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## Balancing the “Zoning Budget”

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## Balancing the “Zoning Budget”

Roderick M. Hills, Jr<sup>†</sup>

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*The politics of urban land use frustrate even the best intentions. A number of cities have made strong political commitments to increasing their local housing supply in the face of a crisis of affordability and availability in urban housing. However, their decisions to engage in “up-zoning,” or increases in the areas in which new housing can be built, are often offset by even more “down-zoning” or laws that decrease the ability of residents in a designated area to build new housing as-of-right. The result is that housing availability does not increase by anywhere near the promises of elected officials.*

*In this essay, we argue that the difficulty cities face in increasing local housing supply is a result of the seriatim nature of local land use decisions. Because each down-zoning decision has only a small effect on the housing supply, citywide forces spend little political capital fighting them, leaving the field to neighborhood groups who care deeply. Further, because down-zoning decisions are made in advance of any proposed new development, the most active interest group in favor of new housing – developers – takes a pass on lobbying. The result is an uneven playing field in favor of down-zoning.*

*Drawing on examples of “extra-congressional procedure” like federal base closing commissions and the Reciprocal Trade Act of 1933, we argue that local governments can solve this problem by changing the procedure by which they consider zoning decisions. Specifically, they should pass laws that require the city to create a local “zoning budget” each year. All deviations downward from planned growth in housing supply expressed in the budget should have to be offset by corresponding increases elsewhere in buildable as-of-right land. This would reduce the degree to which universal logrolling coalitions can form among anti-development neighborhood groups and would create incentives for pro-development forces to lobby against down-zonings in which they currently have little interest. The result should be housing policy that more closely tracks local preferences on housing development.*

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Sometimes seemingly minute events can reveal important truths. October 28<sup>th</sup>, 2009 was a minor benchmark in New York City’s recent zoning history: On this date, the New York City Council approved the 100<sup>th</sup> re-zoning of Mayor Bloomberg’s administration. Initiated by the City’s Planning Department at the request of the residents of a Brooklyn neighborhood known as “Carroll Gardens,”<sup>1</sup> the re-zoning encompassed eighty-six blocks of 3 to 4-story row houses interspersed with some 4- and 5-story multi-family apartment buildings. Under the existing rules, owners of lots with the extra-long front yards common in the neighborhood could have built houses up to seventy feet high.<sup>2</sup> However, such construction would have towered above the fifty-foot row houses currently occupying the parcels. Spurred by neighbors’ complaints about such “pop-up” developments,<sup>3</sup> the Planning Commission recommended that the area be down-zoned to prevent such building, insuring that new construction would “be more consistent with the existing scale of this neighborhood.”<sup>4</sup>

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<sup>1</sup> See New York City Department of City Planning Website, Overview of Carroll Gardens/Columbia Street Rezoning, available at [http://www.nyc.gov/html/dcp/html/carroll\\_columbia/index.shtml](http://www.nyc.gov/html/dcp/html/carroll_columbia/index.shtml). For a map of the area, see [http://www.nyc.gov/html/dcp/pdf/carroll\\_columbia/existing\\_zoning\\_landuse.pdf](http://www.nyc.gov/html/dcp/pdf/carroll_columbia/existing_zoning_landuse.pdf).

<sup>2</sup> Under an 1846 Brooklyn ordinance, rowhouses on certain streets had to extend 33 feet 5 1/4 inches in front of the buildings, allowing for the creation of an oasis of elaborate gardens sporting patches of lawn, flower beds, soaring trees, and, during the Christmas season, elaborate light displays. Gregory Beyer, *The Big Front Yards That Rob the Streets*, N.Y. TIMES, June 1<sup>st</sup>, 2008 at B2. With respect to these lots, the zoning rules are a bit more complicated than merely mandating specific height limits. Under the existing “R6” zoning, extra-large setbacks allowed owners to build structures up to seventy feet high with a “floor-area ratio” of up to 3. “Floor-area ratio” or “FAR” measures the total floor area in relationship to the area of the underlying lot. A one-story building that covers the entire lot has a FAR of 1. Likewise, a two-story building that covers 50% of the lot has a FAR of 1. A FAR of 3 entitles the owner to build a three-story building covering the entire lot.

<sup>3</sup> The petition for the Carroll Gardens Coalition for Respectful Development can be found at [http://carrollgardenspetition.blogspot.com/2009\\_08\\_01\\_archive.html](http://carrollgardenspetition.blogspot.com/2009_08_01_archive.html). For an example of neighbors’ complaints about the out-of-context buildings, see *News about 333 Carroll Street - Carroll Gardens Hell Building*, Outside In, October 31, 2008 available at <http://outside.in/carroll-gardens-brooklyn-ny/333-carroll-street-carroll-gardens-hell-building>.

<sup>4</sup> City Planning Commission, *In the Matter of an application submitted by the Department of City Planning pursuant to Sections 197-c and 201 of the New York City Charter for an amendment of the Zoning Map, Section Nos. 16a & 16c*, September 23<sup>rd</sup>, 2009, Calendar No. 5 C 090462 ZMK), at page 18, available at <http://www.nyc.gov/html/dcp/pdf/cpc/090462.pdf>.

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The interest of Carroll Gardens’ re-zoning is easy to miss, because the moral of the story lies in what was left *unsaid* by the City’s land-use authorities: During the entire lengthy process, no one calculated – or even mentioned – the potential housing units lost as a result of the down-zoning. This omission was especially odd, because the affected sites were prime locations for housing, being only a few blocks from the F and G subway lines leading to Manhattan and Queens, close to retail, and already occupied by sound residential structures that needed only to be enlarged rather than demolished to accommodate additional occupants. Yet the participants at the various hearings all ignored the need for housing, supporting the proposed re-zoning solely because it would preserve existing neighborhood character: The Community Board representing the neighbors requested further down-zoning to keep all buildings in the area at a height of fifty feet, even those fronting on major thoroughfares.<sup>5</sup> The Planning Commission report was likewise silent on the question of preserving opportunities for housing. The City Council voted unanimously to approve the change without a word about housing supply.

That the City would down-zone prime residential land without any comment on the consequent loss of housing opportunities is extremely strange given the state of citywide politics. Mayor Michael Bloomberg proposed a long-term plan for New York City – “PlaNYC 2030” – prior to his 2009 reelection that called for the creation of 265,000 new units of housing by 2030 to accommodate an estimated 1 million new residents.<sup>6</sup> It is safe to say that the Bloomberg Administration, and the city that elected him, have made a political commitment to increasing the supply of housing, a policy

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<sup>5</sup> For an account of the hearing, see <http://pardonmeforasking.blogspot.com/2009/08/carroll-gardeners-urge-nyc-zoning.html>. For a summary of Community Board Six’s recommendations, see Letter from Richard Bashner, chairperson CB 6 to Amanda Burden, Commissioner of the New York Department of Planning, July 13, 2009, available at [http://www.brooklyncb6.org/committees/?a=detail&content\\_id=52](http://www.brooklyncb6.org/committees/?a=detail&content_id=52).

<sup>6</sup> PlaNYC, available at [http://www.nyc.gov/html/planyc2030/html/plan/land\\_housing.shtml](http://www.nyc.gov/html/planyc2030/html/plan/land_housing.shtml).

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choice that responds to high cost of housing in New York, with the average apartment in Manhattan costing \$1.3M in 2010, even after the housing crisis, with the average citywide being \$854K.<sup>7</sup>

However strange, the down-zoning of prime residential land without considering its effect on the housing supply is not anomalous. Fifty-nine percent of the Bloomberg Administration’s down-zonings have eliminated housing in areas served by mass transit,<sup>8</sup> and a disproportionate number of down-zonings have eliminated housing densities in neighborhoods that seemed in heavy demand, as well as in neighborhoods with lots of “soft sites” where new construction would be least expensive.<sup>9</sup> None of the down-zonings seem to be accompanied by any conscious or systematic effort to provide counterbalancing up-zonings.<sup>10</sup> The City’s Environmental Quality Review does not require any assessment of housing lost as a result of a down-zoning: The technical

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<sup>7</sup>See Residential NYC, *New York City Housing Market Continues to Rebound in 3<sup>rd</sup> Quarter, October 12, 2010*, available at <http://www.marketwire.com/press-release/NYC-Housing-Market-Continues-Rebound-in-3rd-Quarter-1333276.htm>.

<sup>8</sup>Furman Center, *How Have Recent Rezoning Affected the City’s Ability to Grow?* (Policy Brief March 2010), at page 11, available at [http://furmancenter.org/files/publications/Rezoning\\_Furman\\_Center\\_Policy\\_Brief\\_March\\_2010.pdf](http://furmancenter.org/files/publications/Rezoning_Furman_Center_Policy_Brief_March_2010.pdf).

<sup>9</sup>*Id.* at 14. There is some weak evidence that the effects of up- and down-zonings may cancel each other out roughly, but in the face of a citywide policy to drastically increase the housing stock, this is weak tea. Between 2003 and 2007, city-initiated re-zonings -- that is, zonings that tend to be large-scale and comprehensive -- affected about 188,000 lots citywide, or about 18% of the City’s total land area. Furman Center for Real Estate and Urban Policy, *State of the City’s Housing & Neighborhoods 2009*, at pages 27-28 available at

[http://furmancenter.org/files/sotc/SOC2009\\_State\\_of\\_New\\_York\\_City's\\_Capacity\\_to\\_Grow.pdf](http://furmancenter.org/files/sotc/SOC2009_State_of_New_York_City's_Capacity_to_Grow.pdf). The Furman Center estimated that the net effect of these re-zonings was to increase the City’s total residential development capacity “on paper” by about 1.7%, which added “enough space, at least ‘on paper,’ for about 80,000 new units or 200,000 new residents.” Furman Center, *How Have Recent Rezoning Affected the City’s Ability to Grow?* *supra* note \_\_, at 28.

<sup>10</sup> From 2002 to October 2005, 42 re-zonings “to preserve neighborhood character” had taken place involving over 3,600 blocks. Janny Scott, *In A Still-Growing City, Some Neighborhoods Say Slow Down*, N.Y.TIMES, Oct. 10, 2005, at B1. Most of these down-zonings have not been consciously accompanied by increases in densities nearby, and the city’s regulations for re-zoning require no such balancing of zoning decisions.

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manual is silent on the topic, and existing Environmental Impact Statements issued by the City do not discuss the issue except in the vaguest of terms.<sup>11</sup>

Why do city decision-makers ignore down-zonings’ impact on housing supply? This essay is an effort to provide an answer to this question. Its central claim is that this sort of neglect of housing need is not an accident but instead is caused by the way the *seriatim* nature of zoning decisions creates systemic incentives of both neighbors and their elected representatives to impose excessive restrictions on the supply of housing. On any given zoning vote, the supporters of restrictive zoning have an advantage over the supporters of additional housing supply even when less restrictive zoning across a given local government might be preferred by city residents. In effect, local governments exceed their “zoning budgets,” imposing restrictions in excess of what their own planners and politicians declare to be the optimal amount of regulation, because land-use regulation procedure causes them to ignore the long-term effects of their individual zoning decisions.

We examine the reasons for zoning’s over-use in Part I. The essence of the problem is that the neighbors who are physically close to parcels proposed for additional housing generally have strong incentives and organizational capacity to oppose changes in the zoning status quo. They are a paradigmatic “Olsonian interest group” – a group of people each with large stakes in the outcome and with physical ties to each other that reduce the costs of networking and collective action. By contrast, the persons benefited

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<sup>11</sup> See City Environmental Quality Review Technical Manual, chapter 4 (“Land Use, Zoning and Public Policy”) and chapter 5 (“Socioeconomic Conditions”), available at [http://www.nyc.gov/html/oec/html/ceqr/technical\\_manual.shtml](http://www.nyc.gov/html/oec/html/ceqr/technical_manual.shtml). The Manual devotes three pages to discussing assessment of “displacement” of “existing residents” by escalating rents resulting from new construction, but the Manual is silent on the possibility that residents could be displaced by barriers to the construction of new housing.

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by proposals for additional housing are dispersed and disorganized. Further, for many projects, like the Carroll Gardens down-zoning, members of the one powerful interest in favor of new construction, city-wide developers, individually have little interest in paying for political opposition to down-zonings as each developer is unsure whether she or some other developer will be selected by the current owner to develop the lots. It is hardly a surprise, therefore, that the neighbors beat the developers in lobbying the relevant land-use decision-makers about neighborhood-initiated down-zonings.

The structure of land-use decision-making lacks effective mechanisms by which the local government’s (or region’s) general interest in housing can be given appropriate weight. In theory, the local legislature – city council, township board, county commission, etc. – could reflect the interests of constituencies other than the relatively small group of people directly affected by nearby construction. In practice, however, local political parties tend to be too weak or unconnected to local issues to make policy issues a matter of contest in local elections.<sup>12</sup> Instead, city council members cultivate the “personal vote” by engaging in non-policy oriented casework<sup>13</sup> – fixing potholes, seeking extra pork spending for their district, and generally fielding neighborhood complaints. In such an environment, each legislator has incentives to defer to every other legislators’ interests in excluding unwanted developments, with the consequence that the general interest in new housing – the jurisdiction’s “zoning budget” – tends to be slighted.

In theory, elected officials or policy experts with jurisdiction across the entire jurisdiction could take on the task of protecting the local governments’ general interest in housing. (Mayor Bloomberg’s “PlaNYC 2030” is an effort in this direction). But such

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<sup>12</sup> See notes \_ and accompanying text.

<sup>13</sup> See generally BRUCE CAIN, MORRIS FIORINA, & JOHN FERREJOHN, *THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE* (1987).

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officials are best suited for defining the general needs of the jurisdiction, not for allocating the land uses that serve those needs among different competing neighborhoods. The latter task requires sensitivity to the intensity of neighbors’ objections to a proposed use, not only an overall view of what is good for the whole jurisdiction. Further, legislators are unlikely to trust that central planning authorities will take their concerns into account sufficiently and hence will not agree to delegate power to them. In short, local legislatures are too decentralized and parochial to be much interested in general issues, while citywide officials tend to be too aloof and remote from neighborhood concerns to know how to allocate land uses among affected neighborhoods.

How can legislators be forced to avoid the tyranny of small decisions that whittles away the supply of buildable land for housing? In Part II, we argue that combining multiple decisions into a single package subject only to an up-or-down vote can help achieve an efficient land-use policy. We illustrate the benefits of such bundling legislative procedures with the examples of Congress’ closing obsolete military bases and ratifying reciprocal tariff agreements. In both of these examples, Congress delegated to an extra-legislative agency (a base-closing commission and the President respectively) the task of packing together decisions on multiple issues, with Congress reserving for itself only the power to ratify the entire package without amendments.

This extra-legislative packaging of issues has one (or both) of two distinct benefits. First, in the case of the base-closings, the procedure reduced incentives for each member of Congress to save their own military base through log-rolling by assuring them that they would not be left out of a majority coalition seeking to increase their own share of money saved from base-closings. We call this benefit the “cost-spreading” advantage

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of extra-legislative issue-bundling. Second, in the case of reciprocal tariff agreements, the “fast-track” procedure bundled together reductions of both foreign and domestic tariffs, thereby recruiting exporters to fight against and neutralize protectionist constituencies who might otherwise defeat the treaty. We call this benefit the “conflict-inducing” advantage of extra-legislative issue bundling.

In Part III, we explore whether similar mechanisms can be used to overcome neighborhood opposition to new housing. Part III(A) shows that two land-use regulatory procedures bear a close analogy to base-closing commissions and “fast track” ratification of trade treaties. First, existing “fair share” systems for allocating affordable housing or other locally unwanted land uses (LULUs in land use speak) among local governments or neighborhoods constitute a version of “cost-spreading” issue-bundling closely analogous to the base closing commission: By relieving each legislator of the fear that they will be the dumping ground for LULUs that other jurisdictions avoid, the cost-spreading bundle reduces their incentives to roll logs to fight off all LULUs whatsoever. Second, zoning rules could create “conflict inducing benefits” if they required down-zonings to be matched with up-zonings. Such a system would closely resemble reciprocal trade treaties that bundle foreign and domestic tariff reductions, because it would enlist neighborhoods targeted for up-zonings to resist rival neighborhoods’ regulatory efforts to restrict housing with down-zonings.

In Part III(B), we conclude with a tentative exploration of how the latter sort of “conflict-inducing” bundling procedure might be refined to insure that down-zonings and up-zonings are not uncoupled by the legislature. By delegating to the Planning Commission the task of tying together restrictive and deregulatory zoning change, zoning

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procedure could markedly increase the costs for city council members to defect from the procedure to keep up-zonings out of their district. The peculiarities of land-use law also offer opportunities for state courts to help entrench the coupling of up- and down-zonings.

We offer this “coupling mechanism” as a heuristic rather than a strict recipe. The important point is that it provides a method for pitting geographically concentrated interest groups against each other in ways that it would be difficult for a legislature to undo. In urban legislatures, where political party competition is weak, legislative procedure can balance specific interest groups and force legislatures to consider more general interests. Reform efforts inside cities should focus on changing the politics of urban land use when they have the opportunity, rather than making one-time policy changes that will be whittled away over time.

### **I. The Public Choice of Land-Use Decisions**

The central claim of this paper is that the method cities use to make land-use decisions has a systematic bias towards excessively protecting incumbent land users against new entrants, particularly in high-value housing areas. Specifically, having the city council vote up-or-down on zoning amendments *seriatim* leads to a series of log-rolling agreements where current owners of homes are able to leverage their greater ability to organize, physical proximity, and greater individual interest in the outcome of policy decisions into excessive restrictions on housing development.

This section will discuss the sources of this systematic bias. It will first explain the natural political benefits that incumbent homeowners have over their opponents in the land-use wars – renters, future buyers, and developers. Second, it will discuss why the

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usual protection for more dispersed interests in legislatures, the interest of the governing party in maintaining the quality of its party brand, does not exist in most local legislatures, leaving decision-making more dependent on the strength of interest groups. Finally, it will argue that delegating land-use decisions to an official with jurisdiction over the entire local government like a mayor or planning commission would not be effective.

### **A. An Unfair Fight: Geographically Concentrated Opposition and Interest Group Misalignment**

The sides in virtually all land use disputes are the same. On one side are incumbent property owners seeking to limit or stop new development. On the other are renters, future residents and crucially developers. When zoning decisions are made seriatim, and particularly where individual developers have no existing interest in down-zoned land, this is hardly a fair fight, both for some pretty obvious (and some less obvious) reasons. The benefits of new development are dispersed, both geographically and across many individuals. In contrast, the harms are concentrated in a specific geographic area of the development, and on individuals who have a great deal invested in the outcome of land use decisions. For many local governments, this disparity in the costs of political organization can result in excessive limitations on new housing.

That land use disputes involve geographically concentrated harms and widely geographically dispersed benefits should be clear. Virtually all of the terms used in debates about land use – Not in My Back Yard (NIMBY), Locally Unwanted Land Uses (LULU) etc. – are premised on the idea that there are many types of land use to which people do not object appearing somewhere, as long as they do not appear near

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themselves.<sup>14</sup> While this is easy to see in the case of homeless shelters or garbage disposal facilities, it is equally true of ordinary housing like apartment buildings and “granny flats.”<sup>15</sup> A proposed new apartment building, for instance, will provide benefits to consumers of housing, both buyers and renters, as prices will fall and quality will rise if supply is allowed to match demand, particularly in the specific locations desired by those consumers.<sup>16</sup> However, any proposed project will only provide small benefits to each prospective consumer of housing, as each new apartment or house will only have a marginal effect on the price. By contrast, there is usually a class of geographically concentrated residents who will be made substantially worse off. Homeowners in the neighborhood of a development may see fewer scenic views, increased shadow, more traffic and less parking, more children in their school’s catchment area,<sup>17</sup> or simply more

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<sup>14</sup> See Vicki Been, *What’s Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

<sup>15</sup> A “granny flat” is an apartment build atop an existing home for the purpose of housing a different household, like a grandmother. See Janny Scott, *The Apartment Atop the Garage Is Back in Vogue*, N.Y. TIMES, December 2, 2006 at A1. The “popup” developments in the Carroll Gardens area that were barred by the downzoning discussed in the introduction likely would have included a number of granny flats.

<sup>16</sup> As we will discuss below, one of the central pro-zoning arguments relies on an assumption that housing or other building in a region is roughly fungible, that down-zoning one area is not a bad result if the housing can go elsewhere. See note \_ and accompanying text. For instance, this argument is raised in defense of the severe height limit on buildings in the District of Columbia, which restricts buildings from growing any higher than 20 feet taller than the width of the street it faces, with supporters of the restriction suggesting that buildings downtown or in high-priced areas do not need to be able to go higher because there are plenty of underused lots elsewhere in the city. See e.g., Paul Schwartzman, *High-Level Debate On Future of D.C.; With Land in Short Supply, Scholar Says Taller Buildings Should Be Permitted*, WASH. POST, May 2, 2007 at B1 (quoting the Director of the National Capital Planning Commission to this effect). However, this ignores the logic of the property market. Consumers of housing and commercial tenants locate in specific places for specific reasons, making restrictions in those places costly even if there is other available housing or office space. For consumers of housing, an apartment in, say, Dupont Circle is not a substitute for an apartment in Brookland, nor is an office on K Street easily replicable with an office in residential upper Northwest. However, modern agglomeration economics has shown that there are benefits to businesses and residents that come from being close to other businesses and residents, like information spillovers or cultural amenities, which are reflected in both housing prices and wages. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1515-29 (2010). Moving from one’s ideal location to some other location entails costs. Forcing development away from certain areas and into others is a tax, and an onerous one at that.

<sup>17</sup> See, e.g., S.Jhoanna Robledo, *Catchment-22*, N.Y. MAG., Nov 25, 2007 (describing opposition to development from parents of children in the same catchment area for a local school).

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people when they would rather see fewer.<sup>18</sup> More importantly, they will see more competition for buyers and renters of housing, as a home in their neighborhood – which, for most homeowners, is their largest asset by a huge margin – becomes less scarce.<sup>19</sup>

As Mancur Olson famously argued, smaller groups facing lower costs of organization and higher payoffs from political success will have an easier time overcoming collective action problems of becoming active in politics.<sup>20</sup> And the situation of homeowners’ abutting a proposed residential development presents an Olsonian perfect storm. Homeowners are easy to organize because they are physically close together and thus easy to monitor. Moreover, to the extent that the neighbors are also owner-occupiers of their structure, their large and undiversified investment in their home gives them big incentives to be politically active to protect their investment from neighborhood change.<sup>21</sup> The beneficiaries of development are theoretical, distant or easy to caricature – rambunctious young new residents and fat cat developers. Anyone

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<sup>18</sup> Further, if the area constitutes a political subdivision of any sort, neighborhood residents also may see lower per capita tax revenues, which may lead them to oppose developments that have no other direct effect on them. As Bruce Hamilton has shown, local governments need to limit their population in order for movement around a region in search of public policies to achieve stability. If a local government uses property taxes and is a high-tax, high service location, property owners will subdivide their property so that residents can live on cheaper than average parcels yet still consume local services at the average rate. Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URBAN STUDIES 205, 211 (1975). A smaller version can happen inside a single government: neighborhoods have a strong interest in allowing new development in the catchment area of their local schools, as it can result in overcrowding.

<sup>19</sup> To the extent that all residents in a neighborhood are willing and able to increase housing supply on their own properties, a downzoning will not provide a benefit to them, as it will reduce each owner’s ability to develop their property to meet the demand for housing. However, to the extent there are common pool resources – streets, schools, sunlight – reducing competition for access to them does provide a benefit. Further, to the extent that homeowners do not want to expand development on their properties (either for taste reasons or because they are already at the current zoning limit), localized residents benefit from restricting development nearby and hence limiting supply. We would like to thank Bruce Johnsen for suggesting this caveat to our general point.

<sup>20</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 1-18 (1965).

<sup>21</sup> As William Fischel has argued, the intense interest of homeowners in local politics makes small local governments intensely responsive to their interests. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 3-5 (2001).

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who has been to a community board meeting understands the physical embodiment of this phenomenon, a host of local residents screaming at a developer’s representative for hours and hours on end with little dissent.

The geographically concentrated nature of the harms is a frequently discussed aspect of land use disputes. Less frequently discussed is the issue of interest group alignment. Housing development disputes differ from ordinary LULU fights in one important respect. Whereas it is relatively clear that virtually all city/region residents other than those near the intended site of a LULU will be happy – everyone in a city wants a garbage treatment plant to locate *somewhere*, just not in their neighborhood – it is not always the case that homeowners in one part of a city will be happy with an apartment tower going up in someone else’s neighborhood. After all, to the extent that their homes serve as even rough substitutes for homes in other neighborhoods, homeowners across a city or region benefit from restrictions on housing supply. Where zoning rules restrict development, they provide benefits to all current holders of houses, just as any other supply restriction provides benefits to holders of an artificially scarce asset. To the extent that homeowners citywide are easier to mobilize than non-home owning consumers or potential consumers of new housing (i.e. renters and prospective buyers), this stacks the deck even more against new development.

However, against this widely shared harm, there stands an interest who can stand in for consumers of housing, specifically developers. When the dispute is about a proposed upzoning or approval for a new project, developers – who are among the biggest players in local politics – will fight neighborhood groups, sometimes winning and sometimes losing. By contrast, developers individually have little interest in fighting

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down-zonings in neighborhoods where they have not yet purchased any real estate interest.<sup>22</sup> If the down-zoning is defeated, any developer can swoop in and buy properties in the area regardless of whether they participated in that defeat, creating an incentive to free ride on someone else’s lobbying activity. Because zoning decisions are made *seriatim*, developers have little incentive to get involved in projects where they have no skin in the game yet, splitting the pro-development coalition between developers and renters/buyers. While upzonings have at least some powerful interest group support, the opposition to down-zoning comes from a theory – the idea that excessively restricting supply in the face of strong demand is costly. And naked theories, unadorned by powerful groups with individually valuable interests, fare poorly in the rough and tumble of urban politics.

Other interest groups face similar collective action problems and hence do not fight downzonings. Higher housing prices affect the ability of employers to attract quality employees, but each project has a small effect on the labor market generally, never mind any given employer’s ability to find talented employees. Further, employers can draw their workforce from across a region, as people can commute, making investment in any one city’s land-use decisions even less likely. As such, it is hard to see urban employers, or anyone else, emerging as a strong voice against excessive zoning.

Put together, the interests involved in many local land-use disputes are horribly unbalanced, between people who are well-equipped to protect their specific investments against mobile residents and developers who are each harmed only a little by most land-

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<sup>22</sup> Developers who continue to own property benefit like other property holders from zoning restrictions. However, they are already involved in restricting development as a result.

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use decisions. It is not surprising, therefore, that down-zoning efforts often frustrate efforts to build increase the local housing supply.

Does this imbalance lead to an inefficiently low level of housing? In theory, developers could simply bribe the neighbors into accept greater housing density in their neighborhood whenever they actually wanted to build. “Community benefits agreements” under which developers promise various public amenities – jobs in the proposed development, playgrounds, affordable housing, etc. – are a practical way in which developers can insure that local opposition does not thwart cost-justified residential development.<sup>23</sup> Such “sale” of development rights by neighborhoods could result in the efficient balancing of development-imposed congestion costs against the value of new housing. A neighborhood or local government’s control over zoning decisions, as William Fischel and Robert Nelson have brilliantly argued, serves as a “collective property right” on behalf of current homeowners, serving to ensure that local property values are enhanced, or at least not reduced, by new development.<sup>24</sup>

However, neighborhoods will disregard the effect denying a project will have on the overall cost of housing citywide. Giving neighborhoods the power to make zoning decisions also can serve to displace development from its most efficient location (e.g. moving housing away from subway lines, or moving firms away from their suppliers), and generally forcing development to spread out unnaturally, reducing the efficiency of “agglomeration economies,” or the economic gains that residents get from being near one

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<sup>23</sup> See Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?* (Furman Center Working paper 2010), available at [http://furmancenter.org/files/publications/Community\\_Benefits\\_Agreements\\_Working\\_Paper.pdf](http://furmancenter.org/files/publications/Community_Benefits_Agreements_Working_Paper.pdf)

<sup>24</sup> They argue that local governments’ negotiations with developers will, for Coasean reasons, result in the same amount of development as would have occurred otherwise. WILLIAM FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* xi, 125-49 (1985); ROBERT NELSON, *ZONING AND PROPERTY RIGHTS* 22-51 (1977).

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another.<sup>25</sup> The problems of locating development inside a city are much like the problems caused by local governments across a region engaged in competitive “exclusionary zoning,” but, crucially, internal limitations on development does not promote sorting among governments based on preferences about local public services.<sup>26</sup> Further, there is also the equity-based objection that neighbors ought not to be able to extract rents from newcomers and developers simply because they happen to reside in a neighborhood where the demand for new homes is high.

The regional effects of zoning restrictions on new housing can be quite large. Ed Glaeser, Joe Gyorko, and Raven Saks have estimated that, for instance, zoning restrictions are responsible for almost half of the cost of homes in the San Francisco region.<sup>27</sup> For a city like New York that itself covers a huge housing market, the cost effects can be dramatic: zoning restrictions increase the cost of housing in Manhattan by

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<sup>25</sup> While Fischel’s argument might hold true for an individual town or neighborhood, when all communities impose a charge for the right to develop, then the collective charges function much like a tax on new development. Further, this local protectionism functions to displace development from its ideal location in a region, reducing the efficiency of agglomeration economies. Unless location is fungible (that is, town A is identical to town B) and there are an infinite number of localities in a region, local control over property development will lead to excessive growth outwards, increase the cost of housing, and reduce the efficiency of agglomeration economies. See Schleicher, *The City as a Law and Economic Subject*, *supra* note \_\_, at 1540-45.

<sup>26</sup> Zoning restrictions are essential to the process of sorting under the well-known Tiebout Model. The Tiebout Model shows that where individuals make location decision based on available packages of public policies, they sort themselves among local governments and this results in the efficient provision of local governmental services. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). However, as Bruce Hamilton has shown, the Tiebout Model does not produce an equilibrium if local governments are funded through property taxes unless cities can limit their population using zoning. The reason is that in any high tax/high service local government, there will be an incentive for property holders to subdivide their property, as it would allow more residents to consume local services but pay less in taxes. Hamilton, *supra* note \_\_, at 211. Without zoning, new residents will just chase high services areas until their entry breaks down the ability of the local government to pay for the high services. Zoning permits cities to limit their population and hence permits there to be an equilibrium in the Tiebout Model. *Id.* This does not change the cost side of zoning – it still displaces development from its best location – but it does add an extra benefit when the competition is between towns and not between neighborhoods inside a city. See Schleicher, *The City as a Law and Economic Subject*, *supra* note \_\_, at 1529-40.

<sup>27</sup> Edward L. Glaeser, Joseph Gyorko and Raven Saks, *Why is Manhattan So Expensive? Regulation and the Rise of House Prices*, 48(2) J. L. & ECON. 331, 59-60 (2005).

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nearly 50%.<sup>28</sup> Thus, although it is difficult to get an exact measure of the net benefits of zoning restriction for cost-benefit analysis purposes,<sup>29</sup> there is a great deal of evidence that neighborhood dominance of land use produces substantial costs.

Although figuring out the exact costs and benefits is a difficult task, at the very least the political power of opponents of development makes it highly likely that single votes on new projects will be more restrictive than what a more neutral cost-benefit analysis would recommend. Dispersed interests like renters or new possible residents have little chance to influence the politics of urban land use decisions when these decisions are made *seriatim*, as they have only a small interest in any one project or down-zoning. This leaves the field to neighborhood protectionist interests, even if a differently organized vote might produce a different result.

There is another reason that land use politics produces lopsided results. In other areas with similar interest group politics, there is often some kind of outside constraint on distributional legislative politics. For instance, in budgeting, a legislature’s desire to reward concentrated interests and short change dispersed ones cannot go on forever. In normal times, excessive deficit spending will cause a reaction in the bond market, raising interest rates and depressing the economy, creating a powerful constraint on profligacy.<sup>30</sup>

As James Carville quipped, “I used to think if there was reincarnation, I wanted to come

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<sup>28</sup> *Id.* at 350-51.

<sup>29</sup> The critical issue is that zoning restrictions not only reduce supply of housing but arguably increase quality and thus demand for housing. Separating out the supply and demand effects of zoning, therefore, is a tricky business – although several economists have attempted to tackle the puzzle. See Susan M. Wachter and Man Cho, *The Interjurisdictional Effects of Growth Controls on Housing Prices*, 40 *J. Urb. & Contemp. L.* 49 (1991).

<sup>30</sup> Thomas Friedman’s choice phrase “the golden straightjacket,” is probably the cleanest description of how the need to remain attached to global financial markets checks government spending. Thomas Friedman, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* 103-33 (2000). We do not mean, however, to wade into any debate about deficit spending during a major recession, just to note that bond markets can check spending.

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back as the president or the pope or a .400 baseball hitter. But now I want to come back as the bond market. You can intimidate everybody.”<sup>31</sup> There is no equivalent constraint for zoning decisions: No bond rating agency will mark a city’s zoning map as “triple-C” or “junk” because the city has excessively restricted the supply of housing beyond the efficient level. To be sure, the eventual loss of housing will impose city-wide costs – loss of potential employers or talented tax-paying resident – that may eventually prod the city to liberalize its restrictions. But this constraint is far slower and less salient than the clear constraint of impending municipal bankruptcy.

### **B. The Local Legislative Blues: Why Ordinary Legislative Procedure Cannot Solve the Problem of Land Use**

Local land use politics also lack competition between mass political parties -- the traditional antidote for excessive concern for concentrated interest group. Partisan competition between well-recognized party “brands” can lead local politicians to devise an agenda for zoning reform to deregulate housing markets. Moreover, such parties can discourage the sort of mutual (“universalistic”) deference that individual legislators extend to each other on exclusion of housing – deference that creates stability in the legislature’s decisions where a strong party leader is missing. Because, in many local governments, there is virtually no party competition inside local legislatures or in the population, local legislators have little reason to take the risks of deregulating housing and thereby face the wrath of neighborhood groups.

The absence of strong political parties in local legislatures can lead to pervasive NIMBYism, because legislatures need some mechanism to overcome what social choice theorists call the problem of “cycling” or strategic coordination problems. The basic

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<sup>31</sup> BOB WOODWARD, *THE AGENDA: INSIDE THE CLINTON WHITE HOUSE* 138 (1994)

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problem is that, under conditions normally regarded as consistent with – indeed, implied by – norms of democratic fairness, a collective body composed of members with ordinary set of preferences cannot produce stable outcomes if each member has an unlimited ability to propose and amend new pieces of legislation.<sup>32</sup> The result of such an uncabined agenda-setting process will be either incapacity to enact any laws whatsoever or a random determination of winners and losers.

The remedy for such an unstable decision-making process is delegation of agenda-setting power to some centralized entity – a speaker, committee, party boss, or other legislative leader.<sup>33</sup> Perhaps the most common structure that puts an end to endless cycling of proposals is party leadership. On one simple model, the rank-and-file members of the legislature delegate to party leaders the powers to monitor whether members are cooperating with the majority party’s agenda, punishing defectors from, and rewarding those who cooperate with, that agenda.<sup>34</sup> Come election time, this leadership

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<sup>32</sup>As Kenneth Arrow famously showed, there are frequent instances where this is more than one possible majority on a single issue. See Kenneth J Arrow, *Social Choice and Individual Values* (1951). Arrow proved that in a world with more than two possible decisions and more than two legislators (or other people with the right to vote on the decision), majority rule can lead to unstable outcomes. That is, a legislature can prefer A to B, B to C, and C to A, a result generally referred to a cycling. This is because legislators themselves may have varied preferences – one preferring A to B to C, another preferring B to C to A and yet another preferring C to A to B. A legislature thus can have unstable preferences, with no one proposal commanding a majority against all others. Arrow proved that no voting rule that can qualify as democratic can avoid entirely the problem of cycling, and as the number of alternatives and the size of the legislature increase, the likelihood of a single majority outcome falls. For criticism of cycling as a major challenge to democratic practices, see See Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 *Colum. L. Rev.* 2121, 2122 (1990). There is a long-standing debate about whether the fairness conditions Arrow used are justifiable. For criticism, see, e.g., Pildes and Andersen, *supra* note \_\_, at 2146-58; William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 130 (1982); for support, see, e.g., Maxwell Stearns, *The Misguided Renaissance of Social Choice*, 103 *Yale L. J.* 1219 (1994). As we are not using Arrow’s impossibility theorem for any purpose other than noting that unstable outcomes create incentives for using delegation, there is little need to weigh in on these debates.

<sup>33</sup> See D. ROGER KIEWET AND MATTHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 22-25 (1991)

<sup>34</sup> GARY W. COX AND MATTHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 85-134 (1993). This work builds on KEWEIT AND MCCUUBBINS, *supra* note \_\_, at 39-55. Cox and

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and the members who remained loyal to its agenda can take credit for their combined legislative successes (and be held accountable for legislative failures).

Party leadership solves the problem of multiple equilibrium results – that is, endless cycling without decisions. Leadership chooses a voting order that best serves the ends of some subset of the legislature, and uses selective incentives, like plum committee positions or pork, to “whip” wavering members of its caucus into voting for legislation that serves the collective ends of the partisan majority. The party “brand” also insures that the agenda is consistent with the interests of the rank-and-file members, because leaders who cannot produce electoral gains for their coalition will cease to have a working legislative majority – and thereby cease to be leaders.<sup>35</sup>

The power exercised by party bosses might seem undemocratic – a relic of cigar-chomping insiders making decisions behind closed doors in smoky rooms – delegation of power to party leadership can make popular democratic control over policy possible. Individual voters have no incentives to monitor the behavior of legislators closely and little ability to determine whether the thousands of votes legislators take between elections represented their interests.<sup>36</sup> The members’ delegation of agenda control to a party leadership gives voters a chance to express their preferences about the overall performance of one highly visible coalition marked by a distinctive “brand label” – that is, the party. Monitoring a party retrospectively based on the overall state of a city is much easier than monitoring dozens of obscure legislators voting on hundreds of obscure

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McCubbins and John Aldrich have shown that political parties evolved historically to create a leadership to which agenda-setting power could be delegated. *Id.* at 107-132; JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 28-65 (1995).

<sup>35</sup> COX AND MCCUBBINS, *supra* note \_\_, at 125-35; KEWEIT AND MCCUBBINS, *supra* note \_\_, at 39-55

<sup>36</sup> For the classic treatment of this point, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-76 (1957). *See also* Neal Devins and Ilya Somin, *Can We Make the Constitution More Democratic?*, 55 *DRAKE L. REV.* 971 (2007).

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bills.<sup>37</sup> While this may not result in voting that is consistent with perfect information, party control of legislatures (and party names appearing on the ballot) is the only thing that makes it possible for a poorly-informed electorate to use issues when voting at all.<sup>38</sup> The party’s necessary recourse to popular support provides some check on the influence of particularistic groups. The need to promote a jurisdiction-wide brand pushes legislators to support legislation that promotes more general, (or at least, not exclusively particularistic) interests. Mass electoral competition, when it works, serves as a check on the ability of interests groups to dominate politics.<sup>39</sup>

In urban legislatures, however, strong party leaders are often missing, destroying the capacity of the legislature to set its own agenda according to some overall vision of the jurisdiction’s interest. There are many reasons for this absence of partisan control. A majority of urban elections, for instance, are non-partisan.<sup>40</sup> In non-partisan elections, voters are denied the one piece of information about policies that is most useful, a party brand on the ballot. Absent information about policy stances through information about

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<sup>37</sup> See Downs, *supra* note \_\_, at 237-76. Further, as Morris Fiorina has argued, party brands that are consistent over time and available on the ballot make it easier for voters to use both prospective and retrospective evaluations. In Fiorina’s account, voters can develop “running tallies” of their retrospective evaluations of party performance across time, adding to it whenever they notice something new. These tallies can be used when it comes time to vote and, particularly across an electorate, will produce voting patterns that roughly translate issue preferences into votes, even if voters lack much specific knowledge of politics. MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 89, 89-106 (1981),

<sup>38</sup> For a discussion of assessments of whether clear party heuristics make voters behave as if they were informed or not, see Schleicher, *What If Europe Held an Election and No One Cared?*, 54 *HARV. INT’L L. J.* 109, 143-44 (2011)

<sup>39</sup> See COX AND McCUBBINS, *supra* note \_\_, at 125-35; E.E. Schattschneider’s comparison between party politics and “pressure politics” remains the classic treatment of this point. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 46-59 (1975). One of its choicest observations is that pressure groups like the Chamber of Commerce or labor groups are like firms facing a monopsonist: “Republican critics of the Democratic party like to portray the Democratic party as the slave of organized labor. Actually, labor usually has no place else to go. As long as it thinks that elections are important, it *must* support the Democratic party, generally....If there are twenty thousand pressure groups and two parties, who had the favorable bargaining position?” *Id.* At 56.

<sup>40</sup> See Karen I. Chang, *The Party’s Over: Establishing Nonpartisan Municipal Elections in New York City*, 11 *J. L. & POL’Y* 579 (2003).

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parties, voters use whatever information they can get their hands on, usually ethnic, racial, and status variables.<sup>41</sup> Incumbency status, the personal networks of candidates, and political interest groups take on outsized influence in such a political environment. The absence of party competition enhances the degree to which urban political conflict is formless, and thus provides little check on the power of concentrated groups in politics.<sup>42</sup>

The absence of organized political party competition also renders non-partisan legislatures harder to organize. Leadership cannot be trusted to organize votes in a way that will maximize the gains to their partisan “brand,” because there are no competitive parties differentiated by ideology. The absence of party brands makes it more difficult for voters to monitor political behavior and thereby reduces the need for politicians to promote generally beneficial policies.<sup>43</sup> The absence of ideological political party brands, in short, increases the power of concentrated groups.

Cities with partisan elections are better on this score, but are not generally competitive in the same way as state legislative and congressional elections are. As one

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<sup>41</sup> “In these types of contests, researchers have found that voters rely on a wide variety of cues, including race, ethnicity, familiarity, place, prestige, religion, and even ballot location.” Gerald C. Wright, *Charles Adrian and the Study of Nonpartisan Elections*, 61 POL. RESEARCH Q. 13, 14 (2008). See also Brian F. Schaffner, Matthew Streb, Gerald Wright, *Teams without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RESEARCH Q. 7 (2001); Joel Lieske, *The Political Dynamics of Urban Voting Behavior*, 33 AM. J. POL. SCI. 150, 154 (1989); Carol A. Cassell, *Social Background Characteristics of Nonpartisan City Council Members: A Research Note*, 38 WEST. POL. Q. 495, 500 (1985).

<sup>42</sup> See Wright, *supra* note \_\_, at 15; Gerald C. Wright and Brian F. Schaffner, *The Influence of Party: Evidence from the State Legislatures*, 96 Am. Pol. Sci. Rev. 367, 377 (2002).

<sup>43</sup> A study by Gerald Wright and Brian Schaeffner of the unicameral Nebraska legislature, which is elected on a non-partisan basis, shows this effect. *Id.* at 367-77. Despite the formally non-partisan nature of these elections, almost all Nebraska legislators are affiliated with one party or another prior to their election and candidates from each party express very different answers to questionnaires about ideological political issues (i.e. Republicans give more conservative answers, Democrats more liberal ones). However, when they get to the legislature, neither ideological stances nor their party membership has an effect on voting patterns in the legislature. Instead, legislators form new and unpredictable coalitions for each issue. Voters cannot police these random voting patterns and the lack of organization in the legislature makes cycling more likely.

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of us has argued, local partisan elections feature the problem of partisan “mismatch.”<sup>44</sup> While our major national political parties now consist of really ideologically coherent coalitions, there is little correlation between beliefs about national issues and beliefs about local issues.<sup>45</sup> However, big city voters rely heavily on national partisan labels – Democratic and Republican – when making voting decisions. Local elections, particularly those for non-Mayoral offices, often end up selecting candidates who are representative of local voters on national issues, but not on local ones.<sup>46</sup>

The result is that partisan big city local elections, outside of some mayoral elections and a few cities in which national party preferences are relatively equal, are not competitive. Local legislatures in partisan cities often look like they do in non-partisan

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<sup>44</sup> See Schleicher, *What if Europe Held an Election and No One Cared?*, *supra* note \_\_, at 1 (describing the problem as a “mismatch.”); David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 *J L & Politics* 419, 422-25 (2007) (laying out a model of uncompetitive local elections.)

<sup>45</sup> See Fernando Ferriera and Joseph Gyourko, *Do Political Parties Matter? Evidence from U.S. Cities*, 124 *Q. J. Econ.* 349 (2009) (finding no policy differences resulting from which party wins close Mayoral elections); Schleicher, *City Council Elections?*, *supra* note \_\_, at 440-46.

<sup>46</sup> The best explanation for this odd result lies in the interaction between election laws and voter ignorance. Schleicher, *City Council Elections?*, *supra* note \_\_, at 448-60 (laying model and assumptions). Most voters know little about individual candidates, at least below the Mayoral level. As a result, they will use the information available to them, the party labels on the ballot, so long as it carries any information (and national party affiliation surely explains *something* about local candidates, even if not very much). Local and state laws guarantee that parties that do well in state elections – the big national parties – are on the ballot at the local level. As a result, voters rely on the Democratic or Republican brands despite their basic inapplicability to local issues. This begs the question why the local minority party does not propose stances on local issues that would make it popular, as we would expect a vote maximizing party to do. But state laws require local parties to use primary elections, and if people join national parties due to their stances on national issues and those issues do not correlate closely with local issue preferences, there is no reason to expect the product of local primaries to be consistent on local issues. The local minority party cannot create a local brand because it is no more ideologically consistent on local issues than the majority party. Further, laws and party rules make it difficult for voters to switch back-and-forth between parties between elections, meaning that voters (and crucially candidates and activists) will not swarm to a potentially competitive local minority party for a local election alone, as this would make participation in their preferred national party primaries more difficult. Local-only third parties do not enter either because of the ordinary disadvantages of third parties in a first-past-the-post election system (voters do not want to waste the votes) and because voters, activists, and candidates do not want to abandon their national parties only for the purpose of a local election.

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cities, except that everyone is a Democrat instead of being unaffiliated.<sup>47</sup> Frequently, the only election that matters is the Democratic primary. However, a primary is just like a non-partisan election: There are no party labels on the ballot.<sup>48</sup> Voters turn out in small numbers and are forced to use non-ideological variables in making their decisions.<sup>49</sup> The result is that partisan city elections are often not much more ideologically competitive than non-partisan ones.

Why should the essentially non-partisan character of local politics matter for land-use regulation? The reason is that local legislatures, deprived of the capacity to control their agendas and their electoral fortunes by delegating agenda control and electoral “branding” to party leadership, rely on alternative mechanisms for controlling legislation. One popular mechanism for managing the legislative agenda is the universal log roll. In the absence of some strong party leader, legislators face a prisoner’s dilemma<sup>50</sup>: Members may prefer that some new development be sited in their neighborhood over their own constituents’ objections that every neighborhood be permitted to exclude all new construction. However, no legislator will vote to allow a new development in her district unless she can be sure everyone else will reciprocate by taking their fair share of the housing needed to meet demand. Without political parties to fix a contract to divide up the costs of these decisions fairly and promulgate the benefits of the overall bargain,

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<sup>47</sup> There are fewer and fewer cities and counties in which national elections are close. This is largely the result of the “big sort,” or the increasing close fit between residential preferences and national political preferences. See BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE MINDED AMERICA IS TEARING US APART* 10 (2009)

<sup>48</sup> See Schleicher, *City Council Elections?*, *supra* note \_\_, at 461-62.

<sup>49</sup> New York City produced the *reducio ad absurdum* version of this tendency in 2009. John Liu defeated David Yassky in a runoff for the position of city comptroller in an election where only 8% of eligible Democratic voters turned out (roughly 2% of eligible voters city wide). Despite an intense campaign, almost all observers credit his victory not to any stance on issues but rather to the organizing capacity of local unions that endorsed him and ethnic voting. See Jennifer Fermino and Maggie Haberman, *Boring Battles Leave City’s Booths Bare*, N.Y.POST, September 30, 2009; *The New New York Machine*, N.Y. Observer, September 30, 2009; Gail Robinson, *The Runoff Results*, Wonkster September 30, 2009.

<sup>50</sup> See COX AND MCCUBBINS, *supra* note \_\_, at 86-91.

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this prisoner’s dilemma leads each legislator to block every project, even though allocating a “fair share” of the undesired uses to each legislator might be a possible Pareto superior result. Moreover, each legislator votes to support their fellow member’s efforts to exclude NIMBYs out of fear that, were they to press for unwanted housing in someone else’s backyard, they would be targeted for unwanted uses themselves. Hence, the idea that leaderless legislatures form “universal” coalitions: Everyone joins the coalition to protect everyone else from locally unwanted land uses because there is no leader capable of enforcing a more nuanced allocation of costs and benefits.

In sum, the absence of party leaders means that individual legislators cannot take credit for the overall benefits of housing nor fairly apportion the electoral blame of individual votes to allow more housing into specific districts. In a Hobbesian legislature where every member stands and falls by themselves, it is hardly surprising that each member focuses on

### **C. Why Not Just Have the Mayor Make All Land Use Decisions?**

If having the City Council vote on map amendments leads to housing shortages, then why have the Council involved at all? In theory, a city could delegate all of its land-use authority to the Mayor or to some administrative agency full of housing experts and city planners, either of which would represent the whole city and hence avoid the inter-neighborhood strategic concerns described above.

Such a delegation has political, informational and practical problems. The political problem comes from the principle-agent problem inherent in delegation. The City Council might be willing to delegate authority to the Mayor if they thought the Mayor would come up with a deal that would solve their collective action problems and

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serve their interests. However, the Mayor would have a great deal of difficulty providing Members with any certainty that she would strike such a deal. Instead, the Mayor could use this power to maximize her own political benefits, or to punish wayward Councilmembers. It is uncertain whether a pure delegation, absent some method for policing the Mayor, will serve the Council’s interest and hence it unlikely that the Council would do so. (Some degree of delegation, we will argue in Sections II(c) and III, would produce benefits for a city council and for the city as a whole.)

The practical problem is similar. The Council gets all sorts of benefits from being the venue in which land use disputes are resolved. For instance, developer groups are among the biggest givers of campaign donations to the New York City Council, and a difficult to measure but surely extremely high amount comes from interested property owners.<sup>51</sup> Getting out of the land-use game would entail all sorts of costs for the Council.

More importantly, it is unclear that the Mayor, or some expert agency, has the tools to resolve the problems inherent in deciding whether to approve up- or down-zonings. It seems safe to presume that mayors have certain institutional advantages over city councils in determining certain land use questions, like how much the housing stock needs to increase in aggregate, or how housing decisions integrate with decisions about how to allocate transportation decisions. That is, the mayor is likely better at determining the citywide benefits from development. However, one crucial type of information is likely to be in the hands of Councilmembers but not in the hands of the mayor or citywide agency – how costly a new project is for a neighborhood. Even if land-use decisions are too strict in general, it should go without saying that not all down-zonings (or all denials of up-zonings) have a negative economic effect. The nuisance value of a

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<sup>51</sup> See Jonathan P. Hicks, *The Council And How It Really Works*, N.Y.TIMES, November 26, 1995 at A13.

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new development to other properties can exceed its benefits, even when properly measured. The zoning process should take into account when a project is really bad for a neighborhood, and hence not worth the addition it makes to the housing stock or to the city. Councilmembers are in close contact with their constituents, and likely have some ability to judge when a project is merely disliked and when it is truly hated. They are thus more likely than citywide mandarins to have access to this information about the intensity of local opposition.

Given the practical and political problems with getting a city council to delegate power to the Mayor, and the difficulty city-wide officials have in determining the intensity of local opposition, delegation to the Mayor is both unlikely and unlikely to produce optimal results. Another answer is needed.

## **II. Cycling Lanes: How Unconventional Legislative Procedure Can Aid Dispersed Interests**

We suggest that a change in voting procedure could mitigate the power of neighborhood groups and induce better land-use decision-making. By bundling together decisions about the use of land in different neighborhoods for a single legislative vote, voting procedures could improve land-use decision-making in two different ways. First, such issue-bundling could re-assure members of the local legislature that they will not be left out of a coalition that seeks to avoid any share of locally undesirable land uses. To the extent that legislators fear most the outcome whereby LULUs are barred from every neighborhood aside from their own, such issue bundling might be a reasonable way to overcome collective action barriers to cooperation and thereby discourage strategic opposition to all siting of LULUs in every neighborhood. Second, by requiring that every

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down-zoning be paired with an equivalent up-zoning, voting rules could pit neighborhoods against each other and thereby mitigate the power of geographically concentrated groups. In general, both sorts of issue-bundling rules are intended to induce local legislatures to consider the effect zoning changes have on the overall housing supply, an interest which is widely shared by a city and region’s residents but not felt particularly intensely by any concentrated geographic group or vested interest (in contrast to its geographically-concentrated and substantial-invested opponents.)

To illustrate the power of such issue-bundling procedures, it is useful to examine them in a context outside land-use law where they have built up a longer track record. Accordingly, we examine Congress’ use of extra-legislative issue-bundling in two distinct contexts – (1) the closing of obsolete military bases under the Base Closure and Realignment Act (BCRA) by using a commission to package multiple base closings into a single bill for Congress’ up-or-down vote and (2) Congress’ use of “fast-track” legislative procedure to ratify reciprocal reductions of both domestic and foreign tariffs in treaties negotiated by the President.<sup>52</sup>

In both cases, the critical element of the procedure was the tying together of several issues into a single legislative package by an actor outside Congress – a base-closing commission or President – that Congress believed it could trust to act impartially between congressional districts or economic interests.<sup>53</sup> By setting the legislative agenda

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<sup>52</sup> See Sections II(a) and (b) *infra*.

<sup>53</sup> As Kiewiet and McCubbins have argued, the difficulty in overcoming the difficulties of monitoring agents tasked with controlling the agenda defines much of Congressional procedure in all areas. See KIEWIET AND MCCUBBINS, *supra* note \_\_, at 4-17. This is particularly true where they have chosen some special legislative procedure.

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for Congress “extra-legislatively”<sup>54</sup> in contexts where partisan ideology did not operate effectively, the executive actor’s issue-bundling accomplished two distinct goals. First, the bundling of issues solved coordination or cooperation problems between legislators, allowing them to apportion costs between their districts without fear that any legislator would be left out of a coalition to avoid the costs entirely. We call this the “cost-spreading” function of extra-legislative procedure.

Second, executive issue-bundling pitted concentrated interests against each other, thereby protecting underrepresented dispersed interests from concentrated interests that might otherwise face no effective opposition. We call this the “conflict-inducing” function of extra-legislative procedure. Both of these functions require that, upon being presented with the executive-defined bundle of issues, Congress gives itself only the option of voting up or down on the entire package. The executive definition of the voting agenda and procedure, therefore, is a substitute for partisan methods of organizing legislatures when parties are absent as an organizing principle and thus general interests become vulnerable to agenda manipulation by concentrated interests.

However, delegation of the agenda-setting function depends critically on insuring that the executive issue-bundler is a faithful agent of the legislature as a whole. Each process baked in protections to ensure that the principle-agent problems did not ruin the process.

The success that extra-legislative procedures enjoyed in extremely difficult political contexts suggest to us that they might have promising applications in the context of land-use regulation. However, in each case, the exact procedure used by Congress

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<sup>54</sup>The political scientist Lawrence Becker has usefully coined the phrase “Extra-Congressional Legislative Procedures” in LAWRENCE BECKER, *DOING THE RIGHT THING: COLLECTIVE ACTION AND PROCEDURAL CHOICE IN THE NEW LEGISLATIVE PROCESS* 2 (2005)

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was tailored to a specific political context. Although we will draw lessons from these examples, they do not provide a cookie-cutter set of proposals.

### **A. Stealing Bases: How the Base Closing Commission Protected Military Need Against Geographically Concentrated Interests**

It is not hard to see why it is politically difficult to close military bases. Domestic military bases bring enormous amounts of money to specific towns and states, and are thus jealously guarded by the people elected to represent those places. In contrast, national defense is the classic public good; it benefits all citizens in a non-rival, non-excludable manner.<sup>55</sup> As military needs change, so does the need for bases for its troops. When a current base structure ceases to serve the military’s interest, we can assume that failing to close it that will reduce the quality of national defense by some marginal amount. This harm will be felt relatively equally by all Americans. Similarly, as discussed above, the harms created by wasteful government spending – marginally higher taxes, higher borrowing costs – are also felt generally.

This creates a bias in the system. For Olsonian reasons, small groups like residents of individual cities facing severe harms will lobby more than large groups who each are individually due to receive only small benefits. However, merely because reductions in the quality of national defense are felt generally does not mean that Members of Congress are always willing to sacrifice national defense needs to local needs. Rather, where the issue of base closing is presented as one of local obstruction against the strong needs of national defense, Congress gives most the military needs of the country at least some deference. However, when decisions do not seem militarily

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<sup>55</sup> See Jeffrey Rogers Hummel and Don Lavoie, *National Defense and the Public-Goods Problem* 38 in *ARMS, POLITICS AND THE ECONOMY: HISTORICAL AND CONTEMPORARY PERSPECTIVES* (Robert Higgs, ed. 1990)

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necessary or are somehow politically suspect, Members of Congress will do everything they can to protect their districts’ bases.

Thus, one can understand base closing as a strategic problem inside Congress, approximating a prisoner’s dilemma.<sup>56</sup> Members prefer to have bases in their districts, no matter what else occurs. However, they also prefer to have all other bases in the proper place for military purposes, and prefer having all bases in the best place for military purposes to all Members’ being able to protect their bases. Absent cooperation, though, each Member will protect his/her base – or “defect” in game theoretic lingo – and no bases will be closed. Only if they can somehow agree not to protect their own bases can Congress get to the better result of all bases being in the proper place for military purposes. As is common, the solution to the Prisoner’s Dilemma scenario is through either an enforceable bargain between Members or through strategic “tit-for-tat” repeated play. Assuming that the latter was excessively costly,<sup>57</sup> Congress needed a way to make credible commitments that base-closing bargains would be kept. Their mechanism for such a commitment was the BCRA.

The story of the BCRA begins with the collapse of the purely Presidential system of base closing after members of Congress became suspicious that the President was

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<sup>56</sup> It is also possible to understand Member motivations in a slightly different way. One might understand Members to prefer absolutely to have bases in the best place for the military needs of the country, but if a list of proposed base closings is not based on military necessity, each Member will want to ensure that the base in his/her district is protected. This creates a “stag hunt” game, and there will be two stable equilibrium results – a “clean” list of base closings and a situation in which no bases are closed. For a discussion of stag hunt games and the law, see Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. 209, 220-22 (2009). The order in which the issue is presented, or the availability of some kind of coordination mechanism, will be crucial for getting to the “clean” list. As Congressional negotiation surely involves a large number of different payoff matrices, and the solution – the BCRA – can be seen as a coordinating solution as well as one that fosters cooperation, we will not analyze the issue as a stag hunt separately.

<sup>57</sup> “Tit for tat” is unlikely to be a successful strategy in base closing politics, because of the difference between closing bases and opening them. Once closed, there is a substantial fixed cost (both economic and political) in getting a base reopened, so much so that it rarely happens.

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playing political favorites in selecting bases to close.<sup>58</sup> In response to distrust for the untrustworthy Presidential agent, Congress effectively stopped all bases from being closed.<sup>59</sup>

In short, the first lesson of the base-closing experience is that delegation to an executive officer requires that the executive agent be a trustworthy agent of Congress. The second lesson is that Congress found itself unable to manage base-closings through simple legislative votes, because the usual mechanisms of partisan agenda setting were absent. As discussed in Section I(b), a majority of Congress generally delegates power to their party leaders to create an agenda that serves the interests of that majority. As these leaders have an interest in maintaining the quality of the national party “brand,” this protects general interests against specialized ones to a degree. But in the 1970s, Congressional leadership was not up to the task of devising a “clean” list of base closings. The parties were weaker than they are today, and straight-ticket voting in the

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<sup>58</sup>Perhaps the most egregious abuse of the process by the executive branch came in the Nixon administration’s effort to use a threatened base closing to win a Senate seat in Rhode Island. As he was running for Senate in 1972, then-Secretary of the Navy John Chafee publicly fought to save the Quonset Point Naval Air Station against a military recommendation that it be closed. The Committee to Reelect the President used the issue in television ads. As the station was not militarily useful, the military wanted to get rid of the project, but waited until after Chafee was elected to repropose the closing of the base. Twight, *supra* note \_\_, at 258-59. After years of bickering but not actually stopping the Defense Department from closing bases, Congress rebelled in 1973 after a particularly severe set of closings was proposed, particularly Representatives from the Northeast, which seemed overrepresented in the list of closures. See BECKER, *supra* note \_\_, at 19-20.

<sup>59</sup>When the Defense Department proposed a new list in 1976, Congress passed a law that required the military to provide Congress with notification when a base was even considered for closure, a long waiting period before any base could be closed and detailed justifications for closure. *Id.* at 21-22; Twight, *supra* note \_\_, at 244-46. Congress also required that all base closings comply with National Environmental Policy Act, meaning that the military had to prepare Environmental Impact Statements, and that closings could be held up in court for years. Although this was vetoed, another almost identical package passed soon after, and was made permanent in 1978. Military Construction Authorization Act, 95 P.L. 82, § 612 (1978). See Christopher J. Deering, *Congress, the President and Automatic Government: The Case of Military Base Closures* in 153, 158 RIVALS FOR POWER (Ed. James Thurber, 1996); Twight, *supra* note \_\_, at 246. This combination of rules effectively stopped all military bases from being closed between 1977 and 1988. See BECKER, *supra* note \_\_, at 21.

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electorate was an all-time low.<sup>60</sup> Members, faced with bad outcomes for their district, were unwilling to sacrifice for their party leadership, as they were unsure that their party’s brand would aid them come election time. Leadership in the House –the body that opposed military control over base closing most vociferously – did not even try to assemble a base-closing package and instead backed the legislation that impeded base closing.<sup>61</sup>

Thus, distrust of the executive and lack of organizational mechanisms in the legislature paralyzed Congress, leading the general interest in closing obsolete bases to be neglected. The costs of the neglect of this dispersed interest eventually became painfully clear, as the absurdity of the bases’ continued existence – like a base created to protect stagecoaches against Native American attacks and another that was protected by a moat – was highlighted both by fact-finding commissions and executive policy entrepreneurs.<sup>62</sup> Yielding to these pressures, Congress enacted a base-closing bill that delegated power to set the base-closing agenda to a commission.<sup>63</sup>

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<sup>60</sup> See Larry Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 AMER. J. POL. SCI. 35 (2000); Morris P. Fiorina, *Parties and Partisanship: A 40-Year Retrospective*, 24 POL. BEHAVIOR 93, 100 (2002).

<sup>61</sup> Tip O’Neil, then Majority Leader in the House, was the prime sponsor of the 1976 bill to gum up the base closing process. BECKER, *supra* note \_\_, at 20.

<sup>62</sup> *Base Closings: Everyone Wins*, N.Y. TIMES, October 10, 1988, at A18; *Base Closings at Last, Some Signs of Progress*, POST-STANDARD (Syracuse, NY), July 14, 1988 at A10. In the waning days of the Reagan administration, Secretary of Defense Frank Carlucci, shrugging off decades of executive reluctance to cede any power for determining which bases needed closing, and the Chairmen of the Armed Services committees in the House and Senate all agreed to base-closing legislation delegating power to an independent commission. The willingness of the President to give up some of his traditional power over base closing, concern about deficit problems at the time, and the unique politics of Presidential changeovers created “unique opportunity.” William J. Eaton, *Negotiators Agree on Bill to Facilitate Closing of Military Bases*, L.A. TIMES, October 6, 1988, at 30. The timing of the bill was perfect – Congress held the vote before election day when there was no clear list of bases. Under the deal, the Secretary of Defense and the Commission would act before Inauguration Day, leaving the new administration unburdened by the political costs of acting. BECKER, *supra* note \_\_, at 28-30

<sup>63</sup> Defense Authorization Amendments and Base Closure and Realignment Act of 1988, 100 P.L. 526 (1988). For a full description of how it works, see David E. Lockwood and George Siehl, *Military Base Closures: A Historical Review from 1988 to 1995*, CRS Report for Congress (October 18, 2004).

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The BCRA essentially delegated to independent “BRAC” Commission the task of determining which bases to close based on an initial list formulated by the armed services and reviewed by the Secretary of Defense.<sup>64</sup> To insure the impartiality and transparency of the commission’s decision, BRAC Commission was required to hold hearings and collect information before deciding whether to disregard entirely the list or add or delete bases from the list. The BRAC Commission’s final recommendation was forwarded to the President for approval, subject only to a Joint Resolution of Disapproval by Congress to be enacted within 45 days of the President’s approval of the final list. The Joint Resolution, however, required an up-or-down vote on all base closures, barring all amendments of the List. In effect, the Congress was faced collectively with the choice of either ignoring entirely the general need to close bases or accepting the package of base closures bundled together by the executive actors defined in the BCRA.

This procedure was strikingly successful in eliminating bases.<sup>65</sup> The success is directly tied to the structure of process. The law has effectively two elements. First, it forces Congress to make a single vote on an entire list of base closings. This stops

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<sup>64</sup> They are generally referred to as Base Realignment And Closure “BRAC” Commissions, although the act is the Base Closing and Realignment Act.

<sup>65</sup> The first round of base closings was not rejected by Congress and went into effect. Melissa Healy, *House Vote Spells End for 86 Bases; Closure Clears Last Legislative Hurdle But Foes File Suit*, L.A. TIMES, April 19, 1989 at 1. After some bickering, Congress and President Bush eventually struck a deal establishing the second commission and institutionalizing the process in the Defense Base Closure and Realignment Act of 1990, which created three more rounds of base closing in 1991, 1993 and 1995. However, in 1990, Secretary of Defense Dick Cheney attempted to close a number of bases independently, arguing that base closing was an executive function and proposed closing a number of bases. Congress rebelled, claiming that the bases that were to be closed were almost all in Democratic districts and the new jobs created were all in Republican districts, rejecting Cheney’s proposal. Lockwood and Siehl, *supra* note \_\_, at 5; Becker, *supra* note \_\_, at 23. There were no new BRAC Commissions in the 1990s after President Clinton was thought to have gone around the BCRA to protect a California military base, but a new round was eventually undertaken in 2005. *Don’t Miss This Chance to Shut Unneeded Bases*. NEWSDAY, October 11, 1988 at 58; Susan F. Rasky, *Congress Agrees on Closing Bases But Leaves the Choices to a Panel*, N.Y. TIMES, October 13, 1988 at A1. Each round ended in success – Congress has not rejected any Commission proposal – and there is a widespread perception that the Commissions have helped reduce the problem of having an excessive number of outdated military bases. See Kenneth Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas through Delegation*, 20 LEG. STUD. Q. 393, 399-401 (1995)

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Members from dissolving the deal by proposing an alternative list, which could create a cycling problem. Second, it gave an outside group – the Commission – the power to define the set of base closings. As long as the Commission’s decisions were credible as an expression of military need, it could solve the coordination problem faced by Congress of spreading the costs of base-closings over the entire body in a manner acceptable to a critical mass of Congress. To insure that the Commission was a trustworthy agent, Congress built into BCRA several safeguards such as (1) substantive criteria for base-closings<sup>66</sup>; (2) a written record that could be reviewed by other entities, like courts and Congress’s auditing arm, the General Accounting Office; (3) some limited role for political considerations<sup>67</sup>; and (4) Senate confirmation of the Commission as well as Presidential consultation with all four House and Senate party leaders before making nominations in order to ensure partisan balance.<sup>68</sup> Congress also ensured that the executive branch could not politicize the process through the backdoor, as the President was subject to the same restrictions as Congress of approving or rejecting the proposal as a whole. The fact that the Commission could add as well as subtract bases made it less likely that the initial list proposed by the Secretary of Defense would contain favors or punishments for particular members of Congress.

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<sup>66</sup> See Kenneth Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas through Delegation*, 20 LEG. STUD. Q. 393, 399-401 (1995)

<sup>67</sup> There is substantial evidence that the military took Congressional political considerations into account as well as military ones in designing its list, a sign that it understood its role as designing a deal in Congress as much as it was making a neutral assessment. See Steven G. Koven, *Base Closing and the Politics-Administration Dichotomy Revisited*, 52 PUB. ADMIN. REV. 526, 529-30 (1992) (noting that, for instance, base closings were targeted in less than a majority of districts).

<sup>68</sup> Congress also closely monitored the staff of the Commission, limiting the number of staffers who had worked for the Department of Defense who could serve or hold specific positions. Former or current members of Congress were selected to chair the first four Commissions (the 2005 round was chaired by a Secretary of Veterans Affairs who had previously been a Senate staffer.) Meyer, *supra* note \_\_, at 401-404; Becker, *supra* note \_\_, at 27;

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The independence of the Commission also provided Members with an added benefit. Members could take credit for voting against individual decisions without imperiling their own or their party’s reputation on defense matters. Members testified in front of the Commission and made a point of trying to protect their district’s bases. More importantly, the losers in front of the Commission – the Members who had districts closed – could vote in favor of the Joint Motion to Disapprove. What they could not do, however, is engage in any horse-trading with other Members, as it was an up-or-down vote. This meant that losers each time could engage in symbolic protest without upending the overall benefits to the country from eliminating military inefficiencies. Sen. Phil Gramm argued from the start that this was one of the best features of BCRA – the ability of members to take credit for opposing the decision of the Commission in a way that would not affect the result. “I come up here and say, ‘God have mercy. Don’t close this base in Texas. We can get attacked from the South. The Russians are going to attack Texas. We need this base.’ Then I can go out and lie in the street and the bulldozers are coming and I have a trusty aid there just as it gets there to drag me out of the way. All the people ... will say ‘You know, Phil Gramm got whipped, but it was like the Alamo. He was with us until the last second.’”<sup>69</sup>

The structure of the decision-making process thus allowed Congress to pass laws that served a general interest in national defense against opposition from geographically concentrated groups (and it was attractive enough that they did it on five separate occasions.) Further, it did so without forcing the Members who represented the areas that lost to bear the downside risk of actually voting against the interests of their community.

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<sup>69</sup> As quoted by Twight, *supra* note \_\_, at 92

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### **B. Trade Balancing: Reciprocity and Fast Track as Methods to Generating Interest Group Support for Reducing Trade Barriers**

International trade is considered the classic concentrated-cost dispersed benefit policy area.<sup>70</sup> It is likely the most widely agreed-upon belief in modern economics that tariffs and other trade barriers are economically harmful.<sup>71</sup> However, the benefits of removing tariffs fall relatively equally to all consumers of imports, benefiting everyone a little bit. In contrast, there are entities and groups that are severely harmed when tariffs are removed, specifically the firms and workers in industries that compete with imported goods. While the costs are smaller in welfare terms than the benefits, this distribution of costs and benefits creates a political problem. Those who are harmed have an incentive to spend resources to fight reductions in tariffs or other trade barriers, while those who benefit do not. The political economy of trade, the story goes, is as slanted towards protectionism as the economic story is in favor of free trade.

The story, though, has a problem. The United States has approved dozens of trade deals since the last major outburst of protectionism in the 1930s and has historically low tariffs and non-tariff trade barriers.<sup>72</sup> With a few notable exceptions, U.S. policy can be described as pro-free trade. If the political economy of trade is so weighted in favor of protectionism, why are protectionist policies the exception rather than the rule? One

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<sup>70</sup> It is so classic that it forms part of the basis for discussing policy in these terms in the work of Olson, Pareto and Schattschneider. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES*, 118-45 (1982); VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* 379 (1927); E.E. SCHATTSCHEIDER, *POLITICS, PRESSURES AND THE TARIFF* 127-28 (1935). See also MICHAEL J. GILLIGAN, *EMPOWERING EXPORTERS: RECIPROCITY, DELEGATION AND COLLECTIVE ACTION IN AMERICAN TRADE POLICY* 4 (1997)

<sup>71</sup> See Bryan Caplan, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 69 (2007) (showing that economists overwhelming support increased reductions in trade barriers); DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 4 (2009) (noting overwhelming support for free trade among economists.)

<sup>72</sup> GILLIGAN, *supra* note \_\_, at 1-2.

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answer to the question lies in the legislative procedure that governs trade deals. Two procedural rules have helped determine the shape and speed of American trade liberalization: reciprocity and fast track.

In the forty years leading up the Great Depression, Congress regularly increased tariffs and decreased them substantially only once, in the Underwood Act of 1913, when the Democrats (the party that was more pro-free trade at the time) controlled both Houses of Congress and the Presidency.<sup>73</sup> Despite its infamy, the Smoot-Hawley Tariff of 1930 was merely the last in a generation of protectionist measures.<sup>74</sup> Notably, trade politics prior to the Depression were based in Congress and involved unilateral decisions to reduce or increase tariffs. Neither the President nor the concerns of foreign countries were given particular deference in this area, and as such there were only two small trade agreements signed between 1890 and 1930.<sup>75</sup> After all, the Constitution gives Congress, not the President, the power to regulate trade.<sup>76</sup> Further, viewed solely from the perspective of economic welfare, there is no reason to link domestic tariff reduction to foreign tariff reduction. Basic economic theory suggests that reducing tariffs is good for

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<sup>73</sup> The Underwood Act of 1913 is a classic case of delegation to party leadership. After President Wilson put an enormous amount of political capital into the fight, including both a great deal of personal lobbying of Senators and the first Presidential address to Congress in more than 100 years, the Democrats drafted the legislation in caucus. When it came to the floor, it did so under a closed rule, which meant no amendments could be offered. This allowed a joint vote rather than a series of individual ones, avoiding potential cycling. Along with a big push from the President, this was enough to allow the bill to pass, despite intense lobbying by import-competing industries. GILLIGAN, *supra* note \_\_, at 62-67.

<sup>74</sup> Its infamy has to do with when it was passed, just after the beginning of the Great Depression. Further, it was the first in a world-wide series of tariff increases. However, there are reasons to believe that other countries – beset with the same political economy problems as the United States – would have increased their tariffs anyway. Irwin, *supra* note \_\_, at 13-17.

<sup>75</sup> These were agreements with Cuba and Hawaii. See Douglas Irwin, *From Smoot-Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s* in THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY 10 (Michael Bordo, Claudia Goldin, and Eugene White eds. 1998). In a few of the trade bills of this period, the President was given power to either raise rates in response to foreign increases in tariffs, or in one bill, to lower them in response to foreign cuts (although this power was never used.) *Id.* at 11-12.

<sup>76</sup> U.S. Const. Art. I, § 8, cl. 3.

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the country that reduces them. Trade deals, although now the standard form for liberalization, are an odd form of agreement, in which countries agree to do something that is good for themselves only if another country will do the same. As we will see, the need for reciprocity is based on domestic politics.

When power swung to the more-pro-free trade Democrats in 1932, they did not merely reduce tariffs as they had done in 1913. Instead, they passed the Reciprocal Trade Agreement Act (RTAA), which gave the President the power to enter into agreements with foreign countries to reduce tariffs unilaterally and without the possibility of Congressional veto.<sup>77</sup> The tariff reductions would be granted to all countries given most favored nation status. However, Congress granted the President this power only for three years, on a renewable basis.<sup>78</sup>

The RTAA, which was renewed on a repeated basis until the 1960s, allowed the President to negotiate deals that served to reduce tariffs somewhat before World War II and then substantially as part of the General Agreement on Tariffs and Trade following the War.<sup>79</sup> Agreements between 1947 and 1963 did little to effect tariff rates, although the combination of an absence of increases and inflation had the effect of reducing *ad valorem* rates during this period. The Trade Expansion Act of 1962 (TEA), however, further enhanced Presidential power, giving the President the authority to reduce tariffs across products instead of by trading concessions on particular products, and allowing him to eliminate tariffs that were lower than 5%.<sup>80</sup> This led to the so-called “Kennedy

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<sup>77</sup> Act of June 12, 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. § 1351 (2006)). See GILLIGAN, *supra* note \_\_, at 70-73; Irwin, *supra* note \_\_, at 19-26.

<sup>78</sup> Irwin, *supra* note \_\_, at 24.

<sup>79</sup> *Id.* at 26-32.

<sup>80</sup> GILLIGAN, *supra* note \_\_, at 76

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Round” of tariff reductions under the GATT, which slashed tariffs to the point where they were no longer an important restriction on trade.

One reason why the RTAA and the TEA were so successful in reducing tariffs is that they empowered the President, who, with his national constituency, is generally considered more pro-free trade than Congress, which has members representing areas that are severely harmed by tariff reduction who can horse trade for more general support. This, however, merely begs the question of why a protectionist Congress would agree to empower to President. The answer lies – as Michael Gilligan argues in his excellent book *Empowering Exporters*– in its requirement of reciprocity.<sup>81</sup> Until the RTAA, exporters had little reason to care about import tariffs. However, exporters desperately wanted to see reduced tariffs abroad, particularly after the harsh round of tariff increases by countries around the world that followed the U.S.’s passage of the Smoot-Hawley tariff in 1930.<sup>82</sup> The RTAA gave the President a tool to achieve this, but the same tool served to reduce domestic tariffs. Thus, the RTAA tied the fates of exporters to the fates of import consumers, ensuring there were concentrated interests in favor of trade deals to combat the concentrated interest groups opposed to them.

The requirement that the RTAA be reauthorized every three years helped solve the principal-agent problem inherent in all delegations. A President who wanted to keep his negotiating authority would only agree to deals that served the ends of Congress, and would thus negotiate sets of tariffs decreases and foreign concessions that, by picking up enough exporter support to offset import competing industry opposition, could get

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<sup>81</sup> *Id.* at 2-13. 70-78.

<sup>82</sup> Irwin, *supra* note \_\_, at 18. There is a long debate about whether Smoot-Hawley caused a cascade of retaliatory tariff increases or whether countries merely used Smoot-Hawley as an excuse to do something they had planned on doing regardless of U.S. policy.

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majority support in Congress. Unsurprisingly, renewals of trade authority received overwhelming support from exporters.<sup>83</sup>

Thus, instead of simply reducing tariffs only to see them increased when the pro-trade coalition lost power, the proponents of the RTAA realized that they needed to change the political economy of trade. They changed trade politics by creating a linkage between the issues of groups that were previously treated separately. The RTAA thus guaranteed a constituency in favor of reduced tariffs with real political muscle. By controlling the order and shape of trade votes, the RTAA moved Congress from regularly anti-free trade majorities to regularly pro-free trade majorities. By the 1960s, both political parties were pro-free trade, a sign that the structure of free trade votes had shifted the politics substantially.<sup>84</sup>

By 1973, when the next round of GATT trade negotiations began, U.S. tariffs were so low that were no longer a major trade issue.<sup>85</sup> Instead, “non-tariff barriers,” like trade subsidies and regulations that served to harm foreign exporters, were the biggest limitations on international trade. These policies came closer to the core of Congressional policy-making and Congress was unwilling to simply delegate them to the President. Further, exogenous shocks to American industry like the oil crisis of 1973 and changes in the terms of trade had made key industries, like steel, automobiles and electronics, extremely sensitive to import competition. Labor unions, who had supported the TEA, opposed giving the President new negotiating power for trade deals.<sup>86</sup> Further,

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<sup>83</sup> GILLIGAN, *supra* note \_\_, at 73-77.

<sup>84</sup> Irwin, *supra* note \_\_, at 35-36

<sup>85</sup> GILLIGAN, *supra* note \_\_, at 77.

<sup>86</sup> *Id.*

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both major parties were – and remain – divided on trade issues, with substantial protectionist elements inside each party.

Even so, and despite his weakened political status at the time, President Nixon requested and received new trade authority in the form of the Trade Act of 1974.<sup>87</sup> The form of the authority changed, however. Instead of negotiated cuts being enacted automatically, each new trade deal would come up for a vote in Congress. However, these votes would be done on a “fast track” basis, which required an up-or-down vote on the package the President presented to Congress, with no amendments and no filibuster. The agreements struck by the President during the Tokyo round of GATT negotiations were approved in the Trade Agreements Act in 1979 by large margins using the fast track procedure. All trade deals since – both regional trade deals like the North American Free Trade Agreement and the most recent multilateral agreement, the Uruguay Round, which created the World Trade Organization – have used fast track authority. (In 2007, fast track authority expired, although deals signed before 2007 will use the procedure.<sup>88</sup>)

Fast track was essential to developing the lobby in favor of each of these deals. Tying the vote for reduced trade protection in other countries to our willingness to reduce domestic trade barriers serves as a clear example of extra-congressional procedure.<sup>89</sup> Congressional leadership has difficulty building a coalition on trade, as the parties have strong internal divisions on trade issues. By requiring that there be only one vote, on a package designed by the President in negotiation with other countries, fast track ensured that exporters would lobby in favor of trade deals. Had amendments been allowed,

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<sup>87</sup> *Id.*

<sup>88</sup> C. O’Neal Taylor, *Of Free Trade Agreements and Models*, 19 *IND. INT’L & COMP. L. REV.* 569, 595 (2009); David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 *ARIZ. J. INT’L & COMP. LAW* 7, 20-22 (1995)

<sup>89</sup> GILLIGAN, *supra* note \_\_, at 77-85; BECKER, *supra* note \_\_, at 77-85.

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exporters might not lobby against amendments that did not concern them, like tariff increases. Further, the design of the package by the President is made with domestic political concerns in mind. For instance, Robert Strauss, the negotiator of the Trade Agreements Act, specifically asked for and received concessions on tobacco products from other countries in order to woo Senators in Kentucky who were worried about the effect of reduced tariffs on alcohol products.<sup>90</sup>

Fast track procedure involves delegating to the President the power to design a package deal that will get a majority in Congress, on the assumption that the President will negotiate for deals that will bring on enough exporter support to offset increased import-competing industry opposition. By barring amendments, fast track ensures that import-competing industry supporters cannot propose alternatives that may be more preferred by Congress. That is, it gives agenda-setting control to the most pro-free trade actor in the system – the President – on an issue on which this likely cycling between various pro-free trade and protectionist preferences.

Further, fast track had many elements that were designed to ensure that the delegation of power to the President was not abused. First, like the RTAA, it had to be re-authorized every few years. However, it required a majority vote on each deal rather than merely let Presidential agreements stand. Also, in 1988, Congress created a procedure to revoke fast-track authority quickly through simple majority votes.<sup>91</sup> Congress decided to hold mark-up sessions on trade deals, which allows them to add side-deals that do not change the terms of the agreement, but does allow Congress (and

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<sup>90</sup> GILLIGAN, *supra* note \_\_, at 78.

<sup>91</sup> BECKER, *supra* note \_\_, at 82

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the President) to pay off certain members for their support.<sup>92</sup> These methods ensured that the President negotiates deals that actually will receive majority support in Congress. The President has agenda-setting authority, but cannot abuse it because Congress is watching very closely.

Free trade is the classic policy area where the ability of concentrated interests to lobby is supposed to defeat more general interests in low tariffs. However, the United States has very low trade barriers. One central reason for this is extra-congressional procedure, specifically delegating to the President the power to negotiate deals that balance exporter support against import-competing industry opposition in a way that will get through Congress. It serves as an example of how such procedure can be used to create majorities through enlisting interest groups into fights in which they otherwise might not engage in.

### **III. Can Land-Use Benefit From Extra Legislative Procedure?**

The stories of base closings and reciprocal trade agreements suggest that extra-legislative procedures can play a critical role in controlling concentrated interests. Are there any lessons here for land-use regulation and its apparent need to control the power of neighborhoods to defeat a dispersed interest in housing? We think that extra-legislative procedures not only could play but *have already played* an important role in solving coordination problems in local legislatures as well as insuring that geographically concentrated interests do not go unchallenged.

As we note in Part III(A)(1), the idea of using extra-legislative actors to bundle zoning issues is at the core of so-called “fair share” methods for apportioning affordable housing or other locally undesirable land uses (“LULUs”) among different communities.

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<sup>92</sup> *Id.* at 83.

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Such “fair share” systems of decision-making are essentially similar to the base-closing commission’s bundling of base-closings for an up-or-down vote of Congress. Agencies like the Council on Affordable Housing (“COAH”) in New Jersey enforce “fair share” rules in much the same way as the base-closing commission enforced criteria for base-closing – as a mechanism for coordinating members of the legislature by spreading the costs of LULUs in an even-handed way over members’ districts.

Taking a cue from the “fast-track” method of bundling domestic and foreign tariff reductions, we offer a second form of extra-legislative zoning procedure in Part III(A)(2) – the bundling of up- and down-zoning proposals to prevent the net reduction of a jurisdiction’s “zoning envelope.” To our knowledge this second procedure has not yet been used by local governments, but we note that it has some of the same advantages of executive bundling in the context of free trade: It would delegate to the planning commission – an administrative body under the mayor’s control – the task of tying together restriction and de-regulation of housing, thereby pitting neighborhoods against each other that seek to shrink the zoning envelope. If the legislature can effectively commit itself to voting for the bundle of regulatory and deregulatory proposals as a package on a single up-or-down vote, then neighborhood groups will be arrayed on both sides of the proposal, as neighborhoods slotted for up-zonings will thereby become enlisted in the fight against down-zonings.

In Part III(B), we refine our idea of matching down-zonings with up-zonings, showing that the device of “housing impact assessments” designed by the planning commission to bundle down-zonings with up-zonings could be an effective and legally

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acceptable way to force the legislature to consider the dispersed interest in siting housing in the most appropriate neighborhood rather than simply excluding housing altogether.

### **A. “Fair Share” and “Zoning Budgets”: Protect Dispersed Land-Use Interests Through Legislative Procedure**

Consider, first, how two different zoning procedures – one old and familiar, and one novel and untried – bear a close analogy to the issue-bundling in base-closing and tariff treaties. The first is the “fair share” procedures used under *Mount Laurel* doctrine and the New Jersey Fair Housing Act by which some judicial or executive agency creates a package of “up-zonings” that become the default rule for allocating affordable housing among different New Jersey communities. The second is “the zoning budget,” a procedure of our own invention: It consists of a requirement that the planning commission recommend disapproval of any down-zoning unless it is matched with an up-zoning of equal magnitude. We argue that “fair share” is a species of the “cost-spreading” procedures of which the base-closing commission is an example – a device by which legislatures can overcome coordination and collective action problems. The zoning budget is a species of “conflict-inducing” legislative procedures of which the “fast-track” procedure for reciprocal tariff treaties is an example: Like “fast track,” the “zoning budget” has the advantage of pitting well-organized interests against each other in the interests of finding the ideal location for new housing.

#### **1. “Fair share” requirements as a cost-spreading extra-legislative procedure**

“Fair share” requirements are most familiar from the *Mount Laurel* litigation in New Jersey. Starting in 1975, the New Jersey Supreme Court construed the state

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constitution to require that each local government in New Jersey accommodate its fair share of the regional need for affordable housing in its zoning ordinance. To calculate these shares, the *Mount Laurel II* Court held in 1983 that three lower state courts, using experts in urban planning, would devise formulae for apportioning the regional need for affordable housing by calculating each community’s share of its region’s land, employment, substandard housing, and population. With the New Jersey Fair Housing Act of 1985, the New Jersey legislature delegated this apportioning function to a state-wide agency, the Council on Affordable Housing (“COAH”). A twelve-person agency appointed by the governor with the advice and consent of the state Senate, COAH has detailed statutory guidelines and procedures by which to calculate each community’s share of the regional need; COAH’s certification of a community’s land-use plan and zoning resolution creates a rebuttable presumption that the community satisfies the constitutional requirements of *Mount Laurel*.

It is not hard to see how COAH’s bundling of different communities’ “fair share” obligations into a single state-wide plan solves a coordination problem in the state legislature. The concentration of poverty and substandard housing in a handful of dilapidated and near-bankrupt cities like Camden and Newark has costs for the state, in terms of peer effects depressing employment and school performance. In order to avoid these peer effects, each New Jersey citizen might prefer that every New Jersey local government, including their own local government, forego their power to exclude all such housing from their territory over the world in which each local government could exclude all such housing. The worst possible world, however, would be that in which one’s own community allowed affordable housing while every other community did not, for, in such

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a case, the peer effects of concentrated poverty would remain, but the non-exclusive community would bear any fiscal or social costs of hosting low-income households. Because monitoring of other communities’ zoning behavior is costly, local governments acting individually might adopt a position of total exclusion. The state legislature could attempt to apportion low-income households among communities, but each legislator would be tempted to adopt standards that would exempt as much as possible their own electoral district from such an obligation. Assuming that the limits on local zoning authority would be complex, the possibilities for log-rolling to thrust housing obligations on different areas of the state are legion. If the leadership of the major political parties did not take any clear position on how affordable housing should be apportioned, then instability in the legislature might lead to the legislature’s simply refusing to address the issue of zoning – which seems to have been the approach of the state legislature before the New Jersey Supreme Court forced the legislature confront the issue. After *Mount Laurel II* seemed to threaten each local government with a judicially calculated “fair share” of housing, the state legislature delegated definition of the “fair share” to the COAH, consisting of a mix of developers, housing advocates, and suburban mayors.

Why did the state legislature transfer responsibility for enforcing *Mount Laurel* from the courts to an executive agency? The obvious answer is that the legislature and governor have greater collective control over COAH than of the courts. Justices serve seven-year terms, subject to Senate confirmation and gubernatorial re-appointment, but strong norms favoring re-appointment of justices give the court substantial – albeit not complete – independence from the political branches.<sup>93</sup> Moreover, the court need not

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<sup>93</sup>Richard Perez-Pena, *Christie, Shunning Precedent, Drops Justice From Court*, N.Y.TIMES, May 3, 2010 at B1.

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contain representatives of suburbs and central cities, nor need it be balanced among the two major political parties. There is a danger, therefore, that the COAH might not be a faithful agent of the entire legislature. By contrast, COAH’s members must include both big city and suburban elected officials as well as equal numbers of Republicans and Democrats.<sup>94</sup> COAH, therefore, poses less of a risk that it will disregard the interests of any region or party within the legislature. Moreover, because COAH owes its very existence to the state legislature, it is more amenable than the state supreme court to anticipating and adopting likely legislative reactions to “fair share” calculations.<sup>95</sup>

Perhaps as a result, COAH’s estimates of regional needs for affordable housing have been persistently criticized by advocates of affordable housing as too low.<sup>96</sup> This criticism, however, hardly indicates that COAH has fallen prey to the parochial forces that it is supposed to supersede. Instead, it might be that the median legislator in the New Jersey state legislature believes that the amount of affordable housing necessary to avoid the costs of excessive zoning restrictions is much lower than the preferences of housing advocates. In effect, the COAH operated as an impartial and transparent agent for the legislature, spreading the costs of affordable housing in ways that avoid a scramble among legislators to form unstable burden-shifting coalitions.

COAH is not unique: The City of New York has used a roughly analogous method for apportioning LULUs among boroughs to insure that low-income neighborhoods do not have to bear more than their “fair share” of noxious facilities like

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<sup>94</sup> N.J. Stat. 52:27D-305(a)-(b).

<sup>95</sup> Because the agency’s assessments of regional need may have been too aggressive for New Jersey localities, local governments have recently pressed for COAH’s elimination, a demand that recently elected Governor Chris Christie seems eager to satisfy. Lisa Fleisher, Gov. Chris Christie proposes eliminating affordable housing quotas, fees, N.J.com, Thursday, May 13, 2010, available at [http://www.nj.com/news/index.ssf/2010/05/gov\\_chris\\_christie\\_proposes\\_el.html](http://www.nj.com/news/index.ssf/2010/05/gov_chris_christie_proposes_el.html)

<sup>96</sup> See, e.g., DAVID L. KIRP ET AL, OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 147 (1995).

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bus depots. As in New Jersey, the city charter delegates the task of working out criteria for siting to an agency – the City’s Planning Commission – while the implementation of the criteria is given to various executive agencies in charge of different categories of LULUs.<sup>97</sup>

There is one salient difference between the COAH and the base-closing commission: The state legislature is not bound to vote up-or-down on the COAH’s package of “fair share” decisions but instead could amend that package simply by amending the New Jersey Fair Housing Act of 1985. The state legislature, however, has not revised COAH’s rules in an ad hoc manner, preferring instead to stay out of the housing fray even when loudly criticizing COAH’s performance. Instead, the state legislature has used the cruder mechanism of threatening not to re-appoint judges or council members to keep COAH in check. The great virtue of these general control mechanisms is that they avoid the collective action problem that fine-tuned amendments of “fair share” rules would create. Given this legislative self-restraint, both the courts and the agencies are well-suited to act as coordinating devices for resolving collective action problems faced by the state legislature.

Why have individual members of the state legislature not attempted to tinker with the package of “fair share” calculations handed down by either COAH or the courts? One reason might be that the apparent neutrality of COAH’s procedures and decisions provide political cover for individual legislators similar to that provided by the base-closing commission. Just as U.S. Senator Phil Gramm can win plaudits from his constituents by threatening to lay down in front of the bulldozers to stop them from

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<sup>97</sup> See Section 203 of the 1989 City Charter, requiring the City Planning Commission to adopt criteria "to further the fair distribution of the burdens and benefits associated with city facilities....".

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destroying a military base, so too, individual legislators can rail against COAH while refraining from rolling logs to unravel COAH’s bundles of “fair share” calculations. In this sense, COAH’s calculations are self-enforcing, because they provide a salient focal point on which legislators can avoid eternal cycling. No one wants to disturb the norm of having some number of *Mount Laurel* units thrust upon one’s suburb by the agency for fear that the alternative would be the instability of ever-shifting regional coalitions of legislators trying to shift the burden of affordable housing on to their neighbors.

### **2. Maintaining a “zoning budget” by offsetting down-zoning with up-zoning**

COAH’s packaging of multiple upzoning decisions into a single bundle solves a collective action problem faced by a state legislature that lacks strong partisan leadership on the question of siting affordable housing. However, a legislative rule designed to increase housing generally has to defeat the general preferences on the part of all homeowners for increased housing. We offer a second sort of extra-legislative procedure as a way of not merely solving coordination problems in the legislature but also inducing conflict among well-organized interest groups. We call this proposal “the zoning budget balance bill.”

As with other extra-legislative procedures, our proposal begins with a delegation of agenda-setting power to some administrative agency – most plausibly, the city’s planning commission. The planning commission would be charged with setting an overall annual zoning “budget” for the city consisting of the optimal increase (or theoretically, a decrease) in the number of housing units within the city or the number of potential units permitted by the zoning envelope. The planning commission would also

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be charged with devising a ratio of up-zonings to down-zonings in light of its zoning “budget.” So long as the City’s housing stock (or zoning envelope) fell below this housing target, the planning commission would prohibit map amendments reducing the number of housing units unless those amendments were matched at some set ratio by an up-zoning elsewhere. If the budget was positive, this ratio would have to be above 1, so that each approved down-zoning would result in more housing. The ratio would apply until sufficient new projects had been approved to meet the number called for in the budget. After that point, all down-zonings or denials would be offset at a ration of one to one. This package would be voted on, up or down, by the local legislature, subject to a closed rule, just like “fast track” for trade deals.

Once the budget was passed, the law would establish a procedure for considering zoning changes. For each proposed map amendment re-zoning city land, the agency would present a package of down- and upzonings to the local legislature, and the legislature would be required to accept or reject the entire package without uncoupling the two decisions (the package would include as many upzoning relative to downzonings as are called for in the ratio adopted in the budget). Supporters of the down-zoning – typically, neighborhood activists seeking to preserve community character – would be forced to identify and defend a potential and suitable up-zoning in some other neighborhood, thereby becoming advocates for new building. Likewise, the residents of that alternative neighborhood would have an incentive to lobby for maintaining housing in the area of a proposed down-zoning, by pointing to the relative unsuitability of their own area for more housing. In this way, the down-zoning/up-zoning ratio would have the effect of enlisting interests that normally fight against housing proposals to lobby for

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housing in competing neighborhoods. The idea would roughly analogous to “pay-as-you-go” budget rules designed to force advocates of new spending programs to identify cuts in other spending programs that would eliminate the budgetary effects of the new proposed spending.<sup>98</sup> By pitting interests against each other, such rules insure that the relative merits of the interests’ rival proposals are brought to the legislature’s attention.

Such a proposal might have some of the same conflict-inducing features as a “fast track” procedure allowing the President to bundle together domestic and foreign tariff reductions. Just as exporters become advocates for reducing domestic tariffs not because they care about consumers but merely because they want to obtain access to foreign markets, so too, the residents of neighborhoods proposed for up-zoning would lobby to preserve housing opportunities elsewhere, while the residents seeking a down-zoning would lobby for expanded housing in the former residents’ neighborhoods.

This could work to create a permanent coalition in favor of an increased housing stock. Developers would be given new allies, specifically the communities most interested in down-zonings, who would lobby together and hence create a powerful coalition in favor of new projects. It would also ensure competition among down-zoning projects, with Councilmembers’ willingness to fight for their projects serving as a proxy for the true value of a down-zoning.<sup>99</sup> Further, as the matching procedure would provide

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<sup>98</sup> Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 510 (1998).

<sup>99</sup> This only works if the competition is a function of a Councilmember’s willingness to fight and not of some other difference, like the political influence of residents. For this to work, some mechanism would have to be created to ensure that the process did not result in matching downzonings of high value properties with upzonings in politically weaker poorer areas. Another problem that could arise would be if upzoning were proposed in areas that were not suitable for new housing. One solution to these problems would be a rough “like for like” requirement, under which the planning commission could only offset downzonings with upzoning in areas where likely development would result in housing of roughly the same value as the downzoned housing (say from 50% to 150% of the value). This would permit useful trades

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a political outlet, the system as a whole would be at least modestly secure against truly unpopular denials of down-zonings.

The analogy to “pay-as-you-go” budgeting, however, suggests an immediate difference between reciprocal trade agreements and proposals to link down- and up-zonings. Like such budgeting, the proposed zoning procedure linking upzoning and down-zoning might be easily waived by the very legislature that it is supposed to constrain. There is a causal and temporal relationship between foreign and domestic tariff reductions: Exporters cannot get the benefit of the former without the latter, regardless of how Congress votes, because foreign governments will not give the United States something for nothing. It would, therefore, be impossible for exporters to sever the foreign from the domestic tariff reductions and lobby just to obtain the former, ignoring the latter. By contrast, developers practically can obtain an up-zoning without lobbying for a down-zoning elsewhere, and, but for the proposed bundling rule, neighbors seeking a down-zoning need not obtain an up-zoning. The temptation, therefore, will be great for both developers and neighbors to lobby the local legislature to waive the procedural rule whenever it threatens to derail their zoning agendas. If the rule were routinely waived, then it would not induce neighbors to lobby for housing; They would, instead, lobby for waiver of the rule.

The challenge of the offset mechanism in our “zoning budget,” therefore, parallels the challenge of PAYGO budgeting procedures: There needs to be a rule, norm, or institutional mechanism for entrenching the bundling of up- and down-zonings. In the

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between downzoning and upzonings without permitting phantom offsets or dumping upzonings in poor areas.

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following section, we fill in the details of the “zoning budget” system, explaining why we believe that this challenge is surmountable.

### **B. Housing Impact Assessments as a Mechanism for Making the “Zoning Budget” Credible**

In crafting a detailed proposal for a zoning budget, we are guided by the example of both the base-closing commissions and Presidential treaty negotiation. In both cases, the institution’s transparency and credibility as an honest broker for legislative interests can induce the legislature to refrain from unbundling the institution’s packages of issues. Likewise, the institution’s capacity to mobilize groups to support the entire package can deter the legislature from picking apart the package for the sake of those mobilized group’s rivals.

The ordinary zoning process in place in most American cities offers the ingredients for such an extra-legislative bundling process. The planning staff and planning commission certainly have the tools to cultivate a reputation for bureaucratic impartiality. The members of planning commissions typically are appointed by mayors sensitive to the various real estate constituencies in the city.<sup>100</sup> Further, their decision making-process is transparent. Planning commissions typically must hold hearings before approving any proposals for zoning map amendments, and these hearings are generally well-attended when they affect the neighborhoods of persons having an equity interest in their homes or businesses. Moreover, standard zoning procedure includes devices for detecting and airing the views of any mobilized interest group. Section 5 of the Standard Zoning Enabling Act, for instance, provides that the owners of 20% of the

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<sup>100</sup> On the political character of planning commissions, see RICHARD F. BABCOCK AND CHARLES L. SIEMON, *THE ZONING GAME REVISITED* (1985); RICHARD F. BABCOCK *ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966).

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land within some defined number of feet of a proposed map amendment may protest the proposal, triggering a requirement that the proposal be approved by a super-majority. New York City’s Uniform Land-Use Review Procedure (“ULURP”) requires map amendments to undergo a gauntlet of public hearings before a community board as well as planning commission, assuring that politically attentive residents will register their protests before the proposal reaches the city council.

In short, there are numerous fire alarms built into the zoning amendment process to apprise legislators of substantial community opposition to any proposal. When the city’s planning staff initiates a zoning map amendment (usually at the behest of developers or neighborhood groups), the initial proposal is crafted with an eye to surviving this gauntlet. Like the President negotiating a package of tariff reductions, the planning staff and commission craft their package of zoning proposals with an eye to how it will be received by the legislature that must ultimately approve it.

Packages of upzonings and downzonings should have the same character: The planning staff should be expected to seek out land for compensatory residential upzoning that mobilizes the strongest interests in defense of the entire package. This would mean land that contains the weakest neighborhood groups but the strongest development interests. One would expect such land to be land with low residential densities but high residential value – say, old warehouses in an area that is gradually becoming “hip,” held by speculators capable of, and interested in, developing the land to capture this difference in current and future value.

The “zoning budget” process can magnify and direct these inherent incentives to organize effective coalitions in defense of upzoning. We suggest, as an example of such

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a mechanism, that the planning staff should be required to submit a “housing impact statement” with any down-zoning/up-zoning proposal, identifying not only the loss of housing resulting from any proposed down-zoning but also the quantity of housing likely to be produced by the proposed up-zoning. Such a statement would identify the developer(s) likely to propose this new housing, with the expectation that such a developer would submit plats, site plans, or other documentation indicating a readiness to develop the land in question. The planning staff would also identify the reasons why the proposed upzoning moved the land to a superior use and why failure to up-zone the land, when coupled with a down-zoning of another neighborhood, would endanger the local government’s overall housing goals.

It is likely that the danger that the local legislature would uncoupling the planning staff’s bundle of up-zoning and down-zoning proposals would emerge only if residents from the two affected neighborhoods made common cause with each other to resist new development in *either* neighborhood. The housing impact statement, however, would highlight the systemic effect of such resistance and force the local legislature explicitly to acknowledge abandonment of its own housing goals. Moreover, the housing impact statement’s assessment that the proposed up-zoning site was unsuitably zoned would be ammunition in the hands of the developer seeking to challenge that zoning as a violation of substantive due process or as inconsistent with the city’s own comprehensive plan. Such lawsuits seldom succeed before state courts, in part because the courts are reluctant to second-guess local officials’ own estimates of the proper timing for implementing the comprehensive plan.<sup>101</sup> The housing impact statement’s specific recommendation that

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<sup>101</sup>*Marracci v City of Scappoose*, 552 P.2d 552 (Or. App. 1976)

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the land be developed simultaneously with the down-zoning of other land would neutralize such grounds for deference.

The threat of judicial review would not, by itself, suffice to lock in the planning staff’s and commission’s coupling of the down- and up-zoning. Instead, the detailed factual findings in the housing impact statement, the ratification of the zoning-budget procedure by the local legislature itself, the lobbying by affected developers, and even the developer’s threat of a lawsuit to challenge down-zoning inconsistent with the zoning budget, would all induce the local legislature to characterize the bundling procedure as pre-existing legal standards the waiver of which would constitute a breach of “rule of law” values. It is unimportant that the local legislature be sincere in publicly renouncing such waiver for the sake of legal regularity. The important point is that the stigma of acting lawlessly would constitute sufficient political cover for local legislators to refrain from picking apart the bundle of up- and down-zoning proposals. To the extent that this coupling procedure becomes viewed as a given, exogenous to the political decision, the residents of the affected neighborhoods will have no choice but to oppose each other’s proposals rather than join forces to urge the uncoupling of the planning commission’s bundle of proposals. Each will argue that the other neighborhood is a more appropriate site for housing given the infrastructure, market demand, presence of industry or other nuisances, etc., providing information to the local legislature not only about their relative preferences but also their relative levels of political organization -- a critical factor for electorally minded politicians seeking information about the risks of alternative policies.

This proposal relies on assumption that Mayors and city planning staff will have a greater desire to promote new housing than Councilmembers. Like the President’s

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interest in trade liberalization, mayors tend to have a jurisdiction-wide perspective on the local government’s needs and housing shortages that drive up rents and drive off employers spell trouble for any incumbent running on the general economic performance of a city, town, or county. The planning commission tends to reflect the mayor’s agenda, being mayoral appointees. The incentives of planning staff in formulating the city-wide goals for a certain number of housing units are likewise likely not to be excessively shaped by neighborhoods, simply because such abstract proposals do not trigger neighborhood activism. Neighbors’ powers are rooted in their investment in particular places and they face the same collective action problems confronted by any other group in trying to mobilize their members to monitor general policy-making not targeted at specific neighborhoods.

As noted in Part I, a mayor cannot effectively overcome neighborhood opposition through sheer brute force of executive order. Like President Nixon’s base closure decisions, any such power would run the risk of being used to reward allies and punish enemies in ways unrelated to city welfare. But trusting the mayor’s planning commission with agenda-setting power allows the local legislature to advance dispersed interests without giving up all power to a potentially untrustworthy agent.

In sum, the planning commission and staff could perform the same role as the President in tariff negotiations, bundling proposals to assemble maximum political support. The powers here urged for the planning commission are not remote from the sorts of powers that such commissions typically exercise. Environmental impact

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statements can and do contain assessments of effects on housing.<sup>102</sup> Extending this requirement to include the effects of down-zonings as well as up-zonings is hardly revolutionary. Likewise, such statements typically require some reference to mitigation of harmful effects, including off-site mitigation. Including up-zoning proposals as part of such mitigation is not radically different from including recommendations of street widenings or traffic lights to mitigate, say, traffic effects. Planning staff and commissions typically assemble complex packages of zoning proposals pursuant to planned unit development ordinances.<sup>103</sup> One can think of the bundle of up- and down-zonings urged here as an extension of the idea of a planned unit development, in which open space in one part of the development is offset by clustered housing elsewhere. Finally, the idea that zoning ought to be consistent with a comprehensive plan reflecting the city’s overall development goals is hardly novel, being embodied not only in the text of the earliest zoning legislation but also the exhortations of generations of land-use scholars. The “zoning budget’s” overall housing goal is merely a specific instance of using city-wide goals to discipline piecemeal neighborhood-by-neighborhood decisions.

Where this proposal differs from past approaches is its underlying case for such planning and bundling. The point of our proposal is to re-align interest group incentives rather than bring planning expertise to bear. We hold no illusions that planners are omniscient in their prescriptions for city development. Instead, we urge a greater role for executive agencies in agenda-setting simply because such bundles show promise of inducing interest group conflict that might break the impasse over enlarging a city’s

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<sup>102</sup> *Chinese Staff & Workers Ass’n v. City of New York*, 502 N.E.2d 176 (N.Y. 1986) (holding that environmental impact statements required by state law must assess gentrification effects of new development).

<sup>103</sup> See generally Symposium, Planned Unit Development, 114 U. PA. L. REV. 1 (1965).

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zoning envelope. Similar mechanisms have liberalized trade and shut down obsolete military bases. It might be time to experiment with extra-legislative procedures in zoning politics.

### **IV. Conclusion: Can Extra-Legislative Procedure Solve Other Urban Problems?**

States bar cities from engaging in policy making on private law topics – tort and contract law – and limit the taxing power cities would need to engage in Pigouvian tax and subsidy policies to address externalities.<sup>104</sup> As a result, cities rely on zoning and regulatory exclusion to achieve all sorts of policy goals that would be more easily and efficiently addressed through ordinary regulatory or tax policy.

Forcing cities to use suboptimal tools pretty clearly results in worse policy making. This paper shows that using land use, as opposed to other regulatory tools, has a political cost as well. Land use decisions are often effectively made at the very local level, as it is difficult for city-wide policy-makers to get information about local nuisances. Further, as a matter of practice, local land use are usually made one-by-one, rather than as a package. This leads to the same dynamic discussed in this paper, local protectionist interests winning to a greater extent than they would in city-wide votes. Unlike subsidies or taxes, which affect a common budget, regulation through zoning is difficult to observe for outsiders and is made through a procedure that limits interest group competition in service of common goods.

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<sup>104</sup> See RICHARD BRIFFAULT AND LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 365-8 (West 7th ed 2009); Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 272-73 (2010) (discussing how tax rules and limits on ability to change private law forces cities to use inefficient means of subsidizing urban manufacturing).

## *Balancing the “Zoning Budget”*

If regulation through zoning causes similar problems in other policy areas as it does in housing, something like the proposal we suggest in this paper could help cities address all sorts of quality-of-life disputes. For instance, a city-wide decision on the “budget” for liquor licenses to hand out and a requirement of matching denials with new approvals would force local protectionist groups to compete with one another for keeping the kids out without excessively limiting the ability of city residents to get a drink.

To the extent the goal is to achieve the “conflict inducing” goal of mobilizing interest groups that usually take a pass on certain regulatory fights, the specific of each proposal would have to be tailored to the interest group alignment that prevailed on any issue. But the broader principal remain the same. As there is frequently a lack of political party competition, legislatures care little about problems with widely-shared effects, as there is no party brand to burnish by addressing them. In this context, ordinary legislative procedure fails to protect general interests. In this context, when reformers achieve political power, as they occasionally do, they should consider developing special forms of urban legislative procedure that will create stable coalitions of groups in favor of more widely shared interests. Extra-legislative procedure can help balance the dominance of the local and the parochial in urban politics, and it should become part of the tool kit of urban reform.