way of Life, 44 Am. J. Soc. 1 (1938).

that this development is largely a late nineteenth and early twentieth century phenomenon.\footnote{Weber, The Growth of Cities in the Nineteenth Century (1899); Schlesinger, The Rise of the City 1878-1898 (1838); Mumford, The Culture of Cities (1938); Reed, Metropolitan Areas, 10 Encyc. Soc. Scis. 896 (1933); Munro, City, 3 Encyc. Soc. Scis. 474 (1930); Adams, City and Town Planning, 3 Encyc. Soc. Scis. 482 (1930); Hawley, Human Ecology 871 (1950).}

The element in this conception of metropolis that we would like to emphasize, much more than the sociologists do, is the notion of "community." With this emphasis, the metropolis may be conceived as a group of people, with an identifiable resource base, pursuing certain common values, by certain institutions.\footnote{This conception of community is expanded in McDougal and Rotival, The Case for Regional Planning with Special Reference to New England c. 3 (1947). See also MacIver, Community (1924), Society c. VIII (1937), and The Web of Government (1947); Goodman and Goodman, Communitas (1947) with review by Riesman, Some Observation on Community Plans and Utopia, 57 Yale L.J. 173 (1947).}

The group of people may be in constant flux and the resource base may be continually changing at its peripheries, but the values sought and the institutional structures of a metropolitan community remain reasonably distinctive and the conditions under which values are sought in such a community are characterized by certain peculiar interdependences.

The values which people in metropolitan communities seek include, of course, in their broadest compass all the values of our contemporary industrial, commercial, democratic society. Certain demands for efficiency in the management of physical environment for the promotion of such values may, however, be regarded as distinctive to large urban aggregations. Some years ago we attempted to summarize these distinctive demands in somewhat popular terms as follows:

They (the people in our metropolitan communities) are demanding healthful homes in attractive, convenient neighborhoods (at prices they can afford to pay), homes conveniently located with reference to schools, to shopping centers, to facilities for recreation and amusement, and to religious centers. They demand modern and efficient facilities for schools, shopping centers, government, recreation and amusement, with more parks and open spaces. They wish to live in neighborhood units that are conveniently located to their places of work. They are demanding that their communities have modern, efficient, convenient factories and other productive components. They are demanding that their communities have modern, efficient, economical, abundant public utilities and service, with street lay-outs and traffic circulation which will remove congestion, increase safety and reduce cost and delays. They are demanding that all the basic components of their community—habitation, productive, servicing, governmental—be efficiently and harmoniously located in relation to each other.

\footnote{Compare the formulation of Wirth, note 11 supra, at 18: "Urbanism as a characteristic mode of life may be approached empirically from three interrelated perspectives: (1) as a physical structure comprising a population base, a technology, and an ecological order; (2) as a system of social organization involving a characteristic social structure, a series of social institutions, and a typical pattern of social relationships; and (3) as a set of attitudes and ideas, and a constellation of personalities engaging in typical forms of collective behavior and subject to characteristic mechanisms of social control."}
They are demanding, in short, a physical environment of appropriate efficiency to exploit to the utmost the potentialities of their resources and skills for the fullest production of all their values—wealth (in terms of a high standard of living), enlightenment, congenial personal relationships, the preservation and transmission of their moral and cultural patterns, the wide sharing of respect throughout the community, and a democratic diffusion of participation in the making of important decisions. They are demanding an efficiency in their institutions for land use planning and development and for the provision of public services which will make the most economical use of their financial resources and free more of their resources for pursuit of other values.\(^{14}\)

The distinctive institutions of a metropolitan community include a great complex of practices designed to process its physical environment for efficient use and to secure for its members the values and services they demand. One convenient way of talking about these institutions is to categorize them in terms of basic community “components,” such as habitation, servicing, productive, and governmental. Habitation components may be defined as those most immediately affecting character values and the transmission of cultural inheritance, including homes and neighborhood units, and systems and centers of education and cultural activity, of health and welfare, of social and religious intercourse, and of recreation. Servicing components are auxiliary to all values and may be said to include all public utilities and services, such as systems and centers of transportation, communication, power production and transmission, business, finance, marketing, storage, trade, distribution, water procurement and utilization, waste disposal, and so on. Productive components supply real income and include all systems of manufacture and of creating and processing goods and services for exchange with other communities. Governmental components include all those by which community coercion is organized and applied for community purposes.\(^{15}\)

The interdependences peculiar to a metropolitan community extend to its every use of land and to all interactions among its basic components in the production of values. The intensity of interaction in a metropolitan community causes any one use of land—whether for habitation, servicing, productive, or governmental purposes—to affect every other use. The total potentiality of a community for the production of values obviously depends in highest degree upon its productive, income-producing components, but these productive components depend in turn in large measure upon the strength and efficiency of the community’s habitation, servicing, and governmental components. Hence, we may generalize for a metropolitan community a community-wide interdependence


\(^{15}\)Fuller indication of what is included in each of these types of components is offered in McDougal and Rotival, note 13 supra. It may be cautioned that the word “productive” is here being used not in the broad sense employed by economists but rather with a more narrow reference to industrial and agricultural enterprises.
with respect to all values sought in such a community. The degree to which any particular community moves toward its highest potentiality in the production of values depends, of course, upon such variables as its members’ consciousness of and detailed information about their interdependences, the extent to which they identify themselves and their interests with the whole community, and their understanding of the alternatives in public and private action required to take their interdependences into account.

For the most comprehensive orientation, it is necessary to recall, further, that people live today not merely in metropolitan communities but in a whole hierarchy of communities—from the metropolitan (or its lesser constituent communities) through regional and national to hemispheric and global. At each of these many different levels of areal or geographical organization distinctive aggregations of people, distinctive perspectives in terms of value demands, identifications, and expectations, distinctive institutions, and distinctive interdependences may be observed. The functioning of the greater communities affects that of all the lesser communities which they enfold and the functioning of the lesser communities affects, in reciprocal interaction, that of all the greater communities which they constitute.

III. POSSIBLE IMPACTS OF THE METROPOLIS UPON PROPERTY

The impacts of the metropolitan community upon property must be observed in their effects upon the perspectives and operations of the decision-makers who create and apply property policies. The theory of decision-making which we assume is that decision-makers act to maximize all their values and that they acquire their values in interactions in the groups in which they operate and with which they identify.

The decision-makers who create and apply property policies, even with respect to metropolitan communities, are not, unfortunately for simplicity in exposition, located only in the governmental structures of such communities. They are commonly located, in addition, in governmental structures at state, regional, and national, and, perhaps, even international levels. Because of the contemporary dominance of metropolitan perspectives over all our life, it can probably be safely assumed, however, that such perspectives exert an influence upon decision-making at all levels.

Within the predispositions of most particular decision-makers who today create and apply property policies, the distinctive perspectives of the metropolitan

References and materials for documentation of this interdependence may be found in McDougal and Haber, VI; Colean, Renewing our Cities c.2 (1953). For historical perspective, see Gras, An Introduction to Economic History 187 (1922); Hackett, Man, Society, and Environment 4 (1950).

This conception of a hierarchy of communities is expounded in a series of chapters, each on a different community, in McDougal and Haber.

This general orientation is amplified in Lasswell and McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 Yale L.J. 203 (1943); Lasswell, Power and Personality (1948); Lasswell and Kaplan, Power and Society (1950).

See citations note 11 supra. By emphasis here upon decision-makers located in governmental structures we do not mean to exclude inquiry with respect to decision-makers located in structures of effective control. See note 23, infra.
'community and all the other perspectives of modern industrial and democratic (or nondemocratic) society are probably hopelessly intermingled. Hence, relevant inquiry might be framed broadly in terms of the effects of all these combined perspectives both upon all "forms" of property (claims with respect to funds, relationships, processes, activities, and so on, as well as with respect to physical resources) and upon the distribution of protected claims, or wealth, within communities. Such combined perspectives and such effects are, however, much more obviously functions of the larger communities of the region, the nation, and the world than of the metropolitan community and their full investigation would extend inquiry immeasurably.

The focus of inquiry that we propose briefly to develop is, therefore, confined most immediately to the impact of the distinctive perspectives of the metropolitan community (insofar as these can or need to be distinguished for present purposes) upon the flow of governmental decisions about land use, including regulation and performance of the functions of allocation, planning and development. Consideration of the flow of decisions about the functions of production and distribution, and of the broader perspectives and effects mentioned above, will not be attempted.

IV. AN HYPOTHESIS ABOUT THE IMPACT OF THE MODERN AMERICAN METROPOLIS UPON LAND LAW

The hypothesis we advance with respect to the impact of the modern American metropolis upon land law is that the perspectives which we have described as distinctively metropolitan have fostered trends toward the rationalization and technicalization of policies. The heritage of property prescriptions and institutions available to American decision-makers in the latter part of the nineteenth

20 Note the intermingling of these perspectives in the various chapters in The Future of Cities and Urban Redevelopment (Woodbury ed., 1953). See also Gallion, The Urban Pattern VII (1951); Income Stabilization for a Developing Democracy c. 1 (Millikan ed., 1953).

21 The great variety in contemporary "forms" of property is well indicated in Philbrick, Changing Conceptions of Property in Law, 86 U. Pa. L. Rev. 691 (1938). Some of the broader issues are raised in Mills, White Collar 13 et seq. (1951); Arnold, The Folklore of Capitalism c. v (1937); Berle and Means, The Modern Corporation and Private Property (1933); Stocking and Watkins, Monopoly and Free Enterprise (1951); Galbraith, American Capitalism (1952); Berle, The Developing Law of Corporate Concentration, 19 U.Ch.L. Rev. 641 (1952); Hale, Freedom Through Law (1952).

22 Available information is pitifully little. For sources, see McDougal and Haber, 100 et seq.

23 The most intensive inquiry would of course look behind the applications of authoritative doctrines to the structure of effective controls over the apportionment of resources. Within any given metropolis, what individuals, located in what value and institutional positions, actually make what effective decisions as to how resources are to be allocated, planned, and developed? How do the perspectives and operations of various business groups—bankers, builders, insurance executives, landlords, and so on—affect the distribution of formal and effective claims to the control of resources? How do special interest groups use specific property forms for special advantages? What are the roles in effective control over resources of political parties, pressure groups, and private associations? The difficulties in obtaining answers to such questions need no emphasis.

24 Some of the factors which condition the demand for rationality in metropolitan perspectives are indicated by Wirth, note 11 supra, at 12. Note also the emphasis upon "efficiency" in Millikan (ed.) note 20 supra, at 45.
In the 19th century, when the growth of metropolitanism first became important, the expansion of metropolitan perspectives, with their intense demands for efficiency in land use and their ever increasing recognition of interdependences in land use, has been expressed, we suggest, in two different, but closely interrelated and complementary trends: the first trend has been toward the development of a body of land law prescription which gives the utmost effect, within the bounds of overriding community policies, to private agreements between parties and unilateral expressions of intent about land transactions, with but little regard for the supposed imperatives of inherited doctrinal reifications; the second trend has been toward an ever increasing direct use of governmental powers in planning and controlling land use and in remoulding and developing the physical environment, with appropriate facilities and services, for all contemporary community purposes.

It may be cautioned that in suggesting these trends toward the rationalization and technicalization of land law policies we do not impute any mysterious teleological "rationality" to decision-makers. The trends to which we point are merely an exemplification of the continuous process by which the decision-makers of any given generation, rejecting automatic response to concepts and rules embodying the policies of earlier times, reassess, redefine, and recreate their inherited doctrines and practices for the richer achievement of contemporary values.

25 This is a summation of what may be found in any extensive treatment of real property law. The major outlines of origins appear in Holdsworth, An Historical Introduction to the Land Law (1927).

26 Thus, Holdsworth, note 25 supra, at 3, urges the special role of "historical knowledge" in understanding land law on the ground that "all through its history, the importance of the land law has caused it to be influenced by all those social, political, and economic ideas which make up the public opinion of any given period."

It is not our suggestion of course that there have been no impolitic decisions or even that all trends have been toward rationality, our hypothesis is only that the dominant trends have been toward rationality. A point which Professor Powell makes with respect to leases may perhaps be generalized to apply to the whole flow of decisions with which we are concerned. In 2 Powell, The Law of Real Property 182 (1950), the author writes: "Thus the background of the lease as a conveyance built solidly by 1800, has a tremendous foreground, evolved largely since 1800, which is purely contractual in character. The modern law is the synthesis of these two historical factors. Sometimes the background peeks through and controls. Sometimes the foreground is alone considered as determinative."

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require the detailed correlation through recent decades of the expression of metropolitan perspectives in legislative debates and reports, judicial opinions, executive pronouncements, party platforms, pressure group appeals, and so on, with the whole flow of governmental decisions about land use. For present

27 For indication of what a scientific study would require, see citations note 18 supra. Casual illustration of how metropolitan perspectives on occasion permeate official utterance may be observed in the following quotations:

In New York City Housing Authority v. Muller, 270 N.Y. 333, 339, 1 N.E.2d 153, 154 (1936) (sustaining a public housing program), Judge Crouch wrote: "The existence of all the conditions adverted to by the Legislature was alleged in the petition and proved with reference to the area included in the project, of which the premises in question are a part. The public evils, social and economic, of such conditions, are unquestioned and unquestionable. Slum areas are the breeding places of disease which take toll not only from denizens, but, by spread, from the inhabitants of the entire city and state. Juvenile delinquency, crime and immorality are there born, find protection, and flourish. Enormous economic loss results directly from the necessary expenditure of public funds to maintain health and hospital services for afflicted slum dwellers and to war again crime and immorality. Indirectly there is an equally heavy capital loss and a diminishing return in taxes because of the areas blighted by the existence of the slums. Concededly, these are matters of state concern ... since they vitally affect the health, safety, and welfare of the public. Time and again, in familiar cases needing no citation, the use by the Legislature of the power of taxation and of the police power in dealing with the evils of the slums, has been upheld by the courts. Now, in continuation of a battle, which if not entirely lost, is far from won, the Legislature has resorted to the last of the trinity of sovereign powers by giving to a city agency the power of eminent domain. We are called upon to say whether under the facts of this case, including the circumstances of time and place, the use of the power is a use for the public benefit—a public use—within the law."

In Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 508, 513, 64 A.2d 347, 349 (1949), (sustaining the exclusion of heavy industry from a small residential community) Vanderbilt, C. J., wrote: "What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning. The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to be governed by such artificial lines. Changes in methods of transportation as well as in living conditions have served only to accentuate the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality, improved highways and new transportation facilities have made possible the concentration of industry at places best suited to its development to a degree not contemplated in the earlier stages of zoning. The same forces make practicable the presently existing and currently developing suburban and rural sections given over solely to residential purposes and local retail business services coextensive with the needs of the community. The resulting advantages ensure alike to industry and residential properties and, at the same time, advance the general welfare of the entire region."

The declaration of national housing policy in the federal Housing Act of 1949 begins:

"The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution toward an economy of maximum employment, production, and purchasing power."

purposes, we will only emphasize the origins, concomitantly, of metropolitan perspectives and of an increasing flow of decisions illustrative of rationality and technicalization.

The importance of the trends toward rationality and technicalization to which we refer, the point scarcely needs emphasis, resides in their implications for the future. These trends make available to us legal tools, well tested in many different communities, reasonably adequate to resolve, if an appropriate public opinion can be created, the many urgent land use problems confronting our contemporary metropolitan communities, even in this time of atomic and bacteriological warfare peril.

V. TRENDS TOWARD RATIONALIZATION IN LAND LAW

The trends toward rationalization to which we refer may be observed in policies with respect to all three of the important functions—allocation, planning, and development—which a community must perform in processing its physical environment for production and consumption purposes. For documentation, let us now consider appropriate, selective illustration with respect to each of these functions.

A. The Allocation of Land Use

The policies by which our communities allocate land uses among different claimants include both (1) the provision and application of a body of prescriptions for regulating private agreements and expressions of intent about land

An act amending the State of Connecticut Redevelopment Law of May 8, 1963, reads:

"It is found and declared that there have existed and continue to exist in municipalities of the state substandard, insanitary, deteriorated, slum or blighted areas which constitute a serious and growing menace, injurious and inimical to the public health, safety, morals, and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, necessitating excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, for crime prevention, correction, prosecution, punishment and the treatment of juvenile delinquency and for the maintenance of adequate police, fire and accident protection and other public services and facilities, and the existence of such areas constitutes an economic and social liability, substantially impairs or arrests the sound growth of municipalities, and retards the provision of housing accommodation; that this menace is beyond remedy and control solely by regulatory process in the exercise of the police power and cannot be dealt with effectively by the ordinary operations of private enterprise without the aids herein provided; that the acquisition of property for the purpose of eliminating substandard, insanitary, deteriorated, slum, or blighted conditions thereon or preventing recurrence of such conditions in the area, the removal of structures and improvement of sites, the disposition of the property for redevelopment incidental to the foregoing, the exercise of powers by municipalities acting through agencies known as redevelopment agencies as herein provided, and any assistance which may be given by any public body in connection therewith are public uses and purposes for which public money may be expended and the power of eminent domain exercised; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination."

Acknowledgment is made to the Michie Casebook Company for permission to adapt in this section a few sentences in paraphrase and quotation from McDougal and Haber, Property, Wealth, Land: Allocation, Planning and Development (1948). The writer is also indebted to Russell C. Dilks and Richard W. Funk, students in the Yale Law School, for suggestions with respect to some of the illustration in this section.
use, and (2) practices of direct community intervention, by eminent domain and other powers, to shift use from one claimant to another.

The agreements and expressions of intent by private individuals for which policies must be created and applied vary, of course, almost infinitely in their purposes and in the divisions of use they seek. And such agreements and intents are unfortunately categorized in the legal literature in a great variety of terms making the most confused reference, sometimes to the instruments of agreement or intent, sometimes to particular divisions of uses, and sometimes to the legal consequences which decision-makers attach to particular agreements and expressions of intent, such as "conveyances," "wills," "vendor and purchaser agreements," "land contracts," "leases," "landlord and tenant relationships," "possessory estates" and "future interests," "trusts," "rights in the land of another," and so on. For effecting community policies with respect to any such agreements or intents, whatever their purpose or division of uses, community officials must, however, perform certain common, more particular functions, which may be briefly itemized as follows:

(1) **Securing Intent**: Making certain that there is a final expression of agreement or intent, or some sequence of behavior, that should be regarded as raising expectations in others that a commitment has been made.

(2) **Fixing Policy Limits**: Determining whether the purposes and probable consequences of agreements and expressions of intent are compatible with over-all community policies. Agreements which provide for race discrimination or for locking up resources from use or which transgress time limits on deadhand control may be denied community protection.

(3) **Enforcement**: The use of community coercion to make certain that the expectations created by agreement or expression of intent actually are honored or that appropriate redress is made. This is the role of traditional remedies in damages, injunction, specific performance, imprisonment, and so on.

(4) **Protecting against Third Parties**: Preventing third parties from interfering with promised expectations or from taking the benefits of agreements or intents without appropriate assumption of burdens. The recording statutes become relevant here.

(5) **Honoring Transfer of Benefits**: Protecting promisees, under appropriate conditions, in transfer of the benefits of agreements and intents.

(6) **Construction** (interpretation): Establishing the relations of the parties with respect to problems which they did not foresee or foresaw only vaguely.

(7) **Termination**: Putting an end to the effects of an agreement or intent when it has served its purposes or when, though lawful, in the beginning, it has since become inimical to community policy.

(8) **Subjection to Community Claims**: Imposing appropriate community burdens in the form of exercises of the police power, the tax power, eminent domain, and so on.

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For more detail, see McDougal and Haber, 113 et seq.

This itemization is adapted from McDougal, The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order, 61 Yale L.J. 915, 936 (1952).
It is in the creation and application of policies in the performance of all these functions, with respect to all the various agreements and intents by which private individuals seek to allocate land uses, that we suggest it is possible to observe trends toward rationality and technicalization.

Brief illustration may be offered with respect to vendor and purchaser agreements, leases or "landlord and tenant relationships," and the expressions of "deadhand control" summarized in "possessory estates" and "future interests." Mention may also be made of certain important recent developments in allocation by public acquisition.

1. Vendor and Purchaser Agreements.—It is not our intention to suggest that land transfer has become as expeditious, cheap, and secure as it might be made by a few appropriate changes in the maintenance of the public books about land interests, but there have been various developments in the direction of rationality. Though, because of the difficulties vendors have in establishing the validity of their claims under our present system of records, transfer is still effected in most communities by a double-barreled ceremony requiring both a "contract" and a "deed," purchasers are now given practically the same protection after they get a "contract" as the "deed" later confirms, and almost any informal statement which contains all the essentials of intent—description of the parties, description of the land, indication of the interest transferred—has come to suffice as a deed. The result is that a vendor may today transfer whatever interest he has with very great ease and simplicity. The formal modes of conveyancing inherited from England have long been invoked only to sustain intents which might otherwise be defeated by failure of compliance with special statutory requirements.

Further illustration of increasing rationality may be suggested in the protection afforded purchasers against economic duress in time stipulations and "land contracts" designed as substitutes for mortgages, in the increased use of tract indexes in public recording systems and in the plants of private title companies, in the development of the doctrine that the vendor does not have to establish an absolutely good but merely a "marketable" title, in the formulation of doctrines of "equitable conversion" to effect an appropriate balance of

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Such changes would include a shift from alphabetical indexes to tract indexes and the making of the public records more conclusive. For leads into recent literature about "title" proof problems, see Payne, Increasing Land Marketability Through Uniform Title Standards, 39 Va. L. Rev. 1 (1953); Basye, Streamlining Conveyancing Procedure, 47 Mich. L. Rev. 995, 1097 (1949).

McDougal, Title Registration and Land Law Reform: A Reply, 8 U. Chi. Law Rev. 63 (1940).

III American Law of Property 5, 173 (1952) (hereinafter cited as ALP); Dunham, Modern Real Estate Transactions 442 (1952); 5 Corbin on Contracts 637 (1950).

III ALP 222, 279; Handler, Cases and Materials on Vendor and Purchaser 514 (1933).


McDougal and Haber, 136.

Dunham, note 33 supra at 791, 904; Gage, Land Title Assuring Agencies (1937): The modest degree to which title registration has been adopted in the United States is indicated in Powell, Registration of the Title to Land in the State of New York (1938).

III ALP 123; IV ALP 670; Handler, note 34 supra at 173.
benefits and burdens between vendor and purchaser in the interval between contract and deed,\textsuperscript{39} in the statutory reform of traditional remedies for establishing claims to and protecting interests in land,\textsuperscript{40} and in the improvement of statutes of limitation for alleviating some of the inadequacies of anachronistic recording systems.\textsuperscript{41}

Similar developments might be noted in policies with respect to mortgages, the ubiquitous accompaniers of vendor and purchaser agreements. The trends in doctrines and practices about rights to possession, claims to profits and income, foreclosure, redemption, and so on, continue to seek a balance between perfecting the mortgage as a security device and the protection of the mortgagor against economic duress.\textsuperscript{42}

2. Lease Agreements—Landlord and Tenant Relationships.—It is common observation in legal literature that policies in recent decades exhibit a gradual change in the conception of the lease agreement from that of a “conveyance” which creates an “estate,” a conception which had its origin in agricultural England when contract law was still primitive, to that of a simple “contract,” with respect to which contemporary contract doctrines and remedies are most appropriate.\textsuperscript{43} Happily for our present theme, a recent comprehensive text ascribes this change to “new social factors” which with the “growth of cities and the employment of leases for urban properties have shifted the background of this field of law from one predominantly agrarian to one predominantly urban.”\textsuperscript{44} The change has in considerable measure been effected by the introduction into leases by the parties of specific clauses designed explicitly to regulate by their own intentions, rather than by judicial derivations from “estate,” their relationships on such important problems as they anticipate. So common has this practice of introducing specific clauses become that “the law of estates for years” is now appropriately described as having “a predominantly contractual ingredient.”\textsuperscript{45}

Other developments that may be referred to include the invention of the doctrine of “constructive eviction” to permit lessees deprived of the substantial enjoyment of the premises (by failure to supply services, or by failure to make repairs and alterations, or by the introduction or toleration of nuisances, and so on) to terminate their liability for rent by vacation of the premises within a reasonable time after interference; some expansion of the notion that covenants in leases are “mutual” or “dependent,” as contrasted with the older notion of “independent” covenants, which permits parties to demand without tendering performance; statutory imposition, in various forms, of duties upon lessees to maintain the repair of premises; statutes in a few states permitting lessees upon accidental destruction of the premises to terminate their liabilities by surrender-

\textsuperscript{39} III ALP 62; Handler, note 34 supra at 312.
\textsuperscript{40} McDougal and Haber, 181.
\textsuperscript{41} Basye, note 31 supra; III ALP 755.
\textsuperscript{42} 3 Powell, The Law of Property c. 36 (1952); IV ALP 81; Dunham, note 33 supra at 353; Fisher, Urban Real Estate Markets: Characteristics and Financing 17 (1951).
\textsuperscript{43} Bennett, The Modern Lease, 16 Tex. L. Rev. 47 (1937).
\textsuperscript{44} 2 Powell, The Law of Property 181 (1950).
\textsuperscript{45} Ibid., at 182.
ing the premises; the gradual imposition of tort liability upon lessors, contrary to the general doctrine of nonliability, by exceptions for concealed defects, for negligence, for misfeasance in making repairs, for failure to perform agreements or statutory duties, and so on; statutes and decisions in a few states outlawing exculpatory clauses by which lessors seek to immunize themselves from tort liability; one line of decisions imposing upon lessors a duty to deliver effective possession of premises; gradual substitution of tests in terms of the intention of the parties for the mystical "touching and concerning the land" in determining whether benefits and burdens of covenants extend to successors to the original parties; a similar substitution of tests in terms of the intention of the parties and of damage to their interests for crude notions of physical annexation in determining whether or not a lessee can remove fixtures; legislation protecting lessees with respect to rents during times of emergency; the encouragement by tax advantages of long term leases as instruments of urban land development; expansion of doctrines of anticipatory breach to protect lessors in their claims for rent; and the improvement of remedies for the lessor's recovery of possession of the premises. 46

3. Allocation by Deadhand Volition.—The policies of our communities favoring private agreement or intent in the allocation of resources extend to honoring and protecting within limits expressions by which donors seek to project their control into the future, even into periods after their death. The objectives for which donors seek such control include not only wealth effects but also effects on all other values. Wealth objectives include both the care of dependents and successors and a wide variety of commercial purposes. Objectives with respect to other values embrace both community purposes (promotion of education, advancement of religion, improvement of government, relief of poverty, promotion of health or patriotism, and so on) and private purposes (preventing specified behavior, such as marriage, divorce, or gambling, by specified persons; or securing specified behavior, such as the care of tombstones, pets, or houses, from specified persons). The modes of control sought include the assignment of specified resources or a fund to specified purposes or a fund to specified purposes in perpetuity or for a long period of time, shifts from certain persons or purposes to others upon future events, ascertainment of beneficiaries only upon future events, restraints on the anticipation of income or principal, restraints on the transfer of specific resources, provision for the accumulation of income and restraints on management powers. The forms of wealth subjected to such controls may vary through all the many forms of land and funds. The management of the controls established may or may not include persons entitled to beneficial enjoyment. The mode by which intent is expressed may be through "legal" or "equitable" property forms, simple agreement, corporate charter, or other equivalents. The amounts of wealth affected are, of course, infinitely various

46 These illustrations are taken from 2 Powell, The Law of Property c. 16 (1950); I ALP Pt. 3 (1952); Jacobs, Cases on Landlord and Tenant (2d ed. 1941); McDougal and Haber, c. IV; Niles, The Intention Test in the Law of Fixtures, 12 N.Y.U.L.Q. Rev. 66 (1934); Stone, A Primer for Rent, 13 Tulane L. Rev. 329 (1939).
and transferors and transferees vary greatly in value and institutional position and, hence, in capacity to affect community values. 47

The methods by which community coercion is brought to bear upon such efforts to secure deadhand control in the allocation of resources include not merely doctrines and practices about taxation, condemnation, agreements, and corporations, but also a vast body of doctrines and practices commonly known as the law of "trusts" and of "possessory" estates and "future interests." This latter body of doctrines and practices comprises an elaborate, technical superstructure, which both purports to make important distinctions between legal and equitable interests and offers a complete cross-categorization of complementary "possessory estates" and "future interests" in multiple categories, such as, with respect to future interests, of possibilities of reverter, rights of entry, and reversions for future interests reserved in the grantor and his successors, and of vested remainders, contingent remainders, and executory interests for future interests created in third parties. 48 It is supposed to be the function of the technical prescriptions built about these dichotomies and categorizations, aided by certain special policing rules such as the rules against perpetuities and restraints on alienation, to guide and limit community officials in their making of decisions about the eight important particular functions (securing intent, fixing policy limits, enforcement, protecting against third parties, honoring transfer of benefits, construction, termination, subjection to community claims) which must be performed with respect to any agreement or expression of intent. Recalling that these dichotomies, categorizations, and prescriptions had their origin in an agricultural country, of family dynasties, competing courts, and primitive modes of conveyancing, and so on, one may reasonably wonder just how much guidance or limit they really can offer for decisions in a modern metropolitan society, in which wealth is largely intangible and demands for efficiency in land use are most intense. Our suggestion is that a comprehensive study of the decisions through recent decades would reveal trends, under the impact of contemporary perspectives, toward uniformities in decision with respect to each of the eight particular types of functions indicated above, in terms of policies uniquely relevant to each of these functions and of the factual probabilities, of an interest coming into possession and enjoyment when such probabilities are relevant to policies, rather than in terms of the supposed dictates of the traditional dichotomies, categorizations and prescriptions—with the result that the traditional superstructure has become largely meaningless and excess verbiage save for the purpose of stimulating or rationalizing an occasional harsh or impolitic decision. 49 The one striking exception to these trends is the continued

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47 Further analysis of the factual background, with references, appears in Mc­Dougal and Haber, c. III and in Lynn, The Rule against Perpetuities as an Instrument of Community Policy (J.S.D. Thesis 1952, Yale Law School Library).
48 This superstructure may be observed in any of the standard treatises and casebooks upon Future Interests and Trusts and in the Restatements of Property and of Trusts.
49 This suggestion is based largely upon unpublished studies, made by the writer and some of his students over a period of years, but it is believed that it can be substantiated by a critical reading of the standard texts. Some documentation appears in Lynn, note 47 supra, and the general approach is outlined in McDougal, Future Interests Restated: Tradition versus Clarification and Reform, 55 Harv. L. Rev. 1077 (1942).
immunization of interests reserved in the grantor and his successors from the application of the Rule against Perpetuities, but vigorous proposals are already being made for the remedying of this evil. 50

Certain more particular developments which might be cited include the increasing enactment of statutes authorizing highly discretionary judicial sale, mortgage, and lease of land subject to future interests; 51 statutes enhancing the powers of trustees to sell, mortgage, and lease when settlor-granted powers are inadequate; 52 judicial decisions implying special powers in trustees to cope with exigencies not foreseen by settlors exercising deadhand control; 53 the imposition of the Rule against Perpetuities time restriction (about 100 years) on restraints upon trustees' powers to alienate; 54 the elaboration of a variety of constructional preferences designed to mitigate the impact of rights of entry and possibilities of reverter upon the alienability and development of land; 55 and the application of the perpetuities time limit to options-in-gross which fetter the alienability and development of land. 56

4. Allocation by Public Acquisition.—Direct community intervention in the allocation of resources, in the shifting of use from one claimant to another, is commonly effected through exercises of the power of eminent domain and of the taxing and spending powers. The most important limitations upon such intervention, imposed by judicial review under constitutional and other doctrinal justifications of the propriety of particular exercises of power, are cast in terms of requirements of “public use” for exercises of the eminent domain power and of “public purpose” for exercises of the taxing and spending powers. In the middle of the last century, when the perspectives of an agricultural economy and laissez-faire were dominant and many communities faced bankruptcy because of promised subsidies to railroads and other enterprises, the courts rendered many decisions greatly restrictive of community powers and elaborated tests of propriety in terms of physical use by public officials or by the public generally, of natural monopoly and the breakdown of competition, of the “necessity” of services for community existence, and so on. 57 Toward the end of the century, with the growth of industrialism and rapid movement to cities, the courts were, however, confronted by a whole flood of new community interventions and by insistent demands that these be sustained as appropriate exercises of public power. The result has been an almost complete transformation of the earlier restrictive criteria into broad considerations of the degree of public advantage.

53 Brunswick, The Court Moves the Dead Hand: The Power of a Court of Equity to Alter, Vary, or Modify the Express Terms of a Trust in an Emergency, 15 Chi.-Kent Rev. 24 (1936).
54 Leach, note 52 supra at 830; 12 Cornell L.Q. 549 (1927).
55 Williams, Restrictions on the Use of Land—Conditions Subsequent and Determinable Fees, 27 Tex. L. Rev. 167 (1948).
56 Leach, note 52 supra, at 814.
57 This history is well recounted in McAllister, Public Purpose in Taxation, 18 Calif. L. Rev. 137, 241 (1930) and Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B.U.L. Rev. 615 (1940).
and an enormous and consistent flow of decisions sustaining exercises of the various specific community powers for promotion or operation of the most diverse activities and enterprises, such as waterworks, electric light plants, street railways, natural gas plants, ferries and wharves, gasoline filling stations, tourists' camps, public golf courses, ice plants, fairgrounds, municipal exhibitions, opera houses, markets, airports, and so on.⁵⁸

Among the most significant recent developments may be mentioned the decisions sustaining exercise of the necessary powers in the public housing program, now being carried on in cooperation between the federal government, the states and the municipalities;⁵⁹ the decisions sanctioning the exercise by municipalities of powers to buy, sell, lease, and operate factories in the promotion of their economic development;⁶⁰ a decision by the Supreme Court of the United States sustaining the TVA in what amounted to an exercise of the power of excess condemnation;⁶¹ and the very contemporary state court decisions sustaining the exercise of the powers necessary to execution of the new nationwide program of urban redevelopment.⁶² Most symptomatic of the probable future expansibility of the concepts of public use and public purpose is perhaps a decision just handed down by the Supreme Court of Illinois which authorizes the inclusion of vacant, undeveloped, suburban land within an urban redevelopment project.⁶³ Building upon a legislative declaration that "there existed in many communities of the state, areas of predominantly open land which are unmarketable for housing or other economic purposes because of 'obsolete platting, diversity of ownership, deterioration of structures on site improvements, or taxes or special assessment delinquencies [sic] usually exceeding the fair value of the land,'" the court concluded:

The purpose and use to which the vacant blighted property is to be taken is both a public purpose and a public use, since the taking tends to alleviate a housing shortage, is an essential aid and adjunct to slum clearance, removes hazards to health, safety, welfare and morals of the community by developing the area, and eliminates factors impairing and arresting sound community growth.⁶⁴

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⁵⁸ The cases are collected in Comments in 52 Yale L.J. 634 (1943) and 58 Yale L.J. 599 (1949).
⁶⁰ Note, 47 Yale L.J. 1412 (1938). Cf. People of Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316 (C.A. 1st, 1946) (upholding as a taking for a public use and not a deprivation without due process the condemnation of land by Puerto Rico's Land Authority, empowered to acquire land of nonnatural persons in excess of 500 acres to be disposed of to private persons for housing, subsistence farming, and "proportional-profit" farming).
⁶² Hill, note 59 supra; Mandelker, Public Purpose in Urban Redevelopment, 28 Tulane L. Rev. 96 (1953).
⁶³ People ex rel. Gutknecht v. City of Chicago, 414 Ill. 600, 111 N.E.2d 626 (1953).
B. The Planning of Land Use

The modes by which our communities plan and determine land uses include judicial planning through doctrines of "nuisance," the provision and application of a body of prescriptions for regulating private agreements about land uses, and certain direct community interventions through public powers and controls. The impact of metropolitan perspectives may be observed upon all three of these modes.

1. Judicial Planning by Doctrines of Nuisance.—The chaos in our contemporary metropolitan communities, with intensive use piled upon intensive use in greatest variety of mixture and without physical plan to mitigate interference of uses, has tremendously increased the importance of traditional judicial "zoning" of land uses through retroactive application of doctrines of "nuisance." One source-book annotation alone, now twenty years dated, lists the following as industries which have disturbed the peace, quiet, beauty, and safety of urban dwellers to a degree sufficient to cause them to ask the courts for redress: aero-plane engine shop, asphalt plant, automobile accessories factory, bakery, cement block plant, cotton gin, dye works, electric plant, ice cream factory, ice plant, iron or steel works, laundry, lighting system, machine shop, mortar manufacturing plant, oil refinery, pottery, printing establishment, quarries and rock crushers, rubber factory, saw mill, shoe factory, stonecutting plant, wire and metal products factory, woodworking plant, and "miscellaneous." Confronted with this bewildering variety of reciprocal interferences among discordant land uses and with the inherent difficulty in framing criteria for just and politic decisions in such situations after the damage has been done, courts and commentators today prescribe a body of doctrine which explicitly confers upon the courts the widest discretion in resolving particular cases. Thus, the Restatement of Torts frames its rules in terms of "reasonableness" and generalizes that substantial and intentional invasions of "another's interest in the use and enjoyment of land" are unreasonable unless "the utility of the actor's conduct outweighs the gravity of the harm." For weighing "the gravity of harm" relevant factors include "the extent of the harm involved," "the character of the harm involved," "the social value which the law attaches to the type of use or enjoyment invaded," "the suitability of the particular use or enjoyment invaded to the character of the locality," and "the burden on the person harmed of avoiding the harm." For determining the "utility of conduct" "important factors" include the "social value which the law attaches to the primary purpose of the conduct," the "suitability of the conduct to the locality," and the "impracticability of preventing or avoiding the invasion." Operating with rules of such flexibility, courts may obviously in any particular case reach whatever decision they deem best for balancing the equities between the parties or for determining the community's land use patterns, but it may be emphasized that the courts come in

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65 Prosser, Torts 585 (1941).
66 90 A.L.R. 1207 (1934). For richer illustration see McDougal and Haber, c. VI.
67 Rest., Torts § 826 (1939).
68 Ibid., at § 826.
69 Ibid., at § 827.
70 Ibid., at § 828.
only after the damage has been done, that they decide only as between the two parties and between them only so long as there has been no substantial change in conditions, that they do not have the staffs or technical aids necessary to efficient and continuous performance of planning functions, and that the only technical standards at their command are these elusive tort doctrines.

2 Land Planning by Private Agreement.—The agreements and expressions of intent by which the people in our communities attempt to plan land uses among themselves are infinitely various in their factual reference. The objectives of the parties to such agreements or intents may be confined simply to securing efficient uses of their land for purposes which the community honors, but their objectives may also include more questionable designs, such as the thwarting of basic community values by provisions that resources be locked up from beneficial use or that occupancy be reserved to specified races or groups; or the interfering directly with specific community plan, as by restricting to residential purposes land marked out by the community for business or other nonresidential development; or the interfering with the efficient operation of the community’s planning process, as by prescribing that particular land shall be used only for specified purposes, such as for churches, or hitching racks, or fish markets; or the binding of land as security for the performance of services, such as the singing of songs, whose value is not easily calculated in money; or the binding of land to certain inefficient and outmoded practices in use and development. The land subjected to such agreements and intents may be of varying degrees of urbanization and of many different forms (surface, air, light, water, minerals, oil, subsurface, etc.). The uses affected may cover the whole range of community components or institutions: habitation, servicing, productive, and governmental. The durations stipulated for control may be temporary, for a definite period, indefinite, or permanent. The people to whom use is extended may range from specified parties to the public generally. The proof or evidence of the agreement or intent may be in nonverbal behavior, oral permission, action in reliance, unsealed writing, or sealed writing, and in language of promise or language of grant. The parties to such agreements or intents may, of course, finally, represent the community’s whole range of values and institutions.70

For policing such agreements and intents for compatibility with community policy and for protecting and enforcing such as are found compatible, both as between original parties and with respect to successors in interest, our official decision-makers still purport to apply a complex and highly technical structure of doctrines inherited from pre-metropolitan days. This structure begins with an alleged overriding distinction between “estates” or “possessory interests” and “nonpossessory interests” or “rights in the land of another,” categories in fact used on occasion as polar extremes clearly to be distinguished from each other but again as semantic equivalents, designed to rationalize exactly the same consequences in exactly the same contexts; proceeds to an anachronistic and largely nominal distinction between “legal” and “equitable” restraints or servitudes; and concludes with vague, tautologous, and imprecise itemizations of

70 Some expansion of this factual background may be found in McDougal and Haber, c. VIII.
alleged distinctions among such "legal" interests as easements, profits a prendre, licenses, leases, licenses "coupled" with interests, running covenants, things "in the nature of" easements, and so on, even including rights of entry and possibilities of reverter—all terms which make a completely confused reference to facts, to official responses to facts, and to relevant policies. This structure of doctrines had its origins, we may briefly recall, in the context of an unindustrialized, rural economy, exhibiting no great interdependences of land use, when land transfers and conscious attempts at land planning by private agreement were relatively less frequent; when the distinction between courts of law and equity was a living reality rather than a deadhand compulsion; when recording systems were either nonexistent or at least rudimentary; when there was prejudice, rooted in various procedural inadequacies and community notions, against the assignability of all agreements; and when the reification of concepts was an habitual mode of thinking for both judges and scholars. It is our suggestion with respect to this structure of doctrines, as it was with respect to the traditional categorizations and rules concerning allocation of land use, that a comprehensive study of the decisions in recent decades would reveal trends, under the impact of contemporary metropolitan perspectives and conditions, toward uniformities in decision with respect to each of the eight particular types of functions suggested above (securing intent, fixing policy limits, enforcement, protecting against third parties, honoring transfers of benefits, construction, termination, subjection to community claims) and in terms of policies uniquely relevant to these functions and the type of factual agreement in context, largely without regard to the supposed imperatives of the traditional categorizations and doctrines—with the result again that such traditional categorizations and doctrines linger on as technical ways of talking that serve only to stimulate or rationalize occasional harsh or impolitic decision.

Particular developments that may be mentioned include decisions managing requirements with respect to seals, writing, and other formalities with a flexibility designed to secure, rather than defeat, the reasonable expectations of parties; decisions dispensing with requirements of "strict necessity" and considering a great variety of relevant factors in implying interests from parties' agreements; the outlawing by the United States Supreme Court of agreements designed to achieve racial discrimination in land occupancy; the extension of

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This structure may be observed in any of the standard treatises or casebooks. See, for example, 2 ALP Pts. 8 and 9 (1952); 5 Rest., Property (1944).

This suggestion is again based largely upon unpublished studies, but it is believed that the materials collected in McDougal and Haber, c. VIII, offer substantial confirmation. The general approach is outlined in McDougal, Review, 58 Yale L.J. 500 (1948).

This trend is apparent in a series of articles by Professor Conard; The Requirement of a Sealed Instrument for Conveying Easements, 26 Iowa L. Rev. 41 (1940); Words Which Will Create an Easement, 6 Mo. L. Rev. 245 (1941); Easements, Licenses, and the Statute of Frauds, 15 Temp. L.Q. 222 (1941); An Analysis of Licenses in Land, 42 Col. L. Rev. 809 (1942); and Unwritten Agreements for the Use of Land, 14 Rocky Mt. L. Rev. 153, 294 (1942).

II ALP 255; 5 Rest., Property § 476 (1944).

Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948). For later developments, see Abrams, Bias in the Use of Governmental Regulatory Powers, 20 Univ. Chi. L. Rev. 414, 420 (1952) and The Segregation Threat in Hous-
recording acts to apply uniformly to all land planning agreements;76 the definition of “touch and concern,” as a traditional test for determining the enforceability of “legal covenants” against successors of the original promisor, in terms that make it essentially tautologous and functionless;77 the definition of “privity of estate,” as another such test, in terms which insure its universal presence;78 the development, through application of requirements of “notice,” of “equitable” doctrines of servitudes parallel with and adequate to remedy surviving archaism with respect to “legal” interests;79 decisions permitting affirmative burdens in agreements to be enforced against successors to promisors;80 the definition of “touch and concern” is a way to permit the flexible implication of the transfer of benefits to successors of promisees;81 decisions sustaining the transferability of “easements” in gross;82 the development of a flexible concept of “building schemes” to affect a wide reciprocity in the benefits of agreements in residential developments;83 increasing acceptance of the “runnability” of both benefits and burdens in party wall agreements;84 the application of a doctrine of “normal evolution” of uses for the adaptation of old agreements to changing needs;85 the development of highly discretionary doctrines for the judicial termination of agreements when conditions so change that continued enforcement is unfair or against community interests;86 decisions designed to promote alienability by freeing covenantors from the burdens of promises after the sale of their interests in the burdened land;87 and finally legislative measures for termination designed to mitigate the impact of ancient agreements upon contemporary uses.88

It should perhaps be added that, despite all these trends toward rationalization in prescription, private agreements remain but limited instruments for community land use planning. Without power to coerce dissenters to join, such agreements can seldom account for all relevant interdependences; and without the framework of a carefully designed and administered comprehensive community plan, the permanence or stability in arrangement toward which such
agreements aspire is commonly illusory. The effective role of private agreement can scarcely extend beyond the reinforcing and augmenting of public standards and controls within the context of total community planning, or planlessness.68

3. Land Planning by Public Powers and Controls.—The most conspicuous trends in recent decades toward rationalization of land use planning policies in our communities appear of course in the invention and application of new direct community interventions through public powers and controls. Such trends may be illustrated by reference to developments with respect to techniques for securing comprehensive community design, for maintaining community design, for maintaining the quality of development, and for establishing planning powers in areas of efficient size.

(a) Techniques for Securing Comprehensive Community Design: The first indispensable requirement for the rational and efficient management of any urban area, under contemporary conditions of interdependence in land use, is a comprehensive, over-all plan for physical design which seeks to anticipate and guide the community's growth or change and to secure the most appropriate ordering, for the effective interrelation of basic community components, of major physical contours, including the location of its business centers, industries, residential areas, public buildings, public utilities, streets and other arteries of circulation, and so on.69 Within recent decades, most of our states have enacted legislation, though with considerable variation in detail, which confers upon urban communities the necessary powers for establishing commissions or agencies for the continuous performance of this general planning function and for translating planning recommendations into legal prescriptions for regulating private and public land use.70 Fortunately, the courts have uniformly sustained this legislation.71 The result is that we have today excellent models in statutes and procedures for comprehensive planning, well tested for both constitutionality and effectiveness in action, that are available for states and communities with the incentive to make use of them.72

Special mention may be made of continued improvement in subdivision regulation. By imposition upon private subdividers of such requirements as conditions upon the recording of transfers, the prohibiting of extension of municipal services to unapproved subdivisions, and the refusing of permits for structures not properly accessible from planned streets, various qualitative

68 For indication of the role that agreements can be made to play in the context of appropriate plans, see Ascher, Private Covenants in Urban Redevelopment, in Urban Redevelopment: Problems and Practices 221 (Woodbury ed., 1953).
69 Comprehensive perspectives are offered by The International City Managers' Association, Local Planning Administration (2d ed., 1948); Black, Planning for the Small American City (Public Administration Service, rev. ed., 1944); An Approach to Urban Planning (Breese and Whitteman ed., 1953). For further references, see Spielvogel, Selected Bibliography on Planning (1951).
70 This history is briefly recounted in Walker, The Planning Function in Urban Government (2d ed., 1950). References to, and descriptions of, the state statutes may be found in U.S. Housing and Home Finance Agency, Comparative Digest of State Planning Laws (1953).
71 An excellent, typical decision is Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (1938).
72 Consider, e.g., the New Jersey statutes: 40 N.J. Stat. Ann. 27-1 to 27-11, 55-1 to 55-21; 52 id. 21-1 to 21-11 (1940, 1952 Supp.); 52 id. 27c (1952 Supp.).
controls are presently being achieved and new quantitative controls are being proposed.\footnote{See Note, 65 Harv. L. Rev. 1226 (1952); Melli, Subdivision Control in Wisconsin (1953) (Law in Action Research Report No. 1, University of Wisconsin Law School); and earlier citations in McDougal and Haber, 790.}

It is worth noting also that the Housing Act of 1949 contains an official national recognition for the first time of the need for comprehensive metropolitan community planning. This act provides that contracts for financial aid shall require that "the redevelopment plan conforms to a general plan for the development of the locality as a whole" and that the federal administration in extending financial assistance shall encourage planning on a unified metropolitan or regional basis.\footnote{63 Stat. 413, 416 § 105(a) (1949); 42 U.S.C. § 1451 (Supp. 1950).}

\(b\) Techniques for Maintaining Community Design: The most important control which has been developed for maintaining community design is "zoning," or the areal segregation or districting of uses. Every state in the country now offers legislation conferring upon municipalities various powers to zone land uses and 31 states confer certain powers upon counties.\footnote{This legislation is described in U.S. Housing and Home Finance Agency, Comparative Digest of Municipal and County Zoning Enabling Statutes (1952). Certain new perspectives are offered in Agle, A New Kind of Zoning, 95 Architectural Forum 176 (1951); and Williams, Land Use and Zoning, in An Approach to Urban Planning 38 (Breese and Whiteman ed., 1952). Harrison, Ballard & Allen, Plan for Rezoning the City of New York (1950) offers a number of innovations and could become an important model for future zoning practice. A comprehensive survey of the purposes for which segregation of uses has been permitted appears in Note, 50 Col. L. Rev. 202 (1950).}

In the famous \textit{Village of Euclid v. Ambler Realty Co.}\footnote{272 U.S. 365 (1926).} case, the United States Supreme Court sustained the constitutionality in principle of zoning, but made it clear also that any particular zoning ordinance might be declared unconstitutional as applied to any particular plot. This power to declare particular applications of zoning ordinances unconstitutional has in fact been not infrequently exercised by the state courts.\footnote{Bassett, Zoning (2d ed. 1940) offers authoritative survey.} As courts have come increasingly to accept broad conceptions of the "public welfare," rather than "nuisance," as justification for zoning, constitutional assaults upon zoning appear, however, to have become decreasingly successful.\footnote{This is based on nothing more than a sampling of scattered cases.} Some of the more recent cases invalidating zoning ordinances seem to have involved rather arbitrary zoning devised on the spur of the moment to forestall specific undesired developments,\footnote{E.g., People ex rel. Trust Co. of Chicago v. Village of Skokie, 408 Ill. 397, 97 N.E.2d 310 (1951).} though one recent case applies the "highest and best use" (to the property owner) test to invalidate an ordinance.\footnote{People ex. rel. Joseph Lumber Co. v. City of Chicago, 402 Ill. 321, 83 N.E.2d 592 (1949).}

The most difficult problem in making zoning effective has been the management of the nonconforming use.\footnote{See, generally, Comments, [1951] Wis. L. Rev. 685; 102 U. Pa. L. Rev. 91 (1953).} Permitted to remain, the nonconforming use is a sore-spot which both infects its area and increases the probability of courts...
declaring the invalidity of the applications of an ordinance to other properties, thereby augmenting the spread of nonconformity and blight. One fairly popular form of legislation meets this problem by prohibiting expansion, re-building when more than a given percentage of a structure has been destroyed, and revival of a discontinued use.

A more effective type of statute authorizes the amortization of nonconforming uses, through giving them a limited lease on life. For the most part, recent state amortization statutes apply only to counties, where the problem is not so acute. Several cities also, however, have adopted ordinances of this type.

The trend of decision suggests, fortunately, that amortization provisions can be expected to meet a reasonably favorable reception from the courts. The theory, however, that a nonconforming use may be immediately eliminated as a nuisance per se has found judicial acceptance but occasionally. Most courts, while conceding that any given nonconforming use may be a nuisance, require a specific showing as to the particular enterprise. Where the investment was insubstantial, the New York Court of Appeals, has allowed, even without appeal to nuisance theory, the immediate prohibition of raising pigeons and maintaining parking lots as nonconforming uses. Where investment is substantial, as with a well-constructed building, it is still doubtful whether courts will approve less than a plan for amortization spread over a reasonable number of years. The Court of Appeals for the Fifth Circuit has upheld application of a ten-year amortization ordinance to gasoline filling stations.

Another difficult problem has concerned the application of zoning ordinances to undeveloped areas. Some courts have stricken down such efforts to anticipate and guide future development as unreasonable with respect to particular property owners. Other courts have sustained carefully drafted and supported plans and the trend of decision appears hopeful.

Perhaps the most significant recent judicial developments in the protection of zoning are to be found in the emergence of certain new concepts of "regionalism" and of ordered "mixed uses." Thus, the New Jersey Supreme Court has embraced the regional concept to uphold the exclusion of heavy industry from a small residential township, pointing to its opinion to the availability of industrial sites nearby. The Maryland Supreme Court has approved zoning of

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105 Comment, 4 Univ. Chi. L. Rev. 477 (1942).
107 Ibid.
108 State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929); State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).
109 E.g., City of Miami Beach v. Daoud, 149 Fla. 514, 6 So.2d 847 (1942).
111 Jones v. Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930).
112 Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (C.A. 5th 1950).
113 A particularly harsh decision is Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).
115 Duffcon Concrete Products v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949).
part of a county against the charge that it did not meet the statutory requirements of “comprehensiveness.”\textsuperscript{116} The New York Court of Appeals upheld an ordinance creating a “floating zone,” permitting the construction of garden apartments on any plot of 10 acres or more when approved, thereby enabling a single-residence community to open its gates to young families whose economic development did not as yet permit purchase of single homes.\textsuperscript{117} And the Connecticut Court of Errors and Appeals has upheld against the charge of “spot zoning” a Bridgeport plan for locating small local business centers in residential communities.\textsuperscript{118}

Another development finds aesthetics, once openly rejected, achieving an increasing acceptance as a legitimate ground for zoning.\textsuperscript{119} Though few courts have as yet openly embraced the concept, tacit recognition is sometimes phrased in terms of the effect of unsightly structures upon neighboring property values which would in turn reduce tax returns.\textsuperscript{120} Billboard restrictions are also obtaining more sympathetic judicial reception.\textsuperscript{121} A few courts, unwilling to stand on aesthetic grounds, have reasoned that the success of billboard advertising depends on the fact that it can be seen from the street; since, therefore, the street is a public way, the state or municipality may impose reasonable regulation.\textsuperscript{122}

Other recent developments concern efforts to impose minimum standards as to the height of buildings, the floor space or cubic content of homes, and size of plot.\textsuperscript{123} Thus far, the courts have taken a cautious view of minimum height restrictions, which with some justification they regard as snob zoning or illegitimate attempts to maximize returns on taxes.\textsuperscript{124} With respect to minimum floor space or volume, even the Supreme Court of Michigan, which has stricken down certain specific restrictions, recognizes a reasonable relationship between the size of a home and the health of its occupants.\textsuperscript{125} In the much discussed Wayne Township\textsuperscript{126} case, the Supreme Court of New Jersey rested its approval of such

\textsuperscript{116} County Com'rs of Anne Arundel County v. Ward, 186 Md. 330, 46 A.2d 684 (1946).
\textsuperscript{117} Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951).
\textsuperscript{118} Bartram v. Zoning Commission of City of Bridgeport, 136 Conn. 89, 68 A.2d 308 (1949).
\textsuperscript{120} E.g., Dunlap v. City of Woodstock, 405 Ill. 410, 91 N.E.2d 434 (1950).
\textsuperscript{121} Comment, 35 Marq. L. Rev. 365 (1952); McDougal and Haber, 789.
\textsuperscript{122} Wilson, Billboards and the Right to be Seen from the Highway, 30 Geo. L.J. 723 (1942) and Comment, 42 Mich. L. Rev. 128 (1943). See also, Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A.2d 527 (1943); United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362 (1952); Crittenson Service, Inc. v. City of East Cleveland, 88 N.E.2d 300 (Ohio, 1949).
\textsuperscript{123} The importance of zoning with respect to building size, shape, and placement for controlling density is emphasized in Comment, 60 Yale L. J. 505 (1951).
\textsuperscript{124} 122 Main Street Corp. v. City of Brockton, 328 Mass. 646, 84 N.E.2d 13 (1949); Brookdale Homes v. Johnson, 123 N.J.L. 602, 10 A.2d 477 (1940), aff'd without opinion, 126 N.J.L. 516, 19 A.2d 868 (1941).
restrictions in part upon expert testimony as to the effects of a small house upon the psychological health of its occupants. It has been severely questioned, however, whether such considerations afford justification for the effective exclusion, as in the *Wayne Township* case, of an economic class from a whole township.\(^{127}\) With respect to minimum plot restrictions, several courts have approved graduated scales for different sections of a township, upon grounds of relationship to health, aesthetics, and property values.\(^ {128}\)

(c) *Techniques for Maintaining the Quality of Development:* For policing the quality of development, under the conditions of intense occupancy in the contemporary metropolis, our communities have developed a considerable variety of techniques ranging from the early tenement and multiple-dwelling regulation through building codes, with all their ancillary safety, fire, plumbing, electrical, and sanitation regulations, to the more recent requirements with respect to the compulsory repair, vacation, and demolition of buildings.\(^ {129}\) Accepting the very broad interpretations of “nuisance regulation” and “police power” urged upon them in support of these techniques, the courts have imposed few constitutional limits but have rather confined themselves to protecting property owners against particular arbitrary actions by elaborating and applying technical prescriptions with respect to notice, hearing, the necessity of findings, modes of enforcement, appeal, review, personal liability of officers, and so on.\(^ {130}\) It is not our suggestion that all available techniques for policing quality in development are everywhere today being rationally administered or that all judicial supervision has been or is likely to be wise, but there appear to be no constitutional or other legal reasons to preclude our communities from adopting the best existing models in regulation and procedures, including new techniques in appraisal,\(^ {131}\) for promoting the highest standards of fitness recommended by contemporary authorities upon public health. Here, as with respect to so many other problems in the public control of land use, legality has been made to depend upon “reasonableness” and the degree of its proof.

(d) *Techniques for Establishing Planning Powers in Areas of Efficient Size:* The principal obstacle to effective planning in metropolitan communities in the United States today is the almost universal division of such communities by multiplicitous governmental units, which disrupt natural interdependencies and preclude integrated administration. It has been recently asserted by an out-

\(^ {127}\) Haar, note 126 supra.

\(^ {128}\) E.g., Flora Realty & Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952); Fischer v. Bedminster Tp., 11 N.J. 194, 93 A.2d 378 (1962).


\(^ {130}\) Rhyne, Demolition, Vacation or Repair of Substandard Buildings (National Institute of Municipal Law Officers, 1945); Miner, Constitutional Aspects of Housing Legislation, 29 Ill. L. Rev. 305 (1945); Comment, 29 Ind. L.J. 109 (1953); Ebenstein, The Law of Public Housing (1940). Cases and references are collected in McDougal and Haber, 952 et seq.

standing authority upon local government that "no metropolitan area" in the United States is presently "organized to prepare, adopt, and execute plans for the whole community." The result is not only tremendous inefficiency and failures in performance of public planning and services, with attendant defeat of basic community values, but also the slow economic death of the indispensable central city core of many of our metropolitan communities, as the suburbanite leech draws the blood of such centers without contributing to their regeneration.

For coping with this obstacle, a variety of legal instruments have been developed and tested in different contexts within recent decades. Some of these instruments, such as the extraterritorial exercise of central city powers, intergovernmental agreements, and special authorities performing special limited functions, are obviously mere stopgap measures designed for limited purposes and subject to many disadvantages. Other instruments, such as annexation (the extension of the boundaries of municipal corporations to include previously unincorporated territory), consolidation (the joining of two or more municipalities into a single governmental unit), and city-county consolidation, can, in contrast, be effectively employed when procedures are adequate in merging the disconnected parts of a community into a healthy whole. It appears unfortunately, however, that procedures for such methods approach adequacy only in Virginia, with a system based on judicial determination, and in Texas and Missouri, which offer simple procedures through amendment and home rule charters. Elsewhere procedures are still most cumbersome and commonly based upon the consent of the majority of potential, but reluctant, annexees. It remains for the state legislatures to take advantage of the wide constitutional limits in establishing more effective procedures.

C. Securing Specific Developments in Land Use

For securing specific developments in land use our communities still of course rely principally upon private enterprise operating within, and governed by, the whole context of federal, state, and local law. Certain particularly relevant trends toward the increasing employment of government ownership for the provision of facilities and services and the increasing use of community powers at all levels of government to stimulate private enterprise to appropriate development may, however, be noted.

1. Public Ownership as an Instrument of Development Policies.—It has already been indicated, in the discussion above of "Allocation by Public Acquisition," that the concepts of "public purpose" and "public use" have in recent decades been defined in such expansible terms that they today offer very little

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132 Jones, Local Government Organization in Metropolitan Areas: Its Relation to Urban Redevelopment, in The Future of Cities and Urban Redevelopment, 479, 484, 534 (Woodbury ed., 1953). The only effective planning on a metropolitan basis today is that by the "private" public utility companies.


134 These are reviewed in Jones, note 132 supra, and in McDougal and Haber, 761 et seq.

135 Jones, note 132 supra, at 560, 562; Note, 36 Va. L. Rev. 971 (1950); Comment, 19 Kansas City L. Rev. 186 (1951).
constitutional hazard to communities which seek, either directly or through public corporations or authorities, to engage in the provision of public utilities and services or in the operation of other enterprises. A tremendous flow of decisions has sustained, it may bear repetition, our communities not only in the provision and operation of such traditional public utilities as with respect to water, sewerage, light, transportation, communication, and so on, but also in the acquisition and maintenance of a great variety of health, education, and recreational facilities, and most recently in the provision of low-rent housing, of factory sites and facilities, and of recleared sites for varied, comprehensive development in accordance with community plan. In the light of all these recent, enlarging, permissive decisions, most of the earlier, more restrictive decisions would appear to be of doubtful future persuasiveness.

Proposals, the constitutionality of which would seem to be well within contemporary trends are being made, further, for still more extensive use of public ownership of land as an instrument of comprehensive community planning and development policies. Thus an editorial comment in the Yale Law Journal suggests:

Extensive municipal land ownership is promising not only for replanning developed urban areas, but also as a reserve for future needs and as a means of controlling private property uses. Thus blighted sections and premature subdivisions could be acquired by the municipality for replatting and title-clearing and either retained for development at public expense or resold with restrictive covenants to control future use. Assembly of large reserves of undeveloped land, both simpler and cheaper than rehabilitation, would permit full control of future growth and withdraw property from disruptive exploitation. With such reserves, greenbelts could be established to restrict the size and disorderly expansion of new developments, to prevent inharmonious encroachments upon homogeneous communities, or to provide breathing spaces and recreational areas for congested sections. Further, such land reserves would serve as a source of future low-cost housing sites, thus eliminating much of the present obstruction caused by prohibitive land prices. And speculation in land could be substantially governed by disposal of cheap municipal real estate at strategic intervals. No control short of public ownership will be strong enough to achieve such a thorough-going regulation of urban land-use patterns and policies.

2. Community Stimulation of Private Development.—Trends toward increasing community stimulation of private development may be most obviously observed in certain manipulations of credit and tax policies and in the con-
temporary nationwide urban redevelopment program, which builds upon a variety of community powers invoked at all the different levels of government.

(a) The Manipulation of Credit Policies: The enormous revolution that has occurred, since the beginning of the economic depression of the 1930's, in our national community in credit policies with respect to land purchase, development, and ownership can only be noted. It has been estimated by competent authorities that the total impact of this revolution, effected through a great variety of federal agencies and of programs for insuring mortgages, guaranteeing deposits in lending institutions, granting of loans, and so on, has been practically to remove all risk from builders and lenders in their operations in land use development. The high degree of control that this assumption of risk by the federal government confers upon federal officials for determining the quantity and location of development, the specific character of particular developments, and types of public and private ownership is obvious.

(b) The Manipulation of Tax Policies: It has long been recognized by students of economics that the general real property tax, levied upon both site value and improvements, which is employed by most of our metropolitan communities as their principal source of revenue, is a regressive tax which tends to deter improvement and to encourage continued exploitation of outmoded facilities. The beginnings of a trend toward the utilization of this insight may be observed both in the increasing use of various exemptions and concessions to secure desired housing and industrial developments and in the deliberate differentiation in a few communities of the burden on site-value from that on improvements, in what is called a "graded" tax. The full use of this insight in the conscious and systematic manipulation of land tax policies to promote desired, and to deter undesired, developments in land use and ownership remains, however, for the future.

Some recognition has begun to appear, further, that how the federal income tax is administered has discernible effects upon the quantity and character of land use development and, hence, that such administration also offers potentialities for guiding and stimulating desired, or deterring undesired, development.

(c) The Contemporary Urban Redevelopment Program: The program of urban redevelopment inaugurated by the federal Housing Act of 1949, and by the state enabling statutes and municipal ordinances enacted to take advantage

[footnotes]

1 For introduction to the vast literature, see Abrams, Revolution in Land (1939) and The Future of Housing (1946); Coleen, The Impact of Government on Real Estate Finance in the United States (1950); Saulnier, Urban Mortgage Lending by Life Insurance Companies (1950); Behrens, Commercial Bank Activities in Urban Mortgage Financing (1952); Fisher, Urban Real Estate Markets: Characteristics and Financing (1951).


3 Testimony can be given by any who have served in a local administration required to get approvals from federal officials.

4 A comprehensive discussion of land tax practices and policies, with references, appears in Comment, 57 Yale L.J. 219 (1947).

of the opportunities of the federal act, represents the most comprehensive attack
our communities have yet aspired to make upon their slums, blight, and plan-
lessness. The procedure contemplated in this program, and today being put
into effect in many communities, is that an appropriately empowered municipal
agency or department will determine the areas where redevelopment is needed;
will acquire by purchase or eminent domain the necessary land; will clear,
replot, and prepare this land for the desired redevelopment; and will, finally,
sell the land at a price fair for its proposed uses to either a private developer
or a public agency, with preference being given to the former, for specified and
stipulated redevelopment, in accord with an over-all community plan. Whatever
loss may be incurred by reason of the net cost of the project, including both
the acquisition of the land and its preparation for redevelopment, exceeding
a fair sale price for proposed uses is to be shared by the federal government
and the municipality, with the federal government bearing two-thirds by capital
grant and the municipality one-third by either capital grant or the provision of
improvements and services. The types of projects that may be undertaken
include the redevelopment of residential slums or blighted areas for any appro-
priate uses, the redevelopment of blighted commercial or industrial areas for
residential use, the residential development of essentially open land needed for
rationally planned community growth.

It would be too much to expect, and irrational to demand, that this program
in urban redevelopment stop or even arrest the long-term trend toward the
decentralization of our cities. Properly managed, it can however be employed
rationally to guide and promote processes of reorientation in land use already
well under way. For the first time our cities are given an effective opportunity
by the joinder of federal funds and municipal powers in land assembly, in a
single, comprehensive operation to enlarge and reorder their arteries of circu-
lation and their traffic facilities, to substitute modern centers of living for slums
and blight, and to sponsor appropriate new commercial and industrial develop-
ment. It is to be hoped that the dispensing of federal funds can in fact be so
managed as to encourage, perhaps even to require, the planning and execution
of such operations as a metropolitan community-wide or regional basis.

It has already been observed that this program in urban redevelopment is,
with occasional and probably temporary exceptions, successfully meeting its
constitutional tests.

VI. FUTURE PERSPECTIVES

Even before the advent of atomic warfare the plight of our cities was known
to be desperate. Certain common expectations were summarized not long ago

For detailed description and citations, see Hill, Recent Slum Clearance and
Urban Redevelopment Laws, 9 Wash. & Lee L. Rev. 173 (1952); Robinson and
Weinstein, The Federal Government and Housing, [1952] Wis. L. Rev. 581; Brown,
Urban Redevelopment, 29 B.U.L. Rev. 818 (1949); and Comments, 44 Ill. L. Rev. 685
(1949) and 54 Yale L.J. 116 (1944).

The terms of federal assistance may vary with the type of project.

The cases are collected and discussed in Mandelker, Public Purpose in Urban
Redevelopment, 28 Tulane L. Rev. 96 (1953), who offers cogent criticism of adverse
decisions in Florida and Georgia. See also Fordham, The Challenge of Contemporary
by a distinguished architect in predicting the imminent disappearance of our cities and the relatively prompt appearance of grass in the present streets of such cities as New York.\textsuperscript{147} The great mass of lingering problems inherited by our cities from their horse-and-buggy days, as important as they are, are, however, today dwarfed in significance by the overriding problem of achieving the highest possible degree of security against atomic and bacteriological warfare.\textsuperscript{148}

It is a matter of some dispute among professional planners whether the requirements of planning for survival coincide with what would otherwise be the requirements of planning for optimum living. One view is that the pattern of community arrangement which offers the greatest security against atomic destruction is that, long urged by professional planners from more general considerations, of a central-city core, which would contain “only those economic functions whose specialized . . . wholesaling and retailing, cultural, educational, and social functions; specialized professional and technical services; and transportation termini and the service functions necessary to maintain these”, surrounded in “some generally radial pattern” by smaller satellites which would contain “most manufacturing functions and those specialized functions for the metropolitan area not requiring central locations”, as well as residential and minor retail accommodations for workers.\textsuperscript{149} Green-belts and appropriate arteries of circulation would be employed in carefully calculated plans to minimize the effects of partial destruction. Another view is that the best protection against atomic attack requires both dispersal of the very functions, “mainly managerial, financial, professional and governmental,” which rational planning would otherwise concentrate, and the isolation of workers residential areas from industrial plants, an isolation not now required by technical planning standards.\textsuperscript{150} Whatever the eventual resolution of this difference of opinion among planning technicians, one fact, however, seems reasonably clear: If our contemporary metropolitan communities are successfully to cope with either the problem of achieving maximum security against attack or the older, but still continuously insistent, problems of the decay and increasingly rapid death of their basic components, they must, as they never have before, create, execute, and maintain bold, new, and comprehensive programs in land-use allocation, planning, and development.

The question now is whether the total impact of the trends toward rationalization and technicalization in the land law, outlined above, has been to create a body of “concepts, rules, and institutions” adequate to sustain and implement the necessary new programs. Answer must be offered, we submit, clearly in the affirmative. Existing prescriptions and procedures are not, of course, everywhere, or perhaps even anywhere, adequate, but a comprehensive documentation of the trends so impressionistically sketched above would, we believe, establish both that all important constitutional issues have been resolved in ways which

\textsuperscript{147} Frank Lloyd Wright in an interview given front page prominence in The New York Herald Tribune, May 14, 1953.

\textsuperscript{148} Some of the history of the public consideration given to this new problem is recounted in The Future of Cities and Urban Redevelopment 166 (Woodbury ed., 1953).

\textsuperscript{149} Monson, City Planning in Project East River, 9 Bull. Atomic Scientists 265, 266 (1953), summarizing certain recommendations from Project East River.

\textsuperscript{150} CoLean, Renewing Our Cities 33 (1953).
promise their continued favorable future resolution and that appropriate models in prescriptions and procedures for the performance of every specific functional task, necessary to the success of the required new programs, have been abundantly tested and perfected in practical utility in many different communities. The difficult problem that confronts us in our present crisis is, therefore, not that of inventing new legal alternatives but rather that of creating a consensus in our national community which will demand a more effective use of the legal alternatives now available.

The task of creating a national consensus which will demand the more effective use of community powers in allocating, planning, and developing land use for both survival and a better life is one of enlightenment. Its performance will require aid to the people in our communities in the clarification of the fundamental values that they seek from their communities; in the deepening of their consciousness of the conditions of interdependence under which they must seek such values and, hence, in the widening of their identifications to include the total areas of their interdependences; and, finally in the increase of their understanding of rational alternatives in public and private action for securing their clarified values under the conditions they recognize. It is to the performance of tasks such as this that great institutions of learning, such as the one whose bicentennial we celebrate here today, are appropriately dedicated. In the planning and building of his communities, as in his other interests, man has “a right to knowledge” and it is among the functions of great universities both to provide him with that knowledge and to encourage “his free use thereof.”

Monson, supra note 149, at 267, questions whether the zoning instrument may be capable of bearing some of the burdens that the recommendations of Project East River might impose upon it. Thus, he writes: “An extension of U.S. zoning practice as the sole vehicle of achieving permanent open space around satellite cities might be theoretically possible, but the reviewer knows of few U.S. legal authorities who would seriously consider such a possibility.”

The answer to this is two-fold. First, zoning need not be the sole device, and, secondly, insofar as zoning is needed its constitutionality will depend, as the uses we have recounted above indicate, upon the “reasonableness” with which it is used. It is scarcely credible that American decision-makers, who have sustained zoning for reasons of health, general welfare, aesthetics, and so on, will regard the requirements of survival as unreasonable.

Broad federal powers in zoning land use might be invoked, further, to supplement state powers. Cf. Comment, Federal Control of Land to Protect Airport Approaches, 48 N.W. U.L. Rev. 343 (1953).

Professional planners sometimes irrationally blame “the law” for difficulties which are in fact the consequence of a whole configuration of factors. See, e.g., Gallion, The Urban Pattern 166, 167, 170 (1950). Inadequacies in existing legal doctrines and practices are of course factors contributing to the difficulties of our contemporary metropolitan communities but an over-emphasis on their role, among many other relevant variables, may be a form of escapism.