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ARTICLES

TURNING NEIGHBORS INTO NUISANCES

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TURNING NEIGHBORS INTO NUISANCES

Maureen E. Brady[*]

A reckoning for single-family zoning is underway. From Minnesota to California, cities and states are looking for ways to compel the densification of neighborhoods long devoted to large lots and detached homes. The bitter debates occasioned by these efforts expose a common source of homeowner opposition: worries about multifamily housing and, specifically, the apartment building. In that regard, little about land use law seems to have changed. The apartment was cited as an evil in the case that upheld zoning as a legitimate use of the state's regulatory power nearly a century ago. Beginning the story there, however, misses an important chapter. For decades prior, judges routinely declined to consider apartments undesirable neighboring uses that existing owners could prevent through private law. The legal history of the apartment demonstrates the important interplay between private forms of land use law — nuisance and deed restrictions or covenants — and the ways that these private land use controls influence the evolution of public regulation.

This Article uses a forgotten period in urban development to illustrate the critical interactions among forms of private and public law in identifying the proper subjects of land use control. In the early nineteenth century, a tool blending contract and tort proliferated: the nuisance covenant, a promise transmitted through deeds not to engage in specific noxious uses — an expanding list ranging from slaughterhouses to circuses to tenements — or any use deemed noxious in the future. This innovation offered benefits over covenant and nuisance law independently, as drafters were able to tailor the definition of nuisance while preserving flexibility to prevent unanticipated activities. And yet, the arrival of the apartment exposed the strong pull of traditional nuisance law: judges were hesitant to interpret restrictions to ban this new form of housing associated with the middle and upper classes. Lawyers and developers worked to identify apartments as problematic through newly drafted covenants and the concept of near-nuisance, paralleling arguments that would reemerge decades later as the proponents of zoning contended that it was within the state's police power to limit apartment construction. Nuisance and covenant law influenced how judges and other parties came to see uses as harmful and anticipated debates about the appropriate scope of regulation. This dialogue between private and public law is echoing in

[*] Assistant Professor of Law, Harvard Law School. This paper has benefited from workshop participants in the Harvard Law School Faculty Workshop, Duke University School of Law Faculty Workshop, Vanderbilt Law School Faculty Workshop, Southern Methodist University Law School Faculty Workshop, Harvard Private Law Workshop, Yale Law School Property Seminar, and the Boston Area Juniors' Roundtable. I am grateful for comments from Jack Brady, Danielle D'Onfro, Bob Ellickson, John Goldberg, Debbie Hellman, John Infranca, Liz Papp Kamali, Noah Kazis, Cynthia Nicoletti, Claire Priest, Carol Rose, Rich Schragger, Joe Singer, Henry Smith, Kristen Stilt, and Rory Van Loo and helpful discussions with Niko Bowie, Ben Eidelson, Chris Essert, Dan Farbman, Nolan Gray, Hiba Hafiz, Claudia Haupt, Louis Kaplow, Larissa Katz, Anna Lvovsky, Kevin Lyons, Phillip Morgan, Portia Pedro, Ezra Rosser, Blaine Saito, Stephen Smith, Lyle Solla-Yates, James Stern, Rebecca Tushnet, and David Waddilove. Chris Hall, Juan Palacio Moreno, Sasha Peters, Ross Slaughter, Natassia Velez, and the librarians at Harvard Law School provided outstanding research assistance, particularly in the midst of a pandemic that substantially increased the difficulty of acquiring materials. Lastly, I am indebted to the editors of the *Harvard Law Review* for their editorial suggestions. In memory of Anne Fleming, a role model for kindness and enthusiasm both in her love for those corners of private law that others might find dry and in her treatment of the everyday characters that form its history.

the twenty-first century, and private law continues to form an important, lurking limitation on land use reform.

INTRODUCTION

For the past several years, single-family zoning — local land use rules preventing anything but detached single-family homes from being built in certain geographic districts — has come under sustained attack.[1] This form of zoning is now widely perceived as a contributor to affordable housing crises, racial and economic segregation, environmental damage attending suburban sprawl, and even overall losses to the United States economy.[2] And yet, while state and local legislators from Oregon to Minnesota to California have begun trying to densify housing in America's cities and suburbs,[3] there remains significant opposition. On August 16, 2020, President Donald Trump and Secretary of Housing and Urban Development Ben Carson published a piece in the *Wall Street Journal* warning that left-leaning politicians want to "remake the suburbs" by compelling "high-density 'stack and pack' apartment buildings in residential neighborhoods."[4] Indeed, apartment buildings and other forms of multifamily housing are ground zero for the debate over zoning.[5] Inevitably, when residents or representatives of a single-family

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[1] *See, e.g.*, Michael Manville, Paavo Monkkonen & Michael Lens, *It's Time to End Single-Family Zoning*, 86 J. AM. PLAN. ASS'N 106 (2020); Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), https://nyti.ms/37QtS8Z [https://perma.cc/XE6V-QU88]; Tanza Loudenback, *America's Future Depends on the Death of the Single-Family Home*, BUS. INSIDER (Dec. 4, 2017, 1:50 PM), https://www.businessinsider.com/us-housing-crisis-homeownership-single-family-home-2017-12 [https://perma.cc/57B3-H3XH]; Gillian B. White, *How Zoning Laws Exacerbate Inequality*, THE ATLANTIC (Nov. 23, 2015), https://www.theatlantic.com/business/archive/2015/11/zoning-laws-and-the-rise-of-economic-inequality/417360 [https://perma.cc/VPH2-PPQC].

[2] In addition to the sources cited in the preceding footnote, see John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 825–27, 830–32 (2019); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 114–15 (2017); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1201–02 (2018); Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 542–43 (2020); Robert C. Ellickson, The Zoning Strait-Jacket: The Freezing of American Neighborhoods of Single-Family Houses 5–6 (Jan. 7, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507803 [https://perma.cc/3NRE-W2NG].

[3] *See* Badger & Bui, *supra* note 1 (summarizing recent legislative efforts).

[4] Donald J. Trump & Ben Carson, Opinion, *We'll Protect America's Suburbs*, WALL ST. J. (Aug. 16, 2020, 4:02 PM), https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133 [https://perma.cc/7GX3-LYL2].

[5] At the outset, it is worth noting that the definition of "apartment" — as contrasted with other forms of multifamily housing such as duplexes, townhouses, or condominiums — proves somewhat slippery. While a precise definition is not material to this Article (except insofar as it echoes the centuries-old definitional problems described in Part II), the term is typically associated with rooms

neighborhood oppose a change in zoning rules, the apartment is invoked as an inherently harmful neighboring use responsible for traffic, decreased school quality, noise, or a parade of other horribles.[6]

One could be forgiven for thinking it has always been this way. In *Village of Euclid v. Ambler Realty Co.*,[7] the 1926 Supreme Court case upholding zoning as a legitimate use of the state's regulatory power, the apartment already loomed large.[8] Although zoning was a substantial incursion on property rights, the majority opinion portrayed regulation as sensible harm prevention: in limiting the apartment to certain areas, for instance, it restricted "a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district."[9] In one of the most famous quotes from the case, the majority suggested that an apartment in a single-family neighborhood "may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard."[10]

Euclid has spawned hundreds of retrospectives,[11] and there is wide consensus that the key move in the case was to unmoor the government's police power from the common law of nuisance.[12] Nuisance is

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inside "a building containing several individual apartments" and often with leases rather than another form of ownership interest. *Apartment*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/apartment [https://perma.cc/T2GD-LQCJ].

[6] One could probably find a quote from public meetings in many urban and suburban municipalities. *See, e.g.*, Anthony Flint, *How to Block Multi-family Housing, Boston-Style*, BLOOMBERG: CITYLAB (June 19, 2019, 2:59 PM), https://www.bloomberg.com/news/articles/2019-06-19/how-to-block-multi-family-housing-boston-style [https://perma.cc/9GEX-CB4U] (discussing how ad hoc decisionmaking at city council and town meetings has enabled "NIMBY-minded residents" in the Boston area to delay multifamily housing); Megan McArdle, *Why Do People Oppose Development?*, THE ATLANTIC (Feb. 15, 2012), https://www.theatlantic.com/business/archive/2012/02/why-do-people-oppose-development/253123 [https://perma.cc/HFG6-QYQD] (discussing New York and Washington, D.C.).

[7] 272 U.S. 365 (1926).

[8] *Id.* at 387–88.

[9] *Id.* at 394; *see also id.* at 397.

[10] *Id.* at 388. For further discussion of this phrase's origins and legacy, see Michael Allan Wolf, *The Prescience and Centrality of* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 252, 257–59 (Charles M. Haar & Jerold S. Kayden eds., 1989).

[11] For representative examples, see ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP, *supra* note 10; David Callies, Village of Euclid v. Ambler Realty Co., *in* PROPERTY STORIES 401 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009); Richard H. Chused, Euclid*'s Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001); Eric R. Claeys, Essay, Euclid *Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731 (2004); Charles M. Haar & Michael Allan Wolf, Commentary, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002); and Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to* Village of Euclid v. Ambler Realty Co., 51 CASE W. RES. L. REV. 617 (2001).

[12] *E.g.*, SEYMOUR I. TOLL, ZONED AMERICAN 236–38 (1969); Chused, *supra* note 11, at 610–14; A. Dan Tarlock, Commentary, Euclid *Revisited*, LAND USE L. & ZONING DIG., Jan. 1982, at 4, 7–8; *see also* Commentary, Village of Euclid v. Ambler*: The Bettman Amicus Brief*, PLAN. &

the property tort involved when "one owner's use and enjoyment of property [unreasonably] interferes with the use or enjoyment of property by another";[13] it conjures images of a polluting factory next to a residential neighborhood.[14] Apartments and other uses targeted by early zoning laws were not generally considered legal nuisances,[15] although the lawyers in *Euclid* managed to portray them as close enough. The *Euclid* decision thus scuttled the idea that land use regulation was limited to suppression of legal nuisances, enabling communities through zoning to structure an affirmative concept of the public good. Of course, that public good was often defined by elites hostile to racial minorities,[16] the poor,[17] and even certain women and families,[18] and it carried the widespread economic and social consequences we now know.[19]

In this Article, I argue that an important preceding development foreshadowed the outcome in *Euclid*, one that conventional land use histories have ignored. And this important development occurred in an unexpected spot: not within constitutional jurisprudence, nor within natural law or political theory, but rather deep within private law, at the intersection of property, contract, and tort. Using perennially underappreciated source material — specifically, deeds and scattered state cases[20] — this Article demonstrates that cracks in the dominance of nuisance law were forming and widening for nearly a century by the time

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ENV'T L., Mar. 2006, at 3, 6–7 (reprinting the arguments in the amicus brief that inspired this move).

13 Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1151 (2020).

14 This is even cited as the canonical example in R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1 (1960).

15 *See infra* notes 220–22 and accompanying text.

16 RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 36 (2013); SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 131 (2014).

17 This fact was appreciated even by judges at the time. *E.g.*, Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924) ("In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life."), *rev'd*, 272 U.S. 365 (1926); R.B. Constr. Co. v. Jackson, 137 A. 278, 286 (Md. 1927) (Offutt, J., dissenting); Altschuler v. Scott, 137 A. 883, 884 (N.J. 1927) (per curiam); Spann v. City of Dallas, 235 S.W. 513, 516 (Tex. 1921).

18 *See* State *ex rel.* Morris v. City of East Cleveland, 31 Ohio Dec. 98, 109–10 (Ct. Com. Pl. 1919) (suggesting zoning would promote childbearing), *adhered to on reh'g*, 31 Ohio Dec. 197 (Ct. Com. Pl. 1920); *see also* Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1, 4–13 (2020) (describing effects of cohabitation limitations in zoning); Kate Redburn, Note, *Zoned Out: How Zoning Law Undermines Family Law's Functional Turn*, 128 YALE L.J. 2412, 2430–31 (2019) (same).

19 *See, e.g.*, Schleicher, *supra* note 2, at 103 & n.101.

20 *Cf.* Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 878–79 (2019) (noting that "records of private land are 'widely scattered and difficult of access'" (quoting Robert P. McIntosh, *The Forest Cover of the Catskill Mountain Region, New York, as Indicated by Land Survey Records*, 68 AM. MIDLAND NATURALIST 409, 410 (1962))).

Euclid was argued. The idea that communities could redefine tort law baselines to prevent harm accelerated in the 1820s through a curious feature straddling contract and property law: the "nuisance covenant."[21] This Article tells the story of the rise and fall of the nuisance covenant toward three different ends: (1) to illustrate how developers and owners used this hybrid legal device to prevent unwanted uses that tort and contract law could not independently exclude from neighborhoods; (2) to indicate how these covenants came to communicate strong messages about the nature of unwanted uses across time and place; and (3) to show how and why the nuisance covenant proved ill-equipped to confront a new land use challenge — the apartment building — and how both its failures and its legacies ultimately shaped the push for formal zoning regulation.

The term "nuisance covenant" requires an initial definition. Although the word "covenant" brings to mind both biblical allusions and nightmares from first-year property courses,[22] covenants are at base voluntary agreements (thus like contracts) that run with the land, rather than attaching to a specific person or owner (thus bearing the in rem quality of property).[23] Covenants are also called deed restrictions,[24] and they are subject to a number of highly technical and bewildering rules largely irrelevant to the purposes of this Article.[25] Instead, this Article's focus is on the emergence of the legal device its nineteenth-century contemporaries called the "covenant against nuisances."[26] The nuisance covenant usually combined two features: a list of specific objectionable

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[21] Some nuisance covenants have been noted in passing in legal and other scholarship, albeit without recognition of the category. *See, e.g.*, BROOKS & ROSE, *supra* note 16, at 48; MIKE WALLACE, GREATER GOTHAM: A HISTORY OF NEW YORK CITY FROM 1898 TO 1919, at 259 (2017) (mentioning a development in 1900 that "barred saloons, factories, and tenements"); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1401–02 (1994); Patricia Burgess Stach, *Deed Restrictions and Subdivision Development in Columbus, Ohio, 1900–1970*, 15 J. URB. HIST. 42, 47 (1988).

[22] *See, e.g.*, *Jeremiah* 31:30–33; *Law School Memes for Edgy T14s*, FACEBOOK (Apr. 17, 2019), https://www.facebook.com/groups/lsm4et14s/?post_id=820876398269822 [https://perma.cc/LU2U-GCM4].

[23] *See Covenant*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[24] *See* PAIGE GLOTZER, HOW THE SUBURBS WERE SEGREGATED: DEVELOPERS AND THE BUSINESS OF EXCLUSIONARY HOUSING, 1890–1960, at 8 (2020) ("The first was deed restrictions, which also became known as restrictive covenants.").

[25] For discussion of these rules (and an indication of the frustration they have caused for commentators), see generally Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982).

[26] A few recent cases adopt the term "nuisance covenant" for these provisions, *e.g.*, Bedows v. Hoffman, No. 4-16-0146, 2016 WL 6906744, at *2 (Ill. App. Ct. Nov. 22, 2016); Buck Hill Falls Co. v. Press, 791 A.2d 392, 395 (Pa. Super. Ct. 2002), though in the nineteenth and early twentieth centuries the term "covenant against nuisances" appears to have been more common, *e.g.*, Van Vliet & Place, Inc. v. Gaines, 162 N.E. 600, 601 (N.Y. 1928); Isaacs v. Schmuck, 156 N.E. 621, 624 (N.Y. 1927); Dieterlen v. Miller, 99 N.Y.S. 699, 700 (App. Div. 1906); Burk v. Kahn, 22 Pa. D. 331, 337 (Ct. Com. Pl. 1913).

uses (such as "slaughterhouses" or "iron factories") and a clause banning all "nuisance" or "noxious" uses (or some similar term).[27] It came to pervade nineteenth- and twentieth-century deeds,[28] was cataloged in multiple books of legal forms,[29] and persisted well into the World War II era in lists of recommended deed provisions promulgated by the Federal Housing Administration and the consortium of suburban developers forming the Urban Land Institute.[30] And as this Article will explore, the decades of litigation over these covenants had effects on both ordinary nuisance law and the debates over property regulation.

This Article proceeds in four parts. Part I identifies and traces the history of the nuisance covenant. To set the stage, it discusses the early uses of deed restrictions in land planning. Most work on covenants has focused on two features: the role of covenants in establishing suburbs and homeowners' associations,[31] or the (quite related) use of racial covenants in deeds meant to exclude Black residents from owning or leasing

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[27] *See infra* section I.B, pp. 1623–29.

[28] A full empirical study of the frequency of nuisance covenants would require poring over disaggregated land records, with no means of locating which deeds have restrictions using the dominant form of search (by name index). Accordingly, the information in this Article comes from a more qualitative review of covenants discussed in two different types of nineteenth- and early-twentieth-century cases in all jurisdictions: (1) cases involving the breach or attempted breach of a covenant, and (2) cases in which buyers tried to get out of real estate sales contracts on the grounds that title was "unmarketable" because of an undisclosed encumbrance (such as a covenant discovered after the proposed sale). It additionally draws upon contemporary writings and meetings of real estate lawyers, developers, and planners about covenant and land use practice. In support of the claim that nuisance covenants were quite ubiquitous, it is notable that this form of promise earned its own term of art ("the covenant against nuisances"), but moreover, some contemporary commenters made note of its frequency. *E.g.*, SALTER S. CLARK, A TEXT-BOOK ON COMMERCIAL LAW 224 (New York, Maynard, Merrill & Co. 1882) ("Deeds not infrequently contain other covenants with various objects. One, sometimes found in deeds of city lands and called a covenant against nuisances . . . ."); Adolph Sieker, *Restrictive Covenants and Building Agreements*, 6 BENCH & BAR NEW SERIES, pt. 2, at 96, 98 (1913) (referring to "the usual covenant against nuisances"); Wm. Huntsman Williams, *Restrictive Covenants*, 21 LAW. & BANKER & CENT. L.J. 174, 174 (1928) (describing "the covenant against nuisances" as the "most ordinary covenant we meet" in lists of frequently occurring provisions).

[29] *See* BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, CLERKS' AND CONVEYANCERS' ASSISTANT: A COLLECTION OF FORMS OF CONVEYANCING, CONTRACTS, AND LEGAL PROCEEDINGS 300–01 (New York, Baker, Voorhis & Co. 1875); GERRY W. BEYER, 19 WEST'S LEGAL FORMS: REAL ESTATE TRANSACTIONS § 25:30 (2020), Westlaw WEST-LF. Claims that nuisance covenants had been breached also appeared in published forms of pleadings. *See, e.g.*, 1 AUSTIN ABBOTT & CARLOS C. ALDEN, FORMS OF PLEADING IN ACTIONS FOR LEGAL OR EQUITABLE RELIEF 633–34 (New York, Baker, Voorhis & Co. 2d ed. 1925); 1 MORRIS M. ESTEE, PRACTICE, PLEADING AND FORMS IN ACTIONS BOTH LEGAL AND EQUITABLE 658 (San Francisco, H.H. Bancroft & Co. 1870).

[30] *See* FED. HOUS. ADMIN., PLANNING PROFITABLE NEIGHBORHOODS 34 (1938); CMTY. BUILDERS' COUNCIL, URB. LAND INST., THE COMMUNITY BUILDERS HANDBOOK app. A, at 176 (1st rev. prtg. 1948).

[31] For examples of both recent and foundational scholarship on the suburb and homeowners' association, see ROBERT M. FOGELSON, BOURGEOIS NIGHTMARES: SUBURBIA, 1870–1930

property.[32] While both these innovations are deserving of the attention and criticism they have received, the earlier history of the covenant reveals a forgotten battleground: the use of covenants to evade technical hurdles in bringing nuisance cases, a tactical choice with unexpected consequences. By inscribing nuisance into deed restrictions, it turns out, owners achieved myriad new capacities to control neighboring land uses that helped them escape limitations imposed by both tort law and covenant law taken independently. The open-ended terms "noxious" and "nuisance" could encompass uses not yet known by the covenant drafter despite the rule that covenants were to be strictly interpreted as restraints on free use. Far more importantly, breach of the nuisance covenant proved injury without need for the affected owners to reach a certain threshold of damage, an imposing barrier to nuisance plaintiffs. This legal device expanded owner capacity to control neighboring use types at a time when residents were seeking more separation between work and home — and also new forms of separation along class lines.

Part II moves to a period in which nuisance covenants came under greater stress and scrutiny: perhaps predictably, with the rise of the apartment building. While nuisance covenants had operated with relative consistency up until that point, the apartment disrupted them almost immediately, as judges refused to find that these new uses fit within the nuisance prohibitions that had helped to control and protect residential areas. Over several decades, landowners tried and failed to prevent apartments with covenant law, a strategy simultaneously pursued with mixed effect to stop new uses associated with the car and new forms of work and business taking place inside the residence.

Part III turns to parallel developments in public law, both caused and influenced by this private law history. In waging the fight against apartments under covenant law, owners and attorneys developed a set of arguments about nuisance's mutability: combining a freedom-of-contract sensibility with underlying tort law principles, they argued that

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(2005); GLOTZER, *supra* note 24; MARC A. WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING (1987); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829; Gillette, *supra* note 21; Robert C. Ellickson, Stale Real Estate Covenants (Aug. 21, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678927 [https://perma.cc/DX5L-Y7FY]. Suburbanization was of course facilitated by public law, too. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–218 (1985) (describing how federal policy helped subsidize suburban sprawl).

[32] *See* BROOKS & ROSE, *supra* note 16; KEVIN MCGRUDER, RACE AND REAL ESTATE: CONFLICT AND COOPERATION IN HARLEM, 1890–1920, at 62–96 (2015); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 77–91 (2017).

harms could be affirmatively declared ahead of time, not merely recognized once underway. Of course, the failure of these arguments paved the way for zoning regulation; the inability of covenants to prevent apartments acted as a rallying cry for Progressive-era advocates of zoning ordinances. Moreover, though, these arguments made to expand the reach of covenants paralleled those that would be made to support the constitutionality of zoning in *Euclid*. Indeed, by the time of that case, members of the real estate bar had been trying to use contracts to tweak the definition of nuisance for a hundred years.[33] One hears echoes of the earlier debates involving nuisance covenants in the arguments made by proponents of zoning, as concepts like "near-nuisance" and "noxious non-nuisance" would become constitutional canon when *Euclid* recognized these uses as within the state's regulatory reach. Without intending to minimize the significance of the leap from private covenants to prospective regulation, examining the debates over the apartment reflects existing tensions about the role nuisance law should play in evaluating how private parties and government representatives attempted to regulate land use. In covenant law, these arguments met a different fate than they would in the public law context.

Part IV examines the conceptual and practical significance of this account. First, it examines how covenants and deed restrictions transmitted prevailing conceptions of harmful land uses among developers, owners, lawyers, and judges, helping to shape norms surrounding reasonable uses in residential neighborhoods. Second, it considers what this dialogue between private and public law reveals about the relationship between these arenas. The stories of the apartment and the nuisance covenant indicate how private law developments may affect perceptions of what is reasonable and harmful in property law and what counts as a legitimate exercise of government power. Private law exists behind and in tandem with public regulation in ways to which those focused on zoning reform should be attentive.

I. CONTRACTING AGAINST NUISANCE

A. Uses of Covenants in Early American Land Use Planning

Covenants running with property date back at least to the Renaissance era.[34] Granted, the history of private covenants is not easy to trace.

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[33] In this sense, this Article adheres to a longer tradition of examining how new legal rules and ideas crystallize through the practice of ordinary lawyers, even if those lawyers did not see themselves as agents of significant change. *See, e.g.*, S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 1–23 (2003).

[34] *See* Charles E. Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699, 722 (1943) (discussing *Pakenham's Case*, YB 42 Edw. 3, fol. 3, pl. 14 (1368) (Eng.)). Another

That history exists in the minds of long-dead attorneys and scrawled deeds, rather than in widely accessible and published legislative documents. Indeed, tracing private law innovations is often a challenge for this reason. As Zechariah Chafee observed in 1935: "We know all too little of the mental processes of the practitioners who invented methods now in common use, or who were fated to have their work shattered by some famous lawsuit years afterwards."[35] Despite the historical pedigree of the covenant, commentators in the nineteenth century could still describe covenant law as "imperfectly settled" and otherwise ambiguous on elementary points.[36] It was still not entirely clear whether a covenant could be enforced by or against successors to the original promise (both in England and America) well into the nineteenth century.[37] Given that lawyers had been inserting covenants into real estate deeds for hundreds of years, that degree of uncertainty is surprising.

Nevertheless, from the earliest periods of colonial settlement, there is scattered evidence of idiosyncratic agreements respecting land that approximate modern covenants.[38] In transferring interests, seventeenth- and eighteenth-century landowners sometimes made promises to one another about continuing or maintaining fences, ditches, or other conditions on the property.[39] As Professor Dirk Hartog has chronicled, and as later cases reveal, town and colony governments and private proprietors alike frequently disbursed property to residents that bound them to build and maintain streets, wharves, or other infrastructure.[40] In other instances, the line between deed restrictions and other forms of early American covenants becomes blurry. Colonial settlers made all

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historian traces restrictive covenants to 1583. WILLIAM S. WORLEY, J.C. NICHOLS AND THE SHAPING OF KANSAS CITY: INNOVATION IN PLANNED RESIDENTIAL COMMUNITIES 125 (1990).

35 Zechariah Chafee, Jr., Book Review, 49 HARV. L. REV. 350, 351 (1935) (reviewing EDWARD M. BASSETT, FRANK B. WILLIAMS, ALFRED BETTMAN & ROBERT WHITTEN, MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES (1935); and RUSSELL VAN NEST BLACK & MARY HEDGES BLACK, BUILDING LINES AND RESERVATIONS FOR FUTURE STREETS (1935)).

36 Ben McFarlane, Tulk v Moxhay *(1848)*, *in* LANDMARK CASES IN EQUITY 203, 210 (Charles Mitchell & Paul Mitchell eds., 2012) (quoting THIRD REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY, 1831-2, HC 484, at 45).

37 *See* Charles I. Giddings, *Restrictions upon the Use of Land*, 5 HARV. L. REV. 274, 274–76, 281–82 (1892).

38 *E.g.*, HELEN C. MONCHOW, THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT 2 (1928) (describing how William Penn's son drew up restrictions in 1749 requiring certain building materials and other conditions in lots surrounding public square).

39 *See* Burbank v. Pillsbury, 48 N.H. 475, 475 (1869); Brady, *supra* note 20, at 897.

40 HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 50–51 (1983); *e.g.*, Com. Wharf Co. v. Winsor, 16 N.E. 560, 561 (Mass. 1888); Story v. N.Y. Elevated R.R. Co., 90 N.Y. 122, 125–27 (1882); Welsh v. Taylor, 2 N.Y.S. 815, 816 (Gen. Term 1888), *rev'd on reh'g*, 7 N.Y.S. 376 (Gen. Term 1889), *rev'd*, 31 N.E. 896 (N.Y. 1892).

kinds of written covenants relating to both church and civil life: promises between themselves and God, promises to uphold certain communal values, promises relating to political developments and the establishment of governmental bodies.[41] Inevitably, because so much of civil life revolved around the disbursement and cultivation of land,[42] covenants sometimes straddled the line between enforceable restrictions running with land and aspirational promises entered into by signatories. One such example comes from the seventeenth century, when residents of Hashamommock, then in New Haven Colony — now the Southold area on Long Island, New York — referred to an "ancient" agreement among themselves to protect the "comfort and quiet . . . enjoyment" that would obtain from "good neighborhood."[43] To fulfill that covenant, residents promised that when they sold property, it would be only to those the other inhabitants would "approve of."[44] Residents in 1660 tried to enforce the promise against Quakers who evidently had not sought the required approval before acquiring land.[45] The General Court of New Haven Colony was asked to determine whether the promise of "good neighborhood" could bind successors and if so under what circumstances — questions English courts would much later approach — and, though sending the question for further resolution out on Long Island, it suggested the agreement was "righteous in itself and binding to those that did first engage and to their successors, provided that due means was afforded for the knowledge of it."[46] In other words, evidence from local forums indicates that Americans were making restrictions and figuring out the law surrounding them nearly as far back as we have such evidence in England.

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[41] *See* DAVID A. WEIR, EARLY NEW ENGLAND: A COVENANTED SOCIETY 2, 223, 238 (2005).

[42] *See* Maureen E. Brady, *The Failure of America's First City Plan*, 46 URB. LAW. 507, 527–30 (2014); Brady, *supra* note 20, at 908; John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1257 (1996).

[43] RECORDS OF THE COLONY OR JURISDICTION OF NEW HAVEN, FROM MAY, 1653, TO THE UNION 350 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Co. 1858).

[44] *Id.*

[45] Though it is unclear when exactly the "ancient" agreement was made and if Quakers were contemplated at the time it was drafted, the latter is plausible. *See id.* at 238–41. In 1659, a "Mr. Wells" brought some business to the court about a neighbor in Southold selling to a Quaker. *Id.* at 300. William Wells was the recorder of the original agreement that the three colonists were seeking to enforce against a "John Budd." *Id.* at 350. Later, in 1661, more trouble erupted around John Budd. Budd was accused by another colonist of slander for asserting that the colony was "strict against Quakers" but tolerated drunkenness and "whoring." *Id.* at 412. Budd was also accused of allowing Quakers to meet in his home, of having called them the "most godly" people, and of saying that one day the governments would repent for treating them badly. *Id.* at 414.

[46] *Id.* at 350.

The nineteenth century brought covenants into more famous and infamous use in the United States. From the 1820s onward, American developers adopted then-fashionable development patterns in England in which houses or other buildings surrounding garden squares came with height or building restrictions.[47] In these "building schemes,"[48] to ensure the garden would be kept open under development pressure, those developing the central squares put covenants into the leases or deeds on adjoining tracts in which owners promised to maintain or keep open the garden.[49] English (and later, American) courts had to grapple with many questions surrounding covenants in order to determine whether and when these promises would be enforceable.[50] These covenants also commonly prescribed structural and physical requirements, like how far back buildings had to be from the street and how many buildings could be located on a lot.[51] This was also the context in which the nuisance covenant took shape, as the next section will explore in greater detail.

Even though the precise technicalities of covenant law were being worked out, lawyers in America's biggest cities had evidently begun using covenants in the urban core as it was on the precipice of change. In 1831, Samuel Ruggles, lawyer and one of New York's most famous developers, decided to lay out "a square in the London fashion" surrounded by houses, creating what eventually became Gramercy Park.[52] In doing so, he created deed restrictions on all the lots fronting the green space.[53] The Gramercy covenants are generally considered some of the earliest residential restrictions in the United States,[54] though more accurately, they are probably the first used in conjunction with a larger-scale subdivision development.[55] As the building scheme gained popularity

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47 CHARLES S. ASCHER ET AL., URBAN REDEVELOPMENT: PROBLEMS AND PRACTICES 228–29 (Coleman Woodbury ed., 1953). In England, the pattern of residential developments surrounding garden squares went back further. *See* IRA KATZNELSON, CITY TRENCHES: URBAN POLITICS AND THE PATTERNING OF CLASS IN THE UNITED STATES 35 (1981).

48 On the term "building schemes," see *Tubbs v. Esser* (1909) 26 TLR 145 (Ch) at 146 (Eng.); and *Korn v. Campbell*, 85 N.E. 687, 689 (N.Y. 1908).

49 DONALD J. OLSEN, TOWN PLANNING IN LONDON: THE EIGHTEENTH & NINETEENTH CENTURIES 152 (1964).

50 *E.g.*, Tulk v. Moxhay (1848) 41 Eng. Rep. 1143; 2 Ph. 774.

51 *See, e.g.*, *id.* at 1143, 2 Ph. at 775.

52 CLEVELAND RODGERS & REBECCA B. RANKIN, NEW YORK: THE WORLD'S CAPITAL CITY 253 (1948); *see also* JOHN B. PINE, THE STORY OF GRAMERCY PARK, 1831–1921, at 4–6 (1921).

53 PINE, *supra* note 52, at 6.

54 *E.g.*, EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 34 (1994).

55 Smaller-scale developers appear to have used covenants at an even earlier date. *See* Parker v. Nightingale, 88 Mass. (6 Allen) 341, 341–42 (1863) (describing an 1822 covenant on Hayward Place in Boston permitting only "dwelling-house[s]," *id.* at 342); Barron v. Richard, 3 Edw. Ch. 96,

in New York, covenants protecting all sorts of things emerged over the ensuing few decades. Within five years of the Gramercy development, Brooklynites were making promises to keep large front courtyards and uniform building lines.[56] About twenty years later, residents of central Manhattan promised to build two-story homes of brick and stone.[57]

Although residential covenants in lot subdivisions may have originated in New York, they were not limited to that city for long. The same year that Ruggles was planning around his park, a resident of Philadelphia subdivided his lot into three and inserted height and setback restrictions.[58] Four New Yorkers developing a tract of land in New Haven in 1834 planned a garden square on what is now the Yale campus surrounded by lots under covenants.[59] In 1844, residents fronting Louisburg Square in Boston — platted in 1826 without covenants — got together to put in promises protecting their own garden plot and private streets in the city's Beacon Hill neighborhood (though their decision to try to restrict children from entering the park would not occur for another eight years).[60] And in 1843, ardent nativist and future Boston mayor Thomas Aspinwall Davis subdivided his family estate in Brookline, Massachusetts, to create "The Lindens," a development with a more suburban than urban feel.[61] While Boston newspapers described the area in glowing terms, that outward beauty concealed an evil innovation: the Linden Place deeds forbid sales to "any negro or native of Ireland."[62] Davis's nativist politics appear to have given rise to the first racially restrictive covenant in the United States.

Racially restrictive covenants have deservedly received much attention from property scholars and historians.[63] These covenants predated explicitly racial zoning ordinances, helping to segregate areas in the crucial initial phases of urban and suburban growth and development well

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97 (N.Y. Ch. 1837) (describing covenants on five lots sold by Thomas Mercein in 1825), *aff'd sub nom.* Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840).

56 Zipp v. Barker, 57 N.Y.S. 569, 569–70 (App. Div. 1899), *aff'd*, 59 N.E. 1133 (N.Y. 1901) (per curiam).

57 Kountze v. Helmuth, 22 N.Y.S. 204, 205–06 (Gen. Term 1893), *aff'd*, 35 N.E. 656 (N.Y. 1893).

58 Landell v. Hamilton, 34 A. 663, 663–64 (Pa. 1896).

59 Easterbrook v. Hebrew Ladies Orphan Soc'y, 82 A. 561, 562–63 (Conn. 1912).

60 PHEBE S. GOODMAN, THE GARDEN SQUARES OF BOSTON 40, 42–44 (2003); *Proprietors of Louisburg Square (Boston, Mass.) Records*, MASS. HIST. SOC'Y, https://masshist.org/collection-guides/view/fa0435 [https://perma.cc/PU34-9STU].

61 *See* BROOKLINE PRES. COMM'N, THE LINDENS (2006), http://www.brooklinehistoricalsociety.org/history/presComm/linden.asp [https://perma.cc/2XAL-AK6D]; William P. Marchione, Uncommon Suburbs: Suburbanization at the Western Edge of Boston, 1820–1873, at 104–05 (Dec. 1994) (Ph.D. dissertation, Boston College), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.739.1423&rep=rep1&type=pdf [https://perma.cc/YA5B-PHHC].

62 JACKSON, *supra* note 31, at 76.

63 *See* sources cited *supra* note 32.

before public land use regulation assumed dominance. The covenants outlasted the invalidation of racial zoning in 1917,[64] and eventually their continued enforcement was deemed unconstitutional in the canonical case of *Shelley v. Kraemer*[65] in 1948.[66] Yet even years after racial covenants were declared unenforceable, the Federal Housing Administration's policies still treated them as positive indicators about neighborhood quality that could help the agency decide whether to insure mortgage loans in a given area.[67] Covenants were also useful signals of hostility to prospective Black purchasers and "neighborhood quality" to white ones (as Professors Carol Rose and Richard Brooks have demonstrated).[68] Although continued insertion and recordation of these covenants is now widely viewed as a violation of federal housing and civil rights statutes,[69] racial restrictions still persist in land records vaults.[70] Impressive efforts to map racial covenants are underway in cities ranging in size from Charlottesville to Philadelphia and beyond,[71] entailing time-consuming reconstruction from thousands of deeds in order to reveal the maps of segregation that landowners, lawyers, developers, and title insurers collaborated to create.[72] Racial covenants combined with other invidious forms of both private and public discrimination to produce scarring stratification that later generations have not yet repaired.[73]

Other new uses occasionally emerged for covenants from the nineteenth century onward. Americans diverged from the English in using covenants to construct the mutual obligations relating to "party walls," the shared boundary walls increasingly prevalent in urban areas.[74] Over the late nineteenth and early twentieth centuries, improved transit led

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64 Buchanan v. Warley, 245 U.S. 60, 82 (1917).

65 334 U.S. 1 (1948).

66 *Id.* at 20.

67 BROOKS & ROSE, *supra* note 16, at 138–39, 221.

68 *See id.* at 177–89.

69 *See id.* at 221–24; ROTHSTEIN, *supra* note 32, at 90; *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421–22 (1968).

70 Nick Watt & Jack Hannah, *Racist Language Is Still Woven into Home Deeds Across America. Erasing It Isn't Easy, and Some Don't Want To*, CNN (Feb. 15, 2020, 12:21 PM), https://www.cnn.com/2020/02/15/us/racist-deeds-covenants/index.html [https://perma.cc/65RB-9LEZ].

71 *See, e.g.*, Jonathan Haynes, *Mapping Inequality: Innovative Project Will Track Housing Discrimination*, C-VILLE WKLY. (Dec. 19, 2018, 7:00 AM), https://www.c-ville.com/mapping-inequality [https://perma.cc/4UTX-RT9K]; Larry Santucci, *How Prevalent Were Racially Restrictive Covenants in 20th Century Philadelphia? A New Spatial Data Set Provides Answers* 3 (Fed. Rsrv. Bank of Phila. Payment Cards Ctr., Discussion Paper No. 19-5, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3497291 [https://perma.cc/HT7N-W76D].

72 *See* BROOKS & ROSE, *supra* note 16, at 224–25; Santucci, *supra* note 71, at 7–10.

73 *See generally* ROTHSTEIN, *supra* note 32 (describing ways that both government and private actors fostered racial segregation through discrimination in public housing, mortgage lending, and other practices).

74 Charles E. Clark, *Party Wall Agreements as Real Covenants*, 37 HARV. L. REV. 301, 305–06 (1924).

to suburbanization, and developers with new quantities of land to subdivide put covenants on larger and larger numbers of properties,[75] affecting bigger areas of land than ever before.[76] To manage these areas, the homeowners' association proliferated as an entity that could ensure covenants and other rules could be enforced and appropriately modified across large groups of lots over time. Long before these more recent and related adaptations, however, in the mid-nineteenth century, residents sought to control neighboring land uses with a form of covenant borrowing from a much older area of law: nuisance.

B. Nuisance Covenants in Practice

The last section described myriad uses of restrictive covenants in the early and middle nineteenth century, but it only briefly mentioned the so-called "covenant against nuisances," one of the innovations that emerged and grew in popularity in that period. Nuisance covenants running with the land appear to have originated around 1820 in both England and the United States alongside the garden-square developments becoming fashionable on both sides of the Atlantic.[77] Some nuisance covenants banned "any business, which shall or may cause or become a nuisance."[78] In addition to these covenants referring to nuisance explicitly, other forms of deed restrictions termed "covenants against

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[75] *See* Getchal v. Lawrence, 201 N.Y.S. 121, 121–22 (Sup. Ct. 1923) (1894 covenant on 443 properties in Westchester); Todd v. N. Ave. Holding Corp., 201 N.Y.S. 31, 32–33 (Sup. Ct. 1923) (1905 covenant on 160 properties in New Rochelle), *aff'd*, 204 N.Y.S. 953 (App. Div. 1924) (mem.); Broadway Flushing Homeowners' Ass'n v. E.N.Y. Enters., Inc., No. 27630/10, 2013 WL 3929058, at *1–3 (N.Y. Sup. Ct. July 17, 2013) (1909 covenant on 541 properties in Queens).

[76] I have not located a covenant litigated in New York prior to 1890 that affected more than a couple of blocks, a half-block, or street frontage. *See, e.g.*, Batchelor v. Hinkle, 104 N.E. 629, 629 (N.Y. 1914) (covenant from 1849 affecting two blocks); Equitable Life Assurance Soc'y v. Brennan, 43 N.E. 173, 173–74 (N.Y. 1896) (covenant from 1881 affecting west side of a block); Rowland v. Miller, 34 N.E. 765, 765 (N.Y. 1893) (covenant from 1865 affecting one block). Many New York City blocks appear to have contained about sixty lots. *Plate 99*, *in* ATLAS OF THE BOROUGH OF MANHATTAN, CITY OF NEW YORK (1921). The earliest covenant that was litigated in the state that clearly involved a larger number of owners — ninety-six — appears to have been the one at issue in *Cummins v. Colgate Properties Corp.*, 153 N.Y.S.2d 321 (Sup. Ct. 1956), involving a New Rochelle covenant drafted in 1891, *id.* at 322–23.

[77] The earliest such covenant I have located dates to 1825, and it appears in the first case involving the enforceability of such an agreement. Barron v. Richard, 3 Edw. Ch. 96, 97 (N.Y. Ch. 1837), *aff'd sub nom.* Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840). The earliest English covenant I have located on purchased land (rather than leased) may be one from 1824. Harrison v. Good (1871) 11 LR Eq. 338 at 339 (Eng.); *see also* Sayers v. Collyer (1882) 28 Ch D 103 at 104 (Eng.) (describing nuisance covenants from 1877).

[78] Clement v. Burtis, 24 N.E. 1013, 1013 (N.Y. 1890). This appears to have meant that such a covenant would not render title unmarketable, because it was not any more of an encumbrance than ownership would typically convey. *See id.*

nuisances" banned "any noxious, offensive, or dangerous trade or business."[79] Still others specifically enumerated certain types of nuisances — for instance, slaughterhouses — along with a residual clause banning nuisances, noxious uses, or the like.[80]

Although nuisance covenants were eventually found in deeds that transferred freehold interests in property outright, evidence suggests that nuisance covenants developed in the context of another form of ownership: the lease. Lease agreements prior to the 1820s sometimes contained restrictions forbidding tenants from engaging in noxious uses of leased property during the lease term.[81] Families leasing and subdividing portions of large estates had grown rather particular about the appearance and development of their lands. For instance, the Russell family — who was granted the title Duke of Bedford and whose former holdings in the Bloomsbury region of London now house the British Museum and Covent Garden — not only put nuisance and other restrictions on family lands leased and transferred over the course of the eighteenth and nineteenth centuries,[82] but also somehow exacted a (still extant) plaque from the neighboring University of London in which the university recorded "its sincere apologies that the plans of this building were settled without due consultation with the Russell family and their trustees and therefore without their approval of its design."[83]

At some point around 1820, nuisance covenants made the leap from lease agreements to deeds transferring property.[84] And they became a

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[79] Dieterlen v. Miller, 99 N.Y.S. 699, 699 (App. Div. 1906).

[80] *E.g.*, Grimm v. Krahmer, 98 N.Y.S. 523, 524 (App. Div. 1906).

[81] *E.g.*, OLSEN, *supra* note 49, at 113 (describing nuisance covenants circa 1804 in London); *see also* Bramwell v. Lacy (1878) 10 Ch D 691 at 691–92 (Eng.); *Landlord and Tenant*, *in* 20 HALSBURY'S LAWS OF ENGLAND 1, 225–27 (Douglas McGarel Hogg ed., 2d ed. 1936); OLSEN, *supra* note 49, at 100–01, 100 n.3 (quoting individual in the 1880s as saying "[o]f course, you always insert in your leases covenants . . . that [the lessee] shall not carry on . . . any trade which may be a nuisance to his neighbors," *id.* at 100 n.3); THOMAS PLATT, A PRACTICAL TREATISE ON THE LAW OF COVENANTS 197–98 (Philadelphia, J.S. Littell 1834). It does appear that these covenants in leases were not ubiquitous and were also not evenly enforced. OLSEN, *supra* note 49, at 120–25 (describing tribulations of tenants seeking permission to engage in various types of business in restricted areas and noting that local records are "filled with tenants' angry letters complaining about nuisances committed by other tenants," *id.* at 122); *id.* at 137 (describing covenants not "rigorously drawn"). Some evidence suggests early American leases likewise contained nuisance covenants. *See* Wright v. Heidorn, 4 Ohio N.P. 124, 124 (Super. Ct. 1897).

[82] *See* OLSEN, *supra* note 49, at 111–14; *Why a University Had to Say Sorry to a Duke*, IANVISITS (Mar. 3, 2019), https://www.ianvisits.co.uk/blog/2019/03/03/why-a-university-had-to-say-sorry-to-a-duke [https://perma.cc/2QEW-4GHT]. The Duke of Bedford would later be the plaintiff in a major English case about the termination of deed restrictions, *Duke of Bedford v. Trustees of the British Museum* (1822) 39 Eng. Rep. 1055; 2 My. & K. 552, a case that was perceived as quite significant by contemporary American judges and commentators, *see* Scharer v. Pantler, 105 S.W. 668, 669 (Mo. Ct. App. 1907) (calling *Duke of Bedford* a "celebrated controversy"); *Barrow*, 8 Paige Ch. at 359; Chafee, *supra* note 35, at 351.

[83] *Why a University Had to Say Sorry to a Duke*, *supra* note 82.

[84] *See supra* note 77 and accompanying text.

widespread feature of nineteenth-century real estate practice, extending from those urban gardens in the 1820s to the first planned residential suburban subdivisions in the 1890s.[85] By 1913, covenants against nuisances were so common in deeds that city planners listed them in routine boilerplate alongside setback and side-yard requirements.[86]

The text of different covenants against nuisances merits more description. As previously stated, covenants were sometimes worded broadly to prohibit "nuisances" or "noxious" or "offensive" uses.[87] But others specified in great detail what sorts of nuisances could *not* be built on property, in addition to a residual clause providing that any other objectionable use would also be prohibited.[88] The lists that nineteenth-century lawyers inserted into deed restrictions were nothing if not colorful, and judges sometimes subtly poked fun at the high number of enumerated nuisance uses in rendering decisions about the scope of a nuisance covenant. In one case, the judge dryly noted that a covenant banned some "number of 50" uses.[89] These lists came to look similar across time and space. Take the 1825 covenant from *Barron v. Richard*[90] as an example: it banned "any livery stable, slaughter house, tallow chandlery, smith's shop, forge, furnace, brass or other foundry, nail or other iron factory, or any manufactory for the making of glue, varnish, vitriol, ink or turpentine; nor for dressing or keeping skins or hides, or any distillery or brewery."[91] Covenants drafted from at least 1831 through the end of the century copied this language nearly verbatim, right down to the lyrical listing of varnish to turpentine.[92]

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[85] *See* GLOTZER, *supra* note 24, at 47–48.

[86] John Nolen, *Report of the Committee on City Plan Study*, *in* PROCEEDINGS OF THE FIFTH NATIONAL CONFERENCE ON CITY PLANNING 168, 174–75 (1913); *see also* MONCHOW, *supra* note 38, at 27, 32.

[87] *See supra* pp. 1623–24.

[88] *E.g.*, De Lima v. Mitchell, 98 N.Y.S. 811, 812 (Sup. Ct. 1906); Roth v. Jung, 79 N.Y.S. 822, 822 (App. Div. 1903); Clark v. Jammes, 33 N.Y.S. 1020, 1021 (Gen. Term 1895).

[89] Iselin v. Flynn, 154 N.Y.S. 133, 134 (Sup. Ct. 1915).

[90] 3 Edw. Ch. 96 (N.Y. Ch. 1837), *aff'd sub nom.* Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840).

[91] *Id.* at 97.

[92] This list of banned uses was in the Gramercy Park deeds in 1831. The Original Deed of Gramercy Park, 1831, *in* STEPHEN GARMEY, GRAMERCY PARK: AN ILLUSTRATED HISTORY OF A NEW YORK NEIGHBORHOOD, app. A at 184 (1984); *see also* Heim v. Schwoerer, 99 N.Y.S. 553, 554 (Sup. Ct.) (involving 1836 covenant), *aff'd*, 100 N.Y.S. 808 (App. Div. 1906), *aff'd*, 80 N.E. 1111 (N.Y. 1907) (per curiam); Riggs v. Pursell, 66 N.Y. 193, 195–96 (1876) (involving 1849 covenant); Goldstein v. Rosenberg, 181 N.Y.S. 559, 560 (App. Div. 1920) (involving 1850 covenant), *aff'd*, 134 N.E. 560 (N.Y. 1921) (per curiam); Bull v. Burton, 124 N.E. 111, 112–13 (N.Y. 1919) (involving 1859 covenant); Boyd v. Kerwin, 15 N.Y.S. 721, 721 (Sup. Ct. 1891) (involving 1860 covenant); Rowland v. Miller, 34 N.E. 765, 765 (N.Y. 1893) (involving 1865 covenant); Simons v. Mut. Constr. Co., 117 N.Y.S. 567, 567 (App. Div. 1909) (involving 1865 covenant); Doyle v. John E. Olson Realty Co., 116 N.Y.S. 834, 835–36 (App. Div. 1909) (involving 1871 covenant); Kitching v. Brown, 73 N.E. 241, 241 (N.Y. 1905) (involving 1873 covenant); Jones v. Chapel Hill, 69 N.Y.S.2d 753, 755 (Sup.

The origins of the list appear to be less of a mishmash of bad uses than otherwise might appear. Indeed, one can see close parallels to this list of uses elsewhere, in nineteenth-century nuisance cases and treatises.[93] Even mentions that seem odd at first blush — museums, theaters, opera houses, public shows or spectacles, dance houses, circuses, and animal menageries[94] — were potential subjects of contemporary nuisance actions, whether because of associated crowds or because contemporaries thought entertainment uses attracted seedy characters.[95] And yet, even if the list had some logic in underlying nuisance law, the persistence of similar laundry lists suggests that nineteenth-century real estate lawyers were working with and sharing forms not always tailored

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Ct. 1947) (involving 1881 covenant), *modified and aff'd*, 77 N.Y.S.2d 867 (App. Div. 1948); Getchal v. Lawrence, 201 N.Y.S. 121, 121–22 (Sup. Ct. 1923) (involving 1894 covenant). Cases in jurisdictions outside New York concern deeds containing similar lists. Pierce v. St. Louis Union Tr. Co., 278 S.W. 398, 400 (Mo. 1925) (describing 1870 deed banning "manufactory of gunpowder, glue, varnish, vitriol, ink or turpentine, or for the tanning, dressing or preparing furs, skins, hides or leather, or any brewery, distillery or public museum, or any theater or circus or place of similar amusement, or place for the exhibition of animals, or any trade or business of any kind, dangerous, noxious or offensive to the neighboring inhabitants; or any tenement house, tavern, hotel or public school"); Eckman v. Irvin, 27 Pa. D. 795, 795 (Ct. Com. Pl. 1918).

[93] *E.g.*, Gilford v. Babies' Hosp., 21 Abb. N. Cas. 159, 160 (N.Y. Sup. Ct. 1888) (noting plaintiffs' argument that various uses common in nuisance covenants, such as tallow chandleries and smith forges, had previously been declared nuisances "in special cases"); *see also* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 601–02 (Chicago, Callaghan & Co. 1880); JOSEPH A. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES, at viii–ix (1906) (listing trades or businesses generally considered nuisances).

[94] *Rowland*, 34 N.E. at 765 (involving 1865 covenant); *Simons*, 117 N.Y.S. at 567 (involving 1865 covenant); *Doyle*, 116 N.Y.S. at 836 (involving 1871 covenant).

[95] *See* Jaques v. Nat'l Exhibit Co., 15 Abb. N. Cas. 250, 251, 253–54 (N.Y. Sup. Ct. 1884) (enjoining street show involving "dancing puppets, of a grotesque and ludicrous character, a dancing human skeleton, a living clown, and persons acting in characters as a soldier, a negro, and a woman," *id.* at 251); COOLEY, *supra* note 93, at 599; JOYCE & JOYCE, *supra* note 93, § 115, at 160. For further discussion about the perceived morals associated with amusement spots, see DORCETA E. TAYLOR, THE ENVIRONMENT AND THE PEOPLE IN AMERICAN CITIES, 1600S–1900S: DISORDER, INEQUALITY, AND SOCIAL CHANGE 381–82 (2009). In Pennsylvania, an interesting number of cases on nuisance covenants grappled with the undesirability of movie theaters. Some refused to enjoin them, noting "[a]t the date of the covenant (1858) and for more than a century before, there had been theatres in Philadelphia" and it was "certain that the general sentiment was and is that giving theatrical representations is not an offensive occupation." Burk v. Kahn & Greenberg, 22 Pa. D. 691, 692 (Ct. Com. Pl. 1913); *see also* Boger v. Kahn, 23 Pa. D. 816, 817 (Ct. Com. Pl. 1914) (noting that "whether or not [the property's] use for the exhibition of moving pictures will be an 'offensive business' is not yet sufficiently clear to justify . . . an action so drastic as its absolute prohibition"). *But see* Burk v. Kahn, 22 Pa. D. 331, 335 (Ct. Com. Pl. 1913) ("[T]heatres, stage plays and performances of all kind have been regarded as, first, something to be prohibited, and, later, to be tolerated and regulated but not encouraged. The policy of our law has been to regard them as nuisances, or, if not nuisances in a legal sense, as closely akin to them.").

to the area or the time period.[96] For instance, it seems to stretch plausibility that the woman who conveyed a chunk of Madison Avenue and Forty-Second Street in 1865 — already shaping up as an upper-class district of residences and churches[97] — really needed to prohibit expressly the "slaughter house[s]" that were already subject to widespread siting criticism, legal regulation, designation as public nuisances or nuisances per se, and scrutiny in the popular press.[98]

On the other hand, the covenants do reveal some sensitivity to land use changes.[99] Among the boilerplate, one occasionally finds an idiosyncratic land use quite rare among covenants litigated at the time, like a "lime kiln,"[100] "hat factory,"[101] or match-making establishment.[102] In one case, a court remarked that a chunk of the nuisance covenant had been "physically eliminated," perhaps indicating that a party to the transfer crossed out some uses while leaving other prohibited uses in the deed.[103] An odd number of covenants in Philadelphia explicitly banned "court-houses."[104] Some charming uses associated with tradesmen, like

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[96] While I have not located correspondence or the like illustrating the sharing of covenant lists, covenants against nuisances appeared in prominent books of standard forms for real estate transfers. ABBOTT & ABBOTT, *supra* note 29, at 300–01; THEOPHILUS PARSONS, LAWS OF BUSINESS FOR ALL THE STATES OF THE UNION, WITH FORMS AND DIRECTIONS FOR ALL TRANSACTIONS 458–59 (Hartford, S.S. Scranton & Co. 1869) [hereinafter PARSONS, LAWS OF BUSINESS FOR ALL THE STATES OF THE UNION]; THEOPHILUS PARSONS, THE POLITICAL, PERSONAL, AND PROPERTY RIGHTS OF A CITIZEN OF THE UNITED STATES: HOW TO EXERCISE AND HOW TO PRESERVE THEM 301–03 (Hartford, S.S. Scranton & Co. 1876) [hereinafter PARSONS, THE POLITICAL, PERSONAL, AND PROPERTY RIGHTS]. Albeit studying in a later period, Professor Paige Glotzer has done excellent research showing that early subdivision developers in distant parts of the United States frequently requested and copied one another's deed restrictions. GLOTZER, *supra* note 24, at 51–52, 54, 95–96. It seems likely that lawyers and developers likewise shared information at least within cities, if not larger regional networks.

[97] JAMES W. SHEPP & DANIEL B. SHEPP, SHEPP'S NEW YORK CITY ILLUSTRATED: SCENE AND STORY IN THE METROPOLIS OF THE WESTERN WORLD 75 (Chicago, Globe Bible Publ'g Co. 1894).

[98] *Rowland*, 34 N.E. at 765; *see City Nuisances: The Slaughter-Houses of New-York*, N.Y. TIMES, Dec. 18, 1865, at 2; WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 222–26 (1996).

[99] Albeit studying a later period, Professor Helen Monchow noted similar examples of local sensitivity in 1928 and recommended that "with a view to meeting local situations . . . lists of nuisances should be compiled in order to be most effective." MONCHOW, *supra* note 38, at 32. This evolution tracks some contract theory on the transmission of boilerplate and what causes its shifts. *See generally* Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1 (2013).

[100] Brouwer v. Jones, 23 Barb. 153, 154 (N.Y. Gen. Term. 1856).

[101] Haskell v. Wright, 23 N.J. Eq. 389, 393 (Ch. 1873).

[102] *Rowland*, 34 N.E. at 765.

[103] Collins v. Wayne Iron Works, 76 A. 24, 26 (Pa. 1910).

[104] Dennis v. Burke, 26 Pa. D. 535, 535 (Ct. Com. Pl. 1917) ("[O]n no part of this lot or piece of ground shall be built, erected or placed any steam-engine, court-house or building for any offensive occupation whatsoever."); Burk v. Kahn, 22 Pa. D. 331, 332 (Ct. Com. Pl. 1913) ("[N]o court-houses, carpenter, blacksmith, currier or machine shop, livery stable, slaughter-house, soap or glue boiling

coopers, carpenters, and cabinetmakers, dropped out of lengthy lists in later years.[105] Other additions and deletions may have reflected responses by covenant drafters to then-recent court decisions. By 1865, covenants began specifically banning coal yards,[106] some years after a case arose because that use was not specifically enumerated in a restriction drafted in 1825.[107] Likewise, in the 1890s, hotels, inns, and hospitals appeared in newly drafted covenants.[108] While this dovetailed with emergent critiques of the ways these uses attracted mobile (and thus suspect) populations,[109] it was also not too long after courts were asked to construe whether inns, hotels, and hospitals fell within the residual clauses of older nuisance covenants.[110] Of course, other legal and historical trajectories likely influenced the content of covenants, too. The restriction on inns and hotels emerged as public accommodations law was narrowing in ways that allowed racial discrimination at other establishments, but not these.[111] One frequently finds gunpowder manufactories in banned lists in Civil War–era covenants,[112] and saloons,

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establishments or factory of any kind where steam power should be used, or *any building for any offensive occupation*, shall at any time hereafter be erected upon the said lot of ground."); Logan v. Hedden, 21 Pa. D. 925, 926 (Ct. Com. Pl. 1911) ("That no tavern or building for the sale or manufacture of beer or liquors of any kind or description, nor court-house, slaughter-house, blacksmith, currier or machine-shop, poudrette, neats-foot oil, lampblack or gunpowder manufactory, starch, soap, candle, glue or bone-boiling establishment or factory of any kind whatever, or establishment where steam power is used, or building for offensive business, shall at any time be erected, used or occupied on any part of the hereby granted premises . . . ."); Warbrick v. Way, 2 W.N.C. 117, 117 (Pa. Ct. Com. Pl. 1875) (per curiam) ("[N]o court houses, carpenter, blacksmith, currier, or machine-shop, *livery-stable*, slaughter-house, soap or glue-boiling establishment, or factory of any kind where steam-power shall be used, or *building for offensive occupation*, shall at any time hereafter be erected upon the said lot of ground . . . .").

105 *Compare* Heim v. Schwoerer, 99 N.Y.S. 553, 554 (Sup. Ct.) (covenant drafted in 1836), *aff'd*, 100 N.Y.S. 808 (App. Div. 1906), *aff'd*, 80 N.E. 1111 (N.Y. 1907) (per curiam), *with* Getchal v. Lawrence, 201 N.Y.S. 121, 122 (Sup. Ct. 1923) (covenant drafted in 1894).

106 *E.g.*, Simons v. Mut. Constr. Co., 117 N.Y.S. 567, 567 (App. Div. 1909); Doyle v. John E. Olson Realty Co., 116 N.Y.S. 834, 836 (App. Div. 1909); Kitching v. Brown, 73 N.E. 241, 241 (N.Y. 1905).

107 Barron v. Richard, 3 Edw. Ch. 96, 97 (N.Y. Ch. 1837), *aff'd sub nom.* Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840).

108 Heller v. Seltzer, 67 N.Y.S.2d 456, 457 (Sup. Ct. 1947) (covenant drafted in 1893); *Getchal*, 201 N.Y.S. at 122.

109 John Infranca, *Spaces for Sharing: Micro-units amid the Shift from Ownership to Access*, 43 FORDHAM URB. L.J. 1, 11–12 (2016). In New York City, oddly, some hotels carried a different connotation: the very rich took up living at establishments like the Plaza and Waldorf-Astoria. *See* WALLACE, *supra* note 21, at 297–98.

110 *E.g.*, Musgrave v. Sherwood (*Musgrave III*), 60 How. Pr. 339, 342–43, 351–52 (N.Y. Gen. Term 1881); Gilford v. Babies' Hosp., 1 N.Y.S. 448, 449 (Sup. Ct. 1888).

111 Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1390, 1404–06 (1996).

112 Bull v. Burton, 124 N.E. 111, 112–13 (N.Y. 1919); Rowland v. Miller, 34 N.E. 765, 765 (N.Y. 1893); Simons v. Mut. Constr. Co., 117 N.Y.S. 567, 567 (App. Div. 1909).

taverns, alehouses, and lager-beer establishments were added to ban lists as the decades (and the temperance movement) rolled on.[113]

As the lists in nuisance covenants replicated and expanded across time and space, they served both ideological and symbolic functions. On a superficial level, these promises indicated the parties' desires to control nuisance uses in the area. More abstractly, they reflected efforts of bourgeois urbanites to separate work spaces from residences.[114] As covenants were being employed to separate uses block by block, creating residential communities and industrial districts, separation was also occurring in the interior of homes: "service" areas became separated from "social" rooms and those reserved for sleep.[115] Separating work from home, however, seeded a second form of physical separation: separation of the richer from the poorer. The poor were stuck in the "gashouse, industrial, and slaughterhouse districts,"[116] unable to pay the premiums necessary to segregate noxious from sacred. In New York City, an emergent upper class engaged in "self-identification and distancing" by moving to fashionable neighborhoods farther and farther uptown.[117] Covenants helped to cement and protect these multiple forms of separation.

C. Nuisance Covenants at Law

At the outset, the interaction between common law nuisance and these deed restrictions was not entirely clear. Nuisance, of course, is the ancient tort involved when one neighbor's use of property interferes with another's.[118] Although tests for what qualifies as a nuisance have changed over time — and nuisance has a less-than-stellar reputation for consistency and clarity[119] — the overall analysis of what counts as a nuisance typically assesses whether the offender's use causes substantial

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[113] Kitching v. Brown, 73 N.E. 241, 241 (N.Y. 1905); *Rowland*, 34 N.E. at 765; *Simons*, 117 N.Y.S. at 567; Doyle v. John E. Olson Realty Co., 116 N.Y.S. 834, 836 (App. Div. 1909); *Getchal*, 201 N.Y.S. at 122; De Lima v. Mitchell, 98 N.Y.S. 811, 812 (Sup. Ct. 1906). One English historian has asserted that, as it appears in America: "Covenants tended during the 19th century to grow increasingly specific in requirements." OLSEN, *supra* note 49, at 100 n.2.

[114] *See* ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA 7–8 (1987); KATZNELSON, *supra* note 47, at 34–39.

[115] WALLACE, *supra* note 21, at 290.

[116] *Id.* at 268.

[117] SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896, at 156 (2001); *see id.* at 155–56.

[118] Brady, *supra* note 13, at 1151; Barry R. Furrow, *Governing Science: Public Risks and Private Remedies*, 131 U. PA. L. REV. 1403, 1438–39 (1983).

[119] Brady, *supra* note 13, at 1151 & n.33; Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 377 (2018).

harm and whether the interference generated by the use is unreasonable under the circumstances.[120]

Judges were initially unsure how to treat the embedding of tort law within deed restrictions. When covenants used the term "nuisance," courts often cabined the reach of the covenant to what tort law would already prohibit.[121] On the other hand, if the covenant used terms like "noxious," "annoying," "injurious," or "offensive," courts usually considered a bit more broadly whether a given use was irritating or damaging without requiring the objectors to prove an activity was necessarily so harmful as to amount to a legal nuisance.[122] Yet even while construing terms like "noxious," judges borrowed heavily from nuisance principles in determining the scope of nuisance covenant protection. In defining nuisance-adjacent words appearing within deed restrictions, judges articulated requirements that the use be sufficiently annoying to persons of ordinary sensibilities, and not offensive to only an individual, sensitive owner.[123] Both of these requirements derive directly from contemporary nuisance cases.[124]

The existence of these covenants and the extent of overlap with tort law present a puzzle: Why would a subdividing owner or a set of neighbors create a promise not to do something that nuisance might already prohibit? Among other things, such a promise would seem to chafe against the ordinary contract law rule that one cannot extract a promise from another in exchange for something one has a preexisting duty to do.[125] To be sure, covenants against nuisances might simply be explained as an example of belt-and-suspenders lawyering: good real estate lawyers trying to leave available two separate causes of action to halt future objectionable land uses. However, the uses of covenants against

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120 Brady, *supra* note 13, at 1151–52.

121 Clement v. Burtis, 24 N.E. 1013, 1013 (N.Y. 1890); *see* Harrison v. Good (1871) 11 LR Eq. 338 at 351–53 (Eng.). *But see* Cross v. Frost, 23 A. 916, 916 (Vt. 1892) (interpreting "other nuisances" to mean only above-surface nuisances because all enumerated harms were above ground).

122 *See* Rowland v. Miller, 34 N.E. 765, 767 (N.Y. 1893); *see also* Gallon v. Hussar, 158 N.Y.S. 895, 898–900 (App. Div. 1916); Dieterlen v. Miller, 99 N.Y.S. 699, 700–02 (App. Div. 1906); Tod-Heatly v. Benham (1888) 40 Ch D 80 (AC) at 84–85 (Eng.). Intriguingly, in the United States, this holding that covenants expanded nuisance coverage was premised on the fact that some of the commonly specified uses in "nuisance" covenants were not always nuisances — although it is unclear which in a list of slaughterhouses and circuses did not qualify. *Rowland*, 34 N.E. at 765, 767.

123 *Rowland*, 34 N.E. at 767 (judging noxiousness by an "ordinary person" standard); Jaques v. Nat'l Exhibit Co., 15 Abb. N. Cas. 250, 253 (N.Y. Sup. Ct. 1884) ("Matters disagreeable to individual taste, or trivial annoyances, are not subject to prohibition by this court."); *Tod-Heatly*, 40 Ch D at 93–94 (Cotton LJ) (appeal taken from Ch).

124 *See generally* JOYCE & JOYCE, *supra* note 93, at 30–42. Even the words noxious, injurious, and offensive came from nuisance cases. *See, e.g.*, Pickard v. Collins, 23 Barb. 444, 453–54 (N.Y. Gen. Term. 1856).

125 RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. b (AM. L. INST. 1981) (suggesting that a promise to forbear from committing a crime or torts may be unenforceable as against public policy).

nuisances — and the effect this innovation had on land law — reveals that additional considerations were at play.

For one thing, the court decisions themselves make clear an instrumental reason why covenants against nuisances arose and spread: they specifically enhanced the sale price of subdivided property. In one of the earliest cases involving such a covenant, the 1837 New York case of *Barron v. Richard*, the opinion noted that "building lots for dwelling houses were considered to be and were in fact much more valuable and would command a much higher price where the neighborhood was protected by conditions or covenants incorporated with the title and running with the land against nuisances and offensive trades."[126] Owing to covenants' novelty, however, there remained numerous unanswered questions about who exactly could enforce the covenant and what exact sorts of conduct it would prohibit.

Barron itself raised such issues. The grantor had sold five lots with nuisance covenants, and one of them now housed a coal yard, which raised two questions: whether the coal yard violated a covenant against any business "in anywise offensive to the neighboring inhabitants," and whether the lot grantees could sue for breach of the covenant as opposed to the original party to the promise — the grantor.[127] The Vice-Chancellor in *Barron*, William T. McCoun,[128] observed that resolving these questions was of the utmost importance, given the rise and spread of covenants against nuisances and their prevalence in New York deeds.[129] Both the Vice-Chancellor and Chancellor in *Barron* held that the neighbors could sue to enforce the covenant, and both likewise held that the coal yard was a violation of the nuisance covenant.[130] The Chancellor did poke fun at Barron's lawyer, who had pleaded that the coal dust settled on plants and flowers, "beclouding the brightness and beauty which a beneficent Creator has given to make them pleasant to the eye, and cheering to the heart of man,"[131] alongside other "poetical" language.[132] With italics to emphasize his pun, the Chancellor noted that "[m]aking all due allowance for the *coloring* which the pleader has given to this naturally *dark* picture, . . . this keeping of a coal yard upon any

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126 Barron v. Richard, 3 Edw. Ch. 96, 98 (N.Y. Ch. 1837), *aff'd sub nom.* Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840). It is not clear whether the plaintiff's name was "Barrow" or "Barron," as the case name changed on appeal from the Vice-Chancellor to the Chancellor.

127 *Barron*, 3 Edw. Ch. at 97, 99.

128 *Barrow*, 8 Paige Ch. at 352; *see Ex-Judge William T. M'Coun*, N.Y. TIMES, July 21, 1878, at 12.

129 *See Barron*, 3 Edw. Ch. at 99.

130 *Id.* at 103; *Barrow*, 8 Paige Ch. at 361.

131 *Barrow*, 8 Paige Ch. at 360–61.

132 *Id.* at 360.

of these lots is a business offensive to the neighboring inhabitants, according to the spirit and intent of these restrictive covenants."[133]

This still does not explain why buyers would pay a premium for nuisance covenants. But there is an explanation: it turns out that covenants against nuisances offered an immediate benefit by shortening the ordinary tort law path to an injunction against a potential nuisance. This effect requires some elaboration. As many law students learn, English common law courts once coexisted with a second system, equity, which developed in the interstices partially as a response to formal pleading requirements in common law and to potential injustices associated with rote application of common law rules.[134] Many of the American colonies and states followed the English example, establishing both courts of law and "chancery" courts for equity, where chancellors might take into account fairness, idiosyncratic hardships, and other competing interests to ensure just results.[135] The courts of law and equity were also associated with different remedies.[136] Most significantly (at least for the purposes of this Article), damages are considered a legal remedy, whereas injunctions have a deep equitable pedigree.[137]

In the 1820s, when nuisance covenants running with land first emerged, there were obstacles to obtaining an injunction against a nuisance that were widely recognized by scholars and judges (although these obstacles may seem foreign to modern lawyers who, since the merger of law and equity in the mid-nineteenth century, have grown accustomed to the availability of injunctions to stop nuisance uses).[138] Most crucially, at least some judges professed that the injunctive power of chancery could be invoked only *after* a trial in the law courts with a jury, during which certain facts upon which a nuisance claim might depend (such as title to property) could be proved.[139] In that trial at law,

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133 *Id.* at 361.

134 For the general history of equity, see JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 105–16 (Oxford Univ. Press 5th ed. 2019). For a recent effort to revitalize similar functions of equity, see Henry E. Smith, *Equity as Meta-law*, 130 YALE L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3734662 [https://perma.cc/JH7Y-ZPNX].

135 *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536–38 (2016).

136 *Id.* at 541–42.

137 *See id.*

138 For information on the consequences of fusion for tort law, as well as the availability of injunctions for nuisance actions, see John C.P. Goldberg & Henry E. Smith, *Wrongful Fusion: Equity and Tort*, *in* EQUITY AND LAW: FUSION AND FISSION 309 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019).

139 GEORGE TUCKER BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY § 337, at 398 (Philadelphia, Kay & Brother 4th ed. 1887); ANTHONY LAUSSAT, JR., AN ESSAY ON EQUITY IN PENNSYLVANIA, at i, 130–31 (Arno Press Inc. reprt. ed. 1972) (1826); William Draper Lewis, *Injunctions Against Nuisances and the Rule Requiring the Plaintiff to Establish His Right at Law*, 56 U. PA. L. REV. 289, 289–91 (1908); *see* NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 467 (E.D.N.Y. 2003). It is unclear from this evidence whether the requirement to proceed before a jury

however, damages were the ordinary remedy, so obtaining abatement still required a subsequent resort to equity.[140] Put succinctly, even if the parties' title to neighboring properties was not really central to the dispute, plaintiffs perceived risks if they did not begin by establishing the foundation of their nuisance claims — their title — at law.

Further complicating matters, there was much confusion between nuisance and easement law in the period, with some commentators and judges treating neighbors' capacities and powers to use land (and any limitations thereon, such as those imposed by nuisance) as forms of servitudes.[141] To illustrate through two examples, a court might conceive of a polluter as having established an affirmative easement to emit fumes across neighboring property,[142] or might treat the neighbor of a polluter as having a negative easement ensuring some quantity or quality of light, air, or water.[143] This framing of nuisance likewise seemed to require a determination *at law* of the parties' respective "easements" before equitable jurisdiction could be invoked. Thus, obtaining an injunction often required resort to two different forums. The consequence of this jurisdictional split between factfinding and remedy increased both the cost and uncertainty of abating an alleged nuisance through ordinary tort law, as contemporary commentary reflects.[144]

Nineteenth-century judges and lawyers were acutely aware that covenants solved this jurisdictional problem. While doubting some of the logic behind the rule requiring a party to pursue a nuisance action at law before seeking an injunction, one New York Vice-Chancellor observed in 1837 that he need not decide "[h]ow far this court interferes to restrain a nuisance," because equity's ability to specifically enforce a covenant was unquestioned.[145] And in 1891, a New York Superior Court judge observed that a claim under a covenant gave plaintiffs a

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first would have been perceived as undesirable in its own right, particularly since equity had no juries. *See* Bray, *supra* note 135, at 548.

140 *See* P.H. Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 189, 191–92 (1931).

141 *See* BISPHAM, *supra* note 139, §§ 440–441, at 497–99; Paul M. Kurtz, *Nineteenth Century Anti-entrepreneurial Nuisance Injunctions — Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 635 (1976); Lewis, *supra* note 139, at 307–13.

142 Kurtz, *supra* note 141, at 635.

143 Lewis, *supra* note 139, at 309–13.

144 *See id.* at 315 (describing the rule that parties had to bring nuisance action at law first as a rule meant to "delay and vex" the "pursuit of justice," originating in "confusion of thought," and "which never has and which never can serve any useful purpose"). On the other hand, Anthony Laussat suggested that the process of obtaining an injunction after a trial at law was not especially burdensome. LAUSSAT, *supra* note 139, at 131.

145 Barron v. Richard, 3 Edw. Ch. 96, 103 (N.Y. Ch. 1837), *aff'd sub nom.* Barrow v. Richard, 8 Paige Ch. 351 (N.Y. Ch. 1840).

"higher equity" than the ordinary nuisance plaintiff had.[146] In other contexts, judges commonly used this phrase — "higher equity" — to indicate that one party had stronger or superior title to another.[147]

But covenants against nuisances offered other benefits that may have been more unexpected, benefits that derived directly from the nesting of tort law within a contractual device. Nuisance covenants lowered the threshold of damages required to maintain a successful nuisance action.[148] As contemporary nuisance writers observed, ordinarily, private nuisance actions required "*material* injury" to property, rather than mere trifling harm or personal inconvenience.[149] Although an injunction to enforce a nuisance covenant was theoretically warranted only where the plaintiff would suffer "irreparable injury,"[150] the equity courts would "not enter into nice discrimination as to the extent of the damage" in enforcing a covenant.[151] Instead, proof of the covenant and its imminent breach would be enough to invoke equity's jurisdiction, without the need to show substantial or material harm.[152]

Indeed, beneficiaries of a nuisance covenant did not have to wait for the objectionable use to cause *any* harm. Under nuisance proper, as the

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[146] Rowland v. Miller, 15 N.Y.S. 701, 702 (Super. Ct. 1891), *aff'd*, 18 N.Y.S. 793 (Gen. Term 1892), *aff'd*, 34 N.E. 765 (N.Y. 1893).

[147] Salmon v. Bennett, 1 Conn. 525, 557 (1816); Hale v. Omaha Nat'l Bank, 49 N.Y. 626, 634 (1872).

[148] Lowering the bar likely also expanded the number of parties who could sue to enjoin a use, because parties might have been able to sue for actions that were harmful or offensive to some neighbors without needing to show a certain magnitude of injury to themselves. I have not located a case that fits this description — instead, the plaintiffs always alleged harm to themselves — but I mention the possibility.

[149] *See* BISPHAM, *supra* note 139, § 439, at 496; JOYCE & JOYCE, *supra* note 93, §§ 21–22, at 36–39.

[150] *Rowland*, 15 N.Y.S. at 702; *see also* Bray, *supra* note 135, at 535, 544 & n.68 (discussing the "irreparable injury rule," *id.* at 544 n.68, as synonymous with the idea that the plaintiff lacked an "adequate remedy at law," *id.* at 544).

[151] BISPHAM, *supra* note 139, § 461, at 514, quoted in *Rowland*, 15 N.Y.S. at 702. Requirements that plaintiffs prove damage in order to mount a nuisance claim may be another example of nuisance law rules that promoted industrial development. *Cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 74–78 (1977).

[152] To be fair, other equitable doctrines might ultimately jettison plaintiffs who suffered nearly no damage or who had other equities stacked against them. For instance, the doctrines of relative hardship (weighing the harm to plaintiff and defendant which would result from enforcement of the covenant) and acquiescence (closely related to estoppel and waiver) might bar the enforcement of covenants — say, for example, if the beneficiary of a nuisance covenant had permitted twelve livery stables to go in without objection, but then sued to stop the thirteenth. *See* Howard R. Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 TEX. L. REV. 419, 451 (1949). *See generally* Henry E. Smith, *Equitable Defences as Meta-law*, *in* DEFENCES IN EQUITY 17 (Paul S. Davies, Simon Douglas & James Goudkamp eds., 2018). Issues related to the definition of material or significant damage continue to plague nuisance law. For an overview, see Brady, *supra* note 13, at 1151–56, 1196–99.

substantiality requirement might indicate, judges were extremely reluctant to embrace the doctrine of "anticipatory nuisance,"[153] or, in other words, to enjoin a proposed use prior to it certainly becoming offensive. To give an example of just how reluctant, in one case, a court refused to enjoin an establishment that would slaughter a hundred hogs daily on the grounds that it had not yet proved itself offensive.[154] Furthermore, nuisance covenants may have protected owners against extortionate scams premised on neighbors' helplessness to stop a nuisance use ex ante. In some cities in the mid-nineteenth century, opportunistic residents bought vacant lots, threatening to engage in some undesirable activity unless the neighbors paid to stop them.[155] Nuisance covenants helped assure buyers that they would not have to wait either for scam artists to make good on their promises or for potentially harmful businesses to show that they were not as well run and managed as they promised to be.[156]

In part, nuisance covenants accomplished these ends through specification. By specifying certain land uses as automatically noxious, parties could shortcut any more granular nuisance examination a court deciding a tort case might engage in.[157] According to the express terms of the agreement, a brewery, glue factory, or candle-making operation could be forbidden, without a judge weighing the benefit of the use to society or any other unpredictable factors. Given that judges sometimes worried that injunctions against manufacturers or other trades might interfere with enterprises crucial to industrial growth, this was not an idle concern.[158] In other words, enumerating uses within a nuisance covenant replaced a standard with a rule.

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153 Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENV'T L. & POL'Y REV. 223, 239–40 (1995).

154 *See* Att'y Gen. v. Steward, 20 N.J. Eq. 415, 417, 419 (Ch. 1869); *see also* Owen v. Phillips, 73 Ind. 284, 291 (1881); Wolcott v. Melick, 11 N.J. Eq. 204, 207 (Ch. 1856).

155 Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 569–70 (1992); Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1645–46 (2011).

156 *Cf.* Windfall Mfg. Co. v. Patterson, 47 N.E. 2, 4 (Ind. 1897) (noting that businesses that are lawful, located properly, and well maintained cannot be considered nuisances); Pfingst v. Senn, 23 S.W. 358, 360 (Ky. 1893) (noting that equity would not intervene prior to damage being caused or inevitable).

157 It appears that judges were aware that specification carried this advantage. *See, e.g.*, Hall v. Wesster, 7 Mo. App. 56, 62–63 (1879) ("Where all the purchasers of an estate are bound by restrictive covenants not to use their houses for certain purposes, an injunction will be granted to restrain a breach of the covenant, without any regard to the question of the character or degree of annoyance. The objection may be founded on the merest whim." *Id.* at 62.).

158 Judges explicitly mentioned this concern, which has led to much scholarship discussing judges' reluctance to enjoin nuisances and their pro-development biases. *See, e.g.*, HORWITZ, *supra* note 151, at 74–78; Kurtz, *supra* note 141, at 624–25, 625 n.24.

To a much lesser extent, nuisance covenants also helped owners evade the strict canons of construction ordinarily applicable to covenants and other contracts involving land, albeit in the same way that any open-ended term like "business" might. Then, as now, the prevailing canon of construction required all doubts about the meaning of a given deed restriction to be resolved in favor of the free use of property.[159] In other words, covenants were to be interpreted narrowly. This canon threatened to undermine the long-term effectiveness of a prohibition on any given enumerated use — for instance, if considering whether banning a "livery stable" would also ban a pigpen, a strict construction might dictate the answer to be no. Toward this end, the open-ended terms like "noxious," "nuisance," and "offensive" seemed to promise more flexibility because a use totally unanticipated at the time of drafting could theoretically be found within the scope of these descriptive terms. Nevertheless, a party might run into a court more inclined to read the covenant according to the intent of its drafters rather than emergent preferences. In *Dennis v. Burke*,[160] the Pennsylvania Court of Common Pleas refused to enjoin a saloon under an 1861 covenant that prohibited "any offensive occupation whatsoever."[161] While the offensiveness of saloons might have been clear to readers in 1917 (near the height of the temperance movement), the court concluded that saloons would not have been considered offensive in 1861, in part because they "were used . . . for the purpose of securing men to enter into the army to aid the Union cause [in the Civil War]."[162]

Courts were willing to permit some unenumerated businesses, structures, and activities to fall within the residual clauses of nuisance covenants in this way. In one early case, New York courts determined that a wharf fit within a ban on "offensive" uses for the delightfully specific reason that it might "afford[] equal, and even greater facilities for the landing of nocturnal debauchees."[163] Using similar reasoning, New York courts found that an undertaking establishment was injurious,[164] a hospital for sick infants counted as a use "injurious[] or offensive to the neighboring inhabitants,"[165] a family hotel was a "business or calling

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[159] *See, e.g.*, Douglass v. Lewis, 131 U.S. 75, 86 (1889); Hawes v. Favor, 43 N.E. 1076, 1079 (Ill. 1896); Postal Tel. Cable Co. v. W. Union Tel. Co., 40 N.E. 587, 590–91 (Ill. 1895); Glenn v. Davis, 35 Md. 208, 218–19 (1872); Duryea v. Mayor of New York, 62 N.Y. 592, 597 (1875); Clark v. Jammes, 33 N.Y.S. 1020, 1020 (Gen. Term 1895).

[160] 26 Pa. D. 535 (Ct. Com. Pl. 1917).

[161] *Id.* at 539.

[162] *Id.* at 538.

[163] Seymour v. McDonald, 4 Sand. Ch. 535, 541 (N.Y. Ch. 1847); *see id.* at 537.

[164] Rowland v. Miller, 34 N.E. 765, 765, 767 (N.Y. 1893).

[165] Gilford v. Babies' Hosp., 1 N.Y.S. 448, 449 (Sup. Ct. 1888).

noxious or offensive to the neighboring inhabitants,"[166] and novel methods of manufacturing paraffin oil were a "noxious or dangerous trade."[167]

In sum, during most of the nineteenth century, covenants and nuisances were not just alternative forms of private land use controls. Within nuisance covenants, they worked in tandem, as lawyers and owners combined them in creative ways that augmented parties' access to equitable remedies and that enhanced owners' powers to control neighboring land uses beyond what nuisance could accomplish on its own. Nuisance covenants combined two important features: specification and broad residual clauses. By specifying particular banned uses, owners did not need to show damages or subject themselves to the unpredictable balancing of tort law. Broad residual clauses helped the covenants reach newer uses and avoid the strict canon of construction applicable to contracts running with the land. By the late nineteenth century, however, new uses were appearing on the horizon that would test nuisance covenants. It is to those new uses that the next Part turns.

II. FAILURES TO VILLAINIZE THE APARTMENT

A. History of Apartment Houses

In 1871, the *New York Times* published a sardonic article entitled "Looking for a House: The Tribulations of a Dwelling Hunter."[168] The article tells the tale of a (probably fictional) couple seeking to lease a private house somewhere in New York. In checking out one private house after another, the hopeful pair encountered obstacles. Approaching the first house, the husband worriedly noticed "[a] few stores and a tenement or two," only to find himself unable to hear the prospective landlord due to a "whir, whir, whir" outside.[169] At the second, he was appalled to discover "the neighbors kept ducks and goats" and the views were of "hog-pens and shanties."[170] As other disappointments followed, the couple had nearly resolved to move to the suburbs, when the husband began to consider an alternative: the apartment.[171] The unidentified author encouraged the reader: "Reader, did you ever advertise for apartments? If not, do so at once."[172]

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166 *Musgrave III*, 60 How. Pr. 339, 352 (N.Y. Gen. Term 1881); *see id.* at 366.
167 Atl. Dock Co. v. Libby, 45 N.Y. 499, 502 (1871); *see id.* at 503.
168 *Looking for a House*, N.Y. TIMES, Apr. 9, 1871, at 5.
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*

This story was written as an ostensibly new form of multifamily residence was taking shape.[173] Inspired by the Parisians (and marketed accordingly), around 1870, American developers started constructing in earnest the apartment or "French flat[]"[174]: a building with multiple units marketed to the middle and upper classes, with units featuring servants' quarters, private bathrooms, and space for entertaining.[175] In the hotbed of apartment construction — New York City — apartments were given formal, grand names: the Stuyvesant, the Dakota, the Madison, the Earlscourt.[176] Decades later, the elevator would permit these middle-class residences to stretch higher and higher.[177]

In some senses, the apartment was not as big an innovation as its marketers would have had contemporaries believe. The American experiment with multifamily housing until that point had primarily consisted of multistory tenement (or tenant) houses, and if one were to define a tenement as a building with more than three units, there was no distinction between apartments and this earlier form.[178] Tenement housing dated to approximately 1840, when the urban population began to swell with immigration to American shores.[179] The tenements quickly became associated both with real dangers and with invented harms associated with the class, race, or ethnicity of tenement occupants. As the tenements crowded, residents associated them with disease and improper sanitation, such as the lack of indoor plumbing.[180] The height of the buildings also exacerbated fears. Newspapers carried horror stories of families that perished in fires while trapped on top

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173 Not every commentator was so sure about the likely success of apartments; the trade publication *Real Estate Record* noted on July 17, 1869: "We have always been inclined to doubt the feasibility of the Paris flats transferred to New York." *Apartment Houses*, REAL EST. REC. (N.Y.), July 17, 1869, at 3. The *Record* recommended investments in suburbanization instead. *Id.*

174 ELIZABETH COLLINS CROMLEY, ALONE TOGETHER: A HISTORY OF NEW YORK'S EARLY APARTMENTS 62 (1990).

175 *See, e.g.*, *Real Estate*, N.Y. TRIB., Nov. 5, 1869, at 3. The Stuyvesant described in that blurb is often described as the first apartment house in New York. *Apartments South of Central Park*, THE SUN (N.Y.), Sept. 8, 1912, at 1; Christopher Gray, *Apartment Buildings, the Latest in French Ideas*, N.Y. TIMES (July 11, 2013), https://nyti.ms/15zfpdP [https://perma.cc/S42S-SCJL].

176 *See* CROMLEY, *supra* note 174, at 142; *Apartments South of Central Park*, *supra* note 175, at 1; Gray, *supra* note 175.

177 Stephen Lynch, *How Elevators Transformed NYC's Social Landscape*, N.Y. POST (Feb. 8, 2014, 9:58 PM), https://nypost.com/2014/02/08/how-elevators-transformed-nycs-social-landscape [https://perma.cc/VGP3-NTSP].

178 *See* WALLACE, *supra* note 21, at 288.

179 One nineteenth-century writer traces the first tenement house to 1838. TENEMENT HOUSE BLDG. CO., THE TENEMENT HOUSES OF NEW YORK CITY 3 (New York, Albert B. King 1891).

180 JACOB A. RIIS, THE BATTLE WITH THE SLUM 19–20 (1902); REPORT OF THE COUNCIL OF HYGIENE AND PUBLIC HEALTH OF THE CITIZENS' ASSOCIATION OF NEW YORK UPON THE SANITARY CONDITION OF THE CITY, at lxxv–lxxvi (New York, D. Appleton & Co. 2d ed. 1866); *see also* Meeker v. Van Rensselaer, 15 Wend. 397, 398–99 (N.Y. Sup. Ct. 1836) (calling a crowded tenement a common nuisance and permitting it to be abated).

floors, unable to escape through stairwells full of smoke and flame.[181] Naturally, contemporary writers also emphasized the moral failings that residents were likely to acquire under such conditions, ranging from prostitution to gambling.[182]

Perhaps unsurprisingly, given these associations with risks and harms both real and exaggerated, mid-nineteenth-century lawyers began including "tenement" or "community" houses in the enumerated lists in nuisance covenants around 1860 for the first time.[183] Thus, developers and their lawyers ended up on both sides of the apartment debate: some were restriction breakers, trying to maximize dense development of the new form of housing, while others were restriction creators, putting new or revised covenants on subdivided properties both urban and suburban. Tenements soon appeared frequently and prominently in restrictive covenants alongside slaughterhouses or stables,[184] a telling indication of how upper-class residents in elite subdivisions perceived tenements' inhabitants. Again, the use of the nuisance covenant expanded an individual owner's power to control the construction of a tenement in the vicinity. A nineteenth-century proprietor would be quite unlikely to prevail in keeping a tenement out through traditional nuisance law, unless able to show some concrete harm associated with a particular tenement: issues associated with crowding or the absence of plumbing or ventilation, for instance.[185] By specifying tenements as unwanted in a covenant, an owner had a surer chance of keeping them at

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[181] *Calamitous Fire: Tenement House on Elm-Street Destroyed*, N.Y. TIMES, Feb. 3, 1860, at 1; *Destructive Fires: Four Tenement Houses Destroyed*, N.Y. TIMES, Mar. 29, 1860, at 1; *see* WALLACE, *supra* note 21, at 253.

[182] Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 234–35 (2002); *see* TENEMENT HOUSE BLDG. CO., *supra* note 179, at 3. Noah Kazis has also described how attacks on single-room living reflected "gendered notions about the proper home." Noah M. Kazis, *Fair Housing for a Non-sexist City*, 134 HARV. L. REV. 1683, 1721 (2021); *see id.* at 1721–26.

[183] Boyd v. Kerwin, 15 N.Y.S. 721, 721 (Sup. Ct. 1891); *see* Rowland v. Miller, 34 N.E. 765, 765 (N.Y. 1893); Fourth Presbyterian Church v. Steiner, 29 N.Y.S. 488, 488 (Gen. Term 1894); Doyle v. John E. Olson Realty Co., 116 N.Y.S. 834, 836 (App. Div. 1909); Kitching v. Brown, 73 N.E. 241, 241 (N.Y. 1905); Jones v. Chapel Hill, 69 N.Y.S.2d 753, 755 (Sup. Ct. 1947), *modified and aff'd*, 77 N.Y.S.2d 867 (App. Div. 1948); Getchal v. Lawrence, 201 N.Y.S. 121, 122 (Sup. Ct. 1923). Sometimes other covenants separate from the nuisance provisions explicitly banned tenements. *E.g.*, Cummins v. Colgate Props. Corp., 153 N.Y.S.2d 321, 322 (Sup. Ct.), *aff'd*, 153 N.Y.S.2d 608 (App. Div. 1956) (mem.).

[184] *See* cases cited *supra* note 183.

[185] Tenements with these consequences may have more commonly been treated as public rather than private nuisances. *See, e.g.*, *Meeker*, 15 Wend. at 398 ("A more offensive nuisance cannot be imagined than the buildings described by the witnesses in this case."). *But see* Griffith v. Lewis, 17 Mo. App. 605, 607 (1885) (private nuisance action alleging, among other things, that leaking privy vault generated "unwholesome vapor"). For a bit on invocations of nuisance to combat sanitation and health problems in tenements, see Judith A. Gilbert, *Tenements and Takings:* Tenement House

bay. In this way, nuisance covenants were displaying some signs of evolution. Whereas many of the uses enumerated in the earliest covenants — from tanneries to iron factories and beyond — were the traditional subjects of nuisance actions,[186] they were starting to break from those common law roots.

Especially as the apartment took shape, contemporaries often described it as different in kind from the tenement, both because it generally came with better amenities and more spacious accommodations and, relatedly, because it housed more middle- and upper-class occupants.[187] Early writings on the "tenement house problem" observed distinctions between the two.[188] As tenement houses were increasingly targeted by regulators for health and safety reasons, the structures that met minimum sanitation and lot size requirements had to be marketed to renters and buyers with a different price point — meaning tenement regulation may have influenced the creation and spread of apartments.[189] But tastes had likely already shifted toward these new structures. In 1881, trade publication the *Real Estate Record* observed that New York City apartment construction was growing significantly.[190] "The number of rich people who want to live in elegant apartments and yet not be hampered with a whole house is steadily increasing . . . ."[191] The occasional restrictive covenant in the 1880s even expressly permitted "French apartment houses" alongside "first-class stone or brick front dwelling houses."[192]

Soon, in the densest American cities, apartment houses did become far more valuable than private dwellings for many owners of land.[193] A 1929 case from New York provides a window into the rapidity of the

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Department of New York v. Moeschen *as a Counterpoint to* Lochner v. New York, 18 FORDHAM URB. L.J. 437, 444–45 (1991).

186 *See supra* notes 91–95 and accompanying text.

187 *See* WALLACE, *supra* note 21, at 288–90.

188 While maintaining that apartments should be subject to the same sanitation and other requirements as tenements, Robert DeForest's work noted differences. First, apartments would require less "inspection . . . by reason of the habits of [their] occupants." Robert W. DeForest, *Introduction: Tenement Reform in New York Since 1901*, *in* 1 THE TENEMENT HOUSE PROBLEM, at ix, xxviii (Robert W. DeForest & Lawrence Veiller eds., 1903). Another section observed that any effort to separate the two types of housing for different forms of regulation would be "one set of laws for the rich" apartment house inhabitants and "another for the poor" tenement inhabitants. Robert W. DeForest & Lawrence Veiller, *The Tenement House Problem*, *in* 1 THE TENEMENT HOUSE PROBLEM, *supra*, at 1, 38; *see id.* at 37–38.

189 *See* Gilbert, *supra* note 185, at 446–47, 495.

190 *Attention, Builders!*, 27 REAL EST. REC. 299, 299 (1881).

191 *Id.*

192 Equitable Life Assurance Soc'y v. Brennan, 43 N.E. 173, 173 (N.Y. 1896) (1881 covenant).

193 *See Apartments South of Central Park*, *supra* note 175, at 4. In an odd turn of events, New York's rich are now seeking to convert business and multifamily structures back into mansions. *See* Robin Finn, *New York's Once and Future Mansions*, N.Y. TIMES (Sept. 5, 2014), https://nyti.ms/1xkZZK9 [https://perma.cc/V9CC-8J3F].

change. In 1886, as the apartment was beginning to proliferate in New York, Isaac V. Brokaw nonetheless purchased a plot of land on Fifth Avenue and Seventy-Ninth Street facing Central Park and constructed an expensive three-story private home featuring, among other luxuries, "murals," a "monumental staircase," and "Italian marble."[194] Brokaw constructed three other mansions in the immediate neighborhood, one for each of his children; each was burdened through his will by a series of restrictions and future interests meant to protect the new complex of buildings and keep them in the family.[195] By 1929, one of the children was seeking out from these restrictions, hoping to replace the mansion with an apartment.[196] The mansion was impossible to rent, impossible to remodel to modern tastes, and costly to maintain.[197] Between 1913 and 1929, "the building of private residences ha[d] practically ceased," with two residences built across fifty-one blocks as compared to forty-four apartment buildings.[198] Only eight of the fifty-one blocks remained apartment-free.[199]

As the apartment grew in popularity, however, its advance was not welcomed by all. By the early years of the twentieth century, sociologists began describing apartments and cities themselves as threats to the family, depicting the amenities of urban living as drawing people away from the home and toward vice.[200] These tropes dovetailed with theories emerging circa 1900 of "race suicide," a concept espoused by numerous Progressives including President Theodore Roosevelt — the idea that wealthier, white people were slowly becoming extinct by having smaller families, while the poor, feeble-minded, and immigrant classes were expanding.[201] The old-style tenements were linked to race suicide on multiple axes. They were alternately portrayed as breeding grounds for

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[194] Brokaw v. Fairchild, 237 N.Y.S. 6, 10 (Sup. Ct. 1929), *aff'd*, 245 N.Y.S. 402 (App. Div. 1930) (mem.) (per curiam), *aff'd*, 177 N.E. 186 (N.Y. 1931) (per curiam); *see id.* at 9–10.

[195] *Id.* at 11.

[196] *Id.* at 10–11.

[197] *Id.*

[198] *Id.* at 10. Those few extremely wealthy who could afford private houses were either strenuously defending their areas against incursion from apartments or moving uptown. *See* WALLACE, *supra* note 21, at 293–96.

[199] *Brokaw*, 237 N.Y.S. at 10.

[200] 3 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 227–28 (1904).

[201] THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA, at xii (2016); David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, LAW & CONTEMP. PROBS., Summer 2009, at 177, 182 (tracing concept of race suicide to 1901 article by sociologist Edward Ross); Ariel S. Tazkargy, *From Coercion to Coercion: Voluntary Sterilization Policies in the United States*, 32 LAW & INEQ. 135, 144–45 (2014). The association between "race suicide" and President Roosevelt was strong enough to make it into a reported case, in which the

immigrant families,[202] sites of moral degeneracy that discouraged marriage or corrupted young girls,[203] or hostile environments where landlords limited the number of children a well-intentioned, hardworking resident might otherwise have.[204] The apartment soon came to be subjected to similar moralizing concerns, despite the generally higher class of its occupants. By 1907, the *American Architect* — a journal on art and construction — was publishing pieces on the apartment house "evil,"[205] paralleling earlier articles in other forums on the "tenement house evil."[206] Apartments were inhabited by "dwellers led by example to indulging unjustifiably in theatre-parties, fur-cloaks, and automobiles," with children in peril of being raised by the streets and men drawn from drink to gambling to the bankruptcy court.[207]

Likewise, the apartment came to be associated with fear of disease. Although the tenement had long been associated with epidemics, that was chiefly because of sanitation deficiencies and other genuinely poor and overcrowded living conditions, as opposed to the lone fact of multiple units within a single structure.[208] With the expansion of the middle- and upper-class apartment, however, commentators found new ways to connect density with illness, especially through discussions of the need for "light and air" as opposed to bulk. The idea that disease was caused by "miasmas" — noxious vapors — was still held by some citizens and architects, and inadequate airflow would logically seem to lead to stagnation.[209] By 1900, however, scientists and doctors were

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standard was called "Rooseveltian." Galveston, H. & S.A. Ry. Co. v. Pingenot, 142 S.W. 93, 96 (Tex. Civ. App. 1911).

202 KATRINA IRVING, IMMIGRANT MOTHERS: NARRATIVES OF RACE AND MATERNITY, 1890–1925, at 12 (2000).

203 *See* DELOS F. WILCOX, THE AMERICAN CITY: A PROBLEM IN DEMOCRACY 124 (1904).

204 *Tenement House Evils*, SHOE WORKERS' J., Mar. 1906, at 12, 12–13.

205 *The Radical Evil of Life in Apartment-Houses*, 91 AM. ARCHITECT & BLDG. NEWS 1, 1 (1907).

206 *Tenement House Evils*, *supra* note 204, at 12.

207 *The Radical Evil of Life in Apartment-Houses*, *supra* note 205, at 1. One author has noted that the term "French flat" even carried "risqué" connotations. WALLACE, *supra* note 21, at 289.

208 *See* Sheaff v. Kansas City, 241 P. 439, 440 (Kan. 1925); Health Dep't v. Rector of Trinity Church, 39 N.E. 833, 839 (N.Y. 1895). Judges sometimes used the term "apartment" to refer to the quarters of businesses carried on within tenements, like bakeries or clothing manufacturers, and viewed the crowding and conditions associated with these businesses as likewise creating vectors for disease. State v. Hyman, 57 A. 6, 7, 11 (Md. 1904); People v. Lochner, 69 N.E. 373, 382–83 (N.Y. 1904) (Vann, J., concurring), *rev'd sub nom.* Lochner v. New York, 198 U.S. 45 (1905).

209 ROBERT M. FOGELSON, DOWNTOWN: ITS RISE AND FALL, 1880–1950, at 125–26 (2001); JULIE SZE, NOXIOUS NEW YORK: THE RACIAL POLITICS OF URBAN HEALTH AND ENVIRONMENTAL JUSTICE 29–30 (2007).

beginning to better understand the true sources of epidemics: microorganisms and viruses.[210] Despite this shift in understandings of epidemiology, commentators became just as fearful about the role of apartments and other large buildings in creating conditions that facilitated the spread of disease — not by virtue of shared surfaces, but because large structures reduced sunlight and wind, the natural enemies of disease-causing organisms.[211] The shadowy sidewalks beneath tall city buildings were called "canyon[s]"[212] and depicted as fertile "breeding ground[s] for germs" in the popular press and in other publications.[213]

The apartment battles split both owners and developers: developers of restricted subdivisions were pitted against developers seeking to build multifamily housing, and owners of existing residences turned against neighbors seeking to redevelop one unit into many (or willing to sell to those who would). There is little doubt that other concerns about the value of real estate and the inhabitants of apartments were beginning to mount in some circles. For every glowing press article describing apartments as "without a parallel in convenience and elegance"[214] or as "congenial neighbors,"[215] soon others began to refer to apartments and their developers in terms of "invasion."[216]

In part, this appears to have been the result of a new front in the class conflicts that had given rise to nuisance covenants in the first place. While nuisance covenants emerged as a legal device to separate work from home and richer from poorer, now they would achieve new life as the "wealthy" sought to separate from the "less wealthy," including more marginal members of the middle and upper-middle classes: professionals, artisans, shopkeepers.[217] In 1902, the wealthy Vanderbilts fought an eighteen-story apartment house proposed near their mansions, eventually putting up millions to acquire land and construct lone houses in a doomed effort to defend the turf.[218] In 1908, the *New York Times* wrote of the "first gun in what promises to be a bitterly fought real estate

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[210] The lower court decision in *Lochner v. New York*, 198 U.S. 45, in fact referenced this emerging consensus, noting that the day had brought "appreciation of, and apprehension on account of, microbes, which cause disease and death." *Lochner*, 69 N.E. at 379.

[211] FOGELSON, *supra* note 209, at 125–26.

[212] HARLAND BARTHOLOMEW, CITY PLAN COMMISSION, ZONING FOR ST. LOUIS: A FUNDAMENTAL PART OF THE CITY PLAN, at Frontispiece (1918) (capitalization omitted).

[213] FOGELSON, *supra* note 209, at 125.

[214] *Apartment Life in Pleasing Form*, N.Y. TIMES, Oct. 28, 1894, at 19 (capitalization omitted).

[215] *In the Real Estate Field*, N.Y. TIMES, Oct. 19, 1902, at 20.

[216] *E.g.*, *In the Real Estate Field*, N.Y. TIMES, Nov. 6, 1904, at 16; *57th Street Invasion?*, N.Y. TIMES, Nov. 7, 1909, at XX2.

[217] *See* BECKERT, *supra* note 117, at 7–8; WALLACE, *supra* note 21, at 293–98.

[218] *See* Christopher Gray, *The Battle Money Couldn't Win*, N.Y. TIMES, June 15, 2014, at RE9; *see also* SHEPP & SHEPP, *supra* note 97, at 75 (describing Fifth Avenue as the "fashionable thoroughfare of the city," replete with "private houses" and "club-houses").

war," as another set of less wealthy private owners farther north organized to fight a new apartment building.[219] With fears from the most elite crystallizing around the apartment in the early years of the twentieth century, owners of land in urban neighborhoods around the United States turned first to private law — and in particular, to those old nuisance covenants.

B. The Apartment Under Nuisance Covenants

In the effort to keep apartments separate from other forms of housing, the nuisance covenant seemed to be one of the strongest tools in a property owner's arsenal. For the same reasons that tort law generally failed to prohibit tenements, ordinary nuisance law — or attempts to imply any form of negative easement preventing adjoining construction — offered little hope of slowing the apartment's expansion.[220] Although some tenements had faced judicial scrutiny for poor sanitation conditions that may well have led to nuisance-generating smells, sounds, or substances,[221] claims that adjoining well-built apartments constituted a nuisance because they would block light or airflow or cause some devaluation simply did not succeed.[222]

Nuisance covenants, however, seemed to offer at least two potential avenues for protection against the encroachment of apartments. First, owners could argue that apartments fell within the broad residual clauses many nuisance covenants contained against "injurious" or "offensive" uses short of legal nuisance.[223] Second, owners could try to argue that apartments qualified as one type of often-enumerated use: tenements.[224] As described in the preceding section, despite apartments' and tenements' similarities in size and in use as multifamily residences,

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[219] *Real Estate War in 100th Street: Objection of Private Owners to Apartment House Invasion Ends in a Court Suit*, N.Y. TIMES, June 11, 1908, at 16.

[220] Courts had rejected theories of implied easements of light and air since the 1830s, even though these were occasionally recognized under the "ancient lights" doctrine in England. In *Parker v. Foote*, 19 Wend. 309 (N.Y. Sup. Ct. 1838), Judge Bronson of the New York Supreme Court of Judicature expressly linked the choice to reject "ancient lights," *id.* at 311, to American development: the English rule could not "be applied in the growing cities and villages of this country, without working the most mischievous consequences," *id.* at 318.

[221] *See supra* note 185 and accompanying text.

[222] W. Granite & Marble Co. v. Knickerbocker, 37 P. 192, 193 (Cal. 1894); Giller v. West, 69 N.E. 548, 549 (Ind. 1904); Smith v. St. Paul, M. & M. Ry. Co., 81 P. 840, 842 (Wash. 1905) (dicta); 1 H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS § 153 (San Francisco, Bancroft-Whitney Co. 3d ed. 1893). Somewhat oddly, landowners had more rights to prevent obstructions of light and air from the street under what were then known as abutters' rights. *See* 10A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 30:66 (3d ed.), Westlaw (database updated Aug. 2020); Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1214 (2016).

[223] *E.g.*, *Musgrave III*, 60 How. Pr. 339, 352 (N.Y. Gen. Term 1881).

[224] *See* cases cited *supra* note 183.

developers, journalists, and others often referred to apartments as inherently different from tenements because of their physical differences — more rooms, spacious quarters, and inside and outside décor — and because, in tandem with these perks, apartments tended to be inhabited by more middle- and upper-class occupants.[225] Now, however, the distinction between tenement and apartment would be presented for judges to resolve in the context of covenant interpretation.

Arguments about whether apartments came within tenement bans were first presented to a New York court in the 1870s,[226] as the first apartment buildings were going up, in a complex case called *Musgrave v. Sherwood*.[227] The facts of the case were as follows: John Sherwood owned four houses on Fifth Avenue and sold one to Fannie Musgrave and her husband.[228] Sherwood subsequently converted two of his remaining dwellings into a "French flat."[229] While these changes were the crux of Musgrave's complaint, matters were complicated by the fact that Sherwood had orally assured Musgrave there would be no changes and by the fact that a party wall issue was presented.[230] Nevertheless, Sherwood's own deed banned "tenement-house[s]," so part of the complaint alleged that apartments fell within this limitation on his title.[231] *Musgrave* yielded three opinions: one awarding a preliminary injunction against the proposed apartment,[232] a final judgment by a second trial judge (with some trepidation) that the proposed building was not within the terms of the covenant,[233] and an appeal determining that the proposed use was in fact a business and so within separate coverage in the ban.[234]

The lower court opinions are useful in understanding how courts were struggling to draw the line between prohibited tenements and the new style of apartment. The plaintiff argued that apartments were large, multifamily structures just like tenements; the apartment-building defendant countered that tenements were distinct because they housed the poor.[235] The first trial judge considered this too vague a distinction

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[225] *See supra* notes 187–92 and accompanying text.

[226] Musgrave v. Sherwood (*Musgrave I*), 53 How. Pr. 311, 314 (N.Y. Sup. Ct. 1877); *see also Musgrave III*, 60 How. Pr. at 351 (summarizing plaintiff's arguments).

[227] 60 How. Pr. 339. The issues included both a party wall conflict and an oral promise. *Id.* at 366–67.

[228] *Musgrave I*, 53 How. Pr. at 312–13.

[229] *Id.* at 313.

[230] *Id.* at 312–14.

[231] *Id.* at 314–15.

[232] *Id.* at 315.

[233] Musgrave v. Sherwood (*Musgrave II*), 54 How. Pr. 338, 361–62 (N.Y. Sup. Ct. 1878), *rev'd*, *Musgrave III*, 60 How. Pr. 339, 366–67 (N.Y. Gen. Term 1881).

[234] *Musgrave III*, 60 How. Pr. at 362–63, 366–67.

[235] *Musgrave I*, 53 How. Pr. at 314–15.

to be persuasive: "[T]here is no fixed standard by which poverty and wealth can be measured. How many dollars must an individual have to be entitled to be called rich, and how few must he possess to be regarded as poor?"[236] Accordingly, the judge turned to a law dictionary that suggested a "tenement house" meant a house with distinct tenants, meaning all multifamily housing would qualify.[237]

The second trial judge reached a different conclusion. First, he observed inconsistency even among the testifying parties in describing the structure, with different parties calling it "an 'apartment-house' or 'French flats,' . . . a hotel[,] 'a family hotel,'" a "boarding-house," a "tenement-house," and one even uttering "a large apartment hotel, tenement-house character, whatever you [choose] to call it."[238] Faced with this confusion, the judge turned to different interpretive tools. First, the judge read the prohibition on "tenement" together with the remainder of the nuisance covenant, noting that all the buildings banned alongside tenements were "noxious or offensive,"[239] and the defendant's well-maintained structure did not qualify on those terms.[240] Second, the judge turned to other definitional sources — regular rather than legal dictionaries and even state statutes — to find that "tenement" described crowded and substandard housing.[241] Although the construction of the apartment was eventually enjoined on appeal on different grounds,[242] each and every judge involved in the case made statements to the effect that the "question involved . . . [is] a very close and interesting one."[243] It was clear that the apartment-tenement distinction was headed for further litigation.

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[236] *Id.* at 315. Attempts to discriminate based on the class of person, rather than type of use, may also have raised red flags for contemporaries because of the "touch-and-concern" requirement in covenant law, which requires some nexus between the proposed restriction and the land itself in order for the promise to run. *See* BROOKS & ROSE, *supra* note 16, at 87–88. Although touch-and-concern issues were never explicitly raised in nuisance covenant cases, they were "haunt[ing]" cases on racial restrictions with questions about why it should "touch and concern land that an owner is African American or Chinese or 'Mongolian.'" *Id.* at 90.

[237] *Musgrave I*, 53 How. Pr. at 315.

[238] *Musgrave II*, 54 How. Pr. at 356.

[239] *Id.* at 358.

[240] *See id.* at 359–60.

[241] *Id.* at 358–59. Although scholars have studied the use of dictionaries in statutory interpretation and even patent construction, *e.g.*, Mark A. Lemley, Chief Justice Webster 2 (Feb. 12, 2020) (unpublished manuscript), https://ssrn.com/abstract=3537211 [https://perma.cc/RJB8-XQGW], their use in covenant interpretation appears to have received little attention.

[242] *See Musgrave III*, 60 How. Pr. 339, 366–67 (N.Y. Gen. Term 1881).

[243] *Id.* at 368; *see also Musgrave II*, 54 How. Pr. at 362 (noting that the judge might "distrust the correctness of [his] own judgment"); *Musgrave I*, 53 How. Pr. 311, 312 (N.Y. Sup. Ct. 1877) ("This application involves questions of so much importance as to cause us to regret that owing to the pressure of business and the need of a speedy decision, no elaborate discussion thereof can be attempted.").

Nearly a decade later, the New York courts again confronted the question whether apartments came within nuisance covenants in *Boyd v. Kerwin*.[244] In the interim, dicta in an otherwise unpublished case had left yet another New York judge expressing "doubt[]" whether apartments "can fairly be regarded as tenement-houses."[245] Again, as in *Musgrave*, the judge asked to grant a preliminary injunction against the apartment in *Boyd* noted that the question whether apartments fit within nuisance covenants was "a question of so much importance, not only to the parties interested here, but to all those engaged in the building business and the community itself," hoping to defer final resolution of the interpretation to the trial.[246] But in declining to award a preliminary injunction to neighboring owners, the judge expressed skepticism that apartments and tenements were equals.[247] The judge observed that apartments were inhabited by "persons of education and refinement, and in many instances by persons of moderate means as well as of wealth and social position,"[248] furnished with "modern improvements," and that their effect on the value of neighboring property was not clearly negative.[249] Instead, again, the judge looked to the "noxious and offensive" language of the covenant and the character of the banned uses: "From the connection of the word 'tenement' and the other kinds of business forbidden," he wrote, the covenant appeared "applicable to that class of tenements which, as distinguished from flat or apartment houses, are occupied by a number of poorer families."[250]

This illustrates an important point. Judges were very willing to interpret nuisance covenants to separate better-off residents from the poor. Nuisance covenants enabled those who could pay a premium for them to live in residential environments free from the annoyances of necessary industries,[251] and other covenants explicitly banned housing associated with the lower class (frequently immigrants and racial minorities).[252]

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[244] 15 N.Y.S. 721 (Sup. Ct. 1891).

[245] Myers v. Sterne (N.Y. Sup. Ct. 1890) (decided on the basis of changed-conditions doctrine), *as reprinted in Boyd*, 15 N.Y.S. at 723, 724.

[246] *Boyd*, 15 N.Y.S. at 723; *see id.* at 721.

[247] *See id.* at 722–23.

[248] *Id.* at 722.

[249] *Id.* at 723.

[250] *Id.* at 722.

[251] This strongly parallels modern environmental justice debates about the siting of necessary waste disposal facilities in areas inhabited "disproportionately by the poor and by people of color." 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, 1002–03 (1993).

[252] *See, e.g.*, Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913*, 42 MD. L. REV. 289, 294 (1983) (describing immigrant and minority inhabitants of Baltimore's tenement districts); *see also* Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 898–900 (2020) (describing

There was unease, however, about nuisance covenants separating those residing in dwelling houses from the middle- and upper-class residents of higher-end apartments. It is telling that most, though certainly not all,[253] of the earliest cases involving nuisance covenants and multifamily housing took place in New York City. New York was the epicenter of an emerging separation between the very rich — like the industrialists whose names still adorn universities, banks, and other institutions — and the rest of the middle and upper class.[254] These social groups were "unstable,"[255] but the emergent elite "owned and invested capital, employed wage workers . . . , and did not work manually."[256] With the apartment, though, "artisans, clerical workers, shopkeepers," and other white-collar professionals could migrate to housing in districts once decorated with mansions and private homes,[257] generating many of the controversies.

Despite one case to the contrary,[258] it was not long before the tide turned permanently against those trying to prohibit apartments through nuisance covenants. The most important case was *Kitching v. Brown*,[259] decided by the state's highest court on a narrow 4–3 vote in 1905.[260] Kate Brown owned property fronting 153 feet on the extreme

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nineteenth- and early twentieth-century nuisance cases brought against Black families living in tenements and other substandard housing).

[253] *See, e.g.*, Morrison v. Hess, 231 S.W. 997 (Mo. 1921) (en banc); Bolin v. Tyrol Inv. Co., 200 S.W. 1059 (Mo. 1918) (en banc); King v. St. Louis Union Tr. Co., 126 S.W. 415 (Mo. 1910); Goater v. Ely, 82 A. 611 (N.J. Ch. 1912); Arnoff v. Williams, 113 N.E. 661 (Ohio 1916); Satterthwait v. Gibbs, 135 A. 862 (Pa. 1927); Elterich v. Leicht Real Est. Co., 107 S.E. 735 (Va. 1921).

[254] *See supra* pp. 1643–44; *see also* BECKERT, *supra* note 117, at 1–9.

[255] BECKERT, *supra* note 117, at 8.

[256] *Id.* at 7.

[257] WALLACE, *supra* note 21, at 268; *see id.* at 267–68. It is tantalizing to consider whether one reason for judicial sympathy may have been that some lawyers and judges were early adopters of apartment living. Resolution of that question awaits further analysis of sources like contemporary census records or biographies. It is likely that some legal professionals lived in apartments while others may have lived in private homes in or near restricted neighborhoods. Although this was prior to his career as a judge, future Justice Benjamin Cardozo resided at 803 Madison Avenue (near East Sixty-Eighth Street) and moved to a brownstone on 16 West Seventy-Fifth Street (near Central Park West) in 1902. *See* ANDREW L. KAUFMAN, CARDOZO 53, 84–85, 146 (1998). At a minimum, these addresses were closely proximate to restricted neighborhoods. *See* Korn v. Campbell, 104 N.Y.S. 462, 463 (App. Div. 1907) (noting restrictions permitting "first class private residences only" on eleven lots fronting "102 feet 2 inches on Madison avenue by 195 feet on Seventy-Third street"), *aff'd*, 85 N.E. 687 (N.Y. 1908); Leonard v. Hotel Majestic Co., 40 N.Y.S. 1044, 1044–45 (Sup. Ct. 1896) (noting that properties on Central Park West "between Seventy-Second and Seventy-First streets," *id.* at 1044, were subject to "restrictive covenants as to the use of this section of the city contained in deeds," *id.* at 1045).

[258] Levy v. Schreyer, 50 N.Y.S. 584, 585–86 (App. Div. 1898) (finding that the construction of a building where each of three floors was a family apartment violated a covenant forbidding a "tenement house," or any "houses except private dwellings," *id.* at 585).

[259] 73 N.E. 241 (N.Y. 1905).

[260] *Id.* at 248.

western edge of Seventy-First Street,[261] just a few blocks from one of those famous new apartment houses, the Dakota.[262] The parcels were burdened by a covenant inserted in 1873 by the executors of Jacob Harsen,[263] a farmer whose family owned a large segment of the undeveloped upper west side.[264] The covenant forbid a standard litany of uses, including tenements.[265] Nevertheless, in 1900, Brown spent the astonishing sum of $400,000 to build three luxurious apartment buildings including such amenities as frescoed walls and hot-water heat.[266]

Brown made the argument that modern apartments were not tenement houses, and the court considered "legislative," "lexicographic," and "judicial" evidence on the point.[267] Dictionaries and legislative material involving the problems of multifamily housing cut in both directions.[268] Accordingly, and evoking opinions in both *Musgrave* and *Boyd*, the court noted that the covenant listed tenements alongside things like "circuses" and "slaughterhouses," "obviously noxious, noisome, or dangerous" uses.[269] The three dissenters would have found that the covenant protected against the "towering apartment house, which affects the passage of the light and of the air, which brings the noise and disturbance of a human beehive, and which is irresponsible for the orderly or respectable character of its tenants," suggesting such structures could still be "menaces."[270] But the majority held that though tenements could "infest or infect the neighborhood,"[271] the modern apartment was nothing of the sort, as evidenced by the "character of its inhabitants, in the style of its architecture, in the number and variety of its equipments."[272] Oddly enough, although the *Kitching* majority permitted the apartment

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[261] *Id.* at 241.

[262] *See* CHRISTOPHER GRAY WITH SUZANNE BRALEY, NEW YORK STREETSCAPES: TALES OF MANHATTAN'S SIGNIFICANT BUILDINGS AND LANDMARKS 326–27 (2003). One can probably assume that Brown's parcels eventually became "The Westview" and "The Vernon" apartment buildings, given later atlases depicting these with a street frontage of about 153 feet. *Plate 88, Part of Section 4*, *in* LAND BOOK OF THE BOROUGH OF MANHATTAN, CITY OF NEW YORK (1925).

[263] *Kitching*, 73 N.E. at 241.

[264] *See Ye Olde Settlers of West Side Dine: Talk About the Days When Goats Roamed over the Sites of Today's Apartment Houses*, N.Y. TIMES, Mar. 24, 1911, at 20.

[265] *Kitching*, 73 N.E. at 241.

[266] *Id.* at 242.

[267] *Id.*

[268] *Id.* at 243–44.

[269] *Id.* at 244.

[270] *Id.* at 247 (Gray, J., dissenting).

[271] *Id.* at 244 (majority opinion).

[272] *Id.* at 245. The opinion also noted that "the wishes of the few must give way to the welfare of the many," *id.*, although the classist undertones of the opinion prevent reading it as too egalitarian or welfarist.

on the grounds of its distinctiveness from the tenement,[273] it also made the more ambiguous pronouncement that "[t]he truth is that the housing of the middle classes in the city of New York is as much of a problem to-day as was the housing of the poorer classes prior to 1873."[274]

Courts inside and outside New York found older nuisance covenants containing tenement bans not applicable to apartments on grounds similar to these: the type of inhabitant and the physical style and amenities.[275] And the reasoning migrated from interpretation within private law to interpretation within public law. In *Grimmer v. Tenement House Department*,[276] the New York Court of Appeals was asked whether an apartment house was subject to the building code requirements of the Tenement House Act.[277] It is somewhat unclear how exactly the proposed structure violated the Act, but it is certain that the proposed structure had been rejected once as noncompliant by the city's building department.[278] The Court of Appeals, however, relied on *Kitching* and other covenant decisions to find that the apartment was not within the purview of the Act.[279] As the court put it, "in popular conception and by judicial decision, the two classes of buildings were distinguished and differentiated."[280] How? Again, both in their construction and in the type of occupant:

> [T]he typical modern apartment house was regarded as possessing more pretentious architectural finish, more expensive and elaborate construction and conveniences than were possessed by the average tenement house. And it may be added as a proper sequence to this view that naturally they would be inhabited by a class of tenants who would be more independent and better able to exact proper living conditions without the help of such drastic provisions as are found in the tenement house act.[281]

In an effort to prescribe a bright-line rule where lower courts were evidently struggling, the New York Court of Appeals stated that apartments could be differentiated by three features: (1) a "separate water-closet,"

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[273] *Id.* at 246.

[274] *Id.* at 245.

[275] *See, e.g.*, Lignot v. Jaekle, 65 A. 221, 223 (N.J. Ch. 1906) (finding apartment outside tenement ban, but within ban on "flat[s]"); Marx v. Brogan, 81 N.E. 231, 232–33 (N.Y. 1907); White v. Collins Bldg. & Constr. Co., 81 N.Y.S. 434, 435–37 (App. Div. 1903) (finding 1873 covenant against tenement inapplicable to apartment house); *see also* Vandershoot v. Kocher, 72 N.Y.S.2d 121, 123 (Sup. Ct. 1947) (finding that use of a structure as an apartment did not violate covenant forbidding "erect[ing]" apartment (emphasis omitted)); Griswold Realty & Holding Corp. v. W. End Ave. & Seventy-Fifth St. Corp., 209 N.Y.S. 764, 766 (Sup. Ct. 1925) (finding that "apartment hotel," even with long stays, was not within ban on "tenements, flats, and apartment houses").

[276] 97 N.E. 884 (N.Y. 1912).

[277] 1901 N.Y. Laws 889; *see Grimmer*, 97 N.E. at 885.

[278] Grimmer v. Tenement House Dep't, 119 N.Y.S. 812, 818 (App. Div. 1909), *rev'd*, 97 N.E. 884.

[279] *Grimmer*, 97 N.E. at 886, 888.

[280] *Id.* at 886.

[281] *Id.*

(2) a "kitchen," and (3) (somewhat comically, by modern standards) a "bath tub."[282] The decision was ultimately undone by a statutory amendment that brought apartments under the Tenement House building code,[283] but it remains representative of contemporary findings that apartments were not harmful neighbors.

Other legal developments likewise broke against owners trying to prevent apartments and other multifamily housing under deed restrictions.[284] Courts in multiple states found apartments to be permissible under covenants requiring "private dwellings," "family residences," or "single dwellings," refusing to construe this language to require single-family housing.[285] This included a famous case about a parcel in the toniest section of New York in 1915, Murray Hill, that ultimately became a rallying point for the proponents of zoning regulation.[286]

Furthermore, in 1881, New York courts recognized for the first time that a "change in the character of the neighborhood" — in other words, developments or changed conditions in the area — could suspend a covenant.[287] In the relevant case, *Trustees of Columbia College v. Thacher*,[288] a new elevated railroad ran through a neighborhood protected by covenants banning businesses and tenements.[289] Though the

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[282] *Id.* at 887. The bathtub recurs not infrequently in property cases. *See, e.g.*, Strain v. Green, 172 P.2d 216, 219 (Wash. 1946) ("But the major changes are probably the result of an awareness of the fact that the luxuries of a given generation become the necessities of the next. It seems highly improbable that any present-day court would hold that a foreclosed mortgagor, on surrendering the premises, could lawfully disconnect, and take with him, the household bathtub.").

[283] Gilbert, *supra* note 185, at 493 n.356.

[284] *E.g.*, McDonald v. Spang, 105 N.Y.S. 617, 620 (Sup. Ct. 1907) (considering it absurd to call a two-family house legally objectionable).

[285] Hutchinson v. Ulrich, 34 N.E. 556, 558 (Ill. 1893); McMurtry v. Phillips Inv. Co., 45 S.W. 96, 96 (Ky. 1898); Minister of Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co., 108 N.E. 444, 446 (N.Y. 1915); Sonn v. Heilberg, 56 N.Y.S. 341, 343 (App. Div. 1899); Hurley v. Brown, 60 N.Y.S. 846, 849 (App. Div. 1899); Johnson v. Jones, 90 A. 649, 651 (Pa. 1914). *But see* Gillis v. Bailey, 21 N.H. 149, 155, 157 (1850) (finding that a covenant requiring "single dwelling-house" meant single-family dwelling, in part because deed recited a need for "open ground" surrounding house, *id.* at 155).

[286] *Minister of Reformed Protestant Dutch Church*, 108 N.E. at 445–46; *see Hard Problem in Old Restrictions*, N.Y. TIMES, Aug. 8, 1915, at XX1; *The Need of Building Restrictions*, N.Y. TIMES, June 18, 1916, at E2 (mentioning Murray Hill case as timely in light of city's consideration of zoning).

[287] Trs. of Columbia Coll. v. Thacher, 87 N.Y. 311, 321 (1881). For an excellent recent treatment of changed circumstances doctrine, see Alisha Jarwala, Note, *The More Things Change:* Hundley v. Gorewitz *and "Change of Neighborhood" in the NAACP's Restrictive Covenant Cases*, 55 HARV. C.R.-C.L. L. REV. 707 (2020).

[288] 87 N.Y. 311.

[289] *Id.* at 313–14. The covenant had been litigated in an earlier case, *Trustees of Columbia College v. Lynch*, 47 How. Pr. 273 (N.Y. Super. Ct. 1874). On the elevated railroad, see *Elevated Railways*, *in* THE ENCYCLOPEDIA OF NEW YORK CITY 368, 368 (Kenneth T. Jackson ed., 1995).

change in the neighborhood was not caused by any fault of the residences, the court found the covenants requiring single-family dwellings pointless: "[P]ersons waiting for the trains, or there for other purposes, can look directly into the windows," "[n]oise from its trains can be heard from one avenue to the other," and the properties had become so pointless as dwellings that there were vacancies.[290] What residences remained belonged to "persons of less pecuniary ability, and willing to sacrifice some degree of comfort for economy, transient tenants of still another class, whose presence would be more offensive to quiet and orderly people who might reside in the neighborhood" — in other words, not the sort of folk "whose convenience and wishes were to be promoted by the covenant."[291] This approach was at the time a much broader concept of "changed circumstances" than England's, which required more culpable conduct on the owner's part in order to find the covenant terminated.[292] To be sure, changed circumstances claims were not a sure bet.[293] Still, late-nineteenth and early-twentieth century courts did sometimes find that apartments had to be permitted on account of changed conditions, offering another pathway for multifamily housing to be built.[294]

It is clear that covenant drafters responded to this turn of events. From the late 1880s onward, new nuisance covenants began explicitly banning "flats" and "apartments," closing one of the loopholes through which multifamily housing was being permitted under covenants where those uses were not specifically enumerated.[295] By the 1920s, developers had learned enough to "take great pains in phrasing the clause which

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[290] *Trs. of Columbia Coll.*, 87 N.Y. at 320.

[291] *Id.*

[292] Duke of Bedford v. Trs. of the Brit. Museum (1822) 39 Eng. Rep. 1055, 1064; 2 My. & K. 552, 574–75. Early commentators were aware of this difference. Annotation, *Change in Neighborhood in Restricted District as Affecting Enforcement of Restrictive Covenant*, 54 A.L.R. 812 (1928).

[293] *See, e.g.*, Dollard v. Whowell, 160 N.Y.S. 544, 545–46 (App. Div. 1916); Holt v. Fleischman, 78 N.Y.S. 647, 650–51 (App. Div. 1902).

[294] *E.g.*, Amerman v. Deane, 30 N.E. 741, 741–42 (N.Y. 1892); Roth v. Jung, 79 N.Y.S. 822, 822, 824–25 (App. Div. 1903).

[295] McClure v. Leaycraft, 75 N.E. 961, 961 (N.Y. 1905) (describing 1886 covenant banning "apartment . . . house"); Griswold Realty & Holding Corp. v. W. End Ave. & Seventy-Fifth St. Corp., 209 N.Y.S. 764, 765–66 (Sup. Ct. 1925) (describing 1887 covenant against apartment houses); Lignot v. Jaekle, 65 A. 221, 221–22 (N.J. Ch. 1906) (describing 1888 covenant against "flat"). In one case, it is even clear that neighbors holding property under an earlier covenant limiting lots to "residence purposes only," Kearney v. Kirkland, 117 N.E. 100, 101 (Ill. 1917), got together to sign a new agreement that prohibited "any building on said real estate, or any part thereof, commonly known as a flat or tenement building or apartment house, or any other building except single private dwelling houses," *id.* at 102. Still other covenants were rather repetitive, ensuring there could be no mistake that the residents wanted only single-family homes. *E.g.*, Miles v. Hollingsworth, 187 P. 167, 169 (Cal. Dist. Ct. App. 1919) (requiring (1) that the lots "be used for residence purposes exclusively," (2) that "no more than one residence . . . be erected," and (3) "no double house or tenement house, that no flat nor any kind of a residence except a residence designed for use as a single residence . . . be erected").

designates certain lots for single-family residence use."[296] But the apartment had exposed a deep problem with existing restrictions. Although some decades earlier, nuisance covenants seemed to offer both flexible scope and the capacity for declaring particular uses automatically noxious, new technologies and land uses tested their mettle. These new uses were not as clearly objectionable as others, and judges were hesitant to perceive apartments and their middle-class occupants in the same frame as tanneries, bone-boiling, and turpentine.[297]

C. Related Trajectories: The Auto and Work at Home

The apartment would soon be joined by other land uses characterized by some level of undesirability among some neighbors but simultaneous association with the middle and upper classes. The car, of course, revolutionized countless areas of law: constitutional law, criminal law, and of course tort law through the law of negligence.[298] Its effect on land use and property law is also well documented, whether one takes into account the voluminous land use literature on suburban sprawl or the somewhat more niche works on automobile title registries and bailments.[299]

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[296] MONCHOW, *supra* note 38, at 33.

[297] An extremely interesting question is why England appears to have followed a different trajectory in which apartments infiltrated private home districts in many cities. FISHMAN, *supra* note 114, at 8. We know that English properties were also bound by nuisance covenants, but I have not yet located similar cases attempting to ban flats or apartments using nuisance covenants. There were certainly cases near contemporaneous with the American ones in which beneficiaries of covenants attempted to stop the conversion of dwellings to hotels or lodging houses. OLSEN, *supra* note 49, at 114. There was at least one case in which a party (unsuccessfully) claimed that some building for multiple families violated deed restrictions pertaining to "detached . . . house[s]." Wright v. Berry (1902) 18 TLR 370 (Ch) at 371 (Eng.), *aff'd*, (1903) 19 TLR 259 (AC) (Eng.). Fuller understanding would require additional research, but I offer a few preliminary thoughts. For one thing, because at any given time in the nineteenth century, a greater percentage of the English population lived in cities, there may have been few alternatives (like territorial expansion) to crowding and dense living. *See* FISHMAN, *supra* note 114, at 10–11. For another thing, England had a much longer history of building regulation dating to its seventeenth-century fires. *See* Nick Green, *A Chronicle of Urban Codes in Pre-industrial London's Streets and Squares*, *in* URBAN CODING AND PLANNING 14, 30–31 (Stephen Marshall ed., 2011); HIRT, *supra* note 16, at 99–100. Americans may have been slower to accept incursions on property rights for this reason (as well as property's explicit constitutional protection). Lastly, England did not mandate land recording until the twentieth century. *See* Brady, *supra* note 20, at 890. This might have made nuisance covenants less easy to find and copy, although that is purely speculative, and it would be rather hard to determine their empirical frequency as a result of the absence of recording.

[298] *See, e.g.*, Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293 (2018); Sarah A. Seo, Essay, *The New Public*, 125 YALE L.J. 1616 (2016); Shill, *supra* note 2, at 502.

[299] *See, e.g.*, H.J.C., Recent Case, *Bailments — Automobile Parking Lots*, 12 TEX. L. REV. 347 (1934); E. Donald Elliott, *Lessons from Implementing the 1990 CAA Amendments*, 40 ENV'T L. REP. NEWS & ANALYSIS 10592, 10596 (2010) (mentioning title registries); Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301 (2000).

The effects of the car on nuisance and covenant law are less well understood. To be sure, for a century of decisions on zoning, the threat of increased traffic has been presented as a justification (often pretextual) for excluding denser or commercial uses.[300] But the car and associated uses began spawning trouble in these areas of property law at around the same time as the apartment, in the early decades of the 1900s.

The most frequent target of neighborly attack was probably the gas station or "filling station," which came rapidly into use across the country after 1905.[301] In the 1910s and 1920s, gas stations spawned their own genre of nuisance cases. Neighbors claimed they increased the risk of pedestrian accidents, depreciated values, and caused irritable light, noises, and smells in order to support keeping them away from residences and shops.[302] Courts usually held that gas stations were not a nuisance per se, often on the grounds that ease of transportation was a necessity and gas stations caused no more traffic or offense than did other commercial establishments,[303] although the occasional plaintiff was successful in claiming that a specific station emitted too much light or noise.[304] Plaintiffs were somewhat more successful in asserting that automobile service shops were nuisances, at least in residential districts, because they could not help but be associated with the loud clang of repairs and whirring starters.[305] Yet both these uses — gas stations and repair shops — were the subject of successful challenges under nuisance covenants. Any time a covenant listed "store" or "business" in its litany of offensive uses, it applied to stations selling fuel.[306] And judges in multiple states interpreted old nuisance covenants to ban twentieth-century

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[300] *E.g.*, Michelle Shortsleeve, *Challenging Growth-Restrictive Zoning in Massachusetts on a Disparate Impact Theory*, 27 B.U. PUB. INT. L.J. 361, 377 (2018); Recent Case, *Constitutional Law — Due Process of Law: Property in General — Ordinances Depriving Abutting Owner of Right of Access to Property for Filling Station*, 43 HARV. L. REV. 958, 958–59 (1930).

[301] David A. Fryxell, *History of Gas Stations*, FAMILY TREE (May/June 2013), https://www.familytreemagazine.com/premium/history-of-gas-stations [https://perma.cc/P4FM-HGC2].

[302] *E.g.*, Hazlett v. Marland Refin. Co. of Ponca City, 30 F.2d 808, 809 (8th Cir. 1929).

[303] *E.g.*, *id.* at 809–10; Julian v. Golden Rule Oil Co., 212 P. 884, 885 (Kan. 1923).

[304] *See* Nat'l Refin. Co. v. Batte, 100 So. 388, 388 (Miss. 1924).

[305] *Compare* Prendergast v. Walls, 101 A. 826, 826–27 (Pa. 1917) (per curiam) (affirming grant of permanent injunction against operation of service garage in residential area), *with* Unger v. Edgewood Garage, 134 A. 394, 395 (Pa. 1926) (upholding denial of injunction against operation and expansion of service garage in area with only one private residence).

[306] *E.g.*, Gunther v. Atl. Refin. Co., 121 A. 53, 54 (Pa. 1923); *cf.* Troy v. Harris, 76 S.W. 662, 664 (Mo. Ct. App. 1903) (concluding that oil company fell within definition of "merchant" under city ordinance). Gas stations could also be expressly banned by nuisance covenants, of course. A brochure advertising a subdivision called Brendonwood near Indianapolis, for instance, contained a menacing warning about the effect of gas stations on neighborhoods and promised all precautions had been taken in the subdivision restrictions. FOGELSON, *supra* note 31, at 70–71.

service shops,[307] an example of their flexible capacity to encompass new uses.

Parking garages, however, raised peculiar difficulties that evoke the apartment's trajectory. As with the new form of multifamily housing, courts did not generally consider parking garages nuisances.[308] Neighbors nonetheless initially resisted the construction of buildings to house automobiles. In one particularly interesting case from 1911, owners claimed that a parking garage fit within a nuisance covenant ban on "stables."[309] The court noted that automobiles were noisy and accompanied by "annoying" smells,[310] leaving a man desirous of "a home where, awake or asleep, he can pass his hours in quiet and repose"[311] "in these days of noise and bulging, intrusive activities."[312] Although the parking garage was ultimately banned by other requirements about the number and types of structures permitted on a lot, the court refused to consider the garage either a noxious use or a stable.[313] Examining multiple editions of five different dictionaries, the court concluded that although a garage was sometimes defined as a "stable[] for . . . automobiles," the term stable would be understood to encompass only a building housing "domestic animals like horses or cattle" (and would surely involve more manure than a garage).[314] Contemporaries considered this case on the garage-stable distinction a close parallel to the earlier cases on tenement-apartment distinctions.[315]

Other courts followed suit, finding that parking garages could not be banned as "stables" or as generally offensive, noxious, or harmful within the meaning of nuisance covenants.[316] This permissiveness extended even to nuisance covenants that explicitly enumerated "garages."[317] As a Delaware court put it, it was inconceivable that an owner would have

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307 Evans v. Foss, 80 N.E. 587, 588–89 (Mass. 1907); Hibberd v. Edwards, 84 A. 437, 437–38 (Pa. 1912).

308 *E.g.*, Eckman v. Irvin, 27 Pa. D. 795, 797, 799 (Ct. Com. Pl. 1918). *See generally* Annotation, *Garage as a Nuisance*, 50 A.L.R. 107 (1927).

309 Riverbank Improvement Co. v. Bancroft, 95 N.E. 216, 217 (Mass. 1911).

310 *Id.* at 218.

311 *Id.* at 218–19.

312 *Id.* at 218.

313 *Id.*

314 *Id.*

315 Comment, *Is a Restriction in a Deed Forbidding the Erection of a Stable Violated by Erecting a Garage?*, 21 YALE L.J. 611, 613 (1912); *see also* George W. Meuth, *Garages and Automobile Supply Stations as Nuisances*, 13 KY. L.J. 288, 293–95 (1925) (discussing a few cases involving the objectionability of garages).

316 Balcom v. Normile, 150 N.E. 885, 885 (Mass. 1926); Smyth v. McCarroll, 76 Pa. Super. 142, 146–47 (1921); Asbury v. Carroll, 54 Pa. Super. 97, 101, 105 (1913). *See generally* Annotation, *Garage, or Filling Station, as Breach of Restrictive Covenant*, 54 A.L.R. 659, pt. II(g)(2)–(3) (1928).

317 Gibson v. Main, 129 A. 259, 260 (Del. 1925); Trainer v. Calef, 126 A. 301, 301–02 (N.J. 1924); Sullivan v. Sprung, 156 N.Y.S. 332, 334 (App. Div. 1915).

wanted to "make the land less desirable for a private residence at a time when a private garage is regarded as almost essential to the comfort and convenience of a home."[318] As with apartments, courts presented the issue as turning on the desirability of the use among persons of education and refinement: in most cases involving the car, suburbanites.[319] In one fabulous case where a garage was permitted despite a nuisance covenant, the court worried more about "bathers clad in their bathing suits" wandering the streets and "modern jazz" turning into a nuisance within covenant terms.[320]

Similar issues plagued covenants that were drafted more broadly to forbid "business" or "trade," but that courts nonetheless interpreted to permit certain kinds of more professional, home-based commercial activity. Modern echoes of this problem persist in attempts to enforce residential zoning regulations or covenants against home businesses, like daycares or beauty shops.[321] Courts struggled with whether certain "eminent" professions — chiefly, physicians — were businesses, under either specific enumerations or broad business bans.[322] Many decided that when a covenant restrained businesses, it meant to forbid only businesses with noxious effects, not all trades.[323] As one court justified the decision to permit commercial activity:

> Some kinds of industry might be carried on in a dwelling-house without any inconvenience whatever to the neighborhood. The house might be occupied by a physician or a lawyer, perhaps by a chemist or photographer, and a portion of it set apart as an office or place of business, without any offence or objection. All this would be allowable under the deed. But to change a

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[318] *Gibson*, 129 A. at 260.

[319] *E.g.*, *Smyth*, 76 Pa. Super. at 145.

[320] Miller v. Jersey Coast Resorts Corp., 130 A. 824, 828 (N.J. Ch. 1925).

[321] Terrien v. Zwit, 648 N.W.2d 602, 604 (Mich. 2002); Waller v. Thomas, 545 S.W.2d 745, 746 (Tenn. Ct. App. 1976); *see* 3 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING ch. 19 (5th ed. 2008); Mark S. Dennison, Annotation, *Construction and Application of "Residential Purposes Only" or Similar Covenant Restriction to Incidental Use of Dwelling for Business, Professional, or Other Purposes*, 1 A.L.R.6th 135 (2005); Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 307–18 (2019); Christian Nafziger, Comment, *Pulling an Old Dusty Weapon out of the Drawer: The Return of Morality Police Powers to Regulate Unwanted Home-Based Businesses*, 81 UMKC L. REV. 231, 253 (2012).

[322] *But see* Semple v. Schwarz, 109 S.W. 633, 637 (Mo. Ct. App. 1908) (finding that physician was engaged in business in violation of covenant).

[323] Easterbrook v. Hebrew Ladies' Orphan Soc'y, 82 A. 561, 563–65 (Conn. 1912) (permitting a home for orphans and the elderly on this theory); Smith v. Graham, 147 N.Y.S. 773, 778 (App. Div. 1914) (suggesting that performance of medical and surgical operations in a dwelling would not violate a covenant requiring dwelling), *aff'd*, 112 N.E. 1076 (N.Y. 1916) (per curiam); Hall v. House of St. Giles the Cripple, 154 N.Y.S. 96, 99 (Sup. Ct. 1915) (holding that a hospital would not violate a restrictive covenant), *aff'd*, 158 N.Y.S. 1117 (App. Div. 1916); *see also* Burton v. Douglas County, 399 P.2d 68, 70–71 (Wash. 1965) (en banc) (post-zoning case finding that a social or country club is not a business).

> dwelling-house into a grocery, a workshop, or a market, would be a very different matter.[324]

In a related way, a Connecticut court suggested that covenants forbidding "business" could not mean to exclude "a charitable institution, or a church building or adjunct, or a free school, or a social club."[325] Once again, judges were drawing lines on class boundaries: while markets, workshops, and groceries were associated with peripheral members of the middle class, social clubs and charities were the province of a more established elite.[326]

Of course, certain forms of "nonprofessional" labor — especially women's labor — fared rather unpredictably under these analyses. In one 1915 case, dressmakers were veritably laughed out of court for trying to claim that their business was no more offensive than the local physicians' offices springing up along the block, met with the court's retort that it was "not necessary to enter upon an ethical discussion of the difference between a livelihood gained by the practice of a profession and that by a business vocation."[327] Other times, however, courts permitted women to engage in dressmaking or singing lessons despite covenants against businesses or restricting an area to dwellings.[328] (But this permissiveness had its limits, at least when the women made a certain amount of noise: unfortunately for the Ladies' Decorative Art Club of Philadelphia, evening woodworking and brass-melding classes using "hammers, mallets, gouges, and chisels" were found to be traditional nuisances without resort to covenant law.[329])

What do these developments illustrate? As the early twentieth century brought new uses and professions to cities and suburbs, judicial construction of nuisance covenants somewhat blunted their effectiveness. Judges struggled to see doctors, social clubs, cars, or upper-class apartments as undesirable neighbors within the terms of nuisance covenants,[330] and sometimes even when those uses were expressly banned

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[324] Dorr v. Harrahan, 101 Mass. 531, 534–35 (1869). *But see* Forstmann v. Joray Holding Co., 154 N.E. 652, 654 (N.Y. 1926) (suggesting that physicians' offices mark the "decline of exclusiveness and the retreat of aristocracy" in the neighborhood).

[325] *Easterbrook*, 82 A. at 565.

[326] *See* BECKERT, *supra* note 117, at 216–18, 263–64.

[327] Iselin v. Flynn, 154 N.Y.S. 133, 136 (Sup. Ct. 1915); *see id.* at 134–36.

[328] Clark v. Jammes, 33 N.Y.S. 1020, 1021 (Gen. Term 1895); Tonnelle v. Hayes, 194 N.Y.S. 181, 182–83 (Sup. Ct. 1922).

[329] Appeal of Ladies' Decorative Art Club of Phila., 13 A. 537, 538 (Pa. 1888).

[330] An interesting and related discussion of the class dimensions of enforcement took place in a case involving the objectionability of movie theaters under a nuisance covenant. There, a court rejected the argument that movie theaters were objectionable because they drew low-income clientele, stating:

> We need not seriously concern ourselves with the personal views of the plaintiff and his neighbors concerning the moral superiority of the well-to-do minority over the less

(as in the case of garages). Through specification of unwanted uses within covenant law, developers and lawyers had been endeavoring with mixed success to twist and mold nuisance toward their own ends. And on the precipice of the 1920s, a new generation of lawyers and developers pushing for public regulation of land uses recognized that it would be important to make nuisance more malleable in order to secure the stable property values and neighborhoods they hoped to foster in the long term. The next Part explores how these struggles reflected larger conflicts both within private law — between the domains of contract and tort — and between public and private law, in the relationship between tort law and the scope of regulation.

III. CONVERTING HARMLESS TO HARMFUL

A. Nuisance, Contract, and the Police Power

Underlying these problems in property law were deeper conflicts confronting judges of the period. Chiefly, these involved how tort law both acted as a limitation on and was limited by contract and constitutional law. To take the private law dimension first, in the early twentieth century — and again, in the New York courts — the nascent law of products liability was changing tort law such that injured parties not in contractual privity with manufacturers could obtain redress.[331] Like the developments associated with the interpretation of nuisance covenants, these decisions reflect some degree of skepticism about contractual efforts to delimit the scope of harm ordinarily defined by the law of torts.[332] In addition to treating tort obligations as existing independent of contracts, contemporaries also saw contractual power as limited in important respects by the scope of legislative power. In conflict-of-laws doctrine, for instance, the power of two parties to alter the legal rules

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> wealthy majority, unless, indeed, the word 'offensive' in the restriction can be construed to mean 'something objectionable to the individual taste of a neighbor.' We are aware of no authority which goes so far.

Burk v. Kahn & Greenberg, 22 Pa. D. 691, 693 (Ct. Com. Pl. 1913).

[331] *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916); John C.P. Goldberg & Benjamin C. Zipursky, *The Myths of* MacPherson, 9 J. TORT L. 91, 99 (2016); John C.P. Goldberg, *The Curious Case of the Disclaimer that Didn't Bark*, JOTWELL (Oct. 19, 2017) (reviewing Victor P. Goldberg, *The* MacPherson-Henningsen *Puzzle* (Columbia L. & Econ. Working Paper, Paper No. 570, 2017), https://dx.doi.org/10.2139/ssrn.3022224 [https://perma.cc/4NLD-JG9Z]), https://torts.jotwell.com/the-curious-case-of-the-disclaimer-that-didnt-bark [https://perma.cc/CU6L-QE4H].

[332] *See MacPherson*, 111 N.E. at 1053 (rejecting the idea that "duty to safeguard life and limb . . . grows out of contract and nothing else" and "put[ting] the source of the obligation where it ought to be" — "in the law"). Of course, there is a distinction in that the law of products liability expanded the range of potential plaintiffs and actions for which redress was available, whereas the law of nuisance covenants narrowed owners' capacity to sue to enjoin neighboring uses.

applicable to their contract was considered "a legislative act,"[333] requiring courts to probe whether the agreement on choice of law was in good faith lest "[s]o extraordinary a power in the hands of any two individuals" be misused.[334] These ideas coexisted uneasily with a seemingly irreconcilable reverence for the well-known and much-discussed "freedom of contract" ideology.[335]

Another thorny interpretive problem concerned the relationship between tort law and the "police power," particularly where land use regulations were concerned. Few concepts within law can claim as much difficulty of definition as the police power; from early 1900s law review articles to 1950s Supreme Court cases right on through to this century, judges and commentators have frequently pronounced it incapable of precise description.[336] To oversimplify,[337] the police power defines the constitutional scope of regulation. It demarcates the boundaries within which the government can affirmatively regulate for the health, safety, and welfare of its citizens, limiting some rights to protect the greater good.[338]

Before it was widely called the police power,[339] back in 1827, Chancellor Kent had in his *Commentaries on American Law* noted the connection between nuisance and the constitutionality of property regulation: "The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens."[340] Although

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[333] Joseph H. Beale, *What Law Governs the Validity of a Contract* (pt. 3), 23 HARV. L. REV. 260, 260 (1910); *see id.* at 260–61.

[334] *Id.* at 261.

[335] *See, e.g.*, David E. Bernstein, *Freedom of Contract*, *in* 2 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 263 (David S. Tanenhaus ed., 2008); Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161, 161 (Harry N. Scheiber ed., 1998).

[336] Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 679–80 (2015).

[337] This is partially an oversimplification because, since 1922, some permissible uses of the police power have nonetheless required payment of compensation to the regulated owners pursuant to the federal Takings Clause. *See* Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to* 51 Imperfect Solutions, 2020 U. ILL. L. REV. 1455, 1464–65.

[338] *See* Miller, *supra* note 336, at 688–89.

[339] The first mention of the "police power" occurred in 1827, in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827). Miller, *supra* note 336, at 686–87 (noting "first use of the term" in *Brown*, *id.* at 686, and the term's subsequent spread). Intriguingly, although *Brown* was not a land use case, the term's first use occurred in a discussion of the government's "power to direct the removal of gunpowder," *Brown*, 25 U.S. (12 Wheat.) at 443; *see id.* at 443–44, a use frequently mentioned in nuisance covenants, *see* cases cited *supra* note 112.

[340] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (New York, O. Halsted 1827). Professor Bill Novak notes that Oliver Wendell Holmes Jr. annotated this section of a later edition of the *Commentaries* as follows: "This power is now called the police power." NOVAK, *supra* note 98, at 50.

the law of nuisance had perhaps played a less decisive role in other periods,[341] it played a major role in the Court's late nineteenth-century decisions on the constitutionality of various land use regulations.[342] While height limits on buildings were upheld by the Supreme Court on the grounds that they bore a reasonable relationship to fire prevention,[343] bare use (as opposed to structural) restrictions on nonnuisance activities, residences, and establishments were a much closer call.[344]

On one view, the divergence of nuisance law from the proposed regulation was not a significant obstacle. In several land use cases, the Court considered and rejected arguments that a regulation was beyond the scope of the police power on the grounds that the plaintiff's proscribed use was not a nuisance, stating that the police power could affirmatively promote health, safety, and welfare rather than merely suppressing something surely offensive under the common law.[345] However, despite these broad statements, the Court's late-nineteenth-century cases always involved prospective regulation of uses with a clear

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[341] Novak and John Hart have both shown that some regulations strayed farther from the common law of nuisance than others, particularly before the late nineteenth century. *See* Hart, *supra* note 42, at 1291–93. Novak's strongest examples are regulations banning wooden buildings in particular areas on the grounds that they posed the danger of fire; wooden buildings would clearly not constitute nuisances on their own. NOVAK, *supra* note 98, at 66–67. Of course, wooden-building regulations governed the type of structure regardless of the precise activities taking place within it.

[342] Hart, for instance, acknowledges that "in late nineteenth-century constitutional doctrine," courts found that "only land use regulation comporting with judicially constructed nuisance doctrine [was] entitled to deference," Hart, *supra* note 42, at 1297, although he contests that in the colonial period, nuisance law was often developed through legislation, *see id.* at 1297–98.

[343] Welch v. Swasey, 214 U.S. 91, 107–08 (1909) ("[T]he opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district." *Id.* at 108.). There is an obvious parallel here to another fire prevention scheme less closely tied to nuisance: wooden-building regulations. *See supra* note 341.

[344] As one contemporary put it, use regulation was the "battle line." EDWARD M. BASSETT, CONSTITUTIONAL LIMITATIONS ON CITY PLANNING POWERS 8 (1917). *But see* Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in* First English Lutheran Church *and* Nollan, 59 U. COLO. L. REV. 427, 446 (1988) (contending that *Euclid* does fit the paradigm of common law nuisance delimiting the police power, although not discussing how apartments and commercial establishments were considered nuisances at common law).

[345] *See* Hadacheck v. Sebastian, 239 U.S. 394, 404, 406, 411 (1915) (upholding ban on brickyards in certain districts of Los Angeles even though plaintiff alleged that his brickyard would not be a nuisance); Reinman v. City of Little Rock, 237 U.S. 171, 176–77 (1915) (upholding ban on livery stables in parts of Little Rock even though plaintiff argued that his livery stable would be responsibly conducted); Bacon v. Walker, 204 U.S. 311, 314, 318 (1907) (noting, in case involving statute banning sheep ranges within certain radius of houses, that the police power "is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary" and "extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people," *id.* at 318). The infamous *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), might also be viewed in this genre, although the discussion of the police power in that case suggested the power's scope was more closely linked to the suppression of nuisances and "[u]nwholesome trades" (which clearly included slaughterhouses). *Id.* at 62 (quoting 2 KENT, *supra* note 340, at 276).

record of offensiveness as adjudicated by the state's courts.[346] Contemporary property cases routinely posed these sorts of questions about the relationship between state decisional law and federal constitutional law. In interpreting the constitutional rules surrounding government expropriations or damages to property, for instance, the federal courts then and now have alternately deferred to states' idiosyncratic common law definitions and limitations on property rights and other times suggested something like a "general law" of property that exists independent of state positive law.[347] In a similar way, the Court's police power decisions both gestured at some general and objective definition of preventable harm while composing that definition out of state common law decisions on nuisance.[348]

Adding to this complexity was another set of decisions reflecting skepticism about local governments' efforts to meddle in nuisance law. In *Yates v. Milwaukee*,[349] the Supreme Court invalidated a city's attempt to declare a specific wharf a nuisance, writing that "the mere declaration by the city council" could not make "[a certain structure] a nuisance unless it in fact had that character"; the proposition that "a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal" was "a doctrine not to be tolerated in this country."[350] This idea that the common law of nuisance furnished a restraint on municipal regulatory power was repeated in lower court decisions and contemporary treatise

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[346] *See Bacon*, 204 U.S. at 318–20 (quoting extensively from *Sweet v. Ballentine*, 69 P. 995 (Idaho 1902), which analogized grazing sheep to fire, noted that grazing conflicts generated violent conflicts among settlers, and observed the odors attending large bands of sheep, *id.* at 997–98); City of Little Rock v. Reinman, 155 S.W. 105, 107 (Ark. 1913), *aff'd*, 237 U.S. 171; *Ex parte* Hadacheck, 132 P. 584, 585–86 (Cal. 1913) (discussing numerous cases that found or support the argument that brick-burning generates nuisance), *aff'd sub nom.* Hadacheck v. Sebastian, 239 U.S. 394; *see also* sources cited *infra* note 359.

[347] *See generally* Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695 (2019); Brady, *supra* note 337.

[348] This observation is consistent with other scholarship suggesting that the Court used common law categories to set a natural baseline for valid exertions of the police power. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 877–80 (1987); *cf.* Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13, 15–16 (David Kairys ed., rev. ed. 1990) (noting that lawyers in the early nineteenth century mediated conflicts between private rights and public power by using "positive law," such as the common law, to define the boundaries of legitimate action). Likewise, scholars agree that this understanding was fraying in the late nineteenth century. *See, e.g.*, Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPS. AM. HIST. 329, 331–33 (1971).

[349] 77 U.S. (10 Wall.) 497 (1870).

[350] *Id.* at 505.

discussions.[351] Although the common law was the primary source for these limitations,[352] a state statute declaring something a public nuisance might also suffice.[353] One sees reverberations of this sort of thinking in some of the Court's modern opinions on takings (rather than due process, as implicated in *Yates*). In the last several decades, various opinions have suggested that the common law of nuisance, and, perhaps, existing regulations, provide some kind of measure for whether compensation is required for regulation (or maybe even drastic changes in the common law).[354]

Against this backdrop, in the late nineteenth and early twentieth centuries, the Court upheld regulations of the following typical nuisance uses (even if the plaintiff promised his use in particular would not be offensive): livery stables,[355] sheep grazing,[356] slaughterhouses,[357] and brickmaking,[358] among several others.[359] The closest call on this front was (unsurprisingly) a case involving the billboard, as — at the time — aesthetic regulations were highly suspect uses of the police power,[360] and

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[351] *See* Hennessy v. City of St. Paul, 37 F. 565, 566–67 (C.C.D. Minn. 1889); Smith v. City of Atlanta, 132 S.E. 66, 68 (Ga. 1926); Everett v. City of Council Bluffs, 46 Iowa 66, 67 (1877); 6A MCQUILLIN, *supra* note 222, § 24:70; 2 WOOD, *supra* note 222, §§ 743–744, at 972–77. The *Yates* framework was surprisingly durable until the mid-twentieth century, when courts more clearly repudiated it. *See* Traylor v. City of Amarillo, 492 F.2d 1156, 1158–60 (5th Cir. 1974).

[352] *See, e.g.*, Daniel R. Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers over Slum Housing*, 67 MICH. L. REV. 635, 646–47 (1969) (describing nuisance law as a limitation on the state's demolition power).

[353] 2 WOOD, *supra* note 222, §§ 743–744, at 972–77. This limitation (less often discussed than those emanating from the common law) likely reflected larger hostilities toward cities specifically (as opposed to legislation generally). *See* Schragger, *supra* note 2, at 1195–97.

[354] *See* Maureen E. Brady, *Defining "Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1443–44 (2015) (discussing role of nuisance and the common law in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

[355] *See* Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915).

[356] *See* Bacon v. Walker, 204 U.S. 311, 313–14, 318 (1907).

[357] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62–63 (1873).

[358] *See* Hadacheck v. Sebastian, 239 U.S. 394, 412–14 (1915).

[359] For other examples, see Nw. Laundry v. City of Des Moines, 239 U.S. 486, 491–92 (1916) (finding that emission of smoke is a nuisance and noting "[t]hat such emission of smoke is within the regulatory power of the State, has been often affirmed by state courts," *id.* at 492); Lawton v. Steele, 152 U.S. 133, 138–40 (1894) (citing New York decisional law for proposition that fishing nets were injurious); and Mugler v. Kansas, 123 U.S. 623, 671–73 (1887) (noting that Kansas statute deeming breweries to be nuisances left judges the discretion to "ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used, as to make it a common nuisance," *id.* at 672, and citing state cases about conditions required for nuisance abatement, *id.* at 673). For further detail on all of the Court's cases and personnel involving this issue, see Joseph Gordon Hylton, *Prelude to* Euclid*: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900–1920*, 3 WASH. U. J.L. & POL'Y 1 (2000).

[360] *See* Katherine Dunn Parsons, Comment, *Billboard Regulation After* Metromedia *and* Lucas, 31 HOUS. L. REV. 1555, 1558 (1995); Comment, *The Constitutionality of Zoning Laws*, 32 YALE L.J. 833, 833 & n.6, 834 n.15 (1923) (collecting cases, *id.* at 833 n.6).

unpleasant sights rarely gave rise to private nuisance actions.[361] Even there, though, the Supreme Court could cite state decisional law finding billboards to be nuisances on the (highly implausible) grounds that "miscreants"[362] engaged in immoral behavior behind them.[363] To put it simply, in each case about the police power and land use regulation in this period, the Supreme Court or lower courts could (and did) rely on state opinions identifying the regulated use as harmful under the common law of nuisance.[364]

B. Making Apartments Harmful: The Movement for Zoning

The preceding Part identified how courts were struggling with attempted contractual extensions of nuisance law in the interpretive battles over the apartment under nuisance covenants. Similarly, any proposed police power regulation of the apartment presented a problem under the *Yates* line of cases. Again, contemporaneous nuisance law never operated to restrict apartments from residential areas.[365] The record on businesses — like retail stores and other commercial uses — was also at best mixed, with courts typically requiring showings of sufficient harm from an enterprise in order to provide a remedy in tort.[366]

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[361] Brady, *supra* note 13, at 1177.

[362] St. Louis Gunning Advertisement Co. v. City of St. Louis, 137 S.W. 929, 942 (Mo. 1911) (en banc).

[363] *See* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 529–30 (1917) (citing *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 137 S.W. 929, for the proposition that billboards are nuisances associated with various dangerous hazards and immoral practices); *St. Louis Gunning Advertisement Co.*, 137 S.W. at 942. Likewise, the Court found in a case involving a billiard hall "[t]hat the keeping of a billiard hall has a harmful tendency is a fact requiring no proof." Murphy v. California, 225 U.S. 623, 629 (1912). Billboards also came to be declared public nuisances by statute. *See* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L., no. 2, 2011, art. 4, at 41.

[364] *See supra* pp. 1660–61.

[365] For nuisance claims respecting the size and density of apartment buildings alone, courts would impose a fairly high bar, ordinarily declining to recognize neighboring buildings or structures as interfering unreasonably with another owner's light or air. *See* W. Granite & Marble Co. v. Knickerbocker, 37 P. 192, 193 (Cal. 1894); Giller v. West, 69 N.E. 548, 549 (Ind. 1904); Smith v. St. Paul, M. & M. Ry. Co., 81 P. 840, 842 (Wash. 1905) (dicta). Since 1838, American courts had repudiated claims (albeit technically in easement law) that one neighbor could enjoin another from building in a way that obstructed the flow of light, rejecting in the process the English "ancient lights" doctrine that might have led to a contrary result. Parker v. Foote, 19 Wend. 309, 311, 318 (N.Y. Sup. Ct. 1838); 1 WOOD, *supra* note 222, § 153, at 199–200. Under the common law of nuisance, litigants generally fared as poorly. *E.g.*, City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 845 (Ohio 1925); Dall. Land & Loan Co. v. Garrett, 276 S.W. 471, 474 (Tex. Civ. App. 1925). "Spite fences" or structures were a potential counterexample, where courts might — but did not always — consider motive relevant to determining whether a structure cutting off light and air constituted a nuisance. Brady, *supra* note 13, at 1193–94. Oddly enough, landowners had more rights to prevent obstructions of light and air occurring in the street under what were then known as abutters' rights. *See* 10A MCQUILLIN, *supra* note 222, § 30:66; Brady, *supra* note 222, at 1214.

[366] For instance, cases in the 1910s and 1920s alleging that public garages or auto repair shops were nuisances came out different ways depending on whether associated harms were viewed as

Of course, a new movement was taking shape at the dawn of the twentieth century that would bring the propriety of regulating these uses into sharp relief: the movement for municipal zoning. The American push for zoning came into full swing between 1900 and 1930,[367] headquartered in New York City, the home of the first comprehensive zoning law passed in 1916.[368] Zoning was an outgrowth of the "Progressive" movement more generally, a political reaction to "corrupt political machines" that sought to infuse government with more "scientific" and "technocratic" expertise to build a better society.[369] Zoning regulations would divide municipalities into geographic districts and prescribe land use rules for each, such as heights or types of acceptable uses, in the name of health, safety, and orderly development. But these regulations were perceived as new incursions on both liberty and property interests, and they were destined for frequent challenge in the courts.

The proponents of zoning — developers, city planners, and lawyers — recognized the common law of nuisance as an important obstacle if zoning was going to succeed and spread. In light of those prevailing conceptions that cities might violate property rights guaranteed by the Constitution if they declared something a nuisance that was not really so,[370] achieving this end would require both finesse and appeal to a different form of authority. In his 1917 essay *Constitutional Limitations on City Planning Powers*, city planner (and architect of the New York zoning law) Edward M. Bassett noted the line of Supreme Court cases relying on nuisance, sanitation, and fire prevention to support height limits and location restrictions.[371] In classic Progressive form, he urged lawyers and cities to justify new ordinances by reference to these considerations and to build a record of "scientific facts" surrounding harm in the trial court to tempt the judges away from the outcome that might result by consulting only "ancient law books."[372] The key limitation emanating from those books was the law of nuisance.[373]

The city planners and the lawyers working alongside them set about pursuing a campaign to weaken the influence nuisance might have over zoning power in state courts and other venues. Indeed, in 1917, Bassett

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guaranteed or speculative. *Garage as a Nuisance*, *supra* note 308. Long past *Euclid*, nuisance law has continued to be variable on which commercial uses are nuisances and when. *E.g.*, Gardner v. Int'l Shoe Co., 49 N.E.2d 328, 332–33, 335 (Ill. App. Ct. 1943) (requiring showing of more significant harm from tannery than annoying smells), *aff'd*, 54 N.E.2d 482 (Ill. 1944); Dawson v. Laufersweiler, 43 N.W.2d 726, 732 (Iowa 1950) (finding increased traffic and depreciated value insufficient to prove undertaking establishment was a nuisance).

367 *See generally* HIRT, *supra* note 16, at 133–77; TOLL, *supra* note 12, at 117–45.

368 Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081 (1996).

369 HIRT, *supra* note 16, at 146.

370 *See supra* notes 349–64 and accompanying text.

371 *See* BASSETT, *supra* note 344, at 7–10.

372 *See id.* at 10.

373 *See id.*

had argued at a city planning conference that state courts were the most important battleground for zoning: if a majority of "the state courts will permit [a use restriction], there is no doubt that the U.S. Supreme Court will uphold it."[374] On the floor of the Massachusetts constitutional convention in 1918, the delegate from Cambridge argued in favor of an amendment enabling zoning by pointing out that "narrow construction[s]" of the police power threatened the enterprise.[375] Further, nuisance law was inadequate:

> To a certain extent, of course, there is constitutional power at present to limit offensive trades to particular districts of the city, but the line is a pretty fine one as to what are offensive trades. Slaughter-houses, of course, ordinarily are a public nuisance and an offensive trade. . . . But how about the storage of old iron? Is that a nuisance? Probably not. Certainly you do not want it, however, next your house.[376]

The campaign to weaken the force of nuisance law was waged in both convention speeches and in the pages of contemporary periodicals. Attorney Alfred Bettman, a corporate lawyer with expertise and interest in urban planning, wrote a 1924 *Harvard Law Review* article to criticize notions that the scope of regulation was linked to the offensiveness of the use regulated.[377] The concept of nuisance was "hopelessly inadequate to suppress or prevent harmful conditions"[378] — too immutable and yet also indefinite. Bettman argued for the recognition of new concepts. Both "near-nuisance[s]" and "non-nuisance[s]"[379] that were "not . . . inoffensive" should be susceptible to regulation.[380] While this elaborate series of negatives would not seem to help any with indefiniteness, Bettman's view did suggest a path forward: the proponents should work to characterize uses as harmful-adjacent, even if the uses fell short of the traditional domain of nuisance.

Heeding this call, 1910s and 1920s lawyers worked to characterize even upscale apartments as worrisome near-nuisances in support of new zoning laws. State cases across the 1920s started explicitly addressing

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[374] Edward M. Bassett, *Constitutional Limitations on City Planning Powers*, *in* PROCEEDINGS OF THE NINTH NATIONAL CONFERENCE ON CITY PLANNING 199, 213 (1917); *see id.* at 212–13.

[375] 3 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917–1918, at 751 (1920).

[376] *Id.* at 752.

[377] Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 841–42 (1924).

[378] *Id.* at 858.

[379] *Id.* at 842.

[380] *Id.* at 837.

divergences between zoning and nuisance, finding that uses like apartments or businesses were close enough to qualify for regulation.[381] There is no better example of this reasoning than *Miller v. Board of Public Works*,[382] a California case from 1925, in which the court adopted Bettman's "near-nuisance" concept expressly: "[T]he court has not limited the power to zone to nuisances per se, and has held that certain business establishments, harmless in themselves, may become 'near-nuisances' because of the character of the neighborhood in which they are operating."[383] And yet, despite some success, other courts hewed to a stricter conception of nuisance in measuring regulation.[384] Courts in different states found ordinances banning the following uses from residential districts impermissible because they did not track the outcome under nuisance law: groceries,[385] a small hospital run by a live-in nurse,[386] a retail establishment,[387] a one-story brick store,[388] and an ice manufactory.[389]

As the effort to demonize apartments and other uses went on in the courts, it is useful to examine exactly how lawyers tried to characterize apartments as nuisance-adjacent. Many constitutional historians identify the litigation strategy of the Progressive period with the "Brandeis brief." This style of argument, developed by future-Justice Brandeis in his arguments before the Court between 1907 and 1916, was characterized by lengthy filings making the case for the validity of some regulation with scientific data, rather than judicial precedent.[390] Others have called into question just how new (or influential) this style was, although

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381 *E.g.*, City of Aurora v. Burns, 149 N.E. 784, 788 (Ill. 1925); Wulfsohn v. Burden, 150 N.E. 120, 122 (N.Y. 1925); State *ex rel.* Carter v. Harper, 196 N.W. 451, 455 (Wis. 1923).

382 234 P. 381 (Cal. 1925).

383 *Id.* at 384.

384 Ignaciunas v. Risley, 121 A. 783, 785 (N.J. Sup. Ct. 1923), *aff'd sub nom.* Ignaciunas v. Town of Nutley, 125 A. 121 (N.J. 1924); Mayor of Wilmington v. Turk, 129 A. 512, 517–18, 522 (Del. Ch. 1925). Echoes of this reasoning reverberate through the Court's Takings Clause decisions, both modern and from the period. In several, nuisance law is a useful measuring stick for determining whether a regulation formalizes a preexisting limitation on the owner's rights or goes farther. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022–23 (1992); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

385 Fitzhugh v. City of Jackson, 97 So. 190, 193 (Miss. 1923); *Ignaciunas*, 121 A. at 785.

386 *Turk*, 129 A. at 513, 517, 522.

387 Spann v. City of Dallas, 235 S.W. 513, 516, 518 (Tex. 1921).

388 Willison v. Cooke, 130 P. 828, 829, 831–32 (Colo. 1913).

389 State *ex rel.* Penrose Inv. Co. v. McKelvey, 256 S.W. 474, 474 (Mo. 1923) (en banc); *id.* at 478 (Graves, J., concurring); *see id.* at 480 (White, J., dissenting) ("The effect of the ruling in the majority opinion is that before an occupation or a building can be prohibited in a given territory it must be proven as a fact to be a nuisance, as nuisances have been defined and determined heretofore. What may be a nuisance now is a very different thing from what may have been a nuisance in time gone by . . . .").

390 Marion E. Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783, 792 (1958).

it was certainly verbose.[391] The history of nuisance litigation also triggers questions of novelty. Nineteenth-century judges were certainly accustomed to evidence about the health consequences and social ills associated with typical nuisance fare, like smog and smoke. It is not clear whether judges would have seen arguments about the harmful effects of a given use in the Progressive Era as a novelty or par for the course.

Whether one perceives the arguments made in favor of zoning as new forms of Progressive lawyering or extensions of a long tradition in nuisance law, it is clear that lawyers found ways to characterize apartments and other dubiously odious uses as harmful. Old justifications related to fire hazards were repurposed, now related not to shoddy construction, but to density itself: apartments were "subject to accidents arising-from the carelessness of any one of a great number of people and not apt to be detected by any systematic watchfulness."[392] Noise and traffic would be generated not by the clamor of overcrowding, but rather by "increased deliveries"[393] from "autos, taxies, milk wagons, coal wagons," and so on.[394]

These descendants of fears once expressed about tenements were joined by somewhat newer ones inspired by then-recent world events. First, patriotism and heightened concern for national security grew alongside both the First World War and Russia's 1917 communist revolution.[395] The single-family home was viewed as giving the ordinary person a stake in the American capitalist way of life and American "civic and social values."[396] As one court put it, it was doubtful whether "that profound and dependable patriotism which is necessary to preserve and maintain an ideal government like ours could survive the lapse of time crowded into apartments."[397]

Second, early-twentieth-century ideas about "race suicide" — those ideas that the white race was under siege due to decreased birth rates and an influx of immigrants — made their way into cases on apartments,

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391 *E.g.*, David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9, 11 (2011); Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 61–62.

392 Wulfsohn v. Burden, 150 N.E. 120, 125 (N.Y. 1925); *see* City of Aurora v. Burns, 149 N.E. 784, 788 (Ill. 1925); Brett v. Bldg. Comm'r, 145 N.E. 269, 271 (Mass. 1924); City of Providence v. Stephens, 133 A. 614, 617 (R.I. 1926).

393 Minkus v. Pond, 158 N.E. 121, 123 (Ill. 1927).

394 Kahn Bros. Co. v. City of Youngstown, 25 Ohio N.P. (n.s.) 30, 32 (Ct. Com. Pl. 1924); *see* Miller v. Bd. of Pub. Works, 234 P. 381, 385 (Cal. 1925); Kennedy v. City of Evanston, 181 N.E. 312, 314 (Ill. 1932); *Burns*, 149 N.E. at 788; *Wulfsohn*, 150 N.E. at 122.

395 *See* ROTHSTEIN, *supra* note 32, at 60–61.

396 *Miller*, 234 P. at 386; *see* Kenealy v. Chevy Chase Land Co. of Montgomery Cnty., 72 F.2d 378, 380 (D.C. Cir. 1934). This idea had been suggested even before 1917. *See* WALLACE, *supra* note 21, at 263.

397 City of Jackson v. McPherson, 138 So. 604, 605 (Miss. 1932) (en banc).

now marshalled to suggest even upscale housing caused lasting societal harm.[398] Lawyers argued that children could not be effectively raised in multifamily housing and that, unable to safely play, they would degenerate into criminals.[399] Worse still, apartments were portrayed as directly decreasing birth rates.[400] In 1919, one judge wrote:

> [W]e must all concede that the apartment house has a destructive effect upon the birth-rate, and a tendency to race suicide. When we see the robin in March, we say, "Spring is nigh," when we see a woman exercising a bleary-eyed Spitz dog, clothed in soft wool raiment, and attached to a silken cord, we *know* that an apartment is nigh, but we see no smiling children gamboling around its doors.[401]

For the judge, this was the portrait of social decline: a wealthy, white woman, childless with a sweater-clad dog.

Lastly — and meaningfully, given what the year 2020 hath wrought — the 1918 influenza pandemic gave lawyers a new way to link the apartment to speculative harm. Cases from the 1920s in multiple states described the apartment as the vector by which "disease [is] communicated and epidemics set on their way."[402] A court from New York considered it permissible for a zoning ordinance to ban apartments but not other buildings like hospitals, charitable institutions, and sanitariums, because in these latter structures "the observation and watchfulness for contagious diseases would be much greater and more systematic than in an apartment house separated into the occupation of many different families."[403]

In Ohio, however, judges drew the connection between disease and apartment buildings most strongly. In 1919, as the 1918 flu was finally in retreat, Judge Foran on the Ohio Court of Common Pleas was called to decide the constitutionality of a law banning apartments from certain districts in *State ex rel. Morris v. City of East Cleveland*.[404] Judge Foran found apartments harmful (and thus subject to regulation) for many reasons, including their connection to sickness: "Epidemics are spread

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[398] *See supra* notes 200–01 and accompanying text.

[399] *Miller*, 234 P. at 386–87; Brett v. Bldg. Comm'r, 145 N.E. 269, 271 (Mass. 1924); Rice v. Van Vranken, 229 N.Y.S. 32, 36–37 (Sup. Ct. 1928), *aff'd*, 232 N.Y.S. 506 (App. Div. 1929), *aff'd*, 175 N.E. 304 (N.Y. 1930) (per curiam); City of Bismarck v. Hughes, 208 N.W. 711, 716–17 (N.D. 1926).

[400] *See Miller*, 234 P. at 386–87.

[401] State *ex rel.* Morris v. City of East Cleveland, 31 Ohio Dec. 98, 109–10 (Ct. Com. Pl. 1919), *adhered to on reh'g*, 31 Ohio Dec. 197 (Ct. Com. Pl. 1920).

[402] Wulfsohn v. Burden, 150 N.E. 120, 122 (N.Y. 1925); *see* Minkus v. Pond, 158 N.E. 121, 123 (Ill. 1927); *Brett*, 145 N.E. at 271 (suggesting apartment bans reduce "the spread of contagious diseases"); People *ex rel.* Stevens v. Clarke, 215 N.Y.S. 190, 200 (App. Div. 1926); City of Providence v. Stephens, 133 A. 614, 617 (R.I. 1926). Similar arguments were made with respect to the effect of commercial establishments near residences, as in one case where a court described this proximity as increasing the "risk of contagion." City of Aurora v. Burns, 149 N.E. 784, 788 (Ill. 1925).

[403] *Wulfsohn*, 150 N.E. at 125.

[404] 31 Ohio Dec. 98.

by social intercourse, and the more dense this intercourse the more devastating is the epidemic, or the plague. When epidemics are sweeping over the land the cities suffer most, and those portions of the city which are most densely populated suffer most of all."[405] After tracing the history of multiple deadly plagues in cities as far back as 1466, Judge Foran explicitly discussed the recent flu and blamed apartments for its spread:

> The influenza epidemic through which this country passed within the last year is fresh in the minds of all. Churches, schools, theaters, public halls and public meetings were closed, but apartment houses, containing from 100 to 200 or 300 families, or from 500 to 1000 persons, remained open. It is no wonder that the influenza could not be checked and that its victims were numbered by the thousand.
>
> The claim is frequently made that modern sanitation, and the advance in medical science and scientific ventilation will practically nullify the effect of epidemics, but the experience of American cities with the influenza last winter flatly contradicts this claim.[406]

That case was reheard several months later, and the new opinion by a different judge likewise concluded apartments to be harmful in part because the "danger of the spread of infectious disease is undoubtedly increased, however little, where a number of families use a common hallway, and common front and rear stairways."[407] Over the remainder of the 1920s, Ohio courts continued frequently to associate apartments with contagious outbreaks, listing illness alongside fire as the dangers prevented by thoughtful zoning rules.[408]

C. Arrival in Euclid

As most first-year law students learn — and as this Article began — the case that upheld zoning as a legitimate use of the police power was *Village of Euclid v. Ambler Realty Co*. As others have ably chronicled, at the time it was decided, *Euclid* was far from a clear victory for the proponents of city planning; evidence indicates that the case nearly came out the other way, striking down zoning as too great an imposition on property interests.[409] It was decided in 1926, in the era most closely associated with the Supreme Court's willingness to strike down regulations, whether one considers that willingness a function of distaste for interference with economic rights or distaste for legislation that seemed

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[405] *Id.* at 112.

[406] *Id.* at 112–13.

[407] State *ex rel.* Morris v. City of East Cleveland, 31 Ohio Dec. 197, 203 (Ct. Com. Pl. 1920).

[408] Pritz v. Messer, 149 N.E. 30, 34 (Ohio 1925) (blaming apartments for "tuberculosis and other social scourges"); Kahn Bros. Co. v. City of Youngstown, 25 Ohio N.P. (n.s.) 30, 32 (Ct. Com. Pl. 1924) (describing "the danger of the spread of disease [in apartments] due to the number of inhabitants").

[409] Tarlock, *supra* note 12, at 5.

to favor narrow rather than general interests.[410] *Euclid* was decided in the heyday of the Supreme Court's "*Lochner* era."[411] And *Euclid* was authored by Justice Sutherland,[412] colloquially known as one of the "Four Horsemen" "fanatically devoted to property rights and callously indifferent to the commonweal."[413]

Most observers now credit the sort of lawyering described in the preceding section for the outcome in *Euclid*.[414] Alfred Bettman — who had been deeply involved with lawyers and city planners in developing the concept of the near-nuisance[415] — persuaded Chief Justice William Howard Taft (a friend and fellow Cincinnati native) to permit him to file an amicus brief between the first argument of the case and its reargument.[416] Bettman's brief styled zoning as similar to nuisance in "purpose and fundamental justification," regulating ex ante the owner's dubious capacity to use property to injure another.[417] Justice Sutherland relied extensively on Bettman's analogy, suggesting that "the common law of nuisances" would "furnish a fairly helpful clew"[418] in "ascertaining the scope of[] the [police] power."[419] Zoning would simply segregate uses with undesirable side effects — like apartment houses — into more appropriate spots.[420] Tantalizingly, although it was a successful argument, this approach to nuisance had alienated the Village of Euclid, whose own lawyer stated that the Village was "unable to subscribe

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410 For debates in this vein, see ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, LAND USE CONTROLS: CASES AND MATERIALS 94 (4th ed. 2013); Barry Cushman, Essay, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 566, 605 n.56 (1997); Howard Gillman, *What Is, and Isn't, Currently Disputed About* Lochner*-Era Police-Powers Jurisprudence*, 26 GEO. MASON L. REV. 1049, 1049 (2019); Haar & Wolf, *supra* note 11, at 2159–60; Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. U. L. REV. 453, 453–454 (1998); Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. REGUL. 91, 96 (2011) ("The supposedly progressive *Euclid* decision was and remains one of the oddities of the seemingly conservative *Lochner* Court jurisprudence."); William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 863 (1998); and G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 87 (1997).

411 *See* David A. Strauss, Essay, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003).

412 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 379 (1926).

413 Cushman, *supra* note 410, at 559.

414 *E.g.*, Callies, *supra* note 11, at 408–09; Chused, *supra* note 11, at 610–14; Tarlock, *supra* note 12, at 7–8.

415 *See supra* p. 1665380.

416 TOLL, *supra* note 12, at 236–37; Chused, *supra* note 11, at 610; Tarlock, *supra* note 12, at 5; Village of Euclid v. Ambler*: The Bettman Amicus Brief*, *supra* note 12, at 3. The Bettman brief has been viewed as an example of a "Brandeis brief." *See* Jerold S. Kayden, *Judges as Planners: Limited or General Partners?*, *in* ZONING AND THE AMERICAN DREAM, *supra* note 10, at 223, 225; source cited *supra* note 390 and accompanying text.

417 Village of Euclid v. Ambler*: The Bettman Amicus Brief*, *supra* note 12, at 6.

418 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

419 *Id.* at 387–88; *see* Tarlock, *supra* note 12, at 8.

420 *See Euclid*, 272 U.S. at 390.

to . . . citations of so-called 'nuisance' and 'semi-nuisance' cases as supporting zoning ordinances."[421]

Euclid was in one sense an even bigger departure than it appeared.[422] While all the decisions on the relationship between nuisance and the police power to that point concerned uses involved in prior nuisance litigation, the apartment and many forms of commercial establishments targeted by zoning did not have a similar record in case law.[423] Bettman did provide the Justices with a copy of a 1913 New York City commission report making the case for zoning that argued that both tall buildings and retail districts presented problems law should solve.[424] Bettman's brief nevertheless cited some of the Court's earlier precedents for the proposition that "neither zoning nor property regulation in general is restricted to or identical with nuisance regulation," contending that the police power should be interpreted broadly to promote the good life rather than to "suppress[]" the bad.[425] And Justice Sutherland took up this strand, finding zoning permissible "although some industries of an innocent character might fall within the proscribed class."[426] Furthermore, and as was described earlier,[427] Justice Sutherland's majority opinion asserted that, when placed in "detached house sections,"[428] "apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."[429]

The Supreme Court's elevation of this concept — the near-nuisance — was the culmination of substantial effort by city planners and attorneys associated with the zoning movement. But the near-nuisance bore a complicated relationship with the private law history that had preceded it. On one hand, the push for public regulation to

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421 Robert Post, *Part V: Social and Economic Legislation in the Taft Court*, *in* 10 OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES (forthcoming) (manuscript at 203 n.758) (on file with the Harvard Law School Library).

422 *See* Mandelker, *supra* note 352, at 646–47; Post, *supra* note 421, at 220 n.823 (noting that apartments had not been found to be nuisances). Another author who has come close to noting the oddness of *Euclid* in its departure from nuisance is Professor James Gordley. *See* James Gordley, *Contract, Property, and the Will — The Civil Law and Common Law Tradition*, *in* THE STATE AND FREEDOM OF CONTRACT, *supra* note 335, at 66, 87.

423 *See supra* section III.A, pp. 1658–63.

424 On the 1913 report generally, see TOLL, *supra* note 12, at 147–64. On Bettman's provision of the report to the Justices and its influence, see *id.* at 238–41.

425 Village of Euclid v. Ambler*: The Bettman Amicus Brief*, *supra* note 12, at 7. Bettman had made a similar case earlier, in both statements made at the 1917 City Planning Conference and in a 1924 *Harvard Law Review* article. PROCEEDINGS OF THE NINTH NATIONAL CONFERENCE ON CITY PLANNING, *supra* note 374, at 217–18; Bettman, *supra* note 377, at 836–37.

426 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926).

427 *See supra* note 10 and accompanying text.

428 *Euclid*, 272 U.S. at 394.

429 *Id.* at 395.

separate uses like apartments was necessary because interpretations of the nuisance covenant had hewed too closely to traditional nuisance law.[430] In 1915, a collective of architects, developers, and real estate lawyers called the Advisory Council of Real Estate Interests published a report on covenants in New York City meant to illustrate their total fallibility and suggest that owners underinvested in realty as a result.[431] The report intentionally portrayed court interpretations of covenants as incomprehensible, in part by swinging around the city: "[A]n apartment hotel is permitted on Forty-third Street and Fifth Avenue, but to bake bread and cake in a baker's oven on the Southern Boulevard will be enjoined."[432] The report was quoted extensively by the *New York Times* in an article entitled "Hard Problem in Old Restrictions — Inconsistencies in Legal Decisions Have Only Added to the Difficulties — Some Absurdities Cited."[433] It was also read aloud by social reformer Lawrence Veiller at a major 1916 city planning conference.[434] In light of the report's implications and to encourage investment, Veiller concluded: "[W]e can control the character of our neighborhoods only through state or municipal regulation."[435]

Even well after zoning ordinances were passed, the advocates of zoning continued to portray covenants as either weak or ineffective land use tools. In 1922, Edward M. Bassett — already mentioned as one of the authors of New York City's 1916 zoning law[436] — defended the need for zoning regulation by arguing that "[t]he history of private restrictions [in deeds] has been far from satisfactory."[437] Why? Bassett alleged that covenants were so vulnerable to being misinterpreted that they were in need of vigilant monitoring yet also so perpetual that they were "incapable of adaptation."[438] He had made this dualism argument before. In an earlier article, "Zoning Versus Private Restrictions," Bassett had claimed that zoning was somehow "more permanent" and also "more elastic" than the restrictive covenant.[439]

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430 *See* Edward M. Bassett, *Zoning Versus Private Restrictions*, NAT'L REAL EST. J., Jan. 2, 1922, at 26, 26.

431 The report is excerpted in *Hard Problem in Old Restrictions*, *supra* note 286, at XX1.

432 *Id.*

433 *Id.*

434 Lawrence Veiller, *Districting by Municipal Regulation*, *in* PROCEEDINGS OF THE EIGHTH NATIONAL CONFERENCE ON CITY PLANNING 147, 149–50 (1916). The conference was attended by most of the drafters of New York's model 1916 law, such as Edward M. Bassett. PROCEEDINGS OF THE EIGHTH NATIONAL CONFERENCE ON CITY PLANNING, *supra*, at v.

435 Veiller, *supra* note 434, at 151.

436 Andrea Renner, *The 1916 Zoning Ordinance*, THE URBANIST (Apr. 30, 2017), https://www.spur.org/publications/urbanist-article/2017-04-30/zonings-next-century [https://perma.cc/Z4ZX-VQXS].

437 Edward M. Bassett, *Zoning*, 9 NAT'L MUN. REV. 311, 317 (rev. ed. 1922).

438 *Id.*

439 Bassett, *supra* note 430, at 26.

While advocates of zoning outwardly criticized covenants, the reality is that most of their critics continued to use them — including nuisance covenants — extensively.[440] Even in 1916, proponents of zoning encouraged developers to lobby for and use both tools, each accomplishing what the other might not.[441] This advice was echoed by the Federal Housing Administration's recommendations in the 1950s that covenants are "an important supplementary aid in maintaining neighborhood character and values,"[442] and indeed, nuisance covenants remained one of the recommended tools.[443] Judicial interpretations buttressed the notion that covenants and zoning could be mutually reinforcing, always resolving in favor of the strictest control. Zoning also interacted with doctrines governing covenants quite directly. Early on, courts were asked to decide whether zoning ordinances permitting denser building or businesses in a particular territory superseded existing restrictive covenants.[444] The answer, then and now, is no: whichever is more restrictive — the ordinance or the covenant — prevails.[445]

The long history of nuisance covenants presents two questions: one conceptual, one practical. First, although they were unsuccessful in controlling land uses to the extent that owners and drafters might have hoped, what functions did nuisance covenants serve as they proliferated across deeds both before and after zoning? And second, if zoning is indeed in its twilight, what practical lessons does this history teach for the future of land use law?

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440 *See* WORLEY, *supra* note 34, at 126–35.

441 Veiller, *supra* note 434, at 156.

442 Bernard H. Siegan, *Non-zoning in Houston*, 13 J.L. & ECON. 71, 80 (1970) (quoting FED. HOUS. ADMIN., LAND PLANNING BULLETIN NO. 3: PROTECTIVE COVENANTS FOR DEVELOPMENTS OF SINGLE-FAMILY DETACHED DWELLINGS (1959)).

443 *See* sources cited *supra* note 30 and accompanying text.

444 *See, e.g.*, Forstmann v. Joray Holding Co., 154 N.E. 652, 653–54 (N.Y. 1926).

445 *See* Brown v. Morris, 184 So. 2d 148, 151 (Ala. 1966); McDonald v. Emporia-Lyon Cnty. Joint Bd. of Zoning Appeals, 697 P.2d 69, 71–72 (Kan. Ct. App. 1985); Annison v. Hoover, 517 So. 2d 420, 422 (La. Ct. App. 1987). This doctrine is one of the reasons that local governments themselves use covenants to support and strengthen zoning regulations. *See generally* Noah M. Kazis, Note, *Public Actors, Private Law: Local Governments' Use of Covenants to Regulate Land Use*, 124 YALE L.J. 1790 (2015).

IV. NUISANCE COVENANTS AS PRIVATE LAW AND PUBLIC MEANING

A. The Expressive Function of Nuisance Covenants

Despite portrayals as chaotic and ineffective,[446] nuisance covenants had played an important role in shaping and supporting zoning regulations. As other scholars have noted, the clauses of early covenants were translated directly into public ordinances,[447] and voluntary agreements to restrict property rights may have played a psychological role in convincing land owners to accept public restrictions on their property rights through zoning regulation.[448] But the promises made in deed restrictions also communicated perceptions of harmful land uses among judges, lawyers, and developers.[449] Professor Mark Suchman has suggested that contracts can be studied not just to learn about legal doctrine or contractual relations, but rather as "artifacts" — as symbols and communications that both influence and are influenced by the physical and cultural environment.[450] Deeds are memorials of agreements that led to the transfer of property.[451] And deed restrictions helped to identify unwanted neighbors and communicate their undesirability among certain audiences.

To whom did the covenants communicate? There is one audience we know for certain interacted with them: real estate professionals and lawyers. Even before such evidence is explicit in the archival letters of influential planners, the deed restrictions themselves bear hallmarks of additive copying. It strains credulity to imagine that lawyers or developers across the nation independently devised lists of banned uses including the verbatim phrase "varnish, vitriol, ink or turpentine,"[452]

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446 *See* Van Vliet & Place, Inc. v. Gaines, 162 N.E. 600, 601 (N.Y. 1928) ("In view of the existence of statutes and ordinances which prohibit the maintenance of most of the objectionable structures enumerated in the deed, the ordinary covenant against nuisances has in recent years lost much of its force.").

447 Korngold, *supra* note 11, at 640–41.

448 *See* WEISS, *supra* note 31, at 68–71.

449 *Cf.* Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 93 (2003).

450 *See id.*

451 *See* Brady, *supra* note 20, at 897.

452 *E.g.*, Easterbrook v. Hebrew Ladies' Orphan Soc'y, 82 A. 561, 563 (Conn. 1912); Pierce v. St. Louis Union Tr. Co., 278 S.W. 398, 400 (Mo. 1925) (describing 1870 deed banning "manufactory of gunpowder, glue, varnish, vitriol, ink or turpentine, or for the tanning, dressing or preparing furs, skins, hides or leather, or any brewery, distillery or public museum, or any theater or circus or place of similar amusement, or place for the exhibition of animals, or any trade or business of any kind, dangerous, noxious or offensive to the neighboring inhabitants; or any tenement house, tavern, hotel or public school").

whether they learned of this list directly from one another, from contemporary case reports, or some other way.[453] In 1869, for example, Harvard Law Professor Theophilus Parsons published a treatise on personal and property rights that included a collection of standard forms; one of these was for a "Warranty Deed, with Covenant Against Nuisances"[454] that, lo and behold, included the varnish-to-turpentine list.[455] Evidence clearly indicates that by the 1900s, developers were requesting and sending one another examples of the latest deed restrictions.[456] One can find deed restrictions banning oil and gas derricks in the heart of comparatively resource-low Tucson, Arizona,[457] possibly because oil and gas derricks were a much bigger land use problem (and frequently the subject of covenants) farther west in Los Angeles.[458] The boilerplate of covenants remained durable as it traversed time and space: restrictive covenants banning slaughterhouses are still being litigated in the twenty-first century.[459]

Judges, too, received information about unwanted uses through covenant provisions. For one thing, judges (and real estate men) encountered some covenants repeatedly, to the point that they could refer to them by neighborhood name.[460] Deed restrictions transmitted express

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[453] The varnish-to-turpentine recital was also published in some newspaper accounts of land use conflicts. *E.g.*, *Cyrus W. Field Objects, but Manhattan College Means to Build at Irvington*, SUN (N.Y.), Dec. 19, 1890, at 9.

[454] PARSONS, LAWS OF BUSINESS FOR ALL THE STATES OF THE UNION, *supra* note 96, at 458.

[455] *Id.* at 459; *see* PARSONS, THE POLITICAL, PERSONAL, AND PROPERTY RIGHTS, *supra* note 96, at 301–03. The same list also appears in ABBOTT & ABBOTT, *supra* note 29, at 300–01.

[456] GLOTZER, *supra* note 24, at 95–96.

[457] *Declaration of Establishment of Conditions and Restrictions*, *in* 20 PIMA COUNTY LAND RECORDS 237, 238 (1922) (on file with the Harvard Law School Library); *Declaration of Establishment of Conditions and Restrictions of Casas Bonitas*, *in* 103 PIMA COUNTY LAND RECORDS 1, 2 (1946) (on file with the Harvard Law School Library). There are still very few oil and gas wells in the Tucson area. *See Oil and Gas Viewer*, ARIZ. OIL & GAS CONSERVATION COMM'N, http://welldata.azogcc.az.gov [https://perma.cc/EH78-85PF].

[458] Werner v. Graham, 183 P. 945, 946 (Cal. 1919) ("[N]o derrick for boring any oil well shall be erected or placed, nor shall oil be produced in any manner whatsoever, on said premises or any part thereof at any time within fifty (50) years from the date hereof . . . ."); Miles v. Hollingsworth, 187 P. 167, 169 (Cal. Dist. Ct. App. 1919) ("[N]o oil well shall ever be bored or operated upon any part of said premises; . . . no derrick nor machinery for conducting any kind of business whatever shall ever be erected or placed upon any portion of said premises.").

[459] James O. v. Chai Ctr. for Living Judaism, Inc., No. A-4088-13T1, 2016 WL 4262655, at *4 (N.J. Super. Ct. App. Div. Aug. 15, 2016).

[460] *See, e.g.*, Cromwell v. Am. Bible Soc'y, 195 N.Y.S. 217, 222 (App. Div. 1922) ("The courts have construed the Murray Hill restrictive agreement on many occasions."); Zipp v. Barker, 57 N.Y.S. 569, 572 (App. Div. 1899) (noting prior interpretations of same covenant), *aff'd*, 59 N.E. 1133 (N.Y. 1901) (per curiam); *see also* Sieker, *supra* note 28, at 97 (referring to "the well known Dater covenant [that] covers a large tract in the Bronx"). Outside New York, one sees similar evidence. *See, e.g.*, Noel v. Hill, 138 S.W. 364, 371 (Mo. Ct. App. 1911) (noting that St. Louis was "a city of homes beautiful" *because of* "restricted residence districts").

information about uses perceived as noxious or harmful — analyses that might influence how judges understood reasonable uses in the community. Previous scholarship has recognized that judges are members of constituent communities, using a combination of precedents, customs, and norms as part of the common law interpretive process, recognizing new harms as they extend ancient concepts to cover new fact situations.[461] Some of these norms were communicated through the contracts and restrictions that judges were asked to interpret. One New York court found it a "matter of common knowledge that much of the land in the city of New York is held subject to ancient covenants" against slaughterhouses and soap manufactories.[462] Judges closely read and reflected on deed restrictions; in one case, for example, the judge wondered whether a "public museum" was really harmful and similar in other ways to the offensive trades listed.[463]

A somewhat similar sort of expressive function of covenants has been documented in other contexts. As Richard Brooks and Carol Rose have written in their work on racially restrictive covenants, "legal devices may be extremely important as signals and focal points for assisting less close-knit communities to organize themselves, whether their projects are laudable or dismaying."[464] They explore how covenants were used to "send[] signals both to insiders and to outsiders about who was and who was not wanted,"[465] a communicative function that racial restrictions continued to serve even after they were declared unenforceable by a Supreme Court decision.[466]

The covenant against nuisances was also a signal among the purchasers and owners of properties burdened with nuisance covenants.[467] It was a way for owners to organize themselves around certain preferred uses in a neighborhood, but it also telegraphed the unwanted nature of emerging activities that regular nuisance law was not always so quick to prevent (like the tenement). In particular, as the first two Parts explained, nuisance covenants telegraphed messages about class: separation of work and home, separation of tenement from brownstone, and (at least attempted) separation of apartment from private, single-family

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461 *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 251–54 (2020).

462 Van Vliet & Place, Inc. v. Gaines, 224 N.Y.S. 481, 485 (App. Div. 1927), *rev'd*, 162 N.E. 600 (N.Y. 1928).

463 Easterbrook v. Hebrew Ladies' Orphan Soc'y, 82 A. 561, 564 (Conn. 1912); *see also* Jones v. Chapel Hill, 69 N.Y.S.2d 753, 755–56 (Sup. Ct. 1947) (conducting similar analysis with respect to undertaking establishment), *modified and aff'd*, 77 N.Y.S.2d 867 (App. Div. 1948).

464 BROOKS & ROSE, *supra* note 16, at 10–11.

465 *Id.* at 13.

466 *See id.* at 2.

467 *Cf.* D. Gordon Smith, *The "Branding Effect" of Contracts*, 12 HARV. NEGOT. L. REV. 189, 189–90 (2007) (discussing the signaling effects of contracts); Suchman, *supra* note 449, at 128 (same).

dwelling. Implicit in these directives were other forms of separation: richer from poorer, family from bachelor, native from immigrant, white from other.[468]

The connections between this trajectory and the trajectory of explicit racial restrictions require further explication. As with the apartment and some other uses, judges in the nineteenth and early twentieth centuries did not typically consider the presence of Black residents alone sufficient to give rise to a nuisance action.[469] The content of nuisance covenants shaped tort law in ways that racial covenants did not. While judges and commentators mixed cases about the contractual meaning of "nuisance" with ordinary tort cases,[470] racial covenants did not similarly cause judges to come to see Black residents as legally proscribable through nuisance law. Likewise, while racial covenants did predate (and perhaps shaped) explicitly racial zoning ordinances, racial zoning was struck down as impermissible long before racially restrictive covenants were invalidated. In contrast, this Article argues, nuisance covenants helped to soften judges and property owners alike to property regulation, paving the way for use zoning on a large scale.

There are two likely reasons for this divergent history. First, and rather obviously, the constitutional amendments used to invalidate racial zoning very early on did not apply to the sorts of distinctions based on class on which nuisance covenants depended. Indeed, in the decision that invalidated racial zoning — *Buchanan v. Warley*[471] — the Court stated that despite attempts to justify the zoning ordinance on the grounds that Black residents "depreciate property" values when residing in proximity to whites, that justification was an unpersuasive reason for discriminating against them because both industry and white lower-class individuals raised similar problems: "[P]roperty may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results."[472] Second, and more technically, unless they explicitly banned use and occupancy rather than sale, racial restrictions were likely not viewed as "use" restrictions analogous to zoning laws the same way that nuisance covenants were. Instead, they were perceived

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468 *See supra* p. 1647.

469 Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 506–07 (2006); Henderson & Jefferson-Jones, *supra* note 252, at 898–901. Nevertheless, many of these decisions do indicate racist attitudes of the deciding judge. Godsil, *supra*, at 507; Henderson & Jefferson-Jones, *supra* note 252, at 898–901.

470 *E.g.*, Heimerle v. Village of Bronxville, 5 N.Y.S.2d 1002, 1010 (Sup. Ct. 1938) (nuisance case relying on covenant case *Rowland v. Miller*, 34 N.E. 765 (N.Y. 1893)), *aff'd mem.*, 11 N.Y.S.2d 367 (App. Div. 1939); Jordan v. Nesmith, 269 P. 1096, 1099 (Okla. 1928) (same); Meuth, *supra* note 315, at 294. *See generally Garage as a Nuisance*, *supra* note 308.

471 245 U.S. 60 (1917).

472 *Id.* at 82.

as restrictions on who could hold title. This became clear in controversies about the "race" of corporations.[473] Courts were "formalistic with respect to the distinction between ownership and use,"[474] refusing to read restrictions prohibiting sale to Black purchasers as forbidding ownership by a corporation even where that corporation was set up to serve Black customers or consumers.[475] Although lawyers consigned to the dustbin of history responded to these holdings in the corporation cases by drafting explicit bans on use or occupancy by Black individuals, the corporation cases occurred *after* racial zoning had been invalidated by *Buchanan*, and thus could not shape regulation.[476]

In a broad sense, the history of nuisance covenants may map onto what is already known about the function of boilerplate in contracts literature. Boilerplate serves "signaling and coordination functions" for parties, sharing information in formalized yet effective ways.[477] Law and contemporary class ideology interacted in a complicated manner; social movements found legal expression in nuisance covenants, but the covenants themselves proved to be additional sites for deliberation and developing consensus on land use harms. Today, in addition to covenants, visual signals — like golf courses and residential amenities — can communicate class solidarity to prospective purchasers in residential communities (or at least to realtors and real estate attorneys).[478] The antecedents of these perks are the nuisance covenants of the 1820s, with their arcane and ever-expanding lists of unwanted things.

B. The Lingering Influence of Private Land Use Controls

The nuisance covenant emerged as a legal device within property at a moment when doctrines within torts, contracts, and regulations were jostling to become the dominant theoretical paradigm for understanding the boundary between public and private realms and between legitimate and illegitimate action. At least until *Euclid*, the law of nuisance exerted significant force on evaluations of the constitutionality of land use regulations. Likewise, in the decisions on nuisance covenants, efforts to contractually redefine nuisances to include uses like apartments and parking garages were met with skepticism and retreat to typical tort

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[473] *See* BROOKS & ROSE, *supra* note 16, at 62–69; Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2057 (2006).

[474] BROOKS & ROSE, *supra* note 16, at 70.

[475] *Id.* at 62–70.

[476] *Id.* at 47, 68–69.

[477] Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1037 (2006).

[478] *See, e.g.*, Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 441, 468–76 (2006) (describing golf courses prevalent in certain subdivisions as "exclusionary amenities," *id.* at 441, that rally racially homogenous residents).

law.[479] Nevertheless, covenants invoked to prevent more traditional nuisance uses had a better chance of being enforced,[480] helping property owners avoid both technical hurdles in accessing equity powers and the need to show substantial damages.

Although the nuisance covenant was unsuccessful in preventing uses like the apartment, it had operated more reliably to segregate work and congestion from middle- and upper-class residences, a protean form of the single-family use zoning that would come to dominate American land use history. And while it is impossible to prove with certainty what psychological and other effects the nuisance covenant had on the development of land use law — after all, nuisance covenants have remained unstudied for about 200 years — one can speculate. The drafters of covenants piloted ideas that nuisance law could be tailored and that "noxiousness" or "injuriousness" was a category close to, but not extensive with, nuisance law, trying out notions that near-nuisances and the noxious-adjacent deserved private and public regulation. Indeed, if one reads *Euclid*'s rather loose discussion of nuisance law as the descendant of earlier debates about *contractual* capacity to define what counts as noxious, the outcome in *Euclid* fits more comfortably in the freedom-of-contract sensibility associated with the *Lochner* era. Whether Justice Sutherland had covenants and their role in community construction in mind in his opinion in the *Euclid* decision, we may never know.

At a minimum, though, nuisance, covenant, and zoning law were in dialogue in the historical debates over what uses counted as harmful, and they remain in dialogue today. These land use devices are frequently discussed as alternatives to one another with different costs and benefits.[481] There is much to be gleaned by comparing these different mechanisms for controlling land uses. To be sure, as commentators have long recognized, covenants can permit residents to opt in to communities that satisfy their preferences and to minimize negative externalities.[482] And owners typically pay a premium for restrictions, signaling the value of this kind of customization to those purchasing property.[483]

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[479] *See supra* section II.B, pp. 1644–53; *supra* pp. 1655–56; *see also* Biggs v. Sea Gate Ass'n, 105 N.E. 664, 667 (N.Y. 1914) (refusing to apply nuisance covenant to boardinghouse).

[480] *See* Simons v. Mut. Constr. Co., 117 N.Y.S. 567, 568 (App. Div. 1909) (confectionery for use of ovens); Brouwer v. Jones, 23 Barb. 153, 155, 162 (N.Y. Gen. Term. 1856) (steam sawmill).

[481] *See* ELLICKSON ET AL., *supra* note 410, at 539; William T. Hughes, Jr. & Geoffrey K. Turnbull, *Restrictive Land Covenants*, 12 J. REAL EST. FIN. & ECON. 9, 11–12 (1996). *See generally* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Siegan, *supra* note 442.

[482] *See* Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 907–08 (1988); Hughes & Turnbull, *supra* note 481, at 11–12.

[483] *See* Epstein, *supra* note 482, at 907–09.

It is also important, however, to recognize the interactions among nuisance law, covenants, and zoning rules. For instance, the contractual preferences of developers and small subsets of property owners can be and often were elevated into public regulation.[484] Once hardened into regulation, covenants become even stickier than before. Even if we view purchasers of covenant-burdened property as those who "opt in" to the rules affecting some subdivision, once those rules are transmitted into ordinances and codes, it becomes more difficult for those who do not wish to be so burdened to "exit" or opt out.[485]

Judges and others also exported definitions of noxiousness in covenant law in ways that shaped tort law in the longer term, even if in individual cases, judges thwarted drastic extensions of nuisance covenants. We know, for instance, that the authors of treatises and secondary sources seamlessly blended cases on the construction of covenants into sections about what activities constituted nuisances.[486] Judges cited nuisance cases interchangeably with cases about the contractual meaning of nuisance in evaluating the reasonableness of proposed activities under tort law alone.[487] The two areas of law informed one another, which gave cases on covenants unexpected reach into the recesses of nuisance proper.

Nuisance covenants live on. While determining the propriety of the apartment was the important question a century ago, today, courts are being asked to interpret whether twenty-first century uses like solar panels qualify as common law nuisances or are within the terms of nuisance covenants.[488]

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[484] Some scholars have been attentive to this role. *See* WEISS, *supra* note 31, at 4, 68–71; Korngold, *supra* note 11, at 640–41; Stach, *supra* note 21, at 59–60.

[485] *Cf.* Ellickson, *Cities and Homeowners Associations*, *supra* note 31, at 1520; Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1856–57 (2003) (book review) (noting the likelihood of involuntary membership in a municipal jurisdiction and the inadequacies of the market model at explaining spatial distribution).

[486] *E.g.*, *Garage as a Nuisance*, *supra* note 308; Meuth, *supra* note 315, at 293–95.

[487] For instance, one case on whether undertaking fell within a nuisance covenant, *Rowland v. Miller*, 34 N.E. 765, 765 (N.Y. 1893), was cited in a multitude of subsequent nuisance decisions. *E.g.*, Heimerle v. Village of Bronxville, 5 N.Y.S.2d 1002, 1010 (Sup. Ct. 1938), *aff'd mem.*, 11 N.Y.S.2d 367 (App. Div. 1939); Jordan v. Nesmith, 269 P. 1096, 1099 (Okla. 1928).

[488] Other uses like wind infrastructure may present similar issues. *See* Gerald Korngold, *Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection*, 3 LSU J. ENERGY L. & RES. 101, 134 (2014). Professor Gerald Korngold also discusses bans on oil and gas drilling now applied to fracking, *see id.* at 130–33; oil and gas drilling restrictions date to among some of the oldest restricted subdivisions, *see* MONCHOW, *supra* note 38, at 27, 32. For additional cases and scholarship on restrictive covenants and solar energy, see Sandomire v. Brown, 439 P.3d 266, 269 n.3 (Haw. Ct. App. 2019); Blood v. Stoneridge at Fountain Green Homeowners Ass'n, 215 A.3d 415, 418 (Md. Ct. Spec. App. 2019); Faler v. Haines, 962 N.Y.S.2d 500, 502 (App. Div. 2013); Kristina Caffrey, *The House of the Rising Sun: Homeowners' Associations, Restrictive Covenants, Solar Panels, and the Contract Clause*, 50 NAT. RES. J. 721, 745 (2010); and Evan J. Rosenthal, Note, *Letting the Sunshine In: Protecting Residential Access to Solar Energy in Common Interest Developments*, 40 FLA. ST. U. L. REV. 995, 997 (2013). For further information on solar law, see Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217, 1232–33 (2009).

In *Faler v. Haines*,[489] for example, one subdivision neighbor sued another, alleging that solar panels on the other property violated a covenant banning "nuisances [from being] maintained on said premises, which may be in any manner dangerous or noxious or offensive to the neighborhood inhabitants."[490] While noting that the solar panels may not qualify as a nuisance under ordinary tort law, a New York trial court found that there was a genuine issue of fact as to whether the glare from the panels meant the solar infrastructure could be enjoined per the deed restriction.[491] Albeit not under traditional nuisance covenants, short-term rentals, such as vacation homes and listings on popular sharing-economy platforms like Airbnb, are also undergoing consideration in private law. Beneficiaries of covenants have brought a flurry of cases alleging that short-term rentals violate covenant provisions on "single-family" housing and the like.[492] The class dimensions of these conflicts are not necessarily as obvious as the dwelling-tenement distinction, and property regulation is well established compared to its status a century ago. Nevertheless, nuisance, covenant, and zoning law are again each acting as a site for deliberation about what qualifies as harm and what qualifies as public good.

It is doubtful that restrictions against tenements will somehow return triumphant to cover couch-surfing. But prescient observers have noted that if single-family zoning disappears or is radically altered, as many observers hope will occur,[493] private law controls retain substantial capacity to preserve single-family districts.[494] Within the many cases on nuisance covenants, one need not look long to find that transaction costs did not pose a substantial obstacle to small numbers of neighbors getting together to execute agreements that certain uses were unwanted in their neighborhoods.[495] Additionally, another legal innovation — the homeowners' association — has emerged in the decades since the influence of

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489 962 N.Y.S.2d 500.

490 *Id.* at 502 (emphasis omitted).

491 *See id.* at 502–03.

492 *See* Dunn v. Aamodt, 695 F.3d 797, 800 (8th Cir. 2012); Santa Monica Beach Prop. Owners Ass'n v. Acord, 219 So. 3d 111, 114 (Fla. Dist. Ct. App. 2017); Grave de Peralta v. Blackberry Mountain Ass'n, 726 S.E.2d 789, 792 (Ga. Ct. App. 2012); Applegate v. Colucci, 908 N.E.2d 1214, 1216 (Ind. Ct. App. 2009); Lowden v. Bosley, 909 A.2d 261, 262 (Md. 2006); Tarr v. Timberwood Park Owners Ass'n, 556 S.W.3d 274, 276 (Tex. 2018); Donald J. Kochan, *The Sharing Stick in the Property Rights Bundle: The Case of Short Term Rentals & HOAs*, 86 U. CIN. L. REV. 893, 912–15, 913 nn.83–86 (2018).

493 *See supra* notes 1–5 and accompanying text.

494 Stephen R. Miller, Opinion, *Ending the Single-Family District Isn't So Simple*, STAR TRIB. (Jan. 2, 2019, 5:53 PM), https://www.startribune.com/ending-the-single-familydistrict-isn-t-so-simple/503820202 [https://perma.cc/B362-4PJ5].

495 *E.g.*, Trs. of Columbia Coll. v. Lynch, 70 N.Y. 440, 446–47 (1877).

nuisance covenants waned. The typical homeowners' association is empowered to enact and update restrictions on an ongoing basis to overcome problems associated with the obsolescence of existing covenants and the coordination required to establish new ones.[496] Restrictions now arguably receive much more deference than they did in the heyday of the nuisance covenant,[497] with its skepticism of restraints on the free use of property. If zoning fades into the background in American municipalities, covenants like those banning apartments may ultimately reemerge in cities and suburbs to entrench resident control over neighboring uses. Should that occur, the doctrines that will limit covenant law in this century await further work.

CONCLUSION

The purpose of this Article has been to describe a forgotten chapter in the history of private land use law. This chapter is composed of interlocking stories: the rise of the nuisance covenant and its first significant test, the apartment complex. The apartment became a focal point for 1920s debates over zoning, and it remains one today. A century ago, private law did not stop the apartment from spreading. It did, however, communicate emerging ideas about unwanted uses. And within both private and public law, apartments served as a focal point for debates among lawyers and judges about the interactions between the common law of nuisance and the proper scope of both contractual and regulatory freedom to define that which we do not want.

Systems of land use regulation interact with one another in complex ways. In published opinions and in the recesses of land records vaults, private law shapes notions of harm and conceptions of property rights. Two hundred years after the first nuisance covenant was drafted, it still carries a lesson. Silos of legal study are not independent, and lawyers even within the most drab of documents can end up molding perceptions widely held in society at large.

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[496] *See* Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENV'T L. 203, 222–23 (1992).

[497] *E.g.*, Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1286 (Cal. 1994).