

# INVISIBLE BUSINESSMAN: UNDERMINING BLACK ENTERPRISE WITH LAND USE RULES

Stephen Clowney\*

*Rates of self-employment in African-American neighborhoods remain feeble. Although the reasons behind the failure of black businesses are complex, zoning regulations play a largely unexamined role in constraining the development of African-American enterprises. Land use fees, municipal zoning board decisions, and the general insistence on separating residential from commercial uses all impress unique and disproportionate harms on African-American merchants, making it difficult to find affordable business space in suitable locations.*

*Moreover, current attempts to reorganize the land use system are inadequate to solve the problems facing black businesspeople. A complete rolling back of zoning laws is impractical and unnecessary, while attempts to promote street vending or home-based business run aground on the objections of local homeowners. Instead of pursuing these failed strategies, municipal governments should create programs that transfer abandoned buildings to fledgling merchants of the inner city. This new land use policy could spark a revival of urban entrepreneurship and help restore crumbling neighborhoods to their former glory. Unlike other proposals to reform zoning laws, transferring vacant government-owned land unites the interests of businesspeople, homeowners, and local governments. Inner-city merchants receive the space they need to foster new business ideas. Local homeowners rid themselves of the scourge of empty buildings. Finally, municipalities generate new revenue by returning unproductive buildings to the tax rolls.*

## INTRODUCTION

At the start of the twenty-first century, land use reform is the most underexamined method of restoring the economic vitality of central ci-

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\* Assistant Professor of Law, University of Kentucky. I owe enormous debts of gratitude to Nicole Stelle Garnett, Bob Ellickson, Art LeFrancois, Al Brophy, and Ben Barros. Special thanks, as always, to Nicole LeFrancois.

ties. Building on insights from sociology and economics, this Article explores how additional regard for the land use needs of urban communities could spur entrepreneurship in the impoverished, largely African-American neighborhoods of the inner city.<sup>1</sup>

Understanding the connection between land use and the vitality of black entrepreneurship becomes especially important as the fabric of enterprise in urban places continues to fray,<sup>2</sup> and conventional techniques of promoting business growth seem ineffective at creating needed jobs and opportunities.<sup>3</sup> Professor Janet Thompson Jackson diagnosed the problem facing black areas: “At one time, African-American urban communities contained thriving business districts . . . [Now,] low-income

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1. This Article defines “land use” as the broad range of activities, from zoning to architecture review, with which city planners are generally concerned.

2. This is not to say that city life is hopelessly bleak. In the last decade, there has been a “remarkable resurgence of a number of big cities.” Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City 2* (Harvard Inst. Econ. Research, Working Paper No. 2109, 2006), <http://www.economics.harvard.edu/pub/hier/2006/HIER2109.pdf>. For fifty years, however, manufacturers and large retailers—the humming engines of capitalism—have slowly abandoned America’s city centers. Although the reasons behind the collapse of urban economies are complicated, it can be attributed in large part to increased competition from areas with lower labor costs, fewer tax burdens, and better infrastructure. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* (2003) (describing the rise and steady decline of New Haven, Connecticut). This decline is felt most severe in urban places of the Northeast and upper Midwest and is especially traumatic for traditional black communities. See RAE, *supra*, at 254–87; WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 6 (1996) (“When the black respondents in our large . . . survey were asked to rate their neighborhoods as a place to live, only a third said that their area was a good or very good place to live . . .”); Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 282–83 (2006) (describing how joblessness and isolation negatively impact black areas); Daniel J. Hutch, *The Rationale for Including Disadvantaged Communities in the Smart Growth Metropolitan Development Framework*, 20 YALE L. & POL’Y REV. 353, 353 (2002) (arguing that the exodus of whites to the suburbs resulted in “a vicious cycle of decline for older,” blacker neighborhoods); W. Dennis Keating, *The Dilemma of Old, Urban Neighborhoods*, 3 WASH. U. J.L. & POL’Y 699, 699–700 (2000) (stating largely black urban communities have abnormally high rates of social problems).

3. The federal government has devised dozens of programs and allocated millions of dollars in an effort to reverse the erosion of entrepreneurship in black neighborhoods. In addition, many states promote self-employment as a means for families to accumulate capital and leave welfare rolls. See Alicia M. Robb & Robert W. Fairlie, *Access to Financial Capital Among U.S. Businesses: The Case of African American Firms*, 613 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2007, at 47, 48 (“[P]erformance of black-owned business in the United States is a major concern among policy makers.”). Legal academics, for their part, have proposed plans to increase access to investment capital, promote business education, and nurture a community-wide business ethos. See, e.g., Magnus Lofstrom & Chunbei Wang, *Mexican-Hispanic Self-Employment Entry: The Role of Business Start-Up Constraints*, 613 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2007, at 32, 33–34; Robb & Fairlie, *supra*, at 68. For more on the challenges that black businesspeople face, see SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* 99 (2006) (explaining why blacks lack experience operating and owning businesses in America); Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487, 496 (1995) (stating that African-Americans have a weak indigenous business culture). It is worth noting here that Latinos in the United States face many similar challenges. See Bárbara J. Robles & Héctor Cordero-Guzmán, *Latino Self-Employment and Entrepreneurship in the United States: An Overview of the Literature and Data Sources*, 613 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2007, 18, 28–29. Nationally, only 1.6 million small businesses are held by Hispanics—a small percentage of the twenty-three million individually owned firms in the country. See Krissah Williams & Cecilia Kang, *The Latino Small-Business Boom*, WASH. POST, Mar. 22, 2006, at A1.

urban communities are filled with abandoned businesses, vacant lots, and dilapidated housing.”<sup>4</sup> Empirical evidence confirms the sagging state of black business. Census records indicate that although African-Americans make up twelve percent of the general population, they create only three percent of new business ventures.<sup>5</sup> Additionally, black entrepreneurs are, on average, less successful than their white counterparts; they hire fewer workers, pay lower salaries, and make considerably smaller profits.<sup>6</sup> Most disturbing, a recent study shows that black-owned firms account for only 0.5 percent of all business receipts.<sup>7</sup>

The tattered state of black-owned businesses imposes steep costs on the residents of African-American places.<sup>8</sup> Policymakers and bureaucrats worry, correctly, that the lack of entrepreneurship in black neighborhoods has closed a reliable avenue out of poverty and into the lower rungs of the middle class.<sup>9</sup> Moreover, the erosion of enterprise also separates black communities from the goods and services they desperately need: supermarkets—where they do exist—sell foodstuffs of inferior quality, banks frequently collect exorbitant fees, and shops sell poorly made goods at high prices.<sup>10</sup> In short, black neighborhoods seem ripe for

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4. Janet Thompson Jackson, *Can Free Enterprise Cure Urban Ills?: Lost Opportunities for Business Development in Urban, Low-Income Communities Through the New Markets Tax Credit Program*, 37 U. MEM. L. REV. 659, 704 (2007).

5. In 1997, there were 823,499 black-owned firms in the United States. They constituted only 3.95 percent of all businesses and 1.76 percent of firms with paid employees. U.S. CENSUS BUREAU, DEP’T OF COMMERCE, PUBL’N NO. EC97CS-3, 1997 ECONOMIC CENSUS: SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES-BLACK 17 tbl.1, 75 tbl.8, 77 tbl.9, 80 tbl.11 (2001) [hereinafter U.S. CENSUS BUREAU, 1997 ECONOMIC CENSUS].

6. See Robb & Fairlie, *supra* note 3, at 53–55. There are other disheartening statistics. In 1996, the total sales of the top 100 black-owned businesses generated a paltry \$14.1 billion. To put that in perspective, a single company with sales of \$14.1 billion would not crack the list of the top 80 earners on the Fortune 500. See ENCYCLOPEDIA OF AFRICAN AMERICAN BUSINESS HISTORY xxxi (Juliet E. K. Walker ed., 1999); see also Leonard M. Baynes, *The Q-626 Report: A Study Analyzing the Diversity of the 626 Largest Businesses, and the 105 Largest Minority-Owned Businesses*, in *Queens*, 80 ST. JOHN’S L. REV. 1007, 1043–44 (2007) (showing a troubling lack of diversity among the largest businesses in Queens, New York).

7. The exact percentage of receipts brought in by black-owned firms is disputed, but all commentators agree that they amount to less than one percent of national totals. See, e.g., U.S. CENSUS BUREAU, 1997 ECONOMIC CENSUS, *supra* note 5, at 9 (pegging percentage of black business receipts as 0.4 percent of the national total); Earl Ofari Hutchinson, *Black Capitalism: Self-Help or Self-Delusion?*, in AFRICAN AMERICANS IN THE U.S. ECONOMY 271, 273 (Cecilia A. Conrad et al. eds., 2005) (reporting that overall the gross receipts for black business hover around 0.5 percent of total business receipts); Suggs, *supra* note 3, at 488 (reporting that, in 1982, business activity in the black community accounted for only 0.16 percent of total business activity). But see Jackson, *supra* note 4, at 701 (stating that interest in self-employment grows in black community). “[B]etween 1997 and 2002 . . . the number of black-owned businesses grew by forty-five percent.” *Id.*; see also BESSIE HOUSE-SOREMEKUN, CONFRONTING THE ODDS: AFRICAN AMERICAN ENTREPRENEURSHIP IN CLEVELAND, OHIO xxiv (2002) (reporting that the number of black businesses is steadily increasing).

8. See *infra* Part I.

9. See sources cited *supra* note 3.

10. I argue that promoting black business could improve both the quantity of services in urban neighborhoods and the quality of available consumer goods. Even though poor people are unlikely to start organic markets, the competition fostered by entrepreneurs presses all businesses to “provide high-quality goods and services at low prices.” Jonathan R. Macey, *Transaction Costs and Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471,

a new wave of commercial development, yet the storefronts necessary to remake neighborhoods remain covered with plywood. What is to be done?

In this Article, I propose a plan to ameliorate the anemic rate of business growth in black neighborhoods. I begin by arguing that black business lags, at least in part, because commentators have overlooked a key constraint on African-American entrepreneurship—land use regulation. In both academic circles and in city hall, observers have failed to understand how land use rules restrict commercial development in minority communities.<sup>11</sup> More specifically, the literature has not acknowledged that zoning—the process of dividing an entire municipality into districts and designating permitted uses for each area—has sharply limited the formation and expansion of entrepreneurship in black neighborhoods.

This analysis of zoning strives to move beyond the customary and formulaic critiques of municipal regulation. In recent years, it has become “standard fare in moderate-left to libertarian-right circles” to claim that overly technical government rules disadvantage small businesspeople.<sup>12</sup> Rather than treading this familiar ground, in Part II of this Article I argue that land use schemes impose unique and disproportionate harms on African-Americans. Relying on extensive analytic and ethnographic evidence, I make three core claims. First, I argue that the cost of complying with land use regulations has a disparate impact on African-American business. Black-owned companies, which are notoriously undercapitalized, have the same land use costs as multinational corporations, but possess significantly fewer resources to pay fees and apply for permits. Second, I empirically show that the types of ventures typically pursued by black entrepreneurs—small-scale service enterprises—face the most stubborn resistance from local zoning boards. Finally, I assert that zoning, which insists on separating commercial uses from residential neighborhoods, creates particular problems for black entrepreneurs. The segregation of uses, for example, divorces black business owners from local customers—a considerable obstacle in a community where relatively few households have access to a private automobile. The overriding theme of these claims is that restrictive land use measures make it near

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515 (1988); see also David Dante Troutt, *Ghettos Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 473 (2000).

11. See *infra* Part II.

12. Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 26 (2004); see also Margaret Beebe Held, *Developing Microbusinesses in Public Housing: Notes from the Field*, 31 HARV. C.R.-C.L. L. REV. 473, 488–89 (1996) (describing the difficulty that municipal regulations imposed on a welfare recipient attempting to open a child care facility in Tennessee); James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 308 (2000) (“America’s twentieth century of regulation has significantly disadvantaged small and emerging business . . . .”); Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897, 1901 (1993) (same).

impossible for black entrepreneurs to find affordable commercial space in desirable locations.

After highlighting the disparate effect of zoning regulations on African-American enterprise, I turn toward devising a policy proposal that could revive the commercial infrastructure of black urban areas. Part III of this Article applies previous attempts to reorganize zoning law to the problems facing inner cities. Over the last thirty years, scholars have saturated legal journals with dozens of plans intended to curb the mischief caused by zoning and other land use measures.<sup>13</sup> Although these reform efforts pack much theoretical punch, I contend that they offer little hope to older and poorer urban neighborhoods.<sup>14</sup> Currently, the problem is that proposals to fix the land use system are either politically untenable or they disregard the distinct needs of the African-American community.

Part IV—the final Section of this Article—searches for a new, more practical approach to urban land use policy. Rather than advocate a complete rollback of zoning laws, I push for something less grandiose but

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13. Zoning stands accused of diverting land from its optimal use, generating corruption, eroding property rights, and contributing to monotonous urban development. For criticism of zoning's ability to divert land from its highest and best use, see generally BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1972) [hereinafter SIEGAN, *WITHOUT ZONING*]. See also Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land-Use Controls*, 40 U. CHI. L. REV. 681, 779 (1973) [hereinafter Ellickson, *Alternatives*]. Many scholars have commented on zoning's potential to institutionalize corruption. For a sampling of this argument, see SIEGAN, *WITHOUT ZONING*, *supra*, at 172. See also Ellickson, *Alternatives*, *supra*, at 701; Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 407–08 (1977) [hereinafter Ellickson, *Growth Controls*]; Bernard H. Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L. REV. 279, 289–90 (1990). Scholars from the libertarian tradition have harshly attacked the effect of land use regulations on property rights. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 131–33 (1985); Bernard H. Siegan, *Editor's Introduction: The Anomaly of Regulation Under the Taking Clause*, in *PLANNING WITHOUT PRICES: THE TAKING CLAUSE AS IT RELATES TO LAND-USE REGULATION WITHOUT COMPENSATION* 36 (Bernard H. Siegan ed., 1977); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 756–57 (1988). Another potential problem with zoning is that it encourages monotonous development. See WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 60–62 (1985) (discussing how zoning regulations are used to prohibit apartments, small homes, mobile homes, and other housing options associated with persons of limited means); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 249–50 (1961); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 441 (1990); Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 71–77 (1993) (arguing that zoning inevitably leads to forms of racial and class discrimination). Many “New Urbanist” thinkers attack traditional zoning laws because they believe zoning unnaturally segregates housing from small-scale development and fails to control sprawl. See, e.g., PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* 34 (1993); ANDRES DUANY & ELIZABETH PLATER-ZYBERK, *TOWNS AND TOWN-MAKING PRINCIPLES* 9–10 (1992). For a sampling of reform proposals, see Ellickson, *Alternatives*, *supra*, at 682; Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1197–98 (2001) [hereinafter Garnett, *On Castles and Commerce*]; Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 291–96 (2006); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 828–29 (1999); Bernard H. Siegan, *Non-Zoning is the Best Zoning*, 31 CAL. W. L. REV. 127, 127–28 (1994) [hereinafter Siegan, *Non-Zoning*].

14. See *infra* Part III.

more achievable. I argue that municipal governments should selectively convert abandoned houses into commercial space. Such a measure could unleash the entrepreneurial energies of inner-city residents and spark a sustainable revival of urban environments. The basic idea is that the conversion of abandoned homes would grant small-scale entrepreneurs the affordable commercial space they need to establish fledgling business ventures. This plan, unlike other proposals to eliminate zoning regulations, would also garner the support of neighboring homeowners. Abandoned houses, studies show, act as a beacon for sex workers, vagrants, and the narcotics trade. For homeowners concerned about their property values and personal safety, law-abiding neighbors of any sort—even commercial vendors—would seem preferable to the risks associated with abandoned property.

### I. A NOTE ON THE IMPORTANCE OF BLACK ENTREPRENEURSHIP

My critique of the land use system requires some preliminary groundwork. Before I attempt to explain the effect of contemporary zoning schemes on black business ownership, it will be useful to pause and briefly explore why self-employment merits increased scholarly attention.<sup>15</sup> The purpose of this Section is not to catalogue every potential advantage of promoting entrepreneurship. Rather, my intent is to give an overview of the general impact that such initiatives may have, explicitly highlighting that many benefits of small-business ownership cannot be quantified in dollar figures.

#### A. *Entrepreneurship as Economic Development*

Economists have long argued that entrepreneurship plays a vital role in the health of local economies.<sup>16</sup> According to a growing chorus of policy analysts, urban economists, and legal academics, small-business ownership has become especially important to the financial outlook of black communities. Economist Stuart Butler plainly states that small business will fire any lasting revival of the inner city.<sup>17</sup> Professor Janet Thompson Jackson similarly asserts that the success of the black community has “always stood on the shoulders of black entrepreneurs.”<sup>18</sup>

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15. See David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 284 (2008) (documenting the proliferation of entrepreneurship in the American academic idiom).

16. See, e.g., David B. Audretsch, *The Dynamic Role of Small Firms: Evidence from the U.S.*, 18 SMALL BUS. ECON., Feb.–May 2002, at 13, 13–14 (2002) (determining small firms—not large—stimulate greater net employment gains and innovation); D. Keith Robbins et al., *An Empirical Assessment of the Contribution of Small Business Employment to U.S. State Economic Performance*, 15 SMALL BUS. ECON., Dec. 2000, at 293, 293 (2000) (arguing that state productivity growth, wage inflation, and unemployment all correlate with the proportion of small-business employment).

17. STUART M. BUTLER, ENTERPRISE ZONES: GREENLINING THE INNER CITIES 66–67 (1981).

18. Jackson, *supra* note 4, at 664 (quoting John Sibley Butler, *Entrepreneurship and the Advantages of the Inner City: How to Augment the Porter Thesis*, in THE INNER CITY: URBAN POVERTY AND

Still other academics contend that entrepreneurship remains the best vehicle “for accelerating the revitalization of urban areas”<sup>19</sup> and “transforming poverty devastated neighborhoods into at least relatively [stable] communities.”<sup>20</sup>

The commentators who argue that business ownership presents people in disadvantaged neighborhoods with the best chance to improve their economic position make two strong arguments to support their position. First, they point to statistical data that confirms that entrepreneurship bolsters the income and employment prospects of the urban poor. Self-employed African-Americans, evidence shows, earn higher wages and display more upward mobility than salaried workers with similar skill sets and education.<sup>21</sup> Second, the boosters of entrepreneurship make a convincing case that the positive effects of business growth ripple from individual merchants throughout entire communities. Consider that small, newly created firms—not large vertically integrated corporations—create at least eighty percent of the country’s new jobs and drive overall metropolitan growth.<sup>22</sup> Thus, black vendors not only create high-paying jobs for themselves, they bolster employment figures and tax revenues throughout their local communities.<sup>23</sup>

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ECONOMIC DEVELOPMENT IN THE NEXT CENTURY 42 (Thomas D. Boston & Catherine Ross eds., 1997)).

19. Candida Brush et al., *Building Ventures Through Civic Capitalism*, 613 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2007, at 155, 155.

20. Held, *supra* note 12, at 477.

21. Robb & Fairlie, *supra* note 3, at 49.

22. See Philip L. Clay, *Choosing Urban Futures: The Transformation of American Cities*, 1 STAN. L. & POL’Y REV. 28, 37 (1989) (“The growth and development of small enterprises in recent years has been responsible for most of the job growth in the United States. . . . Small businesses . . . have fewer entrenched interests, take bigger risks, and are less bound by tradition.”); E. Scott Golden, *Enterprise Zones: New Life for the Inner City*, 4 HARV. J.L. & PUB. POL’Y 243, 265 (1981) (stating that small-scale entrepreneurs hire as many as 80 percent of all new workers); Louise A. Howells, *The Dimensions of Microenterprise: A Critical Look at Microenterprise as a Tool to Alleviate Poverty*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 161, 161–62 (2000) (“[F]irms employing fewer than twenty workers have created about 88 percent of all new net jobs.”); Edward L. Glaeser, *Entrepreneurship and the City* 14–15 (Harvard Inst. of Econ. Research, Working Paper No. 2140, 2007) (explaining the relationship between entrepreneurship and city growth). Last year, black-owned ventures alone employed nearly one million people in the United States. See Robb & Fairlie, *supra* note 3, at 49 (“Past data show that minority firms have hired more than 4.2 million employees in the United States . . .”). Additionally, most black-owned businesses employ African-American workers. Indeed, nearly all of the black-owned businesses in the urban core employ a largely minority workforce. Even outside of black enclaves—in areas where most white-owned firms utilize no minority employees—ninety-seven percent of black employers hire African-American workers. See KILOLO KIJAKAZI, AFRICAN-AMERICAN ECONOMIC DEVELOPMENT AND SMALL BUSINESS OWNERSHIP 40 (1997). This stands in contrast to white-owned small businesses that “continue to exclude minorities from the workplace.” HOUSE-SOREMEKUN, *supra* note 7, at 71; see also Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 WASH. U. J. URB. & CONTEMP. L. 143, 159 (1998) (“[T]he creation of minority-owned businesses has a significant impact on minority employment. . . . [M]inority-owned businesses were more likely to recruit workers from inner-city neighborhoods than nonminority firms.”).

23. See KIJAKAZI, *supra* note 22, at xvi.

Of course, not every scholar believes self-employment has the potential to reverse the decay of the inner city.<sup>24</sup> A handful of academics insist that inner-city neighborhoods provide too thin a soil to nourish entrepreneurship; in their eyes, black families need more abundant reserves of capital to support new stores and shops.<sup>25</sup> They also make the argument that low-income workers lack the skills, resources, and connections necessary to open shops in competitive markets.<sup>26</sup> Louise Howells, a skeptic of the power of micro-enterprise, has given thoughtful voice to these concerns, suggesting that the urban poor often “find themselves in circumstances that are inversely related to successful business entrepreneurship.”<sup>27</sup>

On close examination, however, these objections ring hollow. Indeed, a rough consensus has emerged that black neighborhoods offer particularly fertile ground for the growth and expansion of new small businesses.<sup>28</sup> Between 2000 and 2007, black purchasing power has increased.<sup>29</sup> Even in the poorest areas, black shoppers “have always had money to spend.”<sup>30</sup> Yet, decades of redlining by credit institutions and poor zoning decisions have created a barren commercial landscape that vastly underserves local consumers.<sup>31</sup> The lack of supermarkets, for ex-

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24. See Howells, *supra* note 22, at 161–62 (questioning the strategy of using small-scale entrepreneurship as a tool to lift welfare-dependent persons out of poverty); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 300 (1999) (“The most salient criticism concerns development’s exclusively localized view, which focuses on the specific problems of the targeted poor or disadvantaged community rather than seeing these problems in the context of a totality.”); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217, 220–21 (1999) (arguing that community economic development lawyering ties community groups to complex legal structures that reinforce market subordination and reorient community goals).

25. See Howells, *supra* note 22, at 162 (stating that a low-income person is not likely “to enjoy the personal resources that are necessary to support a growing business and her family at the same time”).

26. See, e.g., *id.* at 161–62 (pushing the idea that low-income individuals make poor entrepreneurs); Suggs, *supra* note 3, at 496 (arguing that black entrepreneurs need human and social capital to advance).

27. Howells, *supra* note 22, at 168.

28. See, e.g., Suggs, *supra* note 3, at 489 (“The potential for entrepreneurship in these inner-city neighborhoods is substantial.”).

29. See Jeffrey M. Humphreys, *The Multicultural Economy 2007*, 67 GA. BUS. & ECON. CONDITIONS 1, 4 (2007), <http://media.terry.edu.edu/documents/selig/GBEC0703Q.pdf> (predicting increase in black purchasing power from \$590 billion in 2000 to \$845 billion in 2007). According to the Stillman School of Business at Seton Hall, African-Americans represent an estimated \$847 billion in purchasing power. Seton Hall University: News and Events, <http://www.shu.edu/news/article/64601> (last visited May 25, 2009).

30. See Troutt, *supra* note 10, at 472.

31. The absence of a vibrant commercial landscape has resulted in an increased demand for goods and services in black neighborhoods. See DAVID DANTE TROUTT, *THE THIN RED LINE: HOW THE POOR STILL PAY MORE* 24–36 (1993); Troutt, *supra* note 10, at 472 (“[M]any companies are now discovering (or being exhorted to discover) the potential profits to be made in ghetto communities.”); John M. Broder, *Clinton, in Poverty Tour, Focuses on Profits*, N.Y. TIMES, July 7, 1999, at A14 (reporting on the release of a HUD study suggesting that chronic disinvestment of poor urban neighborhoods has resulted in more than \$300 billion in untapped retail demand); Bob Herbert, *Ending a Retail Drought*, N.Y. TIMES, July 5, 1998, at WK11 (discussing New Haven, Connecticut’s efforts to revitalize its commercial sector).

ample, remains an intractable problem that limits access to fresh, high-quality foodstuffs.<sup>32</sup> African-Americans also complain that decent bookstores<sup>33</sup> and first-run movie theatres<sup>34</sup> have gone missing from large swaths of urban America.<sup>35</sup> Policies designed to correct these market failures could allow local businesspeople—who best understand the needs of local customers—to remake the consumer infrastructure of their neighborhoods and turn significant profits.<sup>36</sup> Most famously, Earvin “Magic” Johnson built a series of multiplexes in traditionally black neighborhoods during the early 1990s.<sup>37</sup> Although many observers doubted the viability of the project, by all accounts the theaters have been a huge financial windfall for Johnson and his partners.<sup>38</sup>

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32. See Karen Hapgood & Judith Getzels, *Planning, Women, and Change*, PLANNING ADVISORY SERV., Apr. 1974, at 16 (“One workshop participant from a large public housing project in Chicago stated that where she lived there were neither laundry facilities nor a grocery store within a convenient distance . . . .”); David Gonzalez, *The Lost Supermarket: A Breed in Need of Replenishment*, N.Y. TIMES, May 5, 2008, at B1; Erin Aubry Kaplan, *Hungry for a Supermarket*, L.A. TIMES, Aug. 9, 2006, at B13.

33. See, e.g., Andres Viglucci, *Books Galore, No Store*, MIAMI HERALD, Nov. 2, 2007, at 1B (stating that there is no comprehensive, general interest bookstore within the entire city of Miami); Christopher Keough, *Inner-City Insight*, ENTREPRENEUR, Oct. 22, 2001, <http://www.entrepreneur.com/tradejournals/article/79666450.html> (interviewing developer who states that there is not a major bookstore within “miles and miles” of Baldwin Hills, one of the wealthiest black neighborhoods in the country).

34. Until recently, the residents of Jamaica, New York had to travel to far flung communities if they wanted to see first-run movies. See Jane H. Lii, *Multiplex, by Magic Johnson*, N.Y. TIMES, Sept. 8, 1996, at CY9.

35. The U.S. Department of Commerce has also identified unmet demand for “home repair, painting, electrical services, plumbing, carpentry work, and small appliance repair; child and elder day care; health and environmental services; computers and information services; clothing manufacturing and repair; and crafts and foods services such as catering and specialty foods.” Lewis D. Solomon, *Microenterprise: Human Reconstruction in America’s Inner Cities*, 15 HARV. J.L. & PUB. POL’Y 191, 208 (1992).

36. See Regina Austin, “*An Honest Living*”: *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2124 (1994) (discussing how black entrepreneurs can “succeed by catering to the specialized demands of black consumers”); Troutt, *supra* note 10, at 472 (arguing that “[p]oor people in poor neighborhoods have always had money to spend” and that inner cities can support successful business enterprises).

37. Earle Eldridge, *Rebounding from Basketball Court to Boardroom*, USA TODAY, Nov. 8, 2004, at 5B.

38. See, e.g., *id.*; Greg Hassell, *Northline Gets an Assist*, HOUS. CHRON., Apr. 18, 1999, at 1D. Entrepreneurs large or small can find success in the black community. Consider the story of Albert Cleage and Barbara Martin. In the 1970s, the pair noticed an unmet demand for African-American-themed literature among the black citizens of Detroit. In response, they opened a small bookstore called The Shrine of the Black Madonna. See Shrine of the Black Madonna Cultural Center & Bookstore, <http://www.shrinebookstore.com/about.aspx?iid=93&cid=> (last visited May 25, 2009). By all accounts, The Shrine is a success: it now possesses one of the largest collections of black-interest literature in the country and has established two additional stores in Atlanta and Houston. See Candice Hannigan, *A Political and Spiritual Focus*, ATLANTA J.-CONST., June 25, 2005, at B5; Thonnia Lee, *Shrine of Black Madonna Fosters Spiritual, Economic Advancement*, ATLANTA J.-CONST., Mar. 31, 1990, at B9; Robin Richardson, *A Cultural Experience: Picture of Black History, Culture Available at Shrine*, HOUS. CHRON., Feb. 14, 2001, Zone 8, at 1. The triumph of small entrepreneurs like Cleage and Martin provides further evidence that entrepreneurial opportunities abound in the black neighborhoods of the urban core. The rising interest of retailers like Wal-Mart, Home Depot, and Kmart in urban communities also confirms that the needs of inner-city black consumers can support profitable businesses. See, e.g., Ta-Nehisi Paul Coates, *Wal-Mart’s Urban Romance*, TIME, Sept. 5, 2005, at 44; Teresa F. Lindeman, *An Urban Pioneer*, PITTSBURG POST-GAZETTE, Feb. 6, 2000, at C1. It is also

A further reason to believe that increased rates of entrepreneurship could transform inner-city economies is that self-employment remains a surprisingly accessible career path. Unlike law or medicine, opening a small business does not depend on educational credentials acquired during childhood.<sup>39</sup> As Professor Nicole Stelle Garnett writes, “many thousands of welfare recipients” already supplement their incomes by providing “quality, loving childcare” in their homes and apartments.<sup>40</sup> Ventures like food delivery services, car repair shops, and home cleaning companies also welcome individuals who lack fancy diplomas and the “skills demanded by large, service-oriented employers.”<sup>41</sup> Thus, programs that promote entrepreneurship seem to be among the sharpest arrows in the quiver of policymakers concerned about the health of inner-city economies. More than any other poverty-alleviation method, self-employment offers blacks the opportunity to become economically self-sufficient and form the valuable networks that propel neighborhood growth.<sup>42</sup>

### B. *Entrepreneurship as Political and Social Change*

Perhaps more important than the economic gains, entrepreneurship has the potential to remake the political and social landscape in urban communities.<sup>43</sup> Policies that encourage black enterprise, for example, have a large role to play in maintaining the safety of black neighborhoods. In her landmark book, *The Death and Life of Great American Cities*, Jane Jacobs famously hypothesized that busy streetscapes enhance the safety and sense of community in a neighborhood.<sup>44</sup> Pedestrian-thronged areas, Jacobs argued, guarantee the presence of many “eyes on the street,” standing vigil against deviant behavior.<sup>45</sup> If this theory is sound—and a growing swath of scholars defend it—then self-employment plays a singular role in suppressing urban disorder.<sup>46</sup> First,

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worth noting that some scholars argue that promoting a new wave of small-scale entrepreneurship would take advantage of the capitalist drive that already inheres in many black neighborhoods. These academics suggest that, if nothing else, the narcotics trade shows that the profit motive survives even “where violence (often culminating in homicide), rather than bankruptcy, supplies the ultimate market discipline.” Suggs, *supra* note 3, at 489.

39. Susan R. Jones, *Representing the Poor and Homeless: Innovations in Advocacy*, 19 ST. LOUIS U. PUB. L. REV. 385, 393–94 (2000) (“Self-employment does not depend on traditional educational credentials . . .”).

40. Garnett, *On Castles and Commerce*, *supra* note 13, at 1217; see also HOUSE-SOREMEKUN, *supra* note 7, at 73.

41. Garnett, *On Castles and Commerce*, *supra* note 13, at 1217.

42. See, e.g., *id.* at 1216 (arguing that small entrepreneurial businesses “may enable people with limited education and job-related skill to achieve economic self-sufficiency”).

43. Golden, *supra* note 22, at 298 (“Economic development, wherever it takes place acts as a catalyst of social and political change.” (quoting T. VIETORSZ & B. HARRISON, *THE ECONOMIC DEVELOPMENT OF HARLEM* (1970))).

44. JACOBS, *supra* note 13, at 40–45.

45. *Id.* at 42–43.

46. David J. Barron & Gerald E. Frug, *After 9/11: Cities*, 34 URB. LAW. 583, 592 (2002) (“[T]here has been a newfound appreciation for Jane Jacobs’ argument that urban density promotes safety by ensuring eyes on the street and a heightened level of community watchfulness.”).

business owners create the lively stores, bars, nightclubs, and restaurants that keep the sidewalks busy and secure. Second, entrepreneurs seem better positioned to monitor the neighborhood ecology than other citizens. Anxious about the safety of their customers and the physical condition of their stores, they are often the first—or only—community members to discourage heinous street behavior or call police when trouble stirs.<sup>47</sup> One longtime resident of Chicago distilled the point to its essence: small businesses keep urban places safe because they make everything feel “lighted.”<sup>48</sup> Thus, any program that stimulates business ownership not only reduces joblessness, but it also recruits new sentries in the struggle against urban disorder.

Entrepreneurship also has great potential to neutralize the most harmful pathology in low-income minority neighborhoods: the lack of a “culture of work.” As William Julius Wilson observes, persistent unemployment has eroded many African-Americans’ belief in the necessity of labor and the efficacy of individual effort.<sup>49</sup> The aftershocks of this phenomenon devastate inner cities. Social scientists have chronicled how unemployed men and women gradually drift away from community-based institutions toward “undisciplined and empty” activities.<sup>50</sup> Sudhir Venkatesh, for example, notes a direct relationship between the decline of labor-market opportunities in the Chicago area and the amount of social stigma attached to joining a gang.<sup>51</sup> Moreover, psychologists have suggested that chronic joblessness undermines parents’ ability to impart mainstream values to their children.<sup>52</sup>

Entrepreneurship can help. Foremost, a surge of entrepreneurship seems likely to provide role models for wayward adolescents.<sup>53</sup> Almost by definition, the presence of successful business owners reinforces the notion that individuals can acquire material reward and respect outside of gang membership and the narcotics trade. Neighborhood businesses

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47. See Stuart Butler, *Urban Renewal: A Modest Proposal*, 13 POL’Y REV. 95, 102–03 (1980); Troutt, *supra* note 10, at 451 (arguing that “investors . . . become stakeholders in the stability of the community, contributing their power, influence, and, perhaps most importantly, reinvestments”).

48. WILSON, *supra* note 2, at 4.

49. *Id.* at 66.

50. *Id.* at 73–74 (citing MARIE JAHODA ET AL., *MARIENTHAL: THE SOCIOGRAPHY OF AN UNEMPLOYED COMMUNITY* vii, 66 (John Reginall & Thomas Elsaesser trans., Aldine Atherton 1971)) (discussing a long-term study of depression era unemployment).

51. Sudhir Alladi Venkatesh, *The Gang in the Community*, in *GANGS IN AMERICA* 241, 247 (C. Ronald Huff ed., 2d ed. 1996); see also SUDHIR ALLADI VENKATESH, *AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO* 134–39, 161–62 (2000).

52. See, e.g., Mary Corcoran et al., *The Association Between Men’s Economic Status and Their Family and Community Origins*, 27 J. HUM. RESOURCES 575, 592 (1992) (linking children’s success to parents’ reliance on the welfare system).

53. Mary C. Daly, *Rebuilding the City of Richmond: Congress’s Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 975 (1992) (linking economic development with an increase in community role models); Golden, *supra* note 22; Solomon, *supra* note 35, at 207 (arguing that exposure to entrepreneurs “can help individuals in inner-city areas, especially children, become aware of the existence of other options and opportunities”).

may also reestablish work as the fulcrum of daily life.<sup>54</sup> Wilson and others counsel that the constant toil of neighborhood entrepreneurs helps to impose the expectation that work structures social interactions and human biography.<sup>55</sup> Put another way, as the unemployed and disengaged regularly observe shopkeepers opening stores and conducting business, they may begin to feel a renewed sense of connectedness to the formal economy—it becomes possible to envision work as a regular, and regulating, force in their daily lives.

Finally, black-owned businesses provide one of the few safe, quasi-public gathering places and political forums in inner-city neighborhoods. Barbershops, cafeterias, and coffee stands all function as modern-day agoras in black places, serving as spaces to voice opinions, discuss politics, and reaffirm African-American culture.<sup>56</sup> Mitchell Duneier, for example, described how a cafeteria on the South Side of Chicago helped shape the shared identity of the neighborhood: “Social life at the cafeteria functions to bring about a conception of the collectivity as a means of the possession of higher self-worth. . . . What is true of them is true of him.”<sup>57</sup> Although Duneier’s language sets a rather lofty tone, the underlying principle rings true: for black Americans, locally owned businesses remain the preferred hub to test new ideas and renew political and social bonds.

Looking at the scholarly literature on entrepreneurship, it seems relatively clear that a surge of self-employment would bestow tremendous benefits on traditional black neighborhoods of the urban core. Not only would local business growth help satisfy the needs and wants of individuals overlooked by traditional retail outlets, but it could also act as a catalyst for political and social change by reducing urban disorders and providing new spaces for the development of black culture and politics. With these advantages firmly on screen, this Article now begins to attack one of the most pervasive constraints on black entrepreneurship—zoning.

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54. See Jackson, *supra* note 4, at 702–03 (explaining that businesses “reinforce the idea that community life is organized around work” (citation omitted)); see also Ross Gittel & J. Phillip Thompson, *Inner-City Business Development and Entrepreneurship: New Frontiers for Policy and Research*, in *URBAN PROBLEMS AND COMMUNITY DEVELOPMENT* 473, 475 (Ronald F. Ferguson & William T. Dickens eds., 1999).

55. WILSON, *supra* note 2, at 73–75; see also Vicki Schultz, Essay, *Life’s Work*, 100 *COLUM. L. REV.* 1881, 1886–92 (2000) (discussing the importance of work); Noah D. Zatz, *What Welfare Requires from Work*, 54 *UCLA L. REV.* 373, 373 (2006) (postulating that “work is central to much of life”).

56. See, e.g., Bryant Keith Alexander, *Fading, Twisting, and Weaving: An Interpretive Ethnography of the Black Barbershop as Cultural Space*, in *PERFORMING BLACK MASCULINITY* 135, 136–39 (2006); Melissa Harris-Lacewell & Quincy T. Mills, *Truth and Soul: Black Talk in the Barbershop*, in *BARBERSHOPS, BIBLES, AND BET* 162, 162–63 (Melissa Victoria Harris-Lacewell ed., 2004).

57. MITCHELL DUNEIER, *SLIM’S TABLE: RACE, RESPECTABILITY, AND MASCULINITY* 112 (1992).

## II. THE EFFECTS OF LAND USE RULES ON BLACK BUSINESS

Despite policymakers' best efforts to promote the virtues of self-employment, many black communities still struggle to attract capital investments and produce successful merchants. A casual observer of this situation might ask, "Why?" After all, if business ownership truly has the capacity to bring prosperity to African-American families, we should expect entrepreneurship to spread like a wildfire across urban places. This Article argues that black business remains dormant, at least in part, because one key obstacle in the path of urban entrepreneurs has gone unnoticed. The black business community, long hampered by inadequate access to financial services and job training,<sup>58</sup> now struggles against overly burdensome land use practices. Zoning rules, in particular, wreak havoc with small-business growth in the African-American neighborhoods of the urban core.

The broad contours of this argument may sound familiar. Complaints about government interference with private property are commonplace among businesspeople, with many insisting that the web of land use regulations unnecessarily increases costs and stifles innovation.<sup>59</sup> Indeed, the troubling effects of building codes,<sup>60</sup> subdivision rules,<sup>61</sup> and planning schemes<sup>62</sup> on the shape of American enterprise have been thoroughly documented in the scholarly literature.

The purpose of this Article is not to rehash these old arguments. Rather, this Article intends to illuminate a crucial issue that seems en-

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58. See TIMOTHY BATES, *BANKING ON BLACK ENTERPRISE* 50 (1993) ("[B]anks treat black and white loan recipients differently, even when their qualifications do not differ."); VENKATESH, *supra* note 3, at 14 (arguing that financial institutions fail to trust urban entrepreneurs); Timothy Bates, *Unequal Access: Financial Institution Lending to Black- and White-Owned Small Business Start-ups*, 19 J. URB. AFF. 487, 487-88 (1997); Hyman, *supra* note 22, at 160-61 (noting that lack of access to job training has prevented African-Americans from entering certain professions); Robb & Fairlie, *supra* note 3, at 56-58, 66 (showing that African-Americans have difficulty getting access to start-up capital); Carrie Mason-Draffen, *Financing for Business a Concern for Black Entrepreneurs*, *NEWSDAY* (LONG ISLAND, N.Y.), Jan. 21, 2005, at A59.

59. See James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49, 56-59 (2001).

60. See CHARLES G. FIELD & STEVE R. RIVKIN, *THE BUILDING CODE BURDEN* 76-96 (1975); STEPHEN R. SEIDEL, *HOUSING COSTS AND GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE* 73-77, 90 (1978) (arguing that building codes distort building market); Sara C. Galvan, Note, *Rehabilitating Rehab Through State Building Codes*, 115 *YALE L.J.* 1744, 1746 (2006) (arguing that onerous building codes inhibit redevelopment efforts in center cities).

61. ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 475 (2d ed. 2000) (stating that some observers assert that the regulatory maze surrounding subdivisions "is needlessly complex and duplicative, produces unnecessary delays, and raises development costs"); Ellickson, *Growth Controls*, *supra* note 13, at 391 (stating that "onerous design specifications in subdivision ordinances" can impede development); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 *GEO. L.J.* 179, 221-22 (1995) (looking at cost savings in unregulated Texas border subdivisions).

62. JACOBS, *supra* note 13, at 238 ("Cities have the capacity of providing something for everybody, only because, and only when, they are created by everybody . . ."); JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 142-43 (1998) (arguing that overregulation destroys the "value and magnetism" of downtown areas); Huffman & Howard, *supra* note 59.

tirely missing from the discussion of zoning devices. No scholar or government official has analyzed whether land use rules pose a distinct set of problems for minority entrepreneurs. In response to this silence, I sifted through qualitative and quantitative evidence to determine how land use regulations influence the behavior and outcomes of black entrepreneurs. Armed with this data, I contend that land use schemes inflict unique and disproportionate harms on African-Americans. This is not to say that the effects of land use regulation are insignificant on white-owned businesses, but only that they are likely to be more burdensome on black enterprise. In the Section that follows, I offer three original arguments to illustrate how modern land use rules restrict commercial development in black communities.

### A. Compliance Costs

Despite the facial neutrality of zoning and planning laws, the costs of complying with local land use rules—drafting permit applications, observing local design standards, and fighting run-of-the-mill NIMBY complaints—fall most heavily on black businesspeople. The problem, in a nutshell, is that compared to self-employed whites, black entrepreneurs begin with far fewer resources and, therefore, have greater difficulty navigating the tangle of inflexible zoning costs.

The disparity between black and white business stems, in large part, from African-Americans' long battle against lending discrimination.<sup>63</sup> Since the first black entrepreneur set foot in colonial Virginia,<sup>64</sup> African-Americans have labored to attract start-up financing for their entrepreneurial endeavors.<sup>65</sup> Economist Timothy Bates's influential book, *Banking on Black Enterprise*, demonstrates that race continues to dictate commercial lending patterns in urban areas.<sup>66</sup> Bates gathered data from twenty-eight metropolitan areas and discovered that, all other things being equal, commercial banks award white loan recipients twice as much

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63. Many African-American entrepreneurs report difficulty securing a bank loan. See ROBERT SCHAFER & HELEN F. LADD, DISCRIMINATION IN MORTGAGE LENDING 298–300 (1981) (arguing that mortgage lenders discriminate against inhabitants of minority neighborhoods); Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 239 (1996) (finding that most evidence suggests minorities face lending discrimination); Jackson, *supra* note 4, at 662 (“[P]rivate sector investment . . . has long lagged in poor urban areas.”); Lofstrom & Wang, *supra* note 3, at 34 (reporting that banks are more likely to deny credit to black-owned small business, even controlling for creditworthiness). For many budding black entrepreneurs, self-financing also presents problems. If one considers home equity, total investment, and the value of all other savings, fifty percent of all black households have less than \$6,166 in net worth. Robb & Fairlie, *supra* note 3, at 55.

64. In 1651, Anthony Johnson, an ex-slave, purchased 250 acres of land in Virginia, becoming the first black entrepreneur in colonial America. George Tucker, *Ambitious Slave-Turned-Slaveowner Enjoys Farm Success*, THE VIRGINIAN-PILOT & THE LEDGER-STAR, Aug. 21, 1994, at J6.

65. See generally Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787 (1995).

66. BATES, *supra* note 58.

investment capital as blacks.<sup>67</sup> Sounding a similar note, the Department of Justice has asserted that “[o]ver and over again, studies show that minority applicants for business loans are more likely to be rejected and, when accepted, receive smaller loan amounts than nonminority applicants with identical collateral and borrowing credentials.”<sup>68</sup> These empirical claims leave little doubt that the discrimination still churning through the financial services sector reduces the amount of start-up capital available to African-American entrepreneurs relative to similarly situated white business owners. Indeed, the overwhelming majority of black businesspeople, forced to rely on credit cards and personal savings, start out with fewer than \$5,000 on hand.<sup>69</sup>

Unfortunately, municipal zoning administrators have not acknowledged this reality. Unlike most business expenses, which fluctuate based on the number and frequency of a firm’s activities, the costs of land use regulations are relatively fixed.<sup>70</sup> Zoning permits, environmental impact statements, and historic preservation hearings all impose steep, one-time fees without regard to firm size. The municipal government of Tulare County, California, for example, charges businesses \$1,439 plus \$100 per hour to apply for a zoning use variance;<sup>71</sup> the same fee applies to multinational corporations and local mom & pop convenience stores.<sup>72</sup> Thurston County, Washington levies even steeper fees on zoning applications. Companies, both large and small, must pay \$5,075 to file an application for rezoning, \$3,565 for a shoreline development license, and \$2,765 for a permit to operate a home-based business.<sup>73</sup>

The one-size-fits-all structure of land use charges creates daunting barriers for the average black firm. African-Americans have the same land use costs as multinational corporations, but control significantly less capital to pay fees and apply for permits. Compliance costs, consequently, consume an enormous percentage of total start-up capital. This

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67. *Id.* (concluding that “banks treat white and black loan recipients differently even when their qualifications do not differ”). Banks granted white borrowers \$1.83 in debt capital for each dollar of equity they invested in their business, whereas black borrowers received only \$1.16 for each dollar of equity invested. *Id.*

68. Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,057–58 (May 23, 1996) (compiling studies evidencing a disparity in lending rates between minority and nonminority business owners). Data also indicates that black firms located in black communities face especially daunting odds in the pursuit of debt capital. One study, which controlled for loan applicants’ education, equity investment, age, and business experience, concluded that commercial banks grant black businesses located in white neighborhoods an average of \$39,564 more than black businesses in heavily minority districts. See Franklin M. Lee, *Lending Discrimination Hinders Business Growth*, BALT. BUS. J., June 6, 2003, <http://baltimore.bizjournals.com/baltimore/stories/2003/06/09/focus13.html>.

69. HOUSE-SOREMEKUN, *supra* note 7, at 73.

70. Huffman & Howard, *supra* note 59, at 68 (“[C]osts associated with compliance with most regulations are relatively fixed.”).

71. Tulare County Resource Management Agency Application for Zone Variance, <http://www.co.tulare.ca.us/civica/filebank/blobdload.asp?BlobID=3702> (last visited May 25, 2009).

72. *Id.*

73. Thurston County Development Services 2008 Fee Schedule, <http://www.co.thurston.wa.us/permitting/fees/docs/land-use-abbreviated-fee-schedule.pdf>.

threatens the vibrancy and competitiveness of black enterprise, as African-American merchants end up with fewer assets to purchase inventory, advertise, and hire workers. At the margin, land use fees may even shutter some small businesses. A group of entrepreneurial welfare recipients in Knoxville, Tennessee, for example, were forced to close a handful of day care centers after the local zoning board imposed a series of fees on their endeavor—the charges made it impossible for the women to pay staff and purchase needed equipment.<sup>74</sup>

At the end of the day, the success of all entrepreneurs depends on finding an affordable place to work. Unfortunately, by charging similar costs to all entrepreneurs, irrespective of their resources or ambitions, local zoning laws make it painfully difficult for underfunded African-American businesspeople to absorb the cost of land use compliance in order to pursue new ventures.<sup>75</sup> It is hardly surprising that as land use regulations proliferate, the health of small black businesses deteriorates relative to their white competitors. Exposed to inflexible costs and lacking private investment, many black businesses simply dissolve, while others either forgo plans to expand or sell their ideas to larger, better-financed competitors.<sup>76</sup>

### B. Zoning Boards and Black Business

An equally salient problem for black businesses is that the types of ventures most attractive to African-Americans entrepreneurs—small-scale service enterprises—face hostility from local zoning bodies. Since the 1920s, the complex anatomy of state zoning law has mandated that most towns and municipalities establish a citizen-led Board of Zoning Appeals (BZA) designed to evaluate land use permit applications.<sup>77</sup> In general, BZAs possess authority to vary the strict enforcement of zoning regulations by granting applications for variances and special exceptions from local zoning schemes.<sup>78</sup> Although BZAs must act in accordance with principles and criteria set forth in state and local statutes, in the field

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74. See, e.g., Held, *supra* note 12, at 487–89 & n.70.

75. *Id.*

76. See HOUSE-SOREMEKUN, *supra* note 7, at 154–58.

77. See, e.g., COLO. REV. STAT. ANN. § 31-23-307(4) (West 2008) (called the “board of adjustment”); CONN. GEN. STAT. §§ 8-1–8-7 (2008). BZAs were first widely established in the 1920s following the Supreme Court’s decision to uphold the constitutionality of zoning ordinances in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

78. See Randall W. Sampson, *Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something in Between?*, 39 URB. LAW. 877, 879, 888–92 (2007); Ann Martindale, Comment, *Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances*, 20 CONN. L. REV. 669, 669 n.1 (1988). In *Florentine v. Town of Darien*, the Connecticut Supreme Court stated:

A board of appeals is indispensable to the zoning process both from the constitutional and the practical standpoint. . . . The essential purpose of a board of appeals is to deal with these cases by furnishing elasticity in the application of regulatory measures so that they do not operate in an arbitrary or confiscatory, and consequently, unconstitutional, manner.  
115 A.2d 328, 332–33 (Conn. 1955).

of land use, subjective standards remain the rule rather than the exception.<sup>79</sup> Consequently, local zoning officials possess vast power to shape the commercial infrastructure of municipalities.<sup>80</sup> Their judgment often determines how corporations may expand their physical plants and where merchants may locate their businesses.<sup>81</sup>

It is not difficult to see why local BZAs may discriminate against the kind of business endeavors likely to draw black entrepreneurs. Since the early twentieth century, a range of cultural and economic forces have pushed self-employed blacks into personal-service-related fields that require minimal start-up capital and little training.<sup>82</sup> In the urban core, barbershops, auto repair businesses, billiards parlors, secondhand stores, and ethnic restaurants typify the class of enterprises traditionally owned by African-Americans.<sup>83</sup> Members of municipal zoning boards—often prominent citizens appointed by the mayor—may not understand the vital role such establishments play in inner-city communities.<sup>84</sup> It is a common refrain in the zoning literature that the views of the BZA often reflect the assumptions and prejudices of the general population.<sup>85</sup> There is reason to worry that such laypersons needlessly reject land use permit applications received from merchants hoping to open hair-braiding salons and neighborhood bodegas, because such establishments are mistakenly “equated with urban decay” rather than a rebirth of small-scale economic vitality.<sup>86</sup> That is, BZA members may associate black enter-

79. Judge Benjamin Cardozo observed in an early zoning case, “There has been confided to the board a delicate jurisdiction and one easily abused.” *People ex rel. Fordham Manor Reformed Church v. Walsh*, 155 N.E. 575, 578 (N.Y. 1927) (invalidating variance for a parking garage). See also Huffman & Howard, *supra* note 59, at 60 (describing the broad discretionary powers vested in Oregon’s local governments); Sampson, *supra* note 78, at 905 (arguing that most BZA decisions are not supportable under the strict letter of the law).

80. Osborne M. Reynolds, Jr., *The “Unique Circumstances” Rule in Zoning Variances—An Aid in Achieving Greater Prudence and Less Leniency*, 31 URB. LAW. 127, 128 (1999) (“The power to grant or deny lies in the discretion of the members of the board of adjustment, and their exercise of this discretion will not be overturned unless they act arbitrarily, capriciously, or outside the scope of their authority.”).

81. See David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 280 & n.1 (2004).

82. As noted by commentators, black merchants tended to develop in niche markets ignored or disdained by whites. See, e.g., Suggs, *supra* note 3, at 496.

83. See Eugene P. Foley, *The Negro Businessman: In Search of a Tradition*, in *THE NEGRO AMERICAN* 555, 580 tbl.1 (Talcott Parsons & Kenneth B. Clark eds., 1966) (detailing the types of black businesses in Philadelphia in 1964); Suggs, *supra* note 3, at 491.

84. See Owens, *supra* note 81, at 280 (stating that zoning boards are largely unelected).

85. Carol Rose states that if local zoning bodies “have any ‘expertise’ in land as such, it derives less from professional or technical education or information than from sheer familiarity with a locality taken as a whole, in all its complexity.” Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 869 (1983). Jan Krasnowiecki has a lower opinion of local BZAs: “To suggest that the board is intended, or competent, to handle large scale planning and design decisions is, I think, far fetched.” Jan Krasnowiecki, *Planned Unit Residential Development*, 52 URB. LAND INST. TECHNICAL BULL., May 1965, at 9, 38.

86. Jon Dubin asserts that attempts to integrate small businesses into African-American neighborhoods can amount to “assaults on the safety, quality, and integrity of their communities ranging from dangerous and environmentally toxic hazards to more commonplace hazards, such as vile odors, loud noises, blighting appearances, and traffic congestion.” Jon C. Dubin, *From Junkyards to Gentrifi-*

prise with the daily annoyances of city life—aggressive panhandling, noise, and filth—and subject such businesses to more rigorous scrutiny than other applicants for land use permits.<sup>87</sup> In a recent zoning spat in Dayton, Ohio, for example, local officials made unfounded charges that granting zoning permits to a café would increase loitering and make the community less safe.<sup>88</sup>

To put some flesh on the bones of the theory that local zoning officials are biased against the types of businesses African-Americans tend to start, I conducted a small empirical study of the BZA in New Haven, Connecticut. To uncover evidence of discrimination against the small-scale service enterprises that populate black neighborhoods, I examined every permit application for a zoning variance or exception filed with the New Haven BZA over a nine-year period, tracking both the type of relief sought and the parties involved.<sup>89</sup> After gathering the data, I isolated all of the applications from the personal service and retail businesses typically owned by African-American merchants. This set of data included permit requests from every car repair service, day care, convenience store, hair salon, restaurant, and dry cleaner. Finally, I evaluated the extent to which the BZA treated this class of enterprises differently from similar institutions. Assuming that land uses of similar intensity should be granted permits at the same rate, the comparison should reveal the presence of any unspoken bias.<sup>90</sup>

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*cation: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 742 (1993). Such opinions reflect one of the fundamental beliefs that underlie Euclidean zoning—specifically, that commercial activity creates social decay. As Richard Chused argued in a recent paper, the men who championed zoning in the early years of the twentieth century were “positive environmentalists.” Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 601 (2001). These men argued that the chaotic swirl of urban life—namely, the mixture of residential, commercial, and industrial land uses—eroded decent behavior and caused disease. *Id.* at 601–02. Progressives to the core, reformers like Edward Bassett and Frederick Law Olmsted determined that changing the physical backdrop of a community from a jumble of seemingly incompatible uses to an all-residential model would cultivate a renewed moral vigor and improve the structure of peoples’ lives. *See id.* at 598–602.

87. *See, e.g.*, John Fritze, *City Eyes Late Night Licensing*, BALT. SUN, Apr. 29, 2008, at 3B (equating fast food restaurants with loitering and crime); Curt Yeske, *Dunkin’ Donuts Gets Approval to Open Up Shop*, TIMES (Trenton, N.J.), Nov. 16, 2007, at A3 (reporting that a town imposed anti-loitering measures on a donut shop).

88. *See* Nancy Bowman, *Cyber Cafe Set for Historic Tipp Site*, DAYTON DAILY NEWS, Dec. 20, 2007, at Z9 (reporting that board members raised concerns about loitering at permit hearing for cyber café).

89. *The Illinois Law Review* and the author have tables on file detailing the permits considered over the nine-year period, the category of business each permit implicates, and whether that permit was granted or denied by the New Haven BZA.

90. It is possible, however, that the BZA could reject black business applicants at a lower rate and still harbor bias. If, for example, black businesses present only the most meritorious claims, while more high-end applicants submit hundreds of groundless applications, the data could hide evidence of bias. *Cf.* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 36 (1984) (predicting that trial rates are influenced by local decision standards and the parties’ uncertainty in estimating case quality). Fortunately, however, both pools of applicants examined in this study contained requests of varying sophistication and varying merit.

The results of this admittedly small-scale study reveal a striking difference between the fate of the “black” businesses and the fate of other commercial uses. The city records show that over a nine-year period, the New Haven BZA approved nearly eighty percent of all land use applications submitted by the business community as a whole,<sup>91</sup> but only granted sixty-eight percent of requests from commercial uses that populate African-American neighborhoods—a large, statistically significant difference.<sup>92</sup> Take, for instance, applications submitted by corner groceries, the most numerous of the small-scale service enterprises in this study. These applications fared dreadfully in the regulatory gauntlet; the BZA approved only fifty-seven percent of requests from entrepreneurs attempting to open or expand neighborhood convenience stores.<sup>93</sup> Viewed alone, the low rate of success suggests that claims of bias against black enterprise have merit. The BZA routinely denied small-scale service entrepreneurs the basic opportunity to test their business models in the arena of competition.

Comparing all “small-scale service enterprises” against the undivided mass of “total commercial applicants,” however, may manufacture overbroad and misleading conclusions. After all, the “total applicants” category includes dozens of requests from large companies looking to install new signs or dormer windows—activities that are most likely to receive the blessing of the BZA because they inflict few externalities on neighbors.<sup>94</sup> A richer, more complex analysis would measure convenience stores and their ilk against land uses of similar character and intensity.

In the zoning context, professional offices are arguably the kind of use most analogous to the service-related enterprises accessible to black entrepreneurs. Both increase traffic, create sporadic parking shortages, operate long hours, and attract outsiders to the community. If, indeed, BZAs treat black enterprise with an even hand, we would expect that uses like hair-braiding salons find comparable success to businesses like chiropractors’ offices. This assumption, however, runs aground on the facts. Throughout the permitting process, skill-intensive businesses ex-

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91. This finding accords with previous studies conducted on local BZAs. See, e.g., Joseph H. Bornong & Bradley R. Peyton, *Contemporary Studies Project, Rural Land Use Regulation in Iowa: An Empirical Analysis of County Board of Adjustment Practices*, 68 IOWA L. REV. 1083, 1279 (1983) (finding that the statewide average approval rate for area variances exceeded ninety-one percent); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 320 (1962) (reporting that the BZA in Lexington, Kentucky approved seventy-five percent of variance requests); Owens, *supra* note 81, at 308–09 (finding seventy-two percent of variance requests approved according to a survey of 441 North Carolina jurisdictions); Sampson, *supra* note 78, at 893. Unlike these studies, my examination of New Haven recorded all decisions by the BZA, not just the decisions on variance requests.

92. See *supra* note 89.

93. See *supra* note 89.

94. Applicants that exposed neighbors to few externalities experienced tremendous success with the BZA. The grant rate for additions to residential homes, for example, was approximately ninety-seven percent. See *supra* note 89.

perience much greater success than their working-class equivalents, even though both subject neighbors to the same brand of irritants. The data from my research shows that the New Haven BZA accepted over eighty-five percent of requests from white-collar firms, in contrast to the sixty-eight percent approval rate for small, personal service ventures.<sup>95</sup> No matter how the numbers are manipulated, the result always remains the same—the class of businesses favored by black merchants face widespread obstacles in obtaining land use permits.

Of course, the defenders of the BZA could argue, plausibly, that the approval gap between professional and blue-collar applicants arises for nonpernicious reasons. Arguably, podiatrists and lawyers have a more sophisticated understanding of the zoning process, and may gain the support of local zoning officials by locating their offices in areas that mitigate externalities.<sup>96</sup> Professional offices, after all, rarely occupy the same city blocks as second-hand stores. To test the hypothesis that “location effects” may account for the troubles of black business, my study assessed the fate of small-scale service firms against the success of storefront churches in the zoning permit process. The animating theory behind this comparison is that storefront churches and the types of businesses accessible to black entrepreneurs frequently attempt to locate in similar hard-scrabble areas. Of equal import, houses of worship—like small retail firms—often make less than ideal neighbors.<sup>97</sup> Both uses produce negative secondary effects in the form of noise, traffic, and sanitation issues.<sup>98</sup> Despite the similarities, comparing the success of churches against personal-service firms suggests, again, that local zoning officials devalue black enterprise. Zoning permit applications from exotic religious denominations like the Church of the New Beginnings, the Third Star of Jacob Christian Church, and the Church on the Rock (all located in heavily African-American neighborhoods) had a seventy-eight percent approval rate<sup>99</sup>—ten full percentage points higher than the approval rate for “black” business applications.

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95. See *supra* note 89.

96. There is also some thought that city planners and zoning officials have become overly sensitive about allowing commercial and institutional uses in low-income neighborhoods. See, e.g., Dubin, *supra* note 86.

97. See Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 864 (2007).

98. See Marci Hamilton, *Struggling with Churches as Neighbors: Land Use Conflicts Between Religious Institutions and Those Who Reside Nearby*, FINDLAW, Jan. 17, 2002, <http://writ.news.findlaw.com/hamilton/20020117.html> (arguing that undue influence of religious lobbyists has influenced federal land use policy). There is some debate over the role that small storefront churches play in urban African-American neighborhoods. Tracey Meares has argued that the black church is a singularly important community institution in hard-scrabble areas. See Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 701–04 (1998). Yet, some recent scholarship suggests many churches in poor urban neighborhoods are attended or led by people who do not live in the community but who worship there because of cheap rents. See OMAR M. MCROBERTS, *STREETS OF GLORY: CHURCH AND COMMUNITY IN A BLACK URBAN NEIGHBORHOOD 1* (2005).

99. See *supra* note 89.

Although the results of a single, small-scale study can hardly be considered determinative, the data generated here lend some support to the conclusion that zoning boards possess some unspoken hostility toward the types of businesses that attract African-American entrepreneurs. Again and again, land use permit applications from small service-oriented enterprises floundered in front of the New Haven BZA. Chiropractors' offices, architectural firms, and colorful religious congregations all experienced greater success than the businesses that pervade central cities and inject life into the black community. Thus, it seems that the regulatory choices of local zoning officials further undermine the vitality of inner-city black business. Black entrepreneurs not only shoulder disproportionately larger permit fees than their white competitors, they also must face zoning officials who do not value the types of businesses they seek to open.

### C. *The Segregation of Uses*

Perhaps the true Gordian Knot constraining African-American enterprise lies in the basic architecture of American zoning law; namely, ongoing efforts by city planners to purge commercial uses from residential areas. Recall that zoning, at its core, allows regulators to divide a municipality into districts and designate permitted uses for each area.<sup>100</sup> Since the 1920s, city planners have routinely employed this power to create wholly separate spaces for industrial, commercial, and residential uses under the theory that such activities generate reciprocal nuisances.<sup>101</sup> Although the partition of land into these "single-use" districts deviates sharply from the tradition of the multi-use neighborhood,<sup>102</sup> zoning remains immensely popular with homeowners across the American landscape; proponents insist it separates smoke-belching factories from

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100. See ELLICKSON & BEEN, *supra* note 61, at 86 (stating that a zoning ordinance "typically defines the boundaries of various zones, and the substance of the controls differs from zone to zone"); 1 ZONING AND LAND USE CONTROLS § 1.03[2] (Patrick J. Rohan ed., 1987); Garnett, *supra* note 12, at 4 ("Euclidean zoning . . . reflects a longstanding value judgment that the appropriate way to order different land uses is to separate them from one another into single-use zones.")

101. Many books and articles have dissected the historical moment that gave rise to the spread of such "single-use" zones. See, e.g., Lewyn, *supra* note 13, at 261–64 (providing a "Brief History of Zoning"); Nelson, *supra* note 13, at 836–42 (outlining the history of American zoning); Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1821 (2007) (discussing the history of zoning). Zoning, academics reveal, arose during the 1920s in a period of rapid urban growth and industrialization. In cities and towns around the country, the specter of unregulated factory pollutants and unfettered apartment construction triggered waves of anxiety among politicians and their constituents. Homeowners, we are told, worried that inappropriate developments would sully the character of their neighborhoods and decrease the value of their property. In this climate of fear and instability, zoning offered a systematic method for stabilizing land values and preventing the spread of tenements and industries into residential neighborhoods.

102. For a thorough treatment of old multi-use neighborhoods, see generally RAE, *supra* note 2 (analyzing New Haven, Connecticut before the adoption of zoning).

neighborhood playgrounds, contains the expansion of unwanted retail stores, and protects property values in single-family housing districts.<sup>103</sup>

Academics, however, regard single-use zoning with somewhat less enthusiasm. In fact, scholars of all political stripes agree that the implementation of exclusively residential districts has spawned a rather monstrous variety of unintended consequences. Critics from the law and economics tradition regularly attack restrictive zones, claiming that they distort the market for land and divert property from its optimal use.<sup>104</sup> Left-leaning thinkers, for their part, argue that American land use policy degrades the natural environment,<sup>105</sup> creates stultifying communities,<sup>106</sup> and increases the rate of obesity.<sup>107</sup> In the discussion that follows, I argue that the continued survival of single-use zoning has also played a prominent role in the stagnation of African-American enterprise.

### 1. *Single-Use Zoning vs. Black Business Localism*

As we have seen, single-use zoning demands that city planners attempt to eliminate all mode and manner of commerce from local neighborhoods. This peculiarity of American zoning law dampens enthusiasm for entrepreneurship in the inner city because it forces budding entrepreneurs to locate outside of their immediate residential communities, a process that violates deeply held cultural norms in the black business community.

In order to fully understand this argument, it helps to know a bit about the ideological threads that hold together African-American business in urban areas. Note, first, that study after study shows black entrepreneurship does not operate as textbooks describe. While it is widely assumed in business schools that the primary goal of business is to “maximize economic capital”<sup>108</sup> and “make money,”<sup>109</sup> scholars of the urban

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103. As has been argued elsewhere, it seems that municipalities originally adopted comprehensive land use schemes as a rational response to the uncertainty of the age. See Stephen Clowney, Note, *A Walk Along Willard: A Revised Look at Land Use Coordination in Pre-Zoning New Haven*, 115 *Yale L.J.* 116, 128–36 (2005).

104. See, e.g., SIEGAN, *WITHOUT ZONING*, *supra* note 13, at 123–33 (arguing that zoning restricts the development of industry and curtails construction activity).

105. See, e.g., Patrick Gallagher, *The Environmental, Social, and Cultural Impacts of Sprawl*, 15 *NAT. RESOURCES & ENV'T* 219, 219–23 (2001); Jay Wickersham, *Jane Jacob's Critique of Zoning: From Euclid to Portland and Beyond*, 28 *B.C. ENVTL. AFF. L. REV.* 547, 557 (2001) (“By fostering or requiring low density development . . . Euclidean zoning is one of the great generators of suburban sprawl, with all of its environmental, economic, and social costs.”); see also ANDRES DUANY ET AL., *SUBURBAN NATION* 229–33 (2001); PETER KATZ, *THE NEW URBANISM* xii–xiii (1994).

106. See Lance Freeman, *The Effects of Sprawl on Neighborhood Social Ties*, 67 *AM. PLAN. ASS'N J.* 69, 70 (2001) (“[S]prawl reduces social capital primarily because it reduces opportunities for spontaneous social interaction.”).

107. See, e.g., Reid Ewing et al., *Relationship Between Urban Sprawl and Physical Activity, Obesity, and Morbidity*, 18 *AM. J. HEALTH PROMOTION*, Sept.–Oct. 2003, at 47, 54 (2003); Russ Lopez, *Urban Sprawl and Risk for Being Overweight or Obese*, 94 *AM. J. PUB. HEALTH* 1574, 1577 (2004).

108. Timothy K. Kuhner, *The Separation of Business and State*, 95 *CAL. L. REV.* 2353, 2384 (2007).

109. Gabrielle Kohlmeier, *The Risky Business of Lifestyle Genetic Testing: Protecting Against Harmful Disclosure of Genetic Information*, 11 *UCLA J.L. & TECH.* 1, 12 n.30 (2007).

core make the case that many African-American merchants are not primarily motivated by opportunities to enhance their economic standing.<sup>110</sup> Rather, much of these entrepreneurs' energy is consumed by attempts to anchor themselves within their respective ethnic communities and existing social networks.<sup>111</sup> Sudhir Venkatesh states, and others confirm, that black entrepreneurs "describe themselves as being woven together in a web of exchange based on highly personal connections."<sup>112</sup> The implication is that any entrepreneur who fails to embed himself in the local neighborhood cannot succeed. In practice, this means black businesspeople may prioritize nurturing the social and human capital of their communities—providing job training to former felons and bartering with indigent customers—over making a profit or creating personal wealth.<sup>113</sup> Though such behavior defies much orthodox thinking about entrepreneurship, the emphasis on cultivating alliances continues to have deep resonance in a world where reversals of fortune are common and instability remains the norm.<sup>114</sup>

Of immense importance for land use, urban sociologists and ethnographers also suggest that African-American entrepreneurs may ignore lucrative business opportunities if they are forced to operate outside of these closely cultivated networks of friends, creditors, and potential customers. Black businesspersons "display a clear preference to remain with their current peers. This preference can lead them away from new entrepreneurial waters. In particular . . . *the men sometimes forgo opportunities to expand, particularly when this would necessitate severing local*

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[http://lawtechjournal.com/articles/2007/05\\_071230\\_kohlmeier.pdf](http://lawtechjournal.com/articles/2007/05_071230_kohlmeier.pdf); see also ROBERT CHARLES CLARK, CORPORATE LAW 678–79 (1986) (noting that it is widely assumed that "the general profit-maximizing purpose" motivates entrepreneurs); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1263 (2005) (noting that the goal of business firms is strictly profit-maximization).

110. VENKATESH, *supra* note 3, at 103; Brush et al., *supra* note 19, at 170–74 (describing the social mission of inner-city entrepreneurs).

111. VENKATESH, *supra* note 3, at 117; Brush et al., *supra* note 19, at 157 ("[Many businesses] survive and even prosper to the extent that they are socially embedded in their community. That is, they have good ties to their customers and other neighborhoods organizations and local people trust them . . .").

112. VENKATESH, *supra* note 3, at 102; see also Michael Hodge & Joe R. Feagin, *African American Entrepreneurship and Racial Discrimination: A Southern Metropolitan Case*, in THE BUBBLING CAULDRON: RACE, ETHNICITY, AND THE URBAN CRISIS 99, 112–13 (Michael Peter Smith & Joe R. Feagin eds., 1995) (discussing the belief among African-American business owners in Miami that success is tied to personal connections).

113. See Brush et al., *supra* note 19, at 161 (arguing that inner-city entrepreneurs "were more likely to say their goals were to provide jobs or create a quality work environment than to make a profit"); Jeffrey Robinson et al., *Exploring Stratification and Entrepreneurship: African American Women Entrepreneurs Redefine Success in Growth Ventures*, 613 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2007, at 131, 149 (observing that most African-American entrepreneurs defined success in terms of their ability "to provide employment and economic support for their . . . communities").

114. VENKATESH, *supra* note 3, at 105 ("Making adjustments in order to continue working with existing friends and associates seems a rational decision, given their belief that they need to remain in these local support networks to have any chance of staying afloat.").

*ties—for instance, they might decide against . . . opening a store outside [their neighborhood].*<sup>115</sup>

The hesitancy of entrepreneurs to leave local communities regardless of their resources and opportunities permeates both the backrooms of small firms and the boardrooms of “elite businesspersons.”<sup>116</sup> Allison Davis, a successful businesswoman from the South Side of Chicago, concedes that many African-Americans ignore promising opportunities if they cannot set up shop in their immediate neighborhood. She says, “[I]t’s a mental thing, really. And a lot of us get stopped by our fear. Say you got the mayor asking if we want a job out . . . [in] some white community. Yeah, there’s money, but we don’t trust it. . . . [Y]ou’re outside your own home, your community.”<sup>117</sup> She continued, “If [you fail], then what next? You don’t know nobody, you can’t just start looking for clients. White folks will never come to you. . . . [When you come back] folks around here wonder what your loyalty is. ‘Ain’t down with the community, no more?’ That’s what they be saying.”<sup>118</sup>

The current incarnation of American land use law makes no provision for these on-the-ground realities. City planners stubbornly insist on scrubbing the urban workaday world from residential districts; however, they consistently fail to acknowledge that single-use zoning compels budding black entrepreneurs to locate businesses outside of their established webs of trust. Take the example of Oklahoma City. In the heart of Oklahoma City—a typical sprawling Western city built upon an orderly street grid—a historic black neighborhood lies almost two miles from the nearest commercial zone.<sup>119</sup> Thus, a black entrepreneur seeking to start a new business would need to trek almost twenty blocks to open a corner store, laundromat, or car repair outfit. This arrangement, as we have seen, violates a core tenet of inner-city business—do not move outside the neighborhood. Forced by land use laws to choose between starting an enterprise in a distant neighborhood or struggling along on familiar turf, many African-Americans choose the latter course.

## 2. *Single-Use Zoning vs. Transportation Inequality*

Single-use zoning disadvantages black merchants in other related, but distinct, ways. As discussed above, single-purpose districts push residential and commercial uses into separate, and often remote, geographic

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115. *Id.* at 103 (emphasis added).

116. *Id.* at 145.

117. *Id.*

118. *Id.*

119. Using the City’s Zoning Map Locator, I measured the distance from the corner of 50th Street and North Kelley Avenue to the nearest commercial use. The zoning tool can be found at The City of Oklahoma City, Zoning Locator, [http://www.okc.gov/Planning/zoning/locator\\_intro.html](http://www.okc.gov/Planning/zoning/locator_intro.html) (last visited May 25, 2009).

areas.<sup>120</sup> This pattern of regulation, scholars agree, disrupts traditional walkable communities<sup>121</sup> and “virtually guarantees that the automobile will be crucial in accomplishing one’s daily business.”<sup>122</sup> One observer noted that, under a single-use zoning ordinance, “[n]ot only can you not visit your neighbor for a cup of coffee without getting into your car, but there isn’t a Starbucks within even a short car trip from your . . . home.”<sup>123</sup> Indeed, the stark segregation of uses creates almost total dependence on motor vehicle transportation for accomplishing even mundane tasks: buying groceries, seeing a movie, and transporting children to day care.<sup>124</sup>

The problem for the long-term health of black business is that so few African-Americans have access to transportation that can bridge the distance between residential and commercial zones. The data on car ownership in the United States, for example, reveals sharp divisions along racial lines. Nationally, twenty-four percent of black households do not own a car, compared with only seventeen percent of Latino households, thirteen percent of Asian-American households, and seven percent of white households.<sup>125</sup> Note, as well, that public transportation networks do little to overcome the spatial constraints imposed by single-use zoning. Most cities configure their bus routes to haul suburban

120. See Terry J. Tondro, *Sprawl and Its Enemies: An Introductory Discussion of Two Cities’ Efforts to Control Sprawl*, 34 CONN. L. REV. 511, 514 (2002) (defining “single-use zoning” as “the designation of separate land areas for different uses”).

121. See Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 331 (2000) (“[A]bsent a zoning variance, walkable traditional neighborhoods are [often] outlawed . . . because every activity demands a separate zone of its own; people cannot live within walking distance of shopping, and offices cannot be within walking distance of either.”); Silbaugh, *supra* note 101, at 1821 (“[S]ingle-use zoning has meant that, by definition, people cannot get everything that they need—work, housing, schools, and retail—within a tightly defined geographic area.”).

122. G.S. Kleppel, *Urbanization and Environmental Quality: Implications of Alternative Development Scenarios*, 8 ALB. L. ENVTL. OUTLOOK J. 37, 47–48 (2002). The history of this arrangement and its affect on individuals has been amply recounted elsewhere in the literature. Thus, I will not repeat others’ descriptions of the social and economic isolation experienced by the elderly, women, and low-income workers who find themselves trapped in unwalkable communities. See OLIVER GILLHAM, *THE LIMITLESS CITY* 8–26 (2002); Ibipo Johnston, *Location, Race, and Labor Force Participation: Implications for Women of Color*, in FED. HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., PUBL’N NO. FHWA-PL-97-024, WOMEN’S TRAVEL ISSUES: PROCEEDINGS FROM THE SECOND NATIONAL CONFERENCE 338, 339 (1996), [www.fhwa.dot.gov/ohim/womens/chap18.pdf](http://www.fhwa.dot.gov/ohim/womens/chap18.pdf); Elizabeth W. Markson and Beth B. Hess, *Older Women in the City*, in WOMEN AND THE AMERICAN CITY 124, 135 (Catharine R. Stimpson et al., eds., 1981); DONALD N. ROTHBLATT ET AL., *THE SUBURBAN ENVIRONMENT AND WOMEN* 171 (1979); Garnett, *supra* note 13, at 1198–1205. As mentioned elsewhere, this Article attempts to fill a gap that has gone unnoticed in the literature; academics have written little about the effect of the built environment on business health and even less on the particular struggles of minority entrepreneurs.

123. Tondro, *supra* note 120, at 514.

124. See Silbaugh, *supra* note 101, at 1818.

125. See Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L.J. 1183, 1190–91 (2004). It is not difficult to see why rates of car ownership diverge along racial lines: owning a car is an expensive proposition and black families tend to have fewer resources. Transportation costs eat up thirty-six percent of household expenditures in the lowest-income families, and fourteen percent of the outlays in the highest-income families. See SURFACE TRANSP. POLICY PROJECT & CTR. FOR NEIGHBORHOOD TECH., *DRIVEN TO SPEND: A TRANSPORTATION AND QUALITY OF LIFE PUBLICATION* 5, 10 (2000), <http://www.transact.org/PDFs/DriventoSpend.pdf>.

workers into the central city during morning rush hour and then ship them back to their “bedroom communities” in the evening.<sup>126</sup> These traditionally designed networks do little to address the transportation needs of African-Americans struggling to move about urban neighborhoods or access out-of-the-way retail centers.<sup>127</sup> Studies also show that poorly conceived route lines often force black commuters to transfer buses multiple times to reach their final destinations.<sup>128</sup> Transfers not only increase the duration of a merchant’s or shopper’s trip “but also the likelihood that something will go wrong along the way, causing a delay that can have disastrous consequences.”<sup>129</sup>

In this environment, it should be no surprise that black merchants lag so far behind their rivals. Without access to adequate transportation services, many African-Americans with innovative business ideas simply cannot reach the far-off enclaves where zoning allows commercial uses. Indeed, the academic literature is replete with statistical and anecdotal evidence supporting the notion that blacks forgo business opportunities because they cannot reach outlying commercial districts through traditional transportation networks.<sup>130</sup> Of course, some determined entrepreneurs may decide to walk long distances (often through bad weather) or hustle rides to reach commercial zones. Such resolve, however laudable, provides a weak antidote for the problems unleashed by single-use zoning, as relying on jerry-rigged transport schemes may ultimately prevent black businesspeople from maintaining steady hours and properly serving customers—a severe competitive disadvantage.

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Perhaps unsurprisingly, many funeral dirges have been written for black enterprise in inner-city communities. Commentators have spilled much ink explaining how increased competition from white merchants,

126. See Nicole Stelle Garnett, *The Road from Welfare to Work: Informal Transportation and the Urban Poor*, 38 HARV. J. ON LEGIS. 173, 184 (2001). For a brief description of the layout of public transit, see ANTHONY DOWNS, *STUCK IN TRAFFIC* 16–19 (1992) and Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 169–70 (1998).

127. See Robert D. Bullard et al., *Atlanta: A Black Mecca?*, in *THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY* 149, 156 (Robert D. Bullard ed., 2007) (detailing inadequacies of public transportation in Atlanta); Nancy D. Perkins, *Livability, Regional Equity, and Capability: Closing in on Sustainable Land Use*, 37 U. BALT. L. REV. 157, 168–69 (2008) (describing how public transportation fails inner-city minorities).

128. Garnett, *supra* note 126, at 185.

129. *Id.*; see also Hapgood & Getzels, *supra* note 32, at 17 (“Even where public transportation exists, it is noisy and crowded and lacking in clear route information.”); Steven Lee Myers, *Life Beyond the Subway Is Subject to Its Own Disruptions*, N.Y. TIMES, June 14, 1992, at 44 (describing the daunting commute bus riders in Queens face).

130. See Xavier de Souza Briggs, *More Pluribus Less Unum?: The Changing Geography of Race and Opportunity*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 17, 17–44 (Xavier de Souza ed., 2005); Robert D. Bullard et al., *Dismantling Transportation Apartheid in the United States Before and After Natural Disasters Strike*, 34 HUM. RTS., Summer 2007, at 2, 4–6 (2007); Garnett, *supra* note 126, at 177–80; Keith Ihlanfeldt, *The Spatial Mismatch Between Jobs and Residential Locations Within Urban Areas*, CITYSCAPE 219, 228 (1994), <http://www.huduser.org/Periodicals/CITYSCAPE/VOL1NUM1/ch11.pdf>; Jeremy R. Meredith, Note, *Sprawl and New Urbanist Solutions*, 89 VA. L. REV. 447, 458–59 (2003).

discriminatory FHA loans, and increased levels of urban violence have led to a structural weakening of black communities, black families, and black business. Although these insights remain immensely valuable, I have argued here that policymakers concerned about the future of inner-city business ignore land use issues at their peril. City planning regulations steal few headlines, but they have profound effects on the structure of communities. Zoning schemes, in particular, have caged the ambitions of black entrepreneurs in city centers. Land use fees, municipal zoning board decisions, and the general insistence on separating residential from commercial uses all impress unique and disproportionate harms on African-American merchants, making it difficult to find affordable business space in suitable locations. Throughout urban neighborhoods, “[p]rivate, sheltered, decent space is at a premium.”<sup>131</sup> There is, however, some good news for the merchants of the inner city; unlike social problems rooted in the currents of culture and history, the troubles that stem from zoning can be fixed swiftly by thoughtful and creative local governments.

### III. CURRENT EFFORTS TO REFORM THE LAND USE SYSTEM

The previous Part constituted the first attempt to identify how land use rules constrain African-American entrepreneurship in the urban core. The broader problems caused by zoning, however, have already received much attention. In the last three decades, legal scholars have developed a proud tradition of decrying the worst abuses of land use law and offering suggestions to mitigate the harms caused by zoning. It is no exaggeration to claim that there exist tens, if not hundreds, of proposals to fix the current zoning regime. At this juncture, it seems worth asking if these general reform proposals—applied in black neighborhoods—could help black entrepreneurs navigate the land use system. At the very least, a richer understanding of the strengths and weaknesses of current efforts to reorganize zoning law would assist scholars in fashioning new and more effective approaches to the land use problems of black neighborhoods.

Although the policy proscriptions advanced by scholars are numerous, I focus on four developments with the deepest scholarly support: (1) the movement to eliminate all zoning measures, (2) plans to allow home-based businesses, (3) the growth of street vending, and (4) increased neighborhood control of land use decisions. After kicking the tires and checking under the hood, I argue that the broad-based attempts to reorganize the land use system all have major shortcomings, which virtually ensure the real world condition of black entrepreneurs will not improve. More specifically, I contend that current plans to amend the zoning and planning apparatus share two recurring flaws: (1) they face opposition from homeowners concerned about the value of

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131. VENKATESH, *supra* note 3, at 170.

their property, and (2) they disregard the on-the-ground reality of African-American communities.

#### A. Rollback All Zoning Regulations

More than any other proposed reform, the sweeping deregulation of land use laws has the potential to transform the landscape of black business. Since the early 1980s, a vocal group of commentators has pushed municipalities to abolish the entire zoning system and replace it with a regulatory apparatus that relies solely on private covenants, nuisance lawsuits, and the invisible hand of the free market.<sup>132</sup> The common theme that emerges from this cluster of writings is that zoning distorts the natural allocation of land and permanently traps valuable property in unproductive uses.<sup>133</sup> Critics imply that if cities had the courage to eliminate land use regulation, individual property owners could put their land to its highest and best use, thereby creating more dynamic communities.<sup>134</sup>

The wisdom of this approach is firmly grounded in empirical evidence gathered in Houston, Texas, which is the only major American city that refuses to adopt zoning regulations. Most observers assert that, although Houston lacks a comprehensive web of regulation, land use patterns in the metropolitan area do not differ greatly from those in other American cities.<sup>135</sup> Of critical importance for this Article, the health of black business in Houston's deregulated environment seems especially robust. In 2001, *Black Enterprise* magazine studied ten large cities and found that Houston had the highest incidence of black self-employment—roughly, one in twenty-nine African-Americans owned a business.<sup>136</sup> Houston is also heralded for its low housing costs, lack of residential segregation, and vibrant entrepreneurial spirit—strengths that seem tied, at least in part, to the lack of zoning.<sup>137</sup>

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132. See, e.g., Orlando E. Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 261 (1984); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 31 (1981); Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 719 (1980); George Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447, 485 (1981); Nelson, *supra* note 13, at 879–80.

133. See Nelson, *supra* note 13, at 849–50 (“[Z]oning restrictions kept valuable suburban land bottled up in less productive uses.”).

134. One of the more thorough proposals for widespread deregulation comes from the proponents of so-called enterprise zones. Inspired by the success of deregulated Hong Kong, advocates of the enterprise zone concept suggest that governments should eliminate all wage controls and planning laws in the most impoverished areas. See BUTLER, *supra* note 17, at 129–60; Michael Allan Wolf, *Enterprise Zones: A Decade of Diversity*, 4 ECON. DEV. Q., Feb. 1990, at 3, 3–4.

135. Houston is not without detractors. Naysayers will point out that the city has relatively high levels of traffic congestion, environmental degradation, and sewer issues. See, e.g., JOE R. FEAGIN, *FREE ENTERPRISE CITY: HOUSTON IN POLITICAL-ECONOMIC PERSPECTIVES* 40–41 (1988).

136. See Monique R. Brown & David A. Padgett, *Reader's Choice: 10 Best Cities for African-Americans*, BLACK ENTERPRISE, July 2001, at 74.

137. See, e.g., Edward L. Glaeser et al., *REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON* iv (Jan. 5, 2006), [http://www.ksg.harvard.edu/rappaport/downloads/housing\\_](http://www.ksg.harvard.edu/rappaport/downloads/housing_)

Although a nonzoning legal regime would bestow real and lasting benefits on black populations, attempts to revoke established zoning laws seem destined for failure. Quite simply, too many entrenched interests support the current land use system to expect any large-scale rollback of zoning laws. Take landowners, for example. Encouraged by government policies, middle-aged homeowners have, on average, more than six times as much invested in their houses as in other, more liquid, financial assets.<sup>138</sup> The risk that these households face is enormous—a sudden, unexpected change in neighborhood character could send home values plummeting and destroy years of hard-earned home equity. It is a situation comparable to having all of one's stock sunk in a single lumbering and undiversified company.<sup>139</sup> Zoning laws, however, enable homeowners to ease the perils of homeownership; land use controls give individuals a legal tool to resist any developments that threaten local property values.<sup>140</sup> Zoning becomes, in effect, a crude form of home-equity insurance that may boost the average home's value by almost ten percent.<sup>141</sup> It seems relatively certain that homeowners—the most politically powerful group in any jurisdiction—will fight tooth and nail to prevent the rollback of zoning, even if such a measure would benefit the community as a whole.<sup>142</sup> Although less sympathetic than property holders, politicians, too, have little motivation to jolt the system. It is a somber fact that mu-

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regulations/regulation\_housingprices.pdf (finding that land use controls increase home prices); Richard K. Green, *Land Use Regulation and the Price of Housing in a Suburban Wisconsin County*, 8 J. HOUSING ECON. 144, 158 (1999) (arguing that land use regulations “tend to fall more heavily on lower income households than they do on anyone else”); Stephen Malpezzi et al., *New Place-to-Place Housing Price Indexes for U.S. Metropolitan Areas, and Their Determinants*, 26 REAL EST. ECON. 235, 263 (1998) (describing how regulations drive up “quality adjusted” rents and housing prices); Janet Furman Speyrer, *The Effect of Land-Use Restrictions on Market Values of Single-Family Homes in Houston*, 2 J. REAL EST. FIN. & ECON. 117, 125 (1989) (finding that, controlling for relevant variables, housing prices are higher in Houston neighborhoods with restrictions similar to zoning laws).

138. See Steven F. Venti & David A. Wise, *Aging and the Income Value of Housing Wealth*, 44 J. PUB. ECON. 371, 374 (1991).

139. See William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's Privatizing the Neighborhood*, 7 GEO. MASON L. REV. 881, 885 (1999).

140. See Lee Ann Fennell, *Homes Rule*, 112 YALE L.J. 617, 634–35 (2002) (reviewing WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESES: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)).

141. See Newman F. Baker, *Zoning Legislation*, 11 CORNELL L.Q. 164, 169 (1926) (“Often zoning increases the value of the property concerned. To illustrate—if a residence district is set aside by a zoning regulation, the exclusion of the business usually has the effect of increasing the value of the property for residential purposes.”); Abraham Bell and Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 2005–09 (2000) (discussing home equity insurance); William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317, 318 (2004) (explaining that Albert Breton first argued zoning is a rudimentary form of home equity insurance); Malpezzi, *supra* note 137, at 224–31 (determining that land use regulation raises housing prices); Speyrer, *supra* note 137 (finding that zoning generally boosts home values by almost ten percent); Edward Glaeser & Joseph Gyourko, *Zoning's Steep Price*, REGULATION, Fall 2002, at 29–30 (empirically linking high housing prices to excessive zoning regulation).

142. For a delightful example of a small group of risk averse homeowners fighting a proposed development, see Mark Singer, *The Haves and the Haves*, NEW YORKER, Aug. 11, 2003, at 56 (detailing how residents of an affluent Connecticut town fought an experienced developer attempting to construct a world class golf resort).

nicipal governments benefit from a kaleidoscope of kickbacks and quid pro quos under a typical zoning regime.<sup>143</sup> Thus, political realities reduce efforts to eliminate zoning to little more than scholarly vapor. Academics and politicians concerned about black business would better serve their cause by focusing on smaller, more attainable solutions.

### B. *Allow Home Businesses*

In other circles, scholars argue that allowing a handful of low-impact commercial uses into residential neighborhoods could help alleviate some of the negative consequences that zoning law inflicts on entrepreneurs.<sup>144</sup> More specifically, advocates of this approach suggest that permitting merchants to operate small, home- or apartment-based enterprises would sharply lower the cost of starting a business, boost the “efforts of low-income individuals to earn an honest living,” and help parents find a better balance between the competing demands of family and work.<sup>145</sup> Scholars also emphasize that, unlike proposals to rollback all zoning rules, welcoming greater numbers of in-home day care centers and dot-coms into residential areas would not require a “radical restructuring of American land use law.”<sup>146</sup>

The successful deregulation of in-home entrepreneurship would, almost certainly, ease the restraints on African-American merchants; however, even the most devoted supporters of home businesses recognize the pitfalls and limitations of this alternative to single-use zoning. First, any attempt to loosen the restraints on home-based enterprise would, again, incur resistance from neighboring homeowners.<sup>147</sup> Within a residential community, conglomerations of home businesses would undoubtedly amplify negative externalities, such as “customer visits that increase traffic or delivery trucks that wake napping toddlers,” and likely depress property values.<sup>148</sup> Second, and of critical importance for African-American enterprise, even the most liberal home business regula-

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143. See WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 139 (1995) (making the case that special interests easily distort local regulation); Ellickson, *Alternatives*, *supra* note 13, at 702 (“Studies have documented the lawlessness of zoning variance decisions in most communities.”).

144. See, e.g., JACOBS, *supra* note 13, at 206 (discussing how neighborhoods should create a mixture of uses “in accord with the district’s character”).

145. Garnett, *supra* note 13, at 1237; Francesca Ortiz, *Zoning the Voyeur Dorm: Regulating Home-Based Voyeur Web Sites Through Land Use Laws*, 34 U.C. DAVIS L. REV. 929, 943–45 (2001); see also Patricia E. Salkin, *Zoning for Home Occupations: Modernizing Zoning Codes to Accommodate Growth in Home-Based Businesses*, 35 REAL EST. L.J. 181, 188–95 (2006) (offering suggestions on ways to change zoning laws to encourage home-based businesses); Solomon, *supra* note 35, at 213–14 (arguing that cities should lift restrictions on home based businesses); Drew Lucas, Comment, *There Is a Porn Store in Mr. Roger’s Neighborhood: Will You Be Their Neighbor? How to Apply Residential Use Restrictive Covenants to Modern Home Businesses*, 26 CAMPBELL L. REV. 123, 124 (2004) (arguing that home businesses are overregulated).

146. Garnett, *supra* note 13, at 1240.

147. See *supra* text accompanying notes 138–42.

148. Garnett, *supra* note 13, at 1231.

tions would not permit high-intensity uses like automobile repair, warehousing, convenience stores, food processing, and wholesale trade—the sectors of the economy where black firms have gained a significant toehold.<sup>149</sup> Laws designed to permit home businesses, if they overcome the objections of local homeowners, would benefit upscale uses like technology companies and law offices rather than the uses that draw black merchants.<sup>150</sup>

### C. *Encourage Street Vending*

Other critics of municipal zoning suggest that cities should legalize and regulate street vending. Street vending—the act of selling goods like prepared food, clothes, or videotapes from sidewalk kiosks or carts—has the potential to greatly expand entrepreneurship in poor black communities.<sup>151</sup> Street vending is, almost certainly, the most accessible path to business ownership. Sidewalk merchants do not pay “rent, utilities, wages, [or] taxes,”<sup>152</sup> and they can more easily avoid the onerous building codes, environmental regulations, and health standards that often stifle the growth of small businesses.<sup>153</sup> With little overhead, sidewalk merchants can charge less than their competition and increase sales. The recent history of Mexico illustrates the benefits of nurturing a robust culture of street peddling. In Mexico City alone, as many as 200,000 entrepreneurs have started small businesses that sell goods from sidewalk stalls.<sup>154</sup>

In addition to enlarging the pool of potential entrepreneurs, street hustling may also help workers learn to operate larger businesses in the formal economy. According to this theory, as vendors gain business know-how and accumulate a network of industry contacts, they will move from roadside stands into more permanent locations that can house bigger stocks of inventory and serve more customers.<sup>155</sup> Gregg Kettles, a leading authority on street vending, has confirmed that sidewalk selling routinely allows some street merchants to “get a grasp on the bottom rung of the ladder of economic success.”<sup>156</sup>

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149. For example, Tampa, Florida permits sewing, weaving, and washing businesses, but excludes any business like auto-repair or welding. TAMPA, FLA., CODE OF ORDINANCES § 27-131(1), (9) (1999). See also HOUSE-SOREMEKUN, *supra* note 7, at 8 (discussing sectors of the economy where black businesses will grow in the future); Suggs, *supra* note 3, at 492 (same).

150. See Garnett, *supra* note 13, at 1208 (stating that many zoning codes allow professional offices to operate in residential offices, however, most “prohibit nonprofessionals from doing so”).

151. Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMP. L. REV. 1, 6 (2004).

152. See Austin, *supra* note 36, at 2124.

153. PHILIP MATTERA, OFF THE BOOKS: THE RISE OF THE UNDERGROUND ECONOMY 4 (1985).

154. Kettles, *supra* note 151, at 6.

155. See Austin, *supra* note 36, at 2127 (“[O]ne justification for black street vending is that it is a step on the road to more successful formal black businesses.”).

156. Kettles, *supra* note 151, at 26.

Although the legalization of street vending has the potential to transform entrepreneurship in low-income communities, such peddling faces consistent opposition from an organized and powerful political group—merchants who retail products from privately owned buildings.<sup>157</sup> Storefront entrepreneurs, who make significant contributions to tax and employment rolls, routinely complain that street enterprises siphon dollars away from their places of business.<sup>158</sup> Store-based merchants also grumble that sidewalk sellers appropriate public spaces to the detriment of the larger community. “Their presence effectively turns recreational spaces, alleys, and other thoroughfares into workplaces.”<sup>159</sup> Some of that work, like performing oil changes, exposes children and other passersby to hazardous waste material.<sup>160</sup> Unfortunately for low-income entrepreneurs, the arguments advanced by storefront merchants have carried the day. From New York to California, vending remains either illegal or hyperregulated, calling into question the viability of street peddling as a long-term solution to the problems of black businesses.<sup>161</sup>

Some scholars suggest that African-American entrepreneurs should ignore local land use regulations and engage in illegal street vending as a form of civil disobedience.<sup>162</sup> Although this argument is not without merit, proponents of “off-the-books” work fail to realize that, over time, illegal vending exposes African-Americans to unnecessary safety hazards and hurts black neighborhoods. Capital accumulated through illegal work does not enable an individual to make a down-payment on a home, buy stocks, or otherwise pursue socially legitimate activities.<sup>163</sup> The threat of detection and punishment also looms; in New York, individuals caught vending without a license lose their merchandise and face steep fines and court fees.<sup>164</sup> Finally, the task of “having to mete out the law” when a customer shoplifts or a dispute arises over pricing may expose many off-the-book workers to individuals well-acquainted with violence and physical intimidation.<sup>165</sup> To sum up, any calculation of the full costs and benefits of illegal street vending should steer black entrepreneurs and legal academics toward policies that promote legitimate, legal enterprise.

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157. *Id.* at 27–28.

158. See FRIEDRICH SCHNEIDER & DOMINIK H. ENSTE, *THE SHADOW ECONOMY* 159 (2002) (discussing competition between legitimate stores and street businesses); Raffaele De Grazia, *Clandestine Employment: A Problem of Our Times*, in *THE UNDERGROUND ECONOMY IN THE UNITED STATES AND ABROAD* 29, 37 (Vito Tanzi ed., 1982) (same).

159. VENKATESH, *supra* note 3, at 90.

160. *Id.*

161. See Kettles, *supra* note 151, at 26.

162. See Austin, *supra* note 36, at 2119–21.

163. VENKATESH, *supra* note 3, at 386–87 (detailing the challenges of operating in the black market).

164. Austin, *supra* note 36, at 2129; see also SCHNEIDER & ENSTE, *supra* note 158, at 159 (2002) (“[A]ll the knowledge the individual has gathered automatically becomes worthless when he is discovered . . .”).

165. VENKATESH, *supra* note 3, at 382.

*D. Promote Neighborhood Control*

The final land use reform that could, potentially, boost black entrepreneurship calls for devolving the zoning power from city governments to neighborhood organizations.<sup>166</sup> Advocates of this program stress that when land use decisions are made at the municipal level, planners often ignore the localized needs of block-level areas.<sup>167</sup> A better land use system, so the argument goes, would rest the machinery of zoning with a multiblock-level collective entity, such as a neighborhood board, enabling local residents to cater to the unique land use needs of their area and produce greater varieties of public goods.<sup>168</sup> To illustrate, imagine a black neighborhood in the urban core that gained independent control over its land use decisions. It could, conceivably, provide space for all of the entrepreneurial uses that have traditionally offended the tastes of city planners—day care centers, funeral parlors, fortune-tellers, barbershops, and immigrant cooperatives—or increase the amount of land devoted to multifamily apartments.

Although shifting the locus of the zoning power toward local groups could remove many obstacles that dull the commercial energy of black communities, there are reasons to believe that such a plan will never gain traction in city halls and state legislatures.<sup>169</sup> First, as a political matter, it may be difficult to wrest control of zoning and planning responsibilities away from city governments. Zoning, after all, allows city officials to extract significant payments from developers in exchange for land use permits and other entitlements.<sup>170</sup> These concessions, which fund park maintenance, road construction, and other infrastructure projects, make land

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166. See, e.g., GEORGE LIEBMAN, *THE LITTLE PLATOONS* 70–73 (1995); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 77 (1998); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 337 (1993) [hereinafter Liebmann, *Devolution*]; George W. Liebmann, *The Modernization of Zoning: Enabling Act Revision as a Means to Reform*, 23 URB. LAW. 1, 2, 17 (1991); Nelson, *supra* note 13, at 828–29.

167. See Liebmann, *Devolution*, *supra* note 166, at 343–44 (“The ability of existing neighborhoods to adjust to changed demographic patterns has been constrained by zoning, which also has resulted in an imposed uniformity precluding neighborhoods from enriching their character by adding stores and other convenience uses . . .”).

168. See Ellickson, *supra* note 166, at 83.

169. As a result of free-rider problems, devolving zoning power to local institutions would, almost certainly, require state legislatures to enact some sort enabling legislation. Although details vary between proposals, most scholars argue that the enabling acts should authorize the formation of a neighborhood zoning commission if the owners of a supermajority of the property value in the designated area agree to the plan. See generally *id.* (discussing formation procedures and the allocation of votes).

170. See Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 739 (2007); see also Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1573–76 (2006) (arguing that the exactions process often requires newcomers to pay for goods that existing residents received for free); Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1744–47 (1988) (charging that exactions lead to government rent-seeking behavior). But see Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & Pol. 451, 465–70 (2005) [hereinafter Reynolds & Ball, *Public Sphere*] (discussing the move by some states toward legislative, nondiscretionary fees).

use regulations enormously popular with elected officials.<sup>171</sup> It seems difficult to imagine that a city councilperson or planning department would ever relinquish such a flexible and discretion-laden bargaining tool without a fight. Second, divorcing the zoning power from other municipal functions has the potential to increase the prevalence of externalities in the land use process.<sup>172</sup> Neighborhood zoning boards would have few incentives to consider how their actions impact the welfare of persons in nearby communities.<sup>173</sup> Parochial land use boards could, quite easily, veto developments that have citywide benefits or approve construction that has negative spillover effects. Third, there is a real concern that local, block-level institutions may lack the planning expertise to make informed decisions about zoning policy. In a rapidly deteriorating inner-city neighborhood, it seems unlikely that many individuals will have the experience or qualifications necessary to lead a zoning board. A purported lack of local expertise motivated residents of East Palo Alto, a majority black district near San Francisco, to protest the incorporation of the area—some residents, church leaders, and elected officials argued that East Palo Alto lacked “sufficient professional expertise within the community to ensure competent self-government.”<sup>174</sup>

A close examination of the land use system and its alternatives helps explain why single-use zoning maintains its hold on nearly every city and town across the county. First and foremost, modern zoning rules have the firm backing of homeowner groups, who seek to maximize the value of their property by preventing the spread of unwanted and unhealthy uses. And, second, reform proposals often ignore the ambitions of the individuals most likely to support zoning reform—minority and low-income workers.<sup>175</sup> Along these lines, any successful attempt to improve the conditions of black entrepreneurship should both acknowledge the legitimate concerns of homeowners and reckon with the particular spatial needs and culture of inner-city businesspeople. Otherwise, meaningful change is unlikely to be forthcoming.

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171. See Reynolds & Ball, *Public Sphere*, *supra* note 170, at 472 (noting that exactions are of “enormous popularity with . . . local governments”).

172. See Fischel, *supra* note 139, at 899–902 (discussing transaction costs of devolving zoning power).

173. This is a perennial problem with zoning. Local control causes problems when a proposed use affects areas beyond local borders. See ELLICKSON & BEEN, *supra* note 61, at 875–87.

174. Anjur J. Goel et al., *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker Than Brown*, 23 HARV. C.R.-C.L. L. REV. 415, 420 (1998).

175. In a series of votes on zoning in Houston, seventy to seventy-two percent of low-income African-American voters cast their ballots against increased land use regulation. In contrast, only forty-three percent of middle-income whites voted against zoning. Siegan, *Non-Zoning*, *supra* note 13, at 139–40.

## IV. AN ALTERNATIVE APPROACH

With these lessons in mind, this Article now presents a new, more practical plan to resolve the land use needs of black entrepreneurs. In the pages that follow, I propose a legal structure that would restore vibrancy to African-American enterprise by turning empty residential buildings into commercial space. I refer to this initiative as the Vacant and Abandoned Land Transfer (VALT) program. I argue, in a nutshell, that abandoned buildings that fall under the control of municipal governments should be de-zoned and conveyed to local entrepreneurs. This approach has several firm advantages. First, the deregulated land would open acres of space for black entrepreneurs to transform crumbling houses into streetscapes full of stores, bars, and small restaurants. Second, focusing on abandoned buildings would not require a sweeping overhaul of the land use machinery, but only compel legislators to tweak a tiny piece of the existing system. Finally, I put forth that unlike other revitalization projects, VALT programs will unite the interests of all parties concerned with the fate of the urban core: local governments, home owners, and the business community.

A. *The Architecture of VALT Programs*

Before discussing the potential strengths of VALTs, it may be helpful to briefly explain the nuts and bolts of the program. How, exactly, will cities deregulate vacant government-owned land and transfer abandoned buildings to motivated entrepreneurs? As an initial matter, municipalities would need to create a legal framework to oversee the handover of any land. Officials might configure VALTs as separate agencies within the existing structure of municipal government or, perhaps, bring them to life as independent public corporations.<sup>176</sup> Though supporters of the VALT program should remain free to propose any governance structure that fits local needs, organizing land transfers under the authority of an independent corporate entity seems most advantageous. A single public corporation, rather than a small flotilla of government-run agencies, could most efficiently convey title to abandoned properties and manage regional needs,<sup>177</sup> especially in the jurisdictions where a series of

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176. Cities interested in starting a VALT could consult the structure of Land Banks for guidance. These nonprofit organizations have traditionally helped cities assemble land and conserve environmentally sensitive open space. Land Banks are chartered by state statute and organized as “independent corporate entit[ies] possessing [their] own powers.” Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 140, 158 (2005); see also GA. CODE ANN. § 48-4-61(a) (West 2008); MO. REV. STAT. § 92.875 (2008). As independent corporations, Land Banks have bylaws, charters, and boards of directors. See Matthew J. Samsa, Note, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Redevelopment*, 56 CLEV. ST. L. REV. 189, 221 (2008).

177. See A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 557 (stating that efficiency is the “classic reason” given for creating a public corporation instead of an agency).

separate but overlapping government bodies—the city, the county, the school board—own abandoned buildings.<sup>178</sup>

The VALT programs would then engage in three core tasks. First, they would set out to acquire a city's abandoned property. The project envisions that state-level enabling legislation would give VALT programs the muscle to take ownership of all properties that escheat to the government through tax foreclosure proceedings. Every year, thousands of individuals default on their property tax obligations and abandon their homes. Many of these negligent landowners flee the taxing jurisdiction to avoid debt collection.<sup>179</sup> Consequently, to recoup lost revenue, a city may have little choice but to enforce its tax liens and take possession of vacant buildings.<sup>180</sup> This Article advances the idea that VALT programs should automatically take control of all such forfeited land. Although, at first glance, the scope of the program may give one pause, legal precedent already exists for such a move. A handful of states currently grant Land Banks—nonprofit organizations designed to conserve environmentally sensitive open space—the authority to manage property acquired through tax foreclosures.<sup>181</sup> Similar statutory clout could be granted to VALT programs, allowing for control over abandoned land in inner-cities.

After asserting control over government-owned land, VALTs would then work with local legislative bodies to dezone the vacant residential buildings intended for commercial use. Of vital importance for the feasibility VALTs, the authority to deregulate property falls squarely within the scope of a municipality's legal power. Under state zoning legislation, city legislatures have broad power to transform residential spaces into commercial zones.<sup>182</sup> They may, for example, amend zoning maps to increase the amount of space devoted to commercial uses,<sup>183</sup> or modify the regulations that govern individual parcels of land.<sup>184</sup>

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178. See Alexander, *supra* note 176, at 148.

179. See Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 749 (2000) (discussing why individuals stop paying property taxes).

180. See, e.g., David Reiss, *Housing Abandonment and New York City's Response*, 22 N.Y.U. REV. L. & SOC. CHANGE 783, 784 (1997) (discussing how New York City acquired abandoned properties).

181. See Patricia Daley, *Preserving Open Space on Cape Cod: Public and Private Mechanisms for Open Space Protection*, 73 ST. JOHN'S L. REV. 1091, 1100–02 (1999).

182. See, e.g., 53 PA. STAT. ANN. § 10601 (West 2008) (authorizing cities to amend zoning ordinance); *id.* § 10603(c)(1) (allowing for variances to the zoning rules); *id.* § 10609 (laying out procedures for amending the zoning code).

183. There is a deservedly rich academic literature on rezonings. The hottest debate centers on the amount of deference that judicial bodies should give to the zoning decisions of local legislatures. See *Snyder v. Bd. of County Comm'rs.*, 595 So. 2d 65, 80–82 (Fla. Dist. Ct. App. 1991), *vacated* 627 So. 2d 469, 476 (Fla. 1993). For an excellent summary of the issues, see ELLICKSON & BEEN, *supra* note 61, at 74.

184. See, e.g., *Griswold v. City of Homer*, 925 P.2d 1015, 1019, 1030 (Alaska 1996) (allowing zoning change on thirteen individual lots throughout downtown Homer, Alaska).

The final step of the VALT program would convey the dezoned parcels to private citizens.<sup>185</sup> To accomplish that goal, it would be prudent to establish regulations ensuring the fair distribution of deregulated property. Authorities, for example, must first decide whether VALT programs would need to sell vacant properties at full market value. Although such a restriction could generate significant revenue for local treasuries,<sup>186</sup> it would undercut attempts to promote the long-term self-employment of African-Americans in inner-city communities. VALT programs must have broad discretion to distribute land at little or no cost in order to create the space that fledgling black entrepreneurs need to start businesses. Government officials should also articulate criteria to help VALT administrators evaluate potential transferees. Factors to consider in selecting the recipients of vacant property should include business experience, ties to the community, previous job history, and ability to articulate a thoughtful business plan. Whatever the formula, transparent procedures and objective criteria would do much to prevent conflict and avoid charges of corruption as municipalities transfer title of abandoned buildings to private citizens.

### *B. Why a Land Transfer Program Can Work*

#### *1. The Interest of Entrepreneurs*

VALT programs will attract the strong support of the business community because they remove obstacles that inhibit black enterprise. Recall that, at its core, this Article argued that African-American entrepreneurs endure unique harms resulting from the zoning system.<sup>187</sup> The thrust of that discussion needs reemphasis here: land use regulation makes it difficult for black entrepreneurs to find affordable commercial space in desirable locations. A low-income entrepreneur in Chicago encapsulated the problem: “[G]etting a place is priceless. That’s the hardest thing, to just have some place to keep your shit, go take a shit, rest, hide from . . . people who may be upset at you.”<sup>188</sup> He continued, “So any place we have, we really guard it. And that’s why you see us hanging

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185. This could prove problematic in some jurisdictions. Detroit’s legal department, for example, currently interprets the Michigan Constitution as placing restrictions on the transfer of government-owned land. See AMY BROOKS ET AL., *HARNESSING COMMUNITY ASSETS: A DETROIT LAND BANK AUTHORITY* 4 (2004).

186. American governments have a long history of selling off land for profit. On the federal level, “American policy after the Revolution evolved from trying to charge relatively high prices (to pay off Revolutionary War debt) to offering land at lower prices, to including favorable financing terms, to permitting preemption (squatters’ rights), and finally to outright giveaways (the Homestead Acts).” Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1155 (2000). On a local level, officials tend to sell property they acquire at public auction, often with a minimum bid equal to the total sum of any unpaid taxes, penalties, and costs on the land. See Alexander, *supra* note 179, at 774.

187. See *supra* Part II.

188. VENKATESH, *supra* note 3, at 198.

around the same areas. See, the ones who have a place to go to, they look like they just doing nothing, just sitting around. But that's not true, they have the most business going on."<sup>189</sup> Urban ethnographers confirm that low-income entrepreneurs in the black community "possess skill, business acumen, and tremendous potential for innovative skills and strategies. What most lack is a physical place to ply their trade."<sup>190</sup>

VALT programs would ease the spatial crunch and unleash the coiled commercial energies of African-Americans. Freed from the need to comply with Byzantine land use rules, or appear before local zoning boards, ambitious black businesspeople could quickly convert abandoned houses into repair shops, recording studios, or tattoo parlors.<sup>191</sup> Indeed, the history of American cities before the advent of zoning confirms that a more flexible land use system would help inner-city entrepreneurs fashion dynamic and prosperous communities.<sup>192</sup> In the prezoning era, for example, immigrant workers had tremendous success converting older residential districts into thriving mixed-use neighborhoods. One reporter described a typical transformation in New Haven, Connecticut: "The new owners consider the property too valuable for residential purposes alone, so every house that passes into the hands of the latest owners has to go through a process of rebuilding or have a new front that provides for a store."<sup>193</sup> Although the mishmash of uses "wasn't exactly a model of attractive architecture, design or amenities. [T]here was no questioning the vitality, energy and activity that permeated both sides of the street . . . ."<sup>194</sup>

VALTs, unlike proposals to legalize home-based business, would also open larger buildings, like abandoned schools and shuttered government offices, to commercial use. Both wholesalers and hair-braiders—entrepreneurs with very different spatial needs—could take advantage of land deregulated through VALT programs. Further, de-zoning abandoned homes in residential neighborhoods would allow individuals with few resources and little experience to pursue entrepreneurial careers—even vehicleless African-Americans could realistically access the newly created commercial space.

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189. *Id.* at 198–99.

190. *Id.* at 170.

191. Of course, the speed and cost of converting a building's use depends, largely, on the condition of the structure. A thorough renovation of a dilapidated shell can cost as much as \$70,000 on average, in 1990 dollars. Alan Finder, *Renovation Program Is Running Out of Abandoned Housing*, N.Y. TIMES, Apr. 16, 1990, at B5.

192. See Clowney, *supra* note 103, at 164–71 (examining the history of a neighborhood before the advent of zoning).

193. Morty Miller, *New Haven: The Italian Community* 68 (Apr. 30, 1969) (unpublished undergraduate thesis, Yale University) (on file with the New Haven Colony Historical Society) (citation omitted).

194. Abraham Silverman, *Oak Street, New Haven—A Portrait from the Past* 3 (Mar. 13, 1984) (unpublished manuscript, on file with the New Haven Colony Historical Society).

## 2. *The Concern of Homeowners*

Understanding the needs of black entrepreneurs does not, by itself, bring about change. As mentioned above, attempts to revamp the land use system often fizzle under the attack of homeowners concerned about local property values.<sup>195</sup> Landholders typically complain that efforts to dismantle the zoning apparatus drag down their home prices.<sup>196</sup> VALT programs, however, sidestep these familiar skirmishes and unravel the tension between property owners and the advocates of zoning reform. The proposal's key insight is this: converting abandoned land into commercial space ultimately promotes, rather than undermines, landowners' quest to increase home prices and build stronger communities.

To grasp how VALTs could bolster land values and gain the support of homeowners, it is necessary to examine the perverse impact that empty buildings have on city neighborhoods. Study after study shows that abandoned structures visit a hydra of woe on urban places.<sup>197</sup> Foremost, empty homes and apartments provide sanctuary for illegal activity of all stripes. Drug trades,<sup>198</sup> prostitution,<sup>199</sup> arson,<sup>200</sup> and robbery all take root in the dark and untended spaces that police cannot monitor from the street.<sup>201</sup> Two large studies conducted in the early 1990s reveal the extent of the problem. Criminologists in Baltimore, Maryland and Aus-

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195. See *supra* Part III.

196. See *supra* Part III.

197. For a wonderful summation of the impact of vacant buildings, see David T. Kraut, Note, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1142–52 (1999). See also J. E. ECK ET AL., PROBLEM-SOLVING: PROBLEM-ORIENTED POLICING IN NEWPORT NEWS 67 (1987) (arguing that juveniles, drug addicts, and alcoholics often damage vacant apartments); JAMES W. HUGHES & KENNETH D. BLEAKLY, JR., URBAN HOMESTEADING 57–58 (1975) (discussing how vacant property upsets the stability of urban neighborhoods); WESLEY G. SKOGAN, DISORDER AND DECLINE 40 (1990) (making the case that abandoned structures signal a breakdown of social order); Catherine E. Ross & John Mirowsky, *Disorder and Decay: The Concept and Measurement of Perceived Neighborhood Disorder*, 34 URB. AFF. REV. 412, 413 (1999) (describing that the presence of abandoned buildings corresponds with high crime levels); William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J. CRIM. JUST. 481, 488 (1993) (noting that vacant buildings attract drug users).

198. See Michael R. Greenberg et al., *The TOADS: A New American Urban Epidemic*, 25 URB. AFF. Q. 435, 436 (1990) (presenting findings that in fourteen of fifteen large American cities, empty buildings frequently become crack houses).

199. See, e.g., Steve Berry, *Developer Given 2 Weeks to Board Buildings Marked for Quake Repairs*, L.A. TIMES, Feb. 12, 1997, at B4 (discussing how empty buildings in an earthquake-shattered district became the workspace of local prostitutes); Joe Lawlor, *In Need of a Fix*, FLINT J., Apr. 6, 2008, at A1 (describing “rampant” prostitution in an abandoned school).

200. Researchers in Newark, New Jersey, determined that although vacant structures constituted only 5 percent of the city's buildings, they accounted for 21.2 percent of all serious fires. George Sternlieb & Robert W. Burchell, *Fires in Abandoned Buildings*, in THE SOCIAL AND ECONOMIC CONSEQUENCES OF RESIDENTIAL FIRES 261, 264 (Chester Rapkin ed., 1983). The U.S. Fire Administration has discovered that over 12,000 fires occur in abandoned buildings each year—many resulting from arson. NAT'L VACANT PROPS. CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES 4 (Aug. 2005), [http://www.vacantproperties.org/latestreports/True%20Costs\\_Aug05.pdf](http://www.vacantproperties.org/latestreports/True%20Costs_Aug05.pdf).

201. ECK ET AL., *supra* note 197, at 67 (discussing study of Virginia public housing complex that linked burglary rates to unsecured vacant apartments).

tin, Texas both found that the presence of vacant structures on a city block may double the crime rate in the surrounding area.<sup>202</sup> Worse still, local governments report that the plague of empty lots has spread. Throughout the country, rates of home abandonment stand at all-time highs,<sup>203</sup> forcing public safety departments to devote evermore resources to patrolling the dead zones around vacant structures. Police in Atlanta, Georgia, for example, recently organized a task force specifically designed to combat thieves who strip vacant homes of appliances, cabinets, and copper piping.<sup>204</sup> The cumulative effect of these dangers erodes feelings of neighborhood solidarity,<sup>205</sup> diminishes the health of local residents,<sup>206</sup> and sends property values into a tailspin.<sup>207</sup> One resident of a Florida county hit hard by abandonment found the nub of the issue, “[Vacant property is] like a cancer. If someone isn’t at least monitoring the front yard, vagrants and vandals will follow.”<sup>208</sup>

VALT programs would capture the support of homeowners because they offer a realistic plan to revive neighborhoods threatened by vacant buildings. Under VALTs, the worst, most decrepit buildings could swiftly become useful commercial property. Graffitied apartments could morph into artists’ studios, centers of prostitution could be remodeled into childcare centers, and a burglar’s hideout might become a barber-shop. Although these changes would result in some externalities on neighbors, the noise traffic of commerce seems vastly superior to the dangers of vacant buildings. For families worried about their property values and the safety of their children, law-abiding neighbors of any

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202. See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* 197–98 (1996) (finding that measures to contain abandoned property decreased crime by fifty-six percent); Spelman, *supra* note 197, at 488–91 (finding that city blocks containing unsecured vacant buildings suffered from twice as much crime as city blocks without unsecured buildings).

203. *U.S. Vacant Homes Hit Record High*, CBS NEWS, Apr. 28, 2008, <http://www.cbsnews.com/stories/2008/04/28/business/main4050898.shtml> (showing that 2.9 percent of U.S. homes were vacant and up for sale).

204. See Rusty Domin, *Police Fight a Rash of Vacant Home Burglaries*, CNN NEWS, July 22, 2008, <http://www.cnn.com/2008/CRIME/07/22/burglarized.foreclosures/?iref=mpstoryview>.

205. See SKOGAN, *supra* note 197, at 70 (finding that when levels of disorder rise, social bonds break down and neighbors “go their own way”).

206. See Catherine E. Ross, *Fear of Victimization and Health*, 9 J. QUANTITATIVE CRIMINOLOGY 159, 170–71 (1993). Individuals who live in disorderly neighborhoods characterized by vacant, boarded-up buildings tend to walk less and have fewer social interactions with neighbors. *Id.*

207. See Andrew J. Gold, *The Trinity Initiative in Economic Perspective: Place or People Prosperity?*, 30 CONN. L. REV. 1317, 1337 (1998) (discussing Minneapolis study that indicates vacant homes reduce the value of neighboring property); Greenberg et al., *supra* note 198, at 436 (finding that abandonment lowers property values of surrounding community); Thomas Gunton, Comment, *Coping with the Specter of Urban Malaise in a Postmodern Landscape: The Need for a Detroit Land Bank Authority*, 84 U. DET. MERCY L. REV. 521, 522 (2007) (“[V]acant properties generally cause depreciation in property values in the surrounding neighborhood . . .”). One recent study by Temple University found that houses within one block of an abandoned building lost approximately \$6,700 in value. RESEARCH FOR DEMOCRACY, *BLIGHT FREE PHILADELPHIA* 22 (Oct. 2001), <http://www.temple.edu/rfd/content/BlightFreePhiladelphia.pdf>.

208. Shannon Behnken, *Neighbors Are Left with a Mess*, TAMPA TRIB., June 29, 2008, *Nation/World*, at 4.

sort—even barbers and tattoo artists—would seem preferable to the risks associated with abandoned property.

### 3. *The Power of Local Governments*

Skeptics of VALTs may ask why municipal officials would have any interest in entangling themselves with yet another program designed to remake urban enterprise and promote black entrepreneurship. After all, establishing a VALT program would require some elbow grease—property would need to be deregulated and bureaucrats would need to be hired to distribute land. The basic reason local governments would warm to the proposal is that they currently own a startling number of vacant buildings and therefore have a strong incentives to return these properties to private ownership.

Detroit, for example, has a real estate portfolio that contains 38,000 unoccupied structures.<sup>209</sup> Empty buildings also dot the landscape of other, smaller cities; by some estimates, cities in the Northeast average between 10,000 and 25,000 uninhabited structures.<sup>210</sup> Owning these buildings imposes a serious drain on government coffers. Cities generally have to “absorb the added costs of nuisance abatement for vacant property” by boarding-up broken windows and keeping yards free of weeds and debris.<sup>211</sup> More importantly, local governments do not receive vital tax revenue while a property remains abandoned and unused.<sup>212</sup> Thus, cash-strapped local governments have a strong motivation to adopt VALTs—any land returned to productive use represents an enormous cost saving.

#### C. *Overcoming Objections to VALTs*

Although political moderates should have no strong objections to VALT, both economic conservatives and hyper-egalitarians might resist this new legal structure.<sup>213</sup> A staunch conservative might see VALTs as a threat to the free market because they ensnare government in the ownership and distribution of property intended for private use. There are two defenses to this argument. First, over the long haul, VALTs would promote freedom and property rights by chipping away at overly restrictive single-use zoning statutes, regulations that have long frustrated conserva-

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209. Nancy Kaffer, *Blight Buster*, DETROIT METRO TIMES, Apr. 13, 2005, <http://www.metrotimes.com/archives/story.asp?id=7553>.

210. See Samsa, *supra* note 176, at 196; Brian Meyer, *Vacant Buildings Feeding Spread of Arson*, BUFFALO NEWS, Mar. 6, 2007, at B3.

211. Kraut, *supra* note 197, at 1150.

212. *Id.* at 1149 (arguing that vacant homes have “a significant impact on a city’s fiscal health”); see also NAT’L VACANT PROPS. CAMPAIGN, *supra* note 200, at 7–9.

213. This work is indebted to Robert Ellickson for the term “hyper-egalitarian.” Ellickson, *supra* note 166, at 107.

tives and libertarian thinkers.<sup>214</sup> Second, governments could structure VALTs to reduce elected officials' entanglement with private real estate markets. One promising option would require each VALT to have a board of directors composed of community activists and local real estate professions.<sup>215</sup> Ideally, the state's governor would appoint board members to staggered, multiyear terms. This structure would best insulate a VALT's leadership from the political upheaval and corruption that plague many local government institutions. A board composed of members who live in the affected communities would also have strong motivation to make judicious decisions and could more efficiently identify the fledgling entrepreneurs that would benefit from the space.

Thinkers with strong anti-regulatory instincts may also question whether the VALT scheme goes far enough. Would the program remove enough red tape to spark business innovation in the inner city? Although VALTs could, potentially, put buildings in the hands of low-income entrepreneurs, even then, many other regulations would remain, imposing potentially ruinous costs on small business. For example, getting an old and neglected structure to comply with municipal building codes might require renovating steel pipes and old wiring—a prohibitively expensive undertaking for most low-income business people.<sup>216</sup> Federal regulations, including the ADA, could also impose tremendous costs on fledgling entrepreneurs and negate the impact of zoning reform.<sup>217</sup> Although these arguments hold some water, they should not derail attempts to institute VALT programs. First, as the saying goes, the good should not be the enemy of the perfect. Any reduction in business costs, however small, has the potential to increase the number of entrepreneurs at the margin. Second, and more importantly, not all abandoned buildings are unsalvageable or in need of significant rehabilitation. The recent flood of foreclosures has left behind a supply of vacant buildings in urban areas that remain in serviceable condition. As Eduardo Peñalver recently noted, “The housing that is becoming vacant during the current downturn . . . is relatively new and should be easier . . . to repair.”<sup>218</sup> Thus, at fairly minimal cost, the VALT program should allow motivated entrepreneurs to clean and convert well-built, but empty homes into vibrant storefronts.

Hyper-egalitarians, for their part, are likely to oppose any measure that treats low-income neighborhoods differently from other communities. Some commentators in this camp worry about the law's expressive

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214. See, e.g., Siegan, *Non-Zoning*, *supra* note 13, at 127 (“[Z]oning . . . will not bring about a communist economy, but it will greatly reduce the many benefits of free enterprise.”).

215. Other public corporations have had success with this structure. See Samsa, *supra* note 176, at 211.

216. Galvan, *supra* note 60, at 1750–53 (explaining how traditional building codes stifle rehabilitation efforts in center cities).

217. See, e.g., 42 U.S.C. § 12183 (2006).

218. Eduardo M. Peñalver, *Homesteaders in the Hood*, SLATE, Mar. 25, 2009, <http://www.slate.com/id/2214544>.

function. They insist that establishing separate land use systems may send a symbolic message that certain groups remain inferior. Richard Delgado, for example, warns that if governments enforce different housing standards, “we will come to tolerate more and more shanty conditions for those we see as different from ourselves, and these conditions in turn will simply confirm to us that the residents are indeed a different order of humanity.”<sup>219</sup> Other egalitarian-minded scholars focus their criticism on health and safety issues. Jon Dubin, for example, argues that “[r]esidents deprived of zoning protection are vulnerable to assaults on the safety, quality, and integrity of their communities ranging from dangerous and environmentally toxic hazards to more commonplace hazards, such as vile odors, loud noises, blighting appearances, and traffic congestion.”<sup>220</sup> Scholars like Delgado and Dubin, therefore, remain deeply suspicious of plans to promote mixed-use neighborhoods in black areas.<sup>221</sup>

Hyper-egalitarians would be wise to abstain from attacking municipal experiments with institutions such as VALTs. For reasons previously canvassed, these programs promise to reduce crime, build social capital, and deliver new goods to underserved black consumers—all without generating additional externalities. As one scholar stated,

[O]nly a fool would equate the . . . [small neighborhood shop] with the open-air drug markets or brazen gang intimidation that have come to epitomize urban chaos. Nor would most city officials see [a] store, which likely provides a valuable service to nearby residents, as the same kind of disorder as chronic street nuisances such as aggressive panhandl[ing] . . . .<sup>222</sup>

There is also little basis to believe that individuals would interpret VALT programs as codifying the social inferiority of African-Americans. The foundational mission of VALTs, after all, is to restore the panache of black enterprise and black neighborhoods. Moreover, local officials could (and hopefully will) apply VALT programs beyond black neighborhoods to all communities that struggle with abandoned housing and low rates of entrepreneurship. Rather than recoiling from land use reform in the city centers, hyper-egalitarians should seek to alleviate the potential side effects of mixing commercial and residential uses. For example, they might devise strategies to confront loitering around commercial uses or, perhaps, promote legislation mandating that stores in residential neighborhoods operate during reasonable hours.

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219. Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 680 (1997).

220. Dubin, *supra* note 86, at 742; see also ROBERT D. BULLARD, *INVISIBLE HOUSTON* 62–70 (1987) (analyzing the problems caused by commercial enterprises in Houston's (unzoned) black neighborhoods); Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101, 101–19 (Charles M. Haar & Jerold S. Kayden eds., 1989).

221. See Dubin, *supra* note 86, at 762–63 (arguing that cities introduce industrial uses into black neighborhoods to deliberately displace black populations).

222. Garnett, *supra* note 12, at 21.

## V. CONCLUSION

Wylie Avenue bisects The Hill, a historic black neighborhood overlooking downtown Pittsburgh.<sup>223</sup> During the 1940s and 1950s, the area drew bustling crowds to its restaurants, nightclubs, and retail districts. But sixty years later, residents of The Hill confront a far gloomier scene.<sup>224</sup> Plywood has replaced welcoming storefront windows. Rubbish accumulates in abandoned stores. And the corners that once hummed with commerce and jazz have collapsed into crumbling shells. Such areas seem ripe for a new wave of commercial development, yet no entrepreneurs are providing the goods and services necessary to remake the neighborhood.

This Article has attempted to explain the significant and largely unappreciated role that land use regulation has played in the demise of black enterprise. In neighborhoods like The Hill, East St. Louis, East Baltimore, and Cleveland's Glenville, zoning and planning schemes have consistently failed African-American entrepreneurs. As a whole, the land use system takes no account of the particular historical, cultural, and economic setting where black business has tried to establish roots. Fixed-rate zoning fees drain precious start-up capital from chronically underfunded black enterprises. Zoning boards discriminate against the types of business that attract African-American entrepreneurs. And the continued popularity of single-use zoning pushes black businesspeople away from their networks of support.

Although there is no magic elixir to solve all the problems of inner-city entrepreneurs, this Article has also tried to offer a nuts-and-bolts strategy of tackling some of the broader problems imposed by zoning. Turning abandoned homes into commercial space, I argue, would provide black entrepreneurs with the space they need to incubate a new tradition of business growth and neighborhood revitalization. In the long run, African-Americans living in inner cities need institutions that would create a more flexible land use system. Small, locally owned businesses perform a vital role in underserved communities and should not be legislated out of existence through zoning regulations.

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223. The dramatic works of August Wilson have kept the history and culture of The Hill alive. See, e.g., AUGUST WILSON, *FENCES* (1986); AUGUST WILSON, *JOE TURNER'S COME AND GONE* (1988); AUGUST WILSON, *THE PIANO LESSON* (1990).

224. See, e.g., Jeremy Boren, *Mayor's Razing Plan Making a Difference*, *PITTSBURGH TRIB.-REV.*, Mar. 20, 2006 (describing the plague of abandoned buildings in The Hill), [http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregions/s\\_434936.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregions/s_434936.html). For a more hopeful take on the The Hill, see Lynette Clemetson, *Revival for a Black Enclave in Pittsburgh*, *N.Y. TIMES*, Aug. 9, 2002, at A1.