THE NIMBY FILIBUSTER

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Zoning protest petitions allow landowners representing a percentage of the land neighboring an area proposed to be rezoned to force the local government to have to vote by supermajority to approve the rezoning. Only landowners are entitled to file these petitions, and their "vote" toward the percentage of neighboring land necessary to trigger the supermajority is allocated according to the proportion of neighboring land they own. This Note examines the history, statutory construction, and current use of protest petition laws, which are now on the books in twenty states. It illustrates that they formed part of the justificatory architecture of racist and classist exclusionary zoning and Not in My Backyard-ism (NIMBYism), contributing to legal doctrine and informal political norms that treat an entitlement to block locally unwanted activities as a "property right" akin to a right against nuisances. Although protest petitions have historically been rarely used, the political and legal norms of exclusionary zoning and local control are changing. While governments work to alleviate a nationwide housing shortage, the political climate is also characterized by the routine use of procedural hardball in all areas of policy. There are now warning signs that protest petitions will be increasingly used by NIMBY neighbors to "filibuster" rezonings that would allow for the construction of needed housing. To head off this increasingly likely possibility, this Note probes some legal avenues in federal law that might be explored by housing affordability advocates to invalidate, weaken, or induce the repeal of protest petition laws in all states that still have them. It explores due process and One Person, One Vote theories, as well as the idea of using the "affirmatively furthering" mandate of the Fair Housing Act to induce protest petition laws' repeal.

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Introduction

In 2012, the City Council of Austin, Texas set out to update the city's zoning code for the first time since 1984.[1] Time was of the essence. Austin's population had grown by over a million since the 1980s, but the restrictive provisions of the old zoning code made it impossible for housing construction to keep pace.[2] Housing costs rapidly increased, and by the 2010s, half of the city's tenants were struggling to make rent.[3] So the city sought to "create the capacity for an additional 405,000 units of housing . . . mostly accomplished through upzoning parcels of land, or allowing for greater density."[4] After several years of contentious legislative negotiations, and over $10 million in costs,[5] the City Council preliminarily voted to approve the rezoning in 2019 by a margin of seven-to-four.[6] But a small group of homeowners, no more than a few

1 *See* Megan Kimble, *Desperate for Housing, Austin Seeks Relief in Rezoning*, Bloomberg CityLab (Apr. 29, 2022, 11:38 AM), https://www.bloomberg.com/news/features/2022-04-29/as-gentrification-sweeps-austin-zoning-reform-remain-elusive [https://perma.cc/F9VB-PBWP].

2 *See* Megan Kimble, *The Fight to Make Austin Affordable*, Tex. Observer (Dec. 5, 2019, 6:01 PM), https://www.texasobserver.org/the-fight-to-make-austin-affordable-housing [https://perma.cc/5AL3-TZYD] (describing Austin's rapid gentrification).

3 *See id.*

4 *Id.*

5 *See* Kimble, *supra* note 1 ("[T]he process, dubbed CodeNEXT, met fierce resistance and consumed nearly a decade and more than $10 million.").

6 Audrey McGlinchy, *Homeowners Sue City For Right to Protest Changes Under Proposed New Land Code*, KUT (Dec. 12, 2019, 11:52 AM), https://www.kut.org/austin/2019-12-12/

thousand, nonetheless were able to formally block it from taking effect.[7] Why? Because the City Council passed the rezoning by only a bare majority, and as it turned out, the neighbors had petitioned to force the requirement of a supermajority.

Where did less than two percent of the city's population get the right to filibuster Austin's desperately needed rezoning? Enter the protest petition—a process through which landowners within or around an area slated for rezoning can petition to require the zoning change to be approved by a supermajority vote of the local legislature or zoning board.[8] And indeed, *only* landowners are entitled to sign protest petitions, and their voting power toward the threshold that would trigger a supermajority vote is allocated according to the percentage of their land abutting the targeted area.[9] The vote-by-landownership, and the fact that protest petitions immediately bind the government without a popular vote, make them far less democratic than the better-known referendum procedure used to block unwanted legislation.[10] But protest petitions are the law in twenty American states.[11]

Today, many of the most densely populated and economically prosperous areas of the United States face a crisis of housing affordability.[12] The increasing consensus is that this crisis is a problem

homeowners-sue-city-for-right-to-protest-changes-under-proposed-new-land-code [https://perma.cc/VRX6-NAZ8].

[7] *See infra* Section II.B.

[8] *See* Salim Furth & Kelcie McKinley, Mercatus Ctr., Rezoning Protest Petitions Are Ripe for Reform 2 (2022) ("[I]n a state with a protest petition statute, property owners located within a certain distance of [a] proposed rezoning may sign a petition protesting the change. If enough neighbors sign . . . the rezoning can only be approved if a supermajority of the . . . legislative body votes in favor.").

[9] *See id.* at 7 ("The classic protest petition process is designed to protect property values, and each neighbor's signature counts in proportion to the relevant land he owns.").

[10] A referendum generally requires a popular election to enact the change once the requisite number of petition signatures have been gathered. *See Initiative & Referendum Processes*, Nat'l Conf. of State Legislatures, https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes [https://perma.cc/S32A-XN6H] (illustrating the required timeline for an election after an initiative or referendum petition has been submitted with the required number of signatures). Thus, protest petitions might be analogized to referendum enabling laws that automatically stay the law being challenged by referendum as soon as a valid petition to place the referendum on the ballot has been submitted. *See, e.g.*, *id.* (illustrating that Montana, Nebraska, and New Mexico each have a signature threshold that "triggers a referendum vote and also suspends operation of the law in question until the election").

[11] *See* Furth & McKinley, *supra* note 8, at 4 tbl.1 (collecting zoning enabling laws in the states that provide for protest petitions).

[12] *See, e.g.*, Solomon Greene & Ingrid Gould Ellen, Urb. Inst., Breaking Barriers, Boosting Supply: How the Federal Government Can Help Eliminate Exclusionary Zoning 3 (2020) ("[M]any regions and localities undersupply housing . . . . Worse, restrictions are most pronounced in areas where jobs and economic opportunities are growing the fastest . . . .").

of supply,[13] and that low housing supply is driven in significant part by the difficulty of building new housing in the many U.S. jurisdictions that have land use regulations specifically designed to limit new construction.[14] Restrictive zoning rules, onerous housing development approval processes,[15] alongside government refusal to backstop private development with public housing[16] all work to limit the number of housing units built relative to job and population growth.[17] According to the National Low Income Housing Association, this housing shortage costs the national economy two *trillion* dollars a year.[18] Beyond being an economic drag, the housing supply crisis impedes decarbonization (by causing sprawl),[19] exacerbates neighborhood racial and socioeconomic segregation,[20] and increases the rate of homelessness.[21] But despite the enormous and growing economic pressure to liberalize land use policies

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13 *See id.*; N.Y.U. Furman Ctr., The Case Against Restrictive Land Use and Zoning 2 (2022) ("Many studies have shown how rigid land use rules lead to more expensive housing, as a limited supply of housing cannot meet the needs of increasing or even steady demand.").

14 *See, e.g.*, Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 8835, 2002), https://www.nber.org/system/files/working_papers/w8835/w8835.pdf [https://perma.cc/AHW6-RB5W] ("In the places where housing is quite expensive, zoning restrictions appear to have created these high prices.").

15 *See, e.g.*, John Mangin, *The New Exclusionary Zoning*, 25 Stan. L. & Pol'y Rev. 91, 92 (2014) (discussing how municipalities have embraced restrictive development approval processes).

16 *See Public Housing: Where Do We Stand?*, Nat'l Low Income Hous. Coal. (Oct. 17, 2019), https://nlihc.org/resource/public-housing-where-do-we-stand [https://perma.cc/LU8K-UPGD] (discussing the decline in public housing due to consistent underfunding); Jared Brey, *What Is the Faircloth Amendment?*, Next City (Feb. 9, 2021), https://nextcity.org/urbanist-news/what-is-the-faircloth-amendment [https://perma.cc/89MP-L7XP] (discussing a major barrier in federal law to constructing public housing).

17 *See* Mangin, *supra* note 15, at 92 ("[D]evelopment is not keeping pace with the number of people who want to live in these regions.").

18 *See Why We Care*, Nat'l Low Income Hous. Coal., https://nlihc.org/explore-issues/why-we-care [https://perma.cc/98ZL-UXQ4] ("Research shows that the shortage of affordable housing costs the American economy about $2 trillion a year in lower wages and productivity.").

19 *See, e.g.*, Samantha Fu, *How Cities Can Tackle both the Affordable Housing and Climate Crises*, Urb. Inst. (Nov. 2, 2022), https://housingmatters.urban.org/articles/how-cities-can-tackle-both-affordable-housing-and-climate-crises [https://perma.cc/NWF3-6KRA] (discussing how high housing prices in cities push people into suburbs and consequently increase sprawl, producing higher carbon emissions).

20 *See, e.g.*, Adewale A. Maye & Kyle K. Moore, *The Growing Housing Supply Shortage Has Created a Housing Affordability Crisis*, Econ. Pol'y Inst. Working Econ. Blog, (June 14, 2022, 9:31 AM), https://www.epi.org/blog/the-growing-housing-supply-shortage-has-created-a-housing-affordability-crisis [https://perma.cc/4ZBN-G74E] (summarizing the historical use of restrictive zoning to concentrate racialized poverty and its current impacts on racial segregation and poverty concentration).

21 *See, e.g.*, Alex Horowitz, Chase Hatchett & Adam Staveski, *How Housing Costs Drive Levels of Homelessness*, Pew (Aug. 22, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/08/22/how-housing-costs-drive-levels-of-homelessness [https://perma.cc/

to promote housing construction, including rezoning to permit new building, progress has been halting, as local governments either bow to parochial Not In My Backyard (NIMBY)[22] opposition to housing construction, or are flummoxed by NIMBYs' legal maneuvering. And efforts by states to preempt local, exclusionary zoning rules have been an exercise in regulatory whack-a-mole, as NIMBY-inclined localities and individual NIMBY opponents play hardball to skirt compliance.[23]

This Note's purpose is threefold. First, it aims to trace the history of legal jurisprudence around the protest petition, in order to elucidate why it may remain an attractive procedural tactic for NIMBYs who wish to block upzonings that could potentially enable more housing construction. Second, it intends to shed light on recent cases where the protest petition has been used to this end and analyze what these events could portend for the possibility of greater protest petition abuse in the future. Third, it proposes a few novel solutions to curtail the possibility of this abuse before it becomes a more significant impediment to fixing the housing supply crisis. The only people entitled to lodge protest petitions have strong economic incentives against allowing housing construction in their backyards.[24] And state efforts to induce construction have become stories of plugging loophole after loophole with recalcitrant localities and NIMBY groups determined to avoid state-imposed housing construction requirements. It is likely, therefore, that the protest petition will become another tool in the toolbox of techniques

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L43J-NDS9] ("A large body of academic research has consistently found that homelessness in an area is driven by housing costs . . . .").

22 *See, e.g.*, Katherine Levine Einstein, David M. Glick & Maxwell Palmer, Neighborhood Defenders: Participatory Politics and America's Housing Crisis 5 (2020) (defining "NIMBY" sentiment as "the natural psychological tendency to endorse something in theory, but not when it is proposed next door").

23 *See, e.g.*, Nolan Gray, *It's About to Get a Lot Easier to Build Housing in California*, Orange Cnty. Reg. (Nov. 11, 2022), https://www.ocregister.com/2022/11/11/its-about-to-get-a-lot-easier-to-build-housing-in-california [https://perma.cc/5AAY-4DCA] (expressing optimism at recent legislative reforms to promote housing affordability but warning that opponents will exploit any available procedural obstacle to building housing); David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by the National League of Cities*, 81 Ohio St. L.J. 883, 907–08 (2020) (describing how California's attempt to encourage the building of accessory dwelling units (ADUs)—"small[,] independent housing units added to single-family houses"—faced so much opposition from NIMBY opponents and allied local governments that the state "has, over the course of the twenty-five years, passed, roughly speaking, the same law over and over again to overcome local resistance to ADUs" by preempting various procedural obstacles to their construction).

24 *See* Einstein et al., *supra* note 22, at 33 ("The same factor that drives many scholars and policy advocates to support the construction of new housing—that increased housing supply reduces housing prices—is a decided negative in the minds of many homeowners whose wealth is derived from higher home values.").

that have jeopardized progress toward housing affordability. Its recent, high stakes use to block a citywide rezoning in Austin, and as a last-ditch attempt to prevent the New York Blood Center from building a new facility, have offered the first warning signs that it will be picked up off the table as battles over land use grow more politically visible.[25] I examine how this came to be and propose some original solutions for how states, the federal government, and advocates who care about housing affordability might respond to future abuse of protest petitions.

This Note is premised on the prediction that as states and localities try to encourage housing construction via rezoning, the protest petition will become an attractive obstruction tactic. The present political environment is one characterized by the routine use of procedural hardball.[26] If today's hardball stories reflect an upward trend in incidence, they also reflect a familiar pattern. First, increasing political pressure creates the impetus for action that would offend a long-existing procedural norm.[27] Then, that norm is violated through the use of a hardball tactic, leading to the retaliatory use of another hardball tactic in a tit-for-tat escalation.[28] This Note predicts that protest

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[25] *See infra* Section II.B.

[26] This Note uses the term "procedural hardball" analogously to how Professor Mark Tushnet defines "constitutional hardball," that is, the "political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings." Mark Tushnet, *Constitutional Hardball*, 37 J. Marshall L. Rev. 523, 523 & n.2 (2004) (describing these norms as the "'goes without saying' assumptions that underpin working systems of constitutional government"). It substitutes *procedural* for *constitutional* because many of the political norms of exclusionary zoning that preexist the hardball tactics that this Note discusses are based in statute rather than constitutional law. *See infra* Part II. For an illustration of how of the term "procedural hardball" is used in this way, see, for example, Matthew A. Seligman, *Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform*, 54 Ariz. St. L.J. 585, 589 (2022) (suggesting that the "procedural hardball" in the use of Senate rules that has characterized recent Supreme Court appointments is likely to "grow ever more extreme" given current politics).

[27] *See, e.g.*, Richard A. Arenberg & Robert B. Dove, Defending the Filibuster: The Soul of the Senate 97 (2012) (discussing how the ideological polarization of the Democratic and Republican parties contributed to the growth of "politically motivated non-germane amendments" being introduced in the Senate by minority-party Senators to force the majority party to take embarrassing votes).

[28] *See, e.g.*, Bipartisan Pol'y Ctr., *Governing in a Polarized America: A Bipartisan Blueprint to Strengthen our Democracy*, Bipartisan Pol'y Ctr. 64 (June 24, 2014), https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-CPR-Report.pdf [https://perma.cc/5D8A-N77A] (discussing how the possibility of politically embarrassing amendments from the minority party made Senate Majority Leaders increasingly decide to block the ability of any Senators to offer amendments to bills); *id.* (pointing out that the increasing use of filibusters was often a response by the minority party to "its inability to forge an acceptable agreement on a fair amendment process" because the Senate Majority Leader blocked even useful amendments).

petition abuse could escalate in a similar manner because the political circumstances that encouraged NIMBY neighbors to "filibuster" recent rezonings in Austin and New York City using the protest petition indeed reflected this hardball-generating and escalatory dynamic.[29] Furthermore, procedural delay favors those who are status quo biased,[30] a fact that NIMBYs already recognize and routinely weaponize in land use battles.[31] The protest petition thus looks ripe to be increasingly used in the places where a) it is on the books and b) other methods of procedural obstruction and delay have become less reliable due to pressure to liberalize land use regulation.

This Note proceeds in three parts. Part I overviews the early history of protest petition laws. It argues that protest petitions' character was fundamentally exclusionary from their inception for two reasons: First, they were a close relative of the "neighbor consent" ordinances routinely used to entrench residential racial and socioeconomic segregation and likely were a workaround to keep these consent ordinances alive even while they were increasingly invalidated as unconstitutional. Second, they more subtly helped to justify zoning's expansion of nuisance principles into a legal framework that considered anything locally undesirable, including neighbors themselves, to be nuisance-like.

Part II details how protest petitions have festered in state zoning codes as part of the legal architecture of exclusionary zoning and discusses why they may now start to be utilized more often. It identifies three specific NIMBY beliefs that have been validated through case law interpreting protest petition statutes, justifying neighbors' supposed "right" to intervene against any unwanted, nearby land use. It then points to emerging warning signs that protest petitions may be used as a form of procedural hardball to block housing construction in states where they are permitted.

Part III identifies some legal vulnerabilities of protest petition laws. It focuses on federal law for two reasons: First, protest petition processes are nearly identical across states, such that a constitutional defect in one would call into question the underlying legality of them all.[32] Second, multiple presidential administrations in the last ten years have now taken a renewed regulatory interest in enforcing fair housing law and have recognized the connection between housing affordability,

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29 *See infra* Section II.B.

30 *See* Einstein et al., *supra* note 22, at 28 ("Senators can use the filibuster to prevent legislation, either by denying a cloture vote or running out the clock in a time-limited session.").

31 *See id.* ("In land use politics, local institutions grant neighbors the power to delay – and thus preserve the status quo – via participatory institutions.").

32 *See infra* Section II.A.

zoning reform, and neighborhood desegregation.[33] Federal lawmakers and regulators seeking to address both the present housing crisis and the ongoing legacy of historic housing segregation should have a robust set of federal legal responses available to address exclusionary zoning practices. While a Fourteenth Amendment due process challenge would be a long shot under current doctrines, I posit that a challenge to the allocation of voting power to landowners by percentage of land ownership under the Equal Protection Clause's One Person, One Vote principle remains more open. An easier route to their elimination, however, may come in the form of the Fair Housing Act's "affirmatively furthering fair housing" (AFFH) mandate. I conclude by making the legal and political case for using the AFFH mandate to condition federal spending on states' elimination of their protest petition laws, discussing the constitutionality of such action in light of new limits on conditional spending, and suggesting that the federal government has a strong political case that protest petitions are a uniquely exclusionary zoning practice demanding a particularly robust federal response.

I
The Early History of Protest Petitions: Neighbor Consent and Zoning as Nuisance Prevention

Protest petitions formed part of a set of zoning laws designed as "palliative provision[s]" to "make the implementation of zoning at the municipal level more acceptable to local legislative bodies . . . and also to newly regulated property owners."[34] These provisions, which allowed neighbors a direct procedural role in consenting to new land uses, compromised Progressive Era promises that zoning would be a new frontier in rationalized, technocratic governance. Instead, they promised that zoning would be a convenient way to exclude undesirables from wealthy and white neighborhoods—systematic segregation going far beyond what nuisance law could ever accomplish. This Part overviews this early history.

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[33] *See, e.g.*, Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, White House Council of Econ. Advisors Blog (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market [https://perma.cc/Q4W9-TRB3] (summarizing the racial history of exclusionary zoning); Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91–92, 570, 574, 576, & 903 (2015)).

[34] Brief of Plaintiffs Hous. Auth. of the Town of Branford & Beacon Cmtys., Inc., with app. at 13, Hous. Auth. v. Branford Plan. & Zoning Comm'n, No. CV-18-6091644S (Conn. Super. Ct. Apr. 30, 2018) [hereinafter Housing Authority Brief].

Municipalities began to experiment with empowering neighbors to exert direct control over locally unwanted activities as far back as 1887, when Chicago passed an ordinance that forbade livery stables from being built near residential neighborhoods unless all surrounding owners within a specified distance consented.[35] The protest petition itself, though, traces its presence to New York City's 1916 zoning ordinance, the first comprehensive zoning code in a major city.[36] This law almost certainly encouraged protest petition laws' broad adoption: The 1916 ordinance's author, the lawyer Edward Bassett, was so influential to early zoning that he is often referred to as the father of American zoning.[37] Furthermore, the ordinance became the framework for the 1922 zoning scheme of the village of Euclid, Ohio.[38] The protest petition was thus a component of the very same zoning plan that the Supreme Court blessed in its landmark *Village of Euclid v. Ambler Realty Co.* decision,[39] which broadly permitted zoning to survive challenges under the Fourteenth Amendment's Due Process Clause as long as it bore a "substantial relation to [] public health, safety, morals, or general welfare."[40] And the highly influential[41] Standard State Zoning Enabling Act (SZEA)—of which Bassett was one of the principal drafters—imported the protest procedure from New York City's zoning plan as well.[42]

In its official commentary, the SZEA justified the protest petition in pragmatic terms, opining that "there must be stability for zoning ordinances if they are to be of value" and that "in practice" the protest petition has "proved . . . to be a sound procedure and has tended to stabilize" local zoning ordinances.[43] Bassett would later repeat these

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35 *See* Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. Pa. L. Rev. 939, 957–58 (2013) [hereinafter Stahl, *Neighborhood Empowerment*] (discussing Chicago's pioneering of the "block-front consent" ordinance (internal quotation marks omitted)).

36 *See generally* Jerry Frug, *The Geography of Community*, 48 Stan. L. Rev. 1047, 1081–82 (1996).

37 *See* Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 Cardozo L. Rev. 1193, 1237 (2008) (referring to Bassett as the "father of American zoning"); John Infranca, *Singling Out Single-Family Zoning*, 111 Geo. L.J. 659, 684 (2023) (same).

38 *See* Garrett Power, *The Advent of Zoning*, 4 Plan. Persps. 1, 4 (1989) ("[The Village] took the 'use,' 'height' and 'area' districts found in the New York City Zone Plan and superimposed them on the Village of Euclid so as to reflect existing development."); Village of Euclid, Ohio, Ordinance No. 2812, §§ 25-b to -c (Nov. 13, 1922).

39 272 U.S. 365 (1926).

40 *Id.* at 395.

41 *See* 1 Patricia E. Salkin, American Law of Zoning § 2:11 (5th ed. 2024) (discussing how, by 1930, thirty-five states would adopt zoning enabling laws based on the standard act).

42 A Standard State Zoning Enabling Act § 5, at 7–8 n.32 (U.S. Dep't of Com. 1926).

43 *Id.* at 8 n.31.

pragmatic justifications. His 1932 "statement of principles of zoning" referred to the protest petition as a "wise expedient," allowing neighbors to guard against hasty and ill-advised changes, while ultimate authority for zoning changes still "rest[ed] with the municipal authority and not with the property owners."[44] He further pointed out that developers might use the protest petition to protect their perceived reliance interests in building under one type of permitted use, only to find that the legislature had hastily rezoned their lots to permit other uses.[45]

But the broader legal and social context in which protest petition laws were born undermines the innocent vagueness of these pronouncements. Many of zoning's early proponents in the Progressive movement envisioned two uses for zoning: as a technocratic tool of good government and as an exclusionary tool to keep undesirables out of white and wealthy neighborhoods. Bassett's own zoning committee, which wrote the 1916 ordinance, described apartments in terms of an "invasion of inappropriate uses."[46] This language reflected many wealthy, white Progressives' patronizing view of apartments as bringing about "disease, crime, and immorality" by mere virtue of their density,[47] and, implicitly, their racist fears that immigrants and people of color living in them would essentially outbreed white people.[48] The report went on to say that the entry of apartments into formerly low-density (read: wealthier and whiter) areas would result in those neighborhoods being "destroyed for private house purposes"—the apartment a "mere parasite."[49] Justice Sutherland would parrot this exact language ten years later in his *Euclid* majority opinion,[50] in what is now considered a ringing endorsement of zoning for racist and classist ends.[51]

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[44] *See* Edward M. Bassett, Zoning 20 (Nat'l Mun. League reprt. & rev. 1932).

[45] *See id.* at 18 (giving the example of a "property owner who puts up a fourteen-story building in compliance with the zoning law" and is "disappointed to find that the council had altered the law so that a twenty-story building might go up on each side of his building").

[46] Comm'n on Bldg. Dists. & Restrictions, N.Y.C. Bd. of Estimate & Apportionment, Final Report 14 (1916), [hereinafter 1916 Zoning Comm'n Report] https://archive.org/details/finalreportnewy [https://perma.cc/B3JJ-9CS8].

[47] Infranca, *supra* note 37, at 674.

[48] *See* Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 Harv. L. Rev. 1609, 1641–42 (2021) (describing the association in many Progressives' sociological theories between tenement apartments and the eugenic notion of "race suicide").

[49] 1916 Zoning Comm'n Report, *supra* note 46, at 31.

[50] *Compare id.*, *with* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) ("With particular reference to apartment houses, it is pointed out that . . . the coming of apartment houses . . . has sometimes resulted in *destroying the entire section for private house purposes*; that in such sections very often the apartment house is a *mere parasite* . . . ." (emphasis added)).

[51] *See* Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 Pepp. L. Rev. 719, 729 (2023) (linking the "parasite" language of *Euclid* to the sanctioning of zoning codes that "separated people by income"); Audrey G. McFarlane, *The Properties of Integration: Mixed-Income*

Beyond the choice of language in Bassett's report, there are two specific reasons to believe that protest petitions were, from the start, an outgrowth of the early zoning movement's exclusionary aspirations. First, Bassett apparently anticipated that they would be a workaround for the dubiously constitutional zoning ordinances allowing for neighbors to directly consent to others' land uses. Neighbor consent ordinances of the type pioneered in Chicago became a favorite of segregationists. For example, after the Supreme Court prohibited outright racial zoning,[52] Indianapolis and New Orleans both tried to reinstate it using neighbor consent, enacting laws forbidding Black people from moving to white neighborhoods unless a majority of the white neighbors agreed.[53] But the officials responsible for these racially segregationist neighbor consent laws also knew that they would probably not be upheld.[54] In part, this was because the Supreme Court had generally begun to sour on express neighbor vetoes of land use decisions.[55] As Bassett's writings reveal, he seemed to consider the protest petition to be a solution to this legal problem.[56] Professor David Owens, who has surveyed zoning procedures, including protest petitions, agrees, suggesting that the protest petition was specifically developed to allow neighbors "a degree of protection from unwanted changes in the land use policies they have relied upon" while getting around the Court's prohibitions on express

Housing as Discrimination Management, 66 UCLA L. Rev. 1140, 1167 (2019) (discussing the "parasite" metaphor as illustrating how zoning has "enshrined a stigmatization of lower cost multifamily housing" and "legitimated" a belief that "the racially-disparate negative effects of zoning were . . . natural and inevitable"); Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 Brook. L. Rev. 1225, 1291 (2023) (discussing how the *Euclid* opinion, including this language, "resounded in racist tropes that pathologize Black spaces as urban, dirty, crime ridden, and impoverished").

[52] *See* Buchanan v. Warley, 245 U.S. 60, 81–82 (1917) (ruling that zoning laws only allowing white people to participate in sales of residences in white neighborhoods violate the Fourteenth Amendment's Due Process Clause).

[53] *See* Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 46–47 (2017).

[54] *See id.* at 47 ("[Indianapolis's] legal staff had advised that the ordinance was unconstitutional."). The Court would eventually strike down these laws as violating *Buchanan*. *See* Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam) (invalidating New Orleans' segregatory neighborhood consent ordinance).

[55] *See infra* Section III.A; Eubank v. City of Richmond, 226 U.S. 137, 144–45 (1912) (striking down, on due process grounds, neighbor consent law empowering neighbors to disallow construction of non-residential buildings in their neighborhood).

[56] *Cf.* Edward M. Bassett, Zoning: The Laws, Administration, and Court Decisions During the First Twenty Years 42–44 (1940) (suggesting that the fact that protest petitions may be provided for in zoning ordinances may tempt some legislators to go further and provide for neighbor consent laws, but advising against this type of law because they are more often "held invalid by the courts").

neighborhood vetoes.[57] Thus, protest petitions must be understood as one of the procedures developed to "elevat[e] community hostility into a barrier to land use approvals" in order to enforce segregation while not running afoul of constitutional doctrines.[58]

Second, protest petitions appear to be part of the general attempt to graft nuisance law onto zoning law by promising that nuisance principles could be adapted into zoning for exclusionary ends. Prior to *Euclid*, it was anyone's guess whether zoning would be upheld as constitutional by a Supreme Court then at the height of the *Lochner* era, consistently invalidating economic regulations on due process grounds.[59] To assuage the Justices, zoning's defenders argued that zoning was simply an extension of the power the government already had to regulate "nuisance-like conditions."[60] While this was doctrinally novel, running counter to both nuisance doctrine[61] and the more foundational notion that potential tort victims do not get to set their own standards for tortious conduct,[62] the Court nonetheless bought the "zoning as nuisance law" theory.[63] As Professor Garrett Power writes, from the "plutocratic perspective" of Justice Sutherland, "zoning *qua* nuisance prevention had a certain appeal. It was activist government, but it protected the well-positioned."[64] In this context, the protest petition—which gave neighbors formal power to control rezoning because they were physically closer to new, potentially unwanted land uses—was a

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57 David W. Owens, *Protest Petitions*, Univ. of N.C. Sch. of Gov't (2014), https://www.sog.unc.edu/resources/legal-summaries/protest-petitions [https://perma.cc/VK7V-9B3E].

58 Housing Authority Brief, *supra* note 34, at 14.

59 *See* Lochner v. New York, 198 U.S. 45, 53 (1905); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383, 1391–96 (2001) (overviewing the history of the Supreme Court's *Lochner* era jurisprudence, which was characterized by general judicial hostility to legislation that interfered with workers' economic rights and is said to have spanned from the 1890s to the New Deal court-packing plan of the 1930s); Robert C. Ellickson, Vicki Been, Roderick M. Hills, Jr. & Christopher Serkin, Land Use Controls: Cases and Materials 75 (5th ed. 2021) ("The state courts split on the constitutionality of the first comprehensive zoning ordinances . . . ."); Brady, *supra* note 48, at 1669–70 (describing the *Lochner*-era Supreme Court's ultimate blessing of zoning's legality in *Euclid* as having been "far from a clear victory" prior to the decision).

60 Power, *supra* note 38, at 7.

61 *See* Brady, *supra* note 48, at 1676 (characterizing nuisance law in the nineteenth and early twentieth century as "not always so quick to prevent" many "emerging activities" such as apartments and other uses zoning's defenders sought to regulate).

62 *See, e.g.*, Restatement (Second) of Torts § 821F cmt. d (Am. L. Inst. 1979) (discussing how, in nuisance cases, the significance of a nontrespassory invasion of land is an objective standard).

63 *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (analogizing zoning and nuisance by suggesting that nuisances, expressed in zoning terms, "may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard").

64 Power, *supra* note 38, at 11.

way of grafting nuisance principles onto zoning law.[65] But the protest petition "unmoored" nuisance principles from the actual tort of nuisance, promising that rich property owners (like Justice Sutherland) could use nuisance less as a standard than as a metaphor to guide a new legal framework that could justify the exclusion of undesirables from their neighborhoods, even when nuisance law itself could not.[66]

Thus, by empowering neighbors to decide for themselves what nearby land uses are either generally desirable or more specifically nuisance-like, and oppose them with official imprimatur, the protest petition comprised part of the exclusionary statutory architecture of zoning. This architecture remains, as one scholar put it, "one of the most enduring white supremacist legal devices of the Jim Crow era."[67] The continued legacy of early twentieth century zoning "result[ed] in multigenerational harms" to poor communities of color—injuries that remain particularly urgent to remedy as housing demand has outpaced supply and the burden of the affordability crisis falls disproportionately on these communities.[68] The next Part discusses how the exclusionary legacy of early zoning law has festered in courts' construction of protest petition statutes over the last century, in ways that could now threaten rezonings intended to promote housing affordability in states where protest petitions are still allowed.

II
Protest Petition Laws' First and Second Centuries: Exclusionary Undercurrents and Burgeoning Rise

If the protest petition was part of the edifice that undergirded zoning law's most exclusionary aspirations, it begs the question: Has it operated this way in practice? As this Part shows, the answer is yes. Protest petitions have been interpreted in ways that give legitimacy to popular

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65 Some kind of physical proximity between plaintiff and alleged nuisance is generally essential to maintaining a nuisance suit, even if only implicitly. In a few states, such as Louisiana, nuisance plaintiffs must affirmatively prove some physical relationship between the nuisance and the plaintiff's property as an element of a nuisance claim. *See, e.g.*, Bd. of Comm'rs v. Tenn. Gas Pipeline Co., 850 F.3d 714, 731 (5th Cir. 2017) (explaining the standard). In others, proximity is relevant to the ability of the plaintiffs to prove liability for a substantial nontrespassory invasion of their land, or claim damages. *See, e.g.*, Freeman v. Grain Processing Corp., 895 N.W.2d 105, 118 (Iowa 2017) (affirming certification of class of nuisance plaintiffs in part because trial court divided plaintiffs into subclasses by distance to alleged nuisance); *id.* at 124–25 (discussing the relevance of proximity to nuisance damages).

66 Brady, *supra* note 48, at 1612 (describing *Euclid*'s "key" role in conceptually severing "the government's police power from the common law of nuisance").

67 Adams-Schoen, *supra* note 51, at 1231.

68 *Id.* at 1232 ("The need for [housing justice] grows more urgent as renters face a tsunami of evictions . . . [and] rising housing costs continue to outpace income . . . .").

understandings of zoning law that would otherwise be incorrect as a matter of law—specifically, that zoning vests neighbors with a property right to exclude any nearby land use deemed sufficiently nuisance-like. This doctrinal and discursive construction lives with us in the modern NIMBYism that has slowed progress toward housing affordability and residential desegregation. And because the protest petition itself remains on the books in twenty states, there is every reason to believe, and now some evidence to show, that today's NIMBYs will realize that it is a useful and legally friendly vessel for their exclusionary beliefs, and begin to use it with increasing frequency.

A. Protest Rights as NIMBY "Rights"

Protest petition laws are conceptually simple. If, before a zoning change is voted on by the authority responsible for zoning, a valid protest petition is filed by 1) some percentage 2) of eligible 3) neighbors, the change cannot take effect unless passed by 4) some fractional supermajority of the body responsible for approving it.[69] Thus, there are a few doctrinal threads that can be pulled out of their statutory construction, and it is here that we can observe how they justify an exclusionary vision of neighbor empowerment in zoning law. This Section illustrates how protest petition laws have been interpreted to validate NIMBY attitudes.

1. "Zoning Is a Contract Between the Government and My Neighborhood"

The first NIMBY idea that protest petition case law has implicitly supported is the notion that a neighborhood having a particular look and feel is a vested right of neighbors granted to them by the local government.[70] In general, "a property owner has no vested right to 'continuity of zoning of the general area' in which [he] resides."[71] But when construing protest petition rights, the courts have implicitly endorsed the idea that neighbors have a kind of right to rely on the existing zoning of their neighborhoods once it takes effect.

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69 For a concise survey, see FURTH & MCKINLEY, *supra* note 8, at 4 tbl.1.

70 *See, e.g.*, Ilya Somin, *A Flawed Attempt at a Libertarian Defense of Exclusionary Zoning*, VOLOKH CONSPIRACY (June 11, 2023), https://reason.com/volokh/2023/06/11/a-flawed-attempt-at-a-libertarian-defense-of-exclusionary-zoning [https://perma.cc/688L-77YF] (dismissing the argument that zoning is a contract); Scott Brodbeck (@scottbrodbeck), X (Oct. 31, 2022, 12:24 PM), https://twitter.com/scotthrodheck/status/1587118432130142212 [https://perma.cc/N2HL-B4QJ] (showing a photo of an anti-housing mailing sent in Arlington, Virginia, which asserted that the city government was "abandon[ing] a 50-year pact of [m]etro-focused density" by rezoning for more housing development).

71 SALKIN, *supra* note 41, § 8:24 & n.1 (collecting cases).

This idea appears in doctrine around the specific types of changes that are eligible to be protested. Protest petitions are generally allowed against nearly any size of zoning change,[72] and against text amendments (changes of the types of uses allowed within a zone) and map amendments (changes in the physical geography of existing zones) alike.[73] Two state high courts, however, have ruled that local governments' *initial* zoning ordinances (where the property in question had not previously been zoned by that specific locality) may not be protested.[74] In another, the state supreme court exempted from protest a stopgap zoning measure designed to preserve the status quo until a more comprehensive zoning plan could be enacted.[75] On its own, this doctrine is innocuous—after all, zoning laws often confer procedural consultation rights on the people affected by them.[76] But it is directly contradicted by the fact that neighboring landowners *in different municipalities* also generally have protest rights.[77]

If neighbors can protest regardless of their locality of residence, why should the fact that a zoning code had not yet been enacted *by the specific locality in which a neighbor resides* affect that neighbor's protest right? This distinction only makes sense if the right to lodge a protest petition is understood as a right that *vests* when a municipality

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72 *See id.* § 8:30 ("The protest provisions are broadly construed to apply to all changes in the zoning regulations."). *But see* Athey v. City of Peru, 317 N.E.2d 294, 298 (Ill. App. Ct. 1974) (ruling that entirely new zoning plan which "totally displace[d]" a "former provision" was not considered a change subject to protest).

73 *See, e.g.*, Cummings v. City of Waterloo, 683 N.E.2d 1222, 1227 (Ill. App. Ct. 1997) (ruling that "the protest provisions apply to the amendment of regulations, which is the case here, as well as to the amendment of districts"); *see also* Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law § 5:6 (3d ed. 2023) (defining text and map amendments). Occasionally, an enabling statute may expressly limit the protest rights of neighbors to specific types of amendments, but these are the exception. *See, e.g.*, Neb. Rev. Stat. Ann. § 14-405 (allowing protest petitions to be lodged only against a city's "change of boundaries").

74 *See* Caspersen v. Town of Lyme, 661 A.2d 759, 763 (N.H. 1995) (holding that town properly enacted an initial zoning ordinance by simple majority over a protest petition because "pre-existing . . . regulations were [not] 'so comprehensive' as to acquire the status of *de facto* zoning . . ."); Ellish v. Vill. of Suffern, 291 N.Y.S.2d 178, 179–80 (N.Y. App. Div. 1968) (holding that municipality's initial zoning of property annexed into it, which "had never been zoned previously by the defendant [municipality] and was free from all zoning ordinances," was not subject to extraordinary majority requirement in response to protest petition).

75 *See* Sims v. Bradley, 218 S.W.2d 641, 643 (Ky. 1949).

76 *See, e.g.*, Salkin, *supra* note 41, § 8:11 ("Failure of [a] legislative body to provide notice or to conduct an appropriate hearing, which affords a fair opportunity to be heard, will render [a zoning] regulation invalid.").

77 Smagula v. Town of Hooksett, 834 A.2d 333, 336 (N.H. 2003) (construing protest petition law not to "require the signers to be owners of property located in the municipality in which the petition is filed"); Koppel v. City of Fairway, 371 P.2d 113, 115–16 (Kan. 1962) (same). *But see infra* note 111 and accompanying text.

establishes the regulatory baseline of an enacted zoning code on which the resident landowner relies, and then alters it. In this respect, protest petition case law is inconsistent with most other zoning law. But it is consistent with one of Edward Bassett's original predictions: Protest petitions would help assuage the exclusionary sensibilities of neighbors who *believed* that they had reliance interests in the look and feel of their neighborhood.[78]

2. *"Preserving My Neighborhood Is My Property Right"*

The idea that protest rights attach when neighbors rely on a previous state of affairs begs a follow-up question: Do courts treat the protest petition as something more than a procedural right? It turns out that they do. There is a basic statutory construction principle that assumes legislators write statutes against a background of the common law and do not lightly set it aside; when a statute displaces the common law, courts tend to resolve ambiguity in favor of the otherwise displaced common-law principle.[79] Accordingly, zoning laws are often narrowly interpreted, because they are recognized to displace common-law property rights.[80] Understood this way, the property owner who would otherwise be unable to develop their property in their preferred manner is normally considered the rights-holding party that gets the benefit of the doubt when a zoning statute is ambiguous.

Not so with protest petitions. On the contrary, courts that have balanced protest petition statutes against common-law property rights have resolved statutory ambiguity in favor of protestors, and specifically on grounds that the protestors' common-law property rights are threatened by not granting them broader protest rights.[81] In *Koppel v. City of Fairway*, for example, the Kansas Supreme Court ruled (consistent with other states) that landowners in localities other than the one enacting the rezoning may join protest petitions.[82] The court unobjectionably pointed out that "[z]oning ordinances, being in

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78 *See supra* note 45 and accompanying text.

79 *See, e.g.*, Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108–09 (1991) (explaining how the rule works).

80 *See* SALKIN, *supra* note 41, § 41:4 ("The prevailing rule in most jurisdictions, in the absence of any statute to the contrary, is that zoning laws should be strictly construed in the favor of the property owner.").

81 I can only identify one case that used this argument to favor the common-law property rights of regulated parties rather than the supposed common-law property rights of neighbors. *See* Penny v. City of Durham, 107 S.E.2d 72, 76 (N.C. 1959) (construing eligibility to join a protest petition to favor narrower protest rights in order to protect common-law property rights of regulated owners). It occurred in a jurisdiction that has since repealed its protest petition law. *See infra* Section II.B.

82 371 P.2d at 115–16.

derogation of the right of private property, should be liberally construed in the property owner's favor."[83] But rather than resolving ambiguity in the protest petition law in favor of the rights of the developer,[84] the court instead said that a property rights-favoring reading of the protest petition statute must favor the *protestor's* rights.[85]

The same logic was used in a case interpreting the scope of a protest petition law's supermajority requirement. Most courts interpret the required number of officials needed to override a valid protest petition as a supermajority of the full legislative body, rather than a supermajority of a quorum.[86] Consistent with this understanding, in *Steiner, Inc. v. Town Plan & Zoning Commission*, the Connecticut Supreme Court held that two-thirds of the entire defendant-municipality's zoning board needed to vote to successfully override a protest petition, even though a vacancy then existed on the commission.[87] Once again, the court began its analysis with the observation that "zoning legislation is in derogation of private rights" and consequently that "[t]he provisions of the statute must be construed in a way to afford just protection to threatened rights of individual property owners . . . ."[88] But the property owners to whose rights the court deferred in imposing a more onerous override requirement were not the rights of the developer who had applied for a zoning change.[89] Rather, the common-law rights the court concluded would have been jeopardized by interpreting the protest petition statute too liberally were those of the "*neighboring* property owner[,]" who would otherwise "be deprived of the protection which the statute obviously purports to afford . . . ."[90] Even though the usual rule of construction for zoning laws normally favors the property rights of regulated owners, protest petitions turn this logic on its head to favor a broad "property" right of neighbors to lodge protest petitions.

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[83] *Id.* at 115.

[84] *See id.* at 117 (Robb, J., dissenting) (differentiating protest petition rights from property rights held by neighbors bringing "an injunction [or] a nuisance action").

[85] *Id.* at 116 (majority opinion) (arguing that the statute "makes no requirement of residency or location of property other than that it be frontage property to that property proposed to be altered" and therefore this ambiguity should be resolved in favor of the protesting owners because their property rights were being threatened).

[86] *See* Strain v. Mims, 193 A. 754, 757–58 (Conn. 1937) (requiring unanimous vote of entire zoning commission); Streep v. Sample, 84 So. 2d 586, 588 (Fla. 1956) (requiring three-fourths of "governing body"); Savatgy v. City of Kingston, 229 N.E.2d 203, 205 (N.Y. 1967) (same); Kubik v. City of Chicopee, 233 N.E.2d 219, 221–22 (Mass. 1968) (same).

[87] 175 A.2d 559, 560–61 (Conn. 1961).

[88] *Id.* at 560.

[89] *See id.* at 559 (discussing the case's factual background).

[90] *Id.* at 561 (emphasis added).

3. *"Neighbors Are Nuisances"*

If protest petition rights are substantive property rights rather than just procedural rights, what protections do these so-called property rights confer? Unsurprisingly, because protest petitions are an outgrowth of the zoning-as-nuisance-prevention philosophy, the courts commonly analogize protest petition rights of neighbors to rights against nuisance—reflecting a common NIMBY belief.[91] The courts show their hand here by conflating physical proximity of a protesting neighbor to a rezoned area with the anticipated effect that the zoning change would have on that neighbor's property.[92] For example, in *Bredberg v. City of Wheaton*, the Illinois Supreme Court interpreted a statute allowing immediately adjacent property owners to file protest petitions.[93] In its ruling, the court used the language of nuisance to favor neighbor protest rights, construing the statute in favor of those neighbors "who will be *most directly affected* by the change."[94] Similarly, an appellate court in New York ruled that when noncontiguous areas are rezoned, a municipality cannot combine several changes into one omnibus rezoning resolution in order to avoid a supermajority vote on any individual change that neighbors in that area might protest.[95] In doing so, the court tied the protest right to a neighbor's physical proximity to the zoning change (rather than understanding it as more akin to a referendum on a measure that would broadly affect the community).

To be sure, the idea that physical proximity is a measure of direct effect can sometimes cut against expanded protest rights. For example, many courts have so strictly construed the physical proximity requirements of protest petition statutes that municipalities have successfully avoided them by rezoning only part of a lot, leaving a non-rezoned "buffer" between the rezoned area and the adjacent lots whose owners might protest.[96] But in doing so, they still used language that

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91 *See* Brady, *supra* note 48, at 1611–12 ("Inevitably, when residents or representatives of a single-family neighborhood oppose a change in zoning rules, the apartment is invoked as an inherently harmful neighboring use . . . .").

92 For a discussion on the relationship between proximity and nuisance liability, see *supra* note 65.

93 182 N.E.2d 742 (Ill. 1962).

94 *Id.* at 747 (emphasis added).

95 *See* 431 Fifth Ave. Corp. v. City of New York, 55 N.Y.S.2d 203, 209–10 (N.Y. App. Div. 1945).

96 *See, e.g.*, Eadie v. Town Bd., 854 N.E.2d 464, 467 (N.Y. 2006); St. Bede's Episcopal Church v. City of Santa Fe, 509 P.2d 876, 877 (N.M. 1973) (same); Rogers v. Village of Menomonee Falls, 201 N.W.2d 29, 33 (Wis. 1972) (same); Heaton v. City of Charlotte, 178 S.E.2d 352, 365 (N.C. 1971) (same).

conflates neighbor proximity and legal stake in the rezoning.[97] And the few times when courts have not allowed a buffer zone to preclude a protest (and have instead ruled that the protest zone began at the border of the lot rather than the border of the rezoned area), they did so because the (non-rezoned) land in the buffer zone would have required minor improvements.[98] This treatment betrays the courts' hypersensitivity to hypothetical disturbances of nearby neighbors, even though any improvements the developer would make within the buffer, *by definition*, would not be significant enough to require rezoning. Finally, because severable zoning changes must be protested separately, the Connecticut Supreme Court has held that when noncontiguous areas are rezoned, protesting neighbors who reach the threshold to trigger a supermajority to rezone one area cannot force a supermajority vote to rezone other, noncontiguous areas.[99] These cases all illustrate that the scope of neighbors' protest right turns principally on their physical proximity to the changed land use, as with nuisance law. The courts thus analogize the protest right to a protection against nuisance, even while this right operates entirely outside of nuisance law.

4. The Expressive Function of Protest Petition Construction

The foregoing decisions have both doctrinally and expressively shaped zoning law and NIMBY attitudes, even while protest petitions have been somewhat politically inconspicuous for their first century.[100] As land use expert Professor Maureen Brady points out, though, even ineffective legal provisions can shape doctrines and attitudes around land use.[101] Discussing a nineteenth century land use innovation—the private covenant against nuisances—Brady illustrates that they helped disturb the tort nuisance standard, "communicat[ing] perceptions of

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97 *See Eadie*, 854 N.E.2d at 467 (stating that allowance of a buffer "is fair, because it makes the power to require a supermajority vote dependent on the distance of one's property from land that will *actually be affected by the change*" (emphasis added)).

98 *See, e.g.*, Dodson v. Town Bd., 119 N.Y.S.3d 590, 598–99 (N.Y. App. Div. 2020) (ruling that, when land within a buffer zone will require improvements that will only benefit the rezoned land, protest distance must be measured from the outer boundary of buffer); Herrington v. Peoria Cnty., 295 N.E.2d 729, 732 (Ill. App. Ct. 1973) (ruling that when protestors are not within the statutorily specified distance of a buffer zone but are bordering the buffer zone boundary, the validity of the buffer zone in precluding protest turns on the relationship of the buffer zone to the proposed use of the property to be rezoned).

99 *See* Ball v. Town Plan. & Zoning Comm'n, 151 A.2d 327, 330 (Conn. 1959).

100 *See, e.g.*, Matthew Haag, *'So Much Ugliness' as Upper East Siders Battle 16-Story Tower*, N.Y. Times (Nov. 18, 2021), https://www.nytimes.com/2021/11/18/nyregion/new-york-blood-center-manhattan-development.html [https://perma.cc/RSS3-MZX2] (discussing how New York City's protest petition law was "thought to be used just twice . . . since 1943").

101 *See* Brady, *supra* note 48, at 1674.

harmful land uses among judges, lawyers, and developers[,]"[102] and that their boilerplate language served as a "'signaling and coordinating function[]' for parties[.]"[103] This primed judges and landowners alike toward considering a wide array of undesirable land uses, including neighbors themselves, as nuisances, even though nuisance covenants were themselves considered rather ineffective.[104]

By the same token, protest petitions signal particular ideas about the rights of neighbors. They signal 1) that neighbors may be entitled to special rights in the zoning process that vest when localities zone in a way on which neighbors rely; 2) that these rights are substantive property rights and not just procedural rights; and 3) that that property right is for neighbors to determine for themselves whether an adjacent land use will be nuisance-like. As the next Section illustrates, the confluence of these attitudes with today's housing crisis is creating a growing threat by NIMBY neighbors to make protest petitions a serious procedural impediment, jeopardizing necessary housing construction in the places where they are still legal and making them harder to repeal in those places.

B. The Protest Petition Enters the Hardball Age

While protest petitions have generated a fair amount of litigation, the empirical incidence of their historic use has been somewhat unclear. A major empirical survey of the use of protest petitions in a state that permitted them was conducted in 2008 in North Carolina by Professor David Owens.[105] Professor Owens found that only eight percent of rezonings in the state were ever protested.[106] As a result, he concluded that protest petitions are "not frequently a factor in North Carolina rezonings."[107] And as it happens, North Carolina quietly abolished its protest petition in 2015.[108] So did Wisconsin in 2023.[109] In Texas, state legislators proposed raising the threshold for the number of neighbors

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102 *Id.*

103 *Id.* at 1678 (quoting Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1037 (2006)).

104 *See id.* at 1673 (stating that nuisance covenants "were unsuccessful in controlling land uses to the extent that owners and drafters might have hoped").

105 *See* DAVID W. OWENS, ZONING AMENDMENTS IN NORTH CAROLINA 10–12 (2008) [hereinafter OWENS, ZONING], https://www.sog.unc.edu/sites/default/files/full_text_books/ss24.pdf [https://perma.cc/3HEK-GTCR].

106 *Id.* at 11.

107 *Id.*

108 *See* 2015 N.C. Sess. Laws 2015–160 (codified at N.C. GEN. STAT. §§ 122C-403(3), 160A-75, -385(a), -386).

109 *See* 2023 Wis. Legis. Serv. 16 (West) (codified at WIS. STAT. ANN. § 66.10015(3) (West 2023)).

required to join a protest petition in order to trigger the supermajority requirement, and limiting its applicability to individual parcels.[110] In Colorado, the City of Denver passed a ballot proposal to explicitly forbid owners in other municipalities from joining protest petitions affecting Denver rezonings.[111]

Viewing these developments in a vacuum, it would be understandable to conclude that protest petitions are on their way out. But as Emily Hamilton, a policy researcher at George Mason University, suggested recently,[112] if this is a trend, it may apply only in jurisdictions where NIMBYs have not yet discovered the protest petition's utility and organized around using it as a hardball technique. Just like other hardball techniques, protest petitions may stay lightly used while political norms do not make zoning a center of high-stakes contestation.[113] But in states where protest petitions are still on the books, and governments begin to break NIMBY-perceived norms that their neighborhoods will never be zoned to allow anything new, there are troubling signs that NIMBYs have seized upon the protest petition as a useful tool of obstruction.[114]

In the Upper East Side of Manhattan, the New York Blood Center sought a rezoning that would enable it to build a sixteen-story building to replace its aging headquarters.[115] Wealthy neighbors organized to oppose it, complaining that it would be too large and "cast shadows on a park across the street."[116] Proponents of the project framed it as a win for racial equity and characterized its opponents as classist and racist, particularly as the Blood Center conducted important "research

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110 *See* H.B. 1514, 88th Leg. (Tex. 2023) (proposing raising the number of required protestors); H.B. 2989, 87th Leg. (Tex. 2021) (proposing limiting protest rights to individual parcels).

111 *See* Saja Hindi, *Denver Election Results: Voters Approve Ballot Questions 2M and 2N*, Denver Post (Apr. 6, 2023, 2:14 PM), https://www.denverpost.com/2023/04/04/denver-election-results-2m-2n-ballot-questions-zoning [https://perma.cc/SH4J-LTFF] (discussing the measure).

112 Emily Hamilton (@ebwhamilton), X.com (Jan. 5, 2024, 7:06 PM), https://www.twitter.com/ebwhamilton/status/1743423700211270027 [https://perma.cc/48KS-7VD8] ("[T]he secret to protest petition reform is to get it done before people start widely using it.").

113 *Cf.* Eric Schickler & Gregory Wawro, Filibuster: Obstruction and Lawmaking in the U.S. Senate 18 (2013) (positing that the existence of the filibuster in the Senate was acceptable to majority parties "so long as the Senate was characterized by a set of norms that coordinated expectations about the role of obstruction").

114 And it is useful. *See* Owens, Zoning, *supra* note 105, at 11 ("A valid protest petition can, however, affect the zoning process in an indirect but significant manner. The approval rate for projects subject to a protest petition is 52%, compared to a 76% approval rate for rezoning petitions overall.").

115 *See* Haag, *supra* note 100.

116 *Id.*

on sickle cell disease, which disproportionately affects Black people."[117] Armed with broad support against this local opposition, the City Council set a vote on a rezoning that would greenlight a modified version of the proposal.[118] So the owners of a neighboring condominium filed a protest petition to raise the approval threshold that the Council would need to three-fourths.[119] Councilmember Ben Kallos, who represented the area and steadfastly opposed the rezoning, confidently told a local newspaper that this move would kill it.[120] Indeed, the last-ditch effort appeared to come as a total surprise, with the New York Times characterizing this relic of Edward Bassett's original 1916 zoning code as "an obscure city provision."[121] After some wrangling over whether the petition was valid[122] (and likely some behind-the-scenes political maneuvering), the issue became moot when the Council approved the rezoning by greater than a supermajority.[123]

Though it was unsuccessful, and not even about housing, the Blood Center saga shows how protest petitions specifically can come to be justified as useful and politically necessary hardball by NIMBYs. Central to the political battle was Councilmember Kallos's opposition, which would normally doom the project under the Council's "longstanding practice" of deferring to individual members' preferences on land use matters in their districts.[124] This time, however, support from interest groups with a geographically broader constituency pushed a majority of the Council to play hardball themselves and break the member deference norm.[125] This became the proximate cause and the justification

117 Emily Higginbotham, *New Twists in Blood Center Debate*, W. Side Spirit (July 16, 2021, 4:04 AM), https://www.westsidespirit.com/news/new-twists-in-blood-center-debate-FY1717337 [https://perma.cc/T86F-KEX3].

118 *See* Haag, *supra* note 100.

119 *See id.* (discussing how the protest "might be one last hurdle" to the rezoning).

120 *See* Nick Garber, *Blood Center Opponents Invoke Rare Clause in Bid to Kill Project*, Patch: Upper E. Side, N.Y. (Nov. 9, 2021, 10:33 AM), https://patch.com/new-york/upper-east-side-nyc/blood-center-opponents-invoke-rare-clause-bid-kill-project [https://perma.cc/H963-866K] ("The objections filed would raise the required vote from the typical majority to three-quarters of Council members — a level that Kallos believes will doom the project.").

121 Haag, *supra* note 100.

122 *See Transcript of the Minutes of the City Council Stated Meeting, November 23, 2021*, 2020–21 Sess. 24–25 (N.Y.C., N.Y. 2021) (statement of Speaker Corey Johnson) (pointing out that the Council had received dueling legal memos that offered alternative calculations of amounts of abutting land necessary to trigger the supermajority).

123 *See* Courtney Gross, *City Council OKs Controversial Plan to Expand Blood Center*, Spectrum News NY1 (Nov. 24, 2021), https://ny1.com/nyc/all-boroughs/news/2021/11/23/city-council-oks-controversial-plan-to-expand-blood-center- [https://perma.cc/YC3N-SV73] (noting that the ultimate approval was by a vote of forty-three to five).

124 *Id.*

125 *See* Greg David, *Blood Center Expansion Taps Vein of Opposition as Project Heads for Vote*, The City (Oct. 6, 2021, 6:46 PM), https://www.thecity.nyc/2021/10/06/

for opponents to dust off the obscure protest petition—a tit-for-tat escalation whose defenders could credibly claim that their hands were forced by their counterparts' initial norm-breaking.[126]

The Austin case is also instructive and is now the most alarming sign that protest petitions may become routinely used as a NIMBY filibuster. At some point, the city began maintaining that citywide rezonings were not subject to protest petition.[127] Undeterred, a group of homeowners, supported by a nonprofit that opposed the rezoning, filed them, and several then sued when the city ignored them and approved the plan by only a simple majority.[128] The courts agreed with the homeowners.[129] Consistent with the law of other states,[130] both the trial and an appellate court ruled that all affected and abutting landowners had a right to protest the rezoning.[131] On one hand, for a rezoning affecting the whole city, the raw number of protesting neighbors needed to trigger the supermajority would have been quite large.[132] But the notice provision of the law presented a larger problem: They required either that written notice be mailed to every landowner who could possibly protest—an outcome that the city said was logistically infeasible—or to disempower the city's planning commission, effectively restructuring its government to overcome the opposition of a few thousand homeowners.[133]

As a result, a protest petition was able to prevent a major city from taking necessary action to promote housing affordability, and the ruling

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ny-blood-center-expansion-plan-medical-research-hub-vote [https://perma.cc/X4TL-C6E7] (pointing out that, in the eight years of Mayor Bill de Blasio's administration, member deference had been considered so sacrosanct that "not a single project ha[d] been approved over the objection of the local member").

126 *See* Garber, *supra* note 120 (discussing how Kallos characterized the protest petition as a "procedural end run of [the neighbors'] own" and linked the neighbors' lodging the protest to the idea that a supermajority of the Council would be unlikely to vote against member deference).

127 *See* McGlinchy, *supra* note 6 ("The city's legal department has maintained homeowners do not have the right to object because the proposed new code would equate to a citywide rezoning, and protest rights do not apply to such comprehensive changes.").

128 *See id.* ("The nonprofit group Community Not Commodity . . . built a website for homeowners to protest potential zoning changes; at the end of October . . . roughly 700 protests had been sent to the city."). The courts concluded that ultimately "more than 14,000 property owners . . . filed protests." City of Austin v. Acuña, 651 S.W.3d 474, 477 (Tex. App. 2022).

129 *See Acuña*, 651 S.W.3d at 476–77 (affirming the judgment of a trial court that had "agreed with the property owners" that the city's comprehensive rezoning required applying the protest provision of the state's zoning enabling statute).

130 *See supra* note 72 and accompanying text.

131 *See Acuña*, 651 S.W.3d at 485 ("Because the [citywide rezoning] proposes changes in zoning districts, boundaries, regulations, and classifications, we conclude that the [state zoning] statute's written-notice and protest provisions apply.").

132 *See id.* at 483 ("[T]here are over 250,000 property owners in Austin . . . .").

133 *See* Kimble, *supra* note 1.

now "casts a shadow over any Texas city's efforts to comprehensively rezone."[134] A report that surveyed valid protest petitions in major Texas cities during 2021 and 2022 found that twenty were filed in Austin subsequently to the lawsuit, affecting a quarter of the rezonings for multifamily housing.[135] Developers said in interviews with the researchers that they no longer bother developing in relatively affluent areas entirely.[136] The report's authors concluded that a combination of "well-organized neighborhood associations" and the 2019 rezoning lawsuit had raised awareness of the process enough that they are now understood as a useful obstruction tool.[137] Statewide legislative reforms will now be "a big lift" because "[p]rotest petitions have a constituency in Austin[.]"[138]

It is not hard to imagine more circumstances where high stakes land use fights, followed by attempts to overcome NIMBY opposition to new housing that violate neighbors' perception of their "right" to block locally unwanted activities, cause neighbors to filibuster rezonings using protest petitions. As this Part has illustrated, they both reflect and refract NIMBY beliefs, and have now proved a lurking danger, blocking progress toward housing affordability in at least one major city, and plausibly threatening to block the expansion of a major scientific research center in another. Because their usefulness to NIMBY opponents of new housing may consequently threaten the prospects for states to straightforwardly repeal their protest petition enabling laws, it would be wise for housing affordability advocates to find other ways of heading off their increasing abuse. The next Part explores a few possibilities.

III
Disarming Protest Petitions: Options Under Federal Law

What options might advocates explore to take protest petitions off the table? This Part touches on federal legal challenges that could be raised against them or policies that could induce their repeal. While protest petitions ostensibly appear to violate the due process doctrine that forbids standardless delegations of government power to private

134 Salim Furth & C. Whit Ewen, Mercatus Ctr. at George Mason Univ., Mostly Invisible: The Cost of Valid Petitions in Texas 2 (2023).

135 *See id.* at 3 (illustrating the number of valid protest petitions that have occurred in major Texas cities, and discussing how they have been used in Austin).

136 *See id.* at 3 ("Rather than risk a valid petition, few developers apply for rezonings in well-organized, affluent neighborhoods.").

137 *Id.* at 2; *see id.* at 3 ("In all the cases we read, valid petitions protested the loosening, not tightening, of land use regulations.").

138 Hamilton, *supra* note 112.

parties, state courts have uniformly contended that they are not delegations of power at all.[139] As a result, it is unlikely that due process challenges to them would be successful. But in refusing to characterize protest petitions as delegations of legislative power, the courts have exposed an alternative constitutional vulnerability of protest petitions that I explore for the first time. Their apportionment of voting power by property ownership and restriction of protest rights to property owners may violate the equal protection doctrine of One Person, One Vote. Subjecting them to One Person, One Vote requirements would make them harder to bring, as it would require non-owner residents to participate in them and would disempower larger landowners relative to smaller ones. Even more legally plausible, however, would be for the federal government to condition federal funds to states on their abolishing protest petitions using the Fair Housing Act.

A. Due Process

The Supreme Court has generally been sour, if "cryptic," on the idea of neighbor vetoes, often striking them down as Fourteenth Amendment Due Process Clause violations.[140] In *Eubank v. City of Richmond*, the Court invalidated an ordinance permitting neighboring landowners to forbid construction of non-residential buildings in their neighborhood by petition, ruling that delegating standardless power to restrict others' property rights violated the owners' due process rights.[141] In another decision, *Washington ex rel. Seattle Title Trust Co. v. Roberge*, the Court invalidated an ordinance that only allowed "philanthropic home[s] for children or for old people" to be built in residential zoning districts if some percentage of neighbors consented.[142] In *Thomas Cusack Co. v. City of Chicago*, the Court upheld a statute that generally banned billboards but allowed neighbors to waive that restriction in a given neighborhood, on the grounds that *waiving* an existing restriction was not delegating power to neighbors to impose on the property rights of others.[143] But in *Roberge*, it added that even waiver provisions might be

139 *See infra* Section III.A.

140 *See* Stahl, *Neighborhood Empowerment*, *supra* note 35, at 957–60 (summarizing these foundational cases and suggesting that "[m]aking sense of this trio of cases proves exceedingly difficult").

141 226 U.S. 137, 143–44 (1912) (discussing how the "ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised").

142 278 U.S. 116, 118 (1928) (quoting Seattle, Wash., Ordinance 49179, § 3(c) (July 6, 1925)).

143 242 U.S. 526, 531 (1917) (differentiating the unconstitutional ordinance in *Eubank*, which "permit[ted] two thirds of the lot owners to impose restrictions upon the other property in the block," from the Chicago ordinance, which "permits one half of the lot owners to remove a restriction from the other property owners").

standardless delegations if the underlying prohibition did not ban some inherently noxious land use (billboards being considered nuisance-like).[144] The basic rule that can be drawn from this *Eubank-Cusack-Roberge* trilogy is that government power may not be ceded to narrow segments of the population to a) impose new land use restrictions, or b) waive existing restrictions, if those underlying restrictions are on land uses that are not inherently offensive.[145]

Under these precedents, protest petitions that allow neighbors to make it harder for municipalities to loosen zoning restrictions might be read to violate this doctrine. But that is not how the state courts have seen it. Possibly drawing on reasoning in *Roberge* that characterized neighbors' "failure to give consent" for building a philanthropic home as "final,"[146] state courts have uniformly held that protest petitions are not unconstitutional delegations because they *could* be overridden by a legislative supermajority.[147]

There is plenty to be criticized from a practical standpoint about this "final determination" requirement that the states have added to the standardless delegation doctrine. Its formalism does not grapple with how the mere fact of contention could be the equivalent of a veto over a project.[148] The formal power of legislators to give or withhold votes needed to break a protest petition's filibuster (or provide enough votes at the outset to render one irrelevant) is only part of the equation. The

144 *Roberge,* 278 U.S. at 122 ("The facts found [in *Cusack*] were sufficient to warrant the conclusion that such billboards would or were liable to endanger the safety and decency of such districts. It is not suggested that the proposed new home for aged poor would be a nuisance." (citation omitted)).

145 *See* Ellickson et al., *supra* note 59, at 462–63 (identifying the "establish/waive distinction" and "the noxiousness of the proposed use" as the "two variables . . . having constitutional relevance").

146 278 U.S. at 122.

147 *See* Fortieth St. & Park Ave. v. Walker, 234 N.Y.S. 708, 710 (N.Y. Sup. Ct. 1929) ("There is no delegation of power, and the action of the property owners is merely a prerequisite to a vote."); Northwood Props. Co. v. Perkins, 39 N.W.2d 25, 27 (Mich. 1949) (differentiating "ordinances which provide that the right to use property for certain purposes shall depend upon the consent of individual neighboring property owners" from protest petition law which is merely "a prerequisite to adoption of amendments to ordinances"); Farmer v. Meeker, 163 A.2d 729, 733 (N.J. Super. Ct. Law Div. 1960) (upholding protest petition statute because "[it is obvious t]hat the municipality should exercise extra diligence when it is making important changes in the property rights of citizens who object . . . and the Legislature has rightly exercised its discretion in predetermining the precise degree of extra diligence those citizens will be guaranteed"); Bredberg v. City of Wheaton, 182 N.E.2d 742, 746 (Ill. 1962) (same); Trumper v. City of Quincy, 264 N.E.2d 689, 690 (Mass. 1970) (same); Hope v. City of Gainesville, 355 So. 2d 1172, 1173 (Fla. 1977) (same); Singer v. City of Troy, 587 N.E.2d 864, 870 (Ohio Ct. App. 1990) (same).

148 *See* Furth & Ewen, *supra* note 134, at 4 & n.13 (discussing how a protest petition usually results in more negotiation and the developer getting less than they asked for in order to head off a potentially failed bare majority vote).

informal norms of a legislature that demand broad consensus[149] (or the consensus of particular legislators[150]) as a prerequisite to formal action may be powerful enough that merely filing or threatening to file a protest petition could doom a proposed land use change. If a legislative norm of consensus is strong enough that simply imposing the formal requirement of a supermajority would be enough to keep an override vote from happening, the locus of legislative negotiation to head off this threat would necessarily shift to a contest between the developer, the government, and the *protesting neighbors*,[151] who under these norms would play a dispositive role in the legislative process, but unlike legislators are not bound by any constitutional due process standard of rationality.

Only in circumstances of demonstrated practical futility of government override of a protest petition might this objection make a doctrinal difference, though. The Supreme Court has occasionally found "final" action being practically futile to have constitutional relevance in the related context of public function doctrine—under which constitutional provisions usually applying only to the government are applied to private actors if the government deliberately outsources its functions to them. In *Terry v. Adams*,[152] one of the so-called "White Primary Cases,"[153] the Court invalidated a scheme through which a private, whites-only membership organization slated candidates for the Democratic primary who inevitably won, to get around the bar on racially exclusive primary elections. A majority of the Court found it important that "nomination in the Democratic primary is tantamount to election"[154] and that the slating process itself was "the locus of effective political choice."[155] However, a *Terry*-type argument for a due process challenge to a protest petition law could never be a facial challenge under *Terry*'s own logic—the plaintiff would have to show

149 *See, e.g.*, Arenberg & Dove, *supra* note 27, at 13 (describing how Senate holds—"letter[s] (or other communication[s]) from a member of the Senate to his or her party leadership requesting delay in the Senate's consideration of a matter"—function as implied filibuster threats and accordingly result in Senate leadership delaying legislation "for an undefined period of time").

150 *See supra* notes 124–25 and accompanying text (explaining the New York City Council's member deference norm on land use decisions and how it threatened to initially doom the New York Blood Center's expansion).

151 *See* Owens, Zoning, *supra* note 105, at 11 ("[A]n actual or threatened protest petition may encourage the landowner, the neighbors, and the city to negotiate prior to a vote on the rezoning, which can in turn lead to project revisions.").

152 *See* Terry v. Adams, 345 U.S. 461 (1953).

153 *See* Morse v. Republican Party of Va., 517 U.S. 186, 211–13 (1996) (summarizing the White Primary Cases and characterizing *Terry* as one of them).

154 *Terry*, 345 U.S. at 476 (plurality opinion).

155 *Id.* at 484 (Clark, J., concurring).

both the protesting neighbors' improper motivation and the futility of legislative override in that particular circumstance.[156] This would not be particularly useful for a broad constitutional attack on protest petitions.

An even more serious conceptual problem with applying the standardless delegation doctrine to protest petitions, however, is that the power to impose a binding supermajority vote requirement may not even be *delegable*. Because a bare majority of the legislature cannot undo the effect of a protest petition, even by attaching it to a different rezoning proposal,[157] it is a reasonable reading of current doctrine to say that protest petitions bind the procedural rules of present and future legislatures. But this is a power that *legislatures* do not possess, and accordingly could not delegate.[158] The Supreme Court's decision in *City of Eastlake v. Forest City Enterprises, Inc.* appears to comport with this view in the analogous context of zoning by referendum.[159] There, the Court ruled that referendum zoning could never be an impermissible delegation because assigning legislative decisions to referenda are structurally distinct exercises of direct democracy.[160]

If protest petitions are understood analogously, they should comport with the Due Process Clause because they are not *delegations*, even if the finality issue could be overcome. As the next Section illustrates, though, this may be a strategically useful concession for opponents of protest petitions to make. If protest petition laws can be characterized as direct democracy provisions equivalent to referenda, it makes the case stronger that they are governed by the equal protection doctrines that protect voting rights.

B. Equal Protection and One Person, One Vote

In most elections, voting power must be equally apportioned among voters, consistent with the One Person, One Vote principle

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156 *Cf. id.* at 463–64 (plurality opinion) (pointing out that the slating organization's activities were "purposefully designed" to exclude Black voters from having political influence).

157 *See* 431 Fifth Ave. Corp. v. City of New York, 55 N.Y.S.2d 203, 209–10 (N.Y. App. Div. 1945).

158 *See* 6 McQuillin, The Law of Municipal Corporations § 21:10 (3d ed. 2024) ("One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government.").

159 426 U.S. 668, 679 (1976) (upholding a zoning ordinance requiring all proposed zoning changes to be subjected to a popular referendum against a Due Process Clause challenge).

160 *See id.* at 672 (characterizing referenda as reservations of power to the people "to deal directly with matters which might otherwise be assigned to the legislature," as opposed to delegations of legislative power).

derived from the Fourteenth Amendment's Equal Protection Clause.[161] The doctrine is also applicable to petitions that qualify candidates for the ballot[162] and has been applied in the lower courts to petitions to place initiatives on the ballot.[163] The Court has also rejected property ownership requirements to qualify voters to vote on referenda, applying strict scrutiny in elections of general interest.[164] Protest petitions have only rarely been challenged as impinging on equal protection rights.[165] But there is a colorable argument that giving landowners the power to force binding procedural requirements on rezonings violates the political rights of the tenants and smaller landowners that the process locks out or disempowers.[166]

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161 *See* Reynolds v. Sims, 377 U.S. 533, 568 (1963) (ruling that state legislative districts must have similar populations relative to each other); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (congressional districts); Avery v. Midland Cnty., 390 U.S. 474, 478–79 (1968) (local legislative districts).

162 *See* Moore v. Ogilvie, 394 U.S. 814, 819 (1969) (invalidating a requirement that petitions to qualify candidates from new political parties receive signatures from a minimum number of counties because counties had different populations).

163 *See* Idaho Coal. United for Bears v. Cenarrusa, 342 F.3d 1073, 1074 (9th Cir. 2003) (invalidating a requirement that a ballot initiative must obtain petition signatures from a minimum number of voters in non-equipopulous counties). There is now a circuit split on this issue with specific respect to initiative petitions. *Compare id.*, *with* Eggers v. Evnen, 48 F.4th 561, 565–66 (8th Cir. 2022) (reversing grant of preliminary injunction against county-based signature requirement for initiative petitions on grounds that ballot initiatives are state-created rights and thus not so "fundamental" as to trigger strict scrutiny under the Equal Protection Clause). But there is a clear difference between the political rights implicated by petitions that simply qualify an initiative for the ballot and those implicated by petitions that are self-effectuating. *See* Jerry W. Calvert, *The Popular Referendum Device and Equality of Voting Rights—How Minority Suspension of the Laws Subverts "One Person-One Vote" in the States*, 6 Cornell J.L. & Pub. Pol'y 383, 420 (1997) (arguing that referendum petitions signed by a minority of voters that suspend an enacted law between their qualification for the ballot and the referendum election "clearly violate[] the one person-one vote requirement"). Protest petitions, because they immediately bind the government's legislative process, are straightforwardly analogized into that latter bucket.

164 *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 622 (1969) (invalidating a law that only allowed property owners or parents to vote in a school district election); Cipriano v. City of Houma, 395 U.S. 701, 702 (1969) (per curiam) (striking down a requirement that voters on bond issue referendum be property taxpayers); Hill v. Stone, 421 U.S. 289, 300–01 (1975) (holding unconstitutional a requirement that voters must own property to vote on municipal issues dealing with expenditures of city funds).

165 *See* Hope v. City of Gainesville, 355 So. 2d 1172, 1174 (Fla. 1977) ("The written protest to a zoning amendment creates a posture for the one property owner which is dissimilar to that of the owner where no protest is made . . . . [T]his different posture . . . created by a written protest would negate a constitutional attack on equal protection grounds."); Trumper v. City of Quincy, 264 N.E.2d 689, 690 (Mass. 1970) (rejecting equal protection argument that protest petition law discriminates against those in favor of rezoning).

166 *See* Ellickson et al., *supra* note 59, at 465 (suggesting that "constitutional requirements that each adult resident be allocated one vote" have "conceivable applicability" to any "neighborhood consent" provision).

There is a circuit split over whether public petitions that enable only discretionary legislative acts actually implicate voting rights (thus requiring strict equal protection analysis).[167] The Fourth Circuit rejected an equal protection challenge to a law that exclusively allowed landowners in an area adjoining a city to petition to be annexed into the city, at which point the city council would be entitled to vote on the annexation request.[168] The court embraced the same "finality" argument raised in the due process context, emphasizing that the public was not permitted to actually vote on the annexation proposal.[169] The Sixth Circuit took a similar approach with a functionally identical landowner-only annexation petition law.[170] On the other hand, the Ninth Circuit invalidated an ordinance that attempted to coerce non-residents serviced by Portland, Oregon's municipal services into consenting to be annexed into the city, even though the state boundary commission held final authority over the annexation.[171]

The Ninth Circuit has the better of these arguments. First, it anticipated the Supreme Court's eventual holding that the Equal Protection Clause is applicable to voting for presidential electors, even though the electors' eventual vote is formally discretionary.[172] Second, it correctly points out that the Supreme Court has *already* found voting rights to be implicated in exercises of direct democracy that are conditions precedent to discretionary legislation.[173] Finally, it seems that at least the Fourth Circuit has now changed its tune. In *Muller v. Curran*,[174] it invalidated a provision of Maryland law requiring concurrent petitions

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167 *Compare* Berry v. Bourne, 588 F.2d 422, 424 (4th Cir. 1978) (refusing to apply strict scrutiny), *and* Carlyn v. City of Akron, 726 F.2d 287, 290 (6th Cir. 1984) (same), *with* Hussey v. City of Portland, 64 F.3d 1260, 1266 (9th Cir. 1995) (applying strict scrutiny).

168 *See Berry*, 588 F.2d at 423 (affirming the district court's decision to deny the plaintiff's claim under the Fourteenth Amendment).

169 *See id.* at 424 ("Since the electors of the municipality of the area to be annexed are not given the right to vote under the challenged statute, the application of the statute poses no equal protection issue.").

170 *See Carlyn*, 726 F.2d at 289 (rejecting equal protection challenge because state had "not committed any final authority to voters").

171 *See Hussey*, 64 F.3d at 1264 (declining to follow the reasoning of the Fourth and Sixth Circuits).

172 *Compare id.* ("[V]oters do not choose the president, the electoral college does. But that does not show that citizens do not vote in presidential elections."), *with* Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote . . . .").

173 *See Hussey*, 64 F.3d at 1264 (citing Cipriano v. City of Houma, 395 U.S. 701 (1969)) (discussing the Supreme Court's *Cipriano* holding that "municipal bond referendums *do* involve voting" even though "voter approval of a bond referendum does not compel a municipality to issue the bonds").

174 889 F.2d 54 (4th Cir. 1989).

by groups of registered voters and landowners, followed by a favorable vote of the county government, and then a popular referendum, in order to form a new local government.[175] The court held that because the government could not act without landowner consent, it implicated voting rights and was thus subject to strict scrutiny.[176]

This logic could encompass protest petitions. Imagine that, instead of forbidding the local government from approving a rezoning except by supermajority vote, protest petitions operated by placing a referendum on the local ballot to require the local government to vote by supermajority to approve that specific rezoning. (Set aside that this would be a very silly referendum.) Restricting the right to qualify that referendum for the ballot only to landowners, and apportioning their vote by the amount of land that they owned, would clearly violate the Fourth Circuit's *Muller* precedent discussed above, even though the local government could still choose to vote on the rezoning or not if the referendum got approved.[177] This hypothetical process, which *would* clearly implicate voting rights, is functionally identical to the existing protest petition process. And though in my hypothetical an election takes place, which might be viewed as the dispositive factor,[178] it seems impossible to square this with the Supreme Court's *Eastlake* ruling that characterizes a variety of grants of power to the public to pass on zoning questions as exercises of direct democracy.[179]

If protest petitions implicate the right to vote, there would be two consequences. First, the exclusion of non-property owners would be considered a property-based voting qualification that would be almost certainly be subject to strict scrutiny.[180] Second, the apportionment of voting power by percentage of landownership would almost surely be

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[175] *See id.* at 55–56 (describing the three-step process for an unincorporated area to become a municipality).

[176] *See id.* at 56–57 ("The challenged Maryland procedure permits a popular vote to be blocked by property owners. That is so because the county council cannot schedule such a vote unless a given percentage of the property owners authorize it.").

[177] In light of the Eighth Circuit's recent *Eggers* opinion, assume for the purpose of this hypothetical that once the referendum qualified for the ballot, the local government was forbidden from voting on the rezoning until after the election took place. *See* Eggers v. Evnen, 48 F.4th 561 (8th Cir. 2022).

[178] *Compare Hussey*, 64 F.3d at 1264 (dictum) (suggesting that the Fourth and Sixth Circuits might have been correct in their conclusions despite disagreeing with their reasoning, because "[n]either of the annexation methods at issue in those cases granted [voters] any say in the proceedings"), *with* Curtis v. Bd. of Supervisors of L.A. Cnty., 501 P.2d 537, 546 (Cal. 1972) (ruling that power of landowners to petition to block an election implicated voting rights).

[179] *See* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 672–73, 673 n.6 (1976) (characterizing town meetings convened for purposes of regulating nuisances and zoning referendum powers as examples of reservations of direct democratic authority).

[180] *See* sources cited *supra* note 164.

subject to strict scrutiny as a violation of the One Person, One Vote doctrine.[181] The only remaining question would be whether the protest petition process is one of general interest, or governed by the Supreme Court's "special purpose district" doctrine. In two decisions, *Salyer Land Co. v. Tulare Lake Basin Water Storage District*[182] and *Ball v. James*,[183] the Court established an exception to the One Person, One Vote doctrine and the general ban on property-based voting qualifications for elections affecting government-created districts with a "special limited purpose and . . . disproportionate effect of [their] activities on landowners as a group."[184] Elections for the governing boards of these and several other types of special purpose government units (as well as petition processes to create those units) have been held exempt from strict equal protection analysis.[185]

But there are many reasons to think that the special purpose district exemption does not apply to rezonings. Most *Salyer-Ball* exceptions are for districts exercising quasi-corporate functions. For example, with respect to the water storage district in *Salyer*, there was "no way that the economic burdens of district operations c[ould] fall on residents *qua* residents," because "the costs of district projects [we]re assessed against land by assessors in proportion to the benefits received."[186] Rezonings, by contrast, do not *formally* saddle neighbors with economic costs. And even if neighbors could claim to be specially burdened from the possibility of nuisances, only allowing landowners to weigh in on that burden is inconsistent with nuisance law (which allows tenants to bring nuisance suits).[187] Indeed, classifying rezonings as special purpose functions seems to contradict the core holding of *Euclid*, which categorizes zoning as an aspect of state police power "asserted for the *public* welfare."[188] And there is, of course, voluminous evidence that "residents *qua* residents" are affected by zoning—housing

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181 *See* sources cited *supra* notes 161–62.

182 410 U.S. 719 (1973).

183 451 U.S. 355, 371 (1981) (holding that limiting the vote to landowners was permissible because "it bears a reasonable relationship to its statutory objectives").

184 *Salyer*, 410 U.S. at 728.

185 *See, e.g.*, Pittman v. Chi. Bd. of Educ., 64 F.3d 1098, 1103 (7th Cir. 1995) (local school council); Wilson v. Denver, 961 P.2d 153, 162 (N.M. 1998) (irrigation ditch association); Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc., 158 F.3d 92, 108 (2d Cir. 1998) (business improvement district); S. Cal. Rapid Transit Dist. v. Bolen, 822 P.2d 875, 888 (Cal. 1992) (petition to create tax assessment district).

186 *Salyer*, 410 U.S. at 729.

187 *See* Restatement (Second) of Torts § 821E(a), 821E(a) cmt. c (Am. L. Inst. 1979) (classifying "the owners of any possessory estate" as "possessors" of land entitled to recover for nuisance).

188 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (emphasis added); *see also id.* at 387–88 ("[T]he law of nuisances, likewise, may be consulted, not for the purpose of

costs increase or decrease as a result of its permissiveness.[189] Rezonings, even though they can involve areas sometimes termed "districts," are merely exercises of a power recognized since *Euclid* as a general government function affecting the greater public. Accordingly, so long as protest petitions are recognized to implicate voting rights, they should be subject to the One Person, One Vote requirement. But because much of the relevant equal protection doctrine is still in flux in the lower courts, the next Section proposes an easier route to federal intervention into protest petition laws: inducing their repeal through the Fair Housing Act (FHA).

C. Affirmatively Furthering Fair Housing

Early on in President Biden's term, the President proposed $5 billion in federal funding to encourage localities to curb exclusionary zoning as an explicit element of his administration's civil rights policy.[190] But the "carrot" approach of new funding to relatively affluent localities that could do without it rarely moves the needle on exclusionary zoning.[191] The federal government has long had a stick, though: the "affirmatively furthering fair housing" mandate. Under the FHA, the Department of Housing and Urban Development (HUD) must "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" the goal of fair housing.[192] This requirement is codified in the form of explicit conditions on HUD grants to localities, requiring recipients to affirmatively further fair housing.[193] In 2023, the Biden administration proposed a rule under this provision that imposes some requirements on HUD grant recipients to

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controlling [the validity of a zoning law], but for the helpful aid of its analogies in the process of ascertaining the scope of, the power.").

189 *See supra* notes 12–21 and accompanying text.

190 *See* Press Release, White House, FACT SHEET: Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap (June 1, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap [https://perma.cc/RJ7B-L57F] (announcing proposal for "Unlocking Possibilities Program" that would award "funding to jurisdictions that take concrete steps to eliminate needless barriers to producing affordable housing").

191 *See, e.g.*, Scott L. Gates, *The Stick over the Carrot: How Congress Can Incentivize Localities to Reform Exclusionary Zoning and Land Use Policies*, 21 Conn. Pub. Int. L.J. 1, 14–15 (2021) ("Because [wealthy] jurisdictions have less of a need for these newly available federal funds, they would be less incentivized to enact the reforms to their zoning and land use regulations necessary to access them.").

192 42 U.S.C. § 3608(e)(5).

193 *See, e.g.*, 42 U.S.C. § 5304(b)(2) (requiring each recipient of the Community Development Block Grant (CDBG) to certify "to the satisfaction of the [HUD] Secretary that . . . the grantee will affirmatively further fair housing").

identify impediments to fair housing and "develop the goals they will implement to overcome these fair housing issues."[194] But the final rule *could* impose other kinds of requirements. It would be administratively simple, for example, to require that by some date, states must provide for majority voting on all rezonings.[195]

This is not a new idea. Soon after the FHA became law, Housing Secretary George Romney proposed a plan to use the affirmatively furthering mandate to deny applications for federal funds to localities that did not end their exclusionary zoning practices.[196] In the face of vehement protest from white suburbanites,[197] President Nixon undercut this plan, making him a "pariah within [his] administration."[198] Ever since, the federal government has "been loath to use robust measures to end exclusionary zoning."[199] But there has never been a serious question that withholding funds for localities that refuse to promote housing desegregation is within HUD's authority.[200]

Even under recent, more restrictive constitutional rules for permissible conditional spending programs, it is unlikely that a

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194 Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8517 (proposed Feb. 9, 2023).

195 For a concise example of an effective law that provided a clear deadline for states to legislate on pain of losing funding, see, for example, 23 U.S.C. § 158(a)(1) (providing that the Transportation Secretary "shall withhold" specified percentages of funding to states "on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful"); *Alcohol Policy*, Nat'l Inst. on Alcohol Abuse & Alcoholism, https://www.niaaa.nih.gov/alcohols-effects-health/alcohol-policy [https://perma.cc/64EF-62Q4] ("The Federal Uniform Drinking Age Act of 1984 sets the minimum legal drinking age to 21 and every State abides by that standard.").

196 *See* Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, ProPublica (June 25, 2015, 1:26 PM), https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law [https://perma.cc/79QH-SSWZ] ("Romney ordered HUD officials to reject applications for water, sewer and highway projects from cities and states where local policies fostered segregated housing.").

197 *See* Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 Wake Forest L. Rev. 333, 388 (2007).

198 Hannah-Jones, *supra* note 196.

199 Alex Sernyak, Note, *Stop Subsidizing the Suburbs: Property Tax Reform and Ending Exclusionary Zoning*, 31 N.Y.U. Env't L.J. 243, 267–68 (2023).

200 *See* Roisman, *supra* note 197, at 387–88 (discussing how even though President Nixon politically opposed Secretary Romney's plan, he nonetheless recognized the FHA's conferral of authority on HUD to pass on localities' applications for HUD funding using fair housing criteria); *cf.* Shannon v. U.S. Dep't of Hous. & Urb. Dev., 436 F.2d 809 (3d Cir. 1970) (interpreting the AFFH mandate to require HUD to work affirmatively to reduce the residential segregation impact of siting decisions for federally-funded low-income housing).

more aggressive AFFH rule attempting to induce the repeal of protest petition laws would be invalid. Under the framework,[201] the conditional funding must 1) derive from a spending program in pursuit of the general welfare;[202] 2) provide unambiguous notice to recipients of the condition;[203] 3) be related to the asserted federal interest in a particular national program;[204] 4) not run afoul of other constitutional provisions,[205] and; 5) not be overly coercive,[206] in keeping with the "anti-commandeering" principle of the Constitution's Tenth Amendment.[207]

The constitutional case for an AFFH mandate that requires discrete zoning changes like eliminating protest petitions is relatively straightforward. Conditioning grants on zoning reform would easily pass the first and fourth prongs because "general welfare" is viewed deferentially and because the condition does not purport to impose any clearly unconstitutional conditions.[208] On the second prong, reauthorization of a grant program with unambiguous conditions attached likely satisfies the notice provision, even if it imposes new conditions.[209] New conditions attached as part of the AFFH framework should not fail for lack of notice because recipients of funds know that they are subject to possible fair housing conditions before they receive them.[210] On the third, the lower courts have split on how tight the relationship between the condition imposed and the federal interest needs to be.[211] But even under a narrow reading, there is such

201 *See* Gates, *supra* note 191, at 25–26 (breaking the framework down into five distinct prongs).

202 South Dakota v. Dole, 483 U.S. 203, 207 (1987).

203 *Id.*

204 *Id.*

205 *Id.* at 208.

206 *Id.* at 211.

207 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012) (plurality opinion).

208 *See* Gates, *supra* note 191, at 26.

209 *See id.* at 35 (differentiating grant programs that "make new funds available by reauthorizing [a] program" from entitlement funds like Medicaid, under which "Congress does not make new . . . funds available to states through reauthorization").

210 *See* Joseph V. Jaroscak, Cong. Rsch. Serv., R46733, Community Development Block Grants: Funding and Allocation Processes 4 (2021), https://crsreports.congress.gov/product/pdf/R/R46733 [https://perma.cc/H6TE-Y94J] ("Generally, [Community Development Block Grant] funding is included in annual [Transportation and HUD] appropriations bills."); *see also* Austin W. King, Note, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. Rev. 2182, 2215 (2013) (noting that "states and localities receiving [Community Development Block Grants] have been certifying their compliance with the AFFH requirement since" the 1990s).

211 *See* Gates, *supra* note 191, at 28–30 (describing how some courts have only required the government to articulate a discernable relationship between the condition and the broad federal interest asserted, and others have required articulation of a discernable

an obvious relationship between the federal interest in neighborhood racial desegregation and grants for affordable housing that the condition should easily pass muster.[212] Finally, the HUD funds threatened to be withheld are significantly lower in amount than the state Medicaid funds that the Supreme Court deemed a threat to withhold overly coercive, so the condition should not even come close to the quantitative "line where persuasion gives way to coercion."[213]

Rather, the largest barrier to banning protest petitions through the federal AFFH mandate would be political. Since George Romney's time, states and localities have intensely opposed direct federal intervention into "quintessentially local" land use authority.[214] Congress has occasionally succeeded in preempting local authority over land use by carefully limiting the scope of its preemption.[215] But an administration wishing to eliminate protest petitions through a more robust AFFH rule might only avoid significant political pushback if they could find some limited and principled justification to eliminate them, without the possible threat that they would expand into a federal takeover of zoning. Building this justification requires answering the question: Why would protest petitions be a greater threat to fair housing than something like single-family zoning,[216] requiring federal intervention to eliminate them?

The arguments made in a 2018 Connecticut land use lawsuit put forth a plausible roadmap to answering this question. In the town of Branford, the local housing authority partnered with a private

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relationship between the condition and the interest advanced by the specific program threatened to be cut).

212 *See* White House, *supra* note 190 (describing how exclusionary zoning laws "lock families out of neighborhoods with more opportunities," and framing it as part of an initiative to narrow the racial wealth gap).

213 *Id.* at 42 (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012)); *see* King, *supra* note 210, at 2216 & n.201 (noting that the highest percentage of its budget that any state receives in CDBG funds, 0.23%, is only "one-fortieth the lowest percentage that any state receives in Medicaid").

214 Michael C. Pollack, *Land Use Federalism's False Choice*, 68 Ala. L. Rev. 707, 708 (2017); *see* Michael H. Schill, *The Federal Role in Reducing Regulatory Barriers to Affordable Housing in the Suburbs*, 8 J.L. & Pol. 703, 726 (1992) ("Based upon past experience, one cannot be optimistic about the likelihood that . . . the Congress . . . will take action to limit the ability of suburbs to erect regulatory barriers to low and moderate income housing.").

215 *See* Pollack, *supra* note 214, at 709–10 (pointing to examples of federal land laws that have asserted preemption authority over local laws governing land use by religious institutions, telecommunications equipment siting, and energy transmission lines).

216 *See* Sernyak, *supra* note 199, at 250 ("Planners realized [in the early twentieth century] that areas could be zoned exclusively for single-family homes, which would not run afoul of the Court's edict [banning racial zoning], but could ban almost all non-white people, who were generally low-income and living in multifamily housing . . . .").

developer to turn a former senior citizens' residence into non-age-restricted affordable housing.[217] From the start, it faced NIMBY opposition.[218] The proposal required a rezoning, which made its way to the town's five planning and zoning commissioners in early 2018; they voted three-to-two in favor.[219] Before they voted, however, the abutting neighbors filed a protest petition to force a greater-than-two-thirds vote.[220] As a result, the Commission deemed the rezoning request denied because they had not voted by a supermajority of at least four-to-one.[221] The housing authority and the developer sued the commission, contending that the state's subsequently enacted affordable housing statute impliedly repealed the protest petition law for any rezoning that operated to specifically permit affordable housing development.[222]

In a brief to the court, the authority launched a broadside against protest petitions. They drew a direct line between protest petition laws and the racist neighbor consent laws that Indianapolis and New Orleans adopted in the 1920s to get around bans on racial zoning,[223] arguing that protest petitions "[we]re the type of exclusionary procedure" that the newer affordable housing law "was adopted to remedy."[224] They discussed the procedure's arbitrariness, noting that, though protest petitions have been upheld against standardless delegation challenges, it was relevant that the number of neighbors able to trigger a supermajority was entirely random.[225] And they raised the practical

217 *See* Press Release, Yale L. Sch., CED Clinic Appeals Decision in Branford Zoning Denial (Feb. 22, 2018), https://law.yale.edu/yls-today/news/ced-clinic-appeals-decision-branford-zoning-denial [https://perma.cc/V94L-HL23] (discussing the history of the project).

218 *See* Chatwan Mongkol, *Affordable Housing Construction Begins at Branford's Parkside Village One*, New Haven Register (Nov. 22, 2022), https://www.nhregister.com/news/article/branford-affordable-housing-parkside-village-17603388.php [https://perma.cc/9H6V-CGC7] (describing neighbor concerns "that the housing would diminish the town's character and potentially attract undesirable tenants").

219 *See* Hous. Auth. v. Branford Plan. & Zoning Comm'n, No. LND-CV-18-6091466S, 2018 WL 6131330, at *1 (Conn. Super. Ct. Oct. 24, 2018) (recounting this factual history).

220 *See id.*

221 *See id.*

222 *See* Housing Authority Brief, *supra* note 34, at 12 (discussing prior caselaw holding that specific provisions of the later-enacted affordable housing statute superseded general provisions of the state zoning enabling law).

223 *See id.* at 13–14.

224 *See id.* at 14.

225 *See id.* at 14, 17 ("The petition area could be undeveloped land owned by one person, or it could contain a residential condominium in which hundreds of people will own a fractional interest, and everything in between.").

argument that a supermajority requirement could "effectively derail a proposed land use."[226]

The court agreed, ruling that the failure to override a protest petition by a supermajority was "not a proper ground" under which to deny a rezoning for an affordable development.[227] While the court did not expressly base its decision on the sweeping argument against protest petitions raised by the plaintiffs, it noted that the plaintiffs' concerns about "the very concept of the protest petition" were well taken.[228] The protest petition was not the type of direct neighborhood veto that the Supreme Court has clearly found unconstitutional. But as a filibuster provision, it was close enough to these vetoes that it seemed to offend some notion of fairness—allowing small groups of private landowners to interfere with legislation affecting the public at large.[229] It might not have been express racial zoning, but the limitless discretion it afforded neighbors offered them ample ability to engage in "subterfuge for discrimination," according to the court.[230] While Connecticut's protest petition had survived for the past century as an afterthought in the state zoning code,[231] it clearly bothered the court that the provision was now being weaponized in exactly the way that neighbor consent laws were used in the 1920s to perpetuate racial and class segregation.[232]

The federal government would do well to try this argument. They could say that, as a vestige of neighbor consent provisions (and one that localities often cannot repeal because they exist in state law), protest petitions represent a uniquely anti-democratic threat to state and local efforts to affirmatively further fair housing goals—demanding a unique federal civil rights response. It is anyone's guess whether this political approach would work for a presidential administration seeking to ban protest petitions through the AFFH mandate. But the idea that protest petitions are an unusually problematic aspect

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226 *Id.* at 17.

227 Hous. Auth. v. Branford Plan. & Zoning Comm'n, No. LND-CV-18-6091466-S, 2018 WL 6131330, at *6 (Conn. Super. Ct. Oct. 24, 2018).

228 *Id.* at *4 n.10 ("These concerns are valid.").

229 *See id.* ("In the extreme, conceivably just one person who owns all the lots within 500 feet could . . . impose a supermajority . . . .").

230 *Id.*

231 *See* Housing Authority Brief, *supra* note 34, at 15 (noting that Connecticut's protest petition law "has not undergone any substantial revision since 1959").

232 *See Branford*, 2018 WL 6131330, at *5 ("[I]t would not be reasonable or rational to conclude that a small but vocal minority could block development of affordable housing and thwart the purpose of [the newer affordable housing law] simply by signing a petition."); *id.* at *4 n.10; *see also supra* notes 52–56 and accompanying text.

of zoning law is borne out by evidence from their early history and statutory construction. As Professor Brady writes, "[o]ne could be forgiven for thinking" that NIMBYs have always believed new neighbors (particularly those who live in multifamily housing) are akin to nuisances, "responsible for traffic, decreased school quality, noise, or a parade of other horribles."[233] But the structure of zoning law shapes these perceptions. While it usually does not treat zoning as a contract between neighborhood and government, grant neighbors a substantive property right to exclude any locally unwanted land uses, or allow neighbors to define their own nuisances, the law of protest petitions *does* operate as if this were true,[234] and consequently affords legal justifiction for people to believe these things.[235] The combination of these beliefs, a legal framework to act on them, and today's routine use of procedural hardball to block housing construction should prompt the federal government to consider using the AFFH mandate to get states to eliminate them for good.

Conclusion

Protest petition laws may be a vestigial organ, but they have the potential to be a dangerous one. The early proponents of zoning added protest petitions alongside neighbor consent ordinances for two main reasons: to make zoning more palatable to a public not used to being regulated, and to throw a lifeline to a Supreme Court otherwise inclined to strike down zoning by analogizing zoning to nuisance law. The protest petition has lived on even though neither of these justifications remain necessary, and even as the Court has eliminated more express neighborhood land use vetoes. As part of the edifice of the old neighbor-empowering zoning laws used to entrench racial and class segregation, though, the protest petition has festered within state zoning codes as a statutory embodiment of zoning's most socially destructive idea: that neighbors have a "property right" to preserve their neighborhood in amber and exclude others from it. The courts have validated this idea in their interpretation of protest petition laws.

Today, though, many people reject the notion that zoning gives neighbors a right to exclude anything and anyone undesirable from a neighborhood, at the cost of housing affordability, racial integration, the

233 Brady, *supra* note 48, at 1612.

234 *See supra* Section II.A.

235 *Cf.* Brady, *supra* note 48, at 1678 (describing the dynamic through which "social movements f[ind] legal expression").

environment, other people's property rights, and popular democracy itself. But we have now seen the first signs—in New York City and Austin—that the protest petition could gain increasing utility for those holdouts who still wish to exclude. Fortunately, there are options for proponents of affordability and fair housing to reform, abolish, or attempt to invalidate protest petitions. It would be a wise choice to do so before they become a serious impediment to the struggle for housing justice.