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## The Twilight of National Land Use Policy, 45 J. Marshall L. Rev. 237 (2012)

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# THE TWILIGHT OF NATIONAL LAND USE POLICY

FRED BOSSELMAN\*

## I. INTRODUCTION

In the early 1970s, Congress came within a few votes of adopting a bill called the National Land Use Policy Act. Few people today recall the debates over this proposal, and most people today would probably be surprised to learn that a Republican president was promoting this expansion of federal power. At that time, however, the popular mood was quite different than what we find today.

This Article provides a brief review of the debates over land use policy that took place four decades ago. In metropolitan areas, three interest groups were particularly unhappy with the regulation of land development by local governments, and welcomed intervention at a higher level: (1) civil rights groups were concerned about the need for affordable housing near suburban jobs; (2) business interests supported facilities needed for regional growth; and (3) conservation groups feared loss of open space.

The proposed National Land Use Policy Act was designed to attract support from all of these interest groups, but each group had its own ideas about what national land use policy should be. To gather such support, the writers of the Act tried to offer no clue to what national policy would actually be if the bill was enacted, hoping that each interest group could support the bill on the assumption that its own idea of a good national policy would have universal appeal.

Although opponents raised objections to loss of local power and interference with property rights, what defeated the legislation—and the very idea of a national land use policy—was the realization that the increasing globalization of the world economy prevented any nation from truly controlling its own land use policy. Since then, the United States has been responding to the policies of other nations without forming any overall land use policy of its own.

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## II. THE RIGHTS REVOLUTION

The 1960s had been the decade of what Cass Sunstein calls the “rights revolution” because “Congress and the President invoked the rhetorical power of the civil rights movement on behalf of causes involving not only discrimination on various grounds, but also the environment, workers, the poor, and even consumers.”<sup>1</sup> During his term of office, President Johnson presided over the greatest expansion of public control of decisions, which were previously controlled by market forces, since the presidency of Franklin Roosevelt.<sup>2</sup> Congress gave much of that power to federal agencies, partly to counteract suspicion of the civil rights records of some state governments.<sup>3</sup> By delegating an unprecedented degree of rulemaking authority to these agencies,<sup>4</sup> the new laws created “an administrative and legislative tangle that made Kennedy’s Washington seem a place of Greek simplicity.”<sup>5</sup>

One of the most troublesome issues for civil rights groups was the migration of employers from the central cities to suburban areas far from the existing homes of most minority group members.<sup>6</sup> Urban unrest contributed to a fear that central cities were likely to become more and more undesirable locations for growth.<sup>7</sup> Businesses were escaping to the suburbs, leaving many minorities stranded in an area of declining jobs, but the suburbs that were eager to attract businesses were not providing housing that most minority group members could afford.<sup>8</sup>

The federal government had little control over local land use decisions, and was reluctant to become involved, despite persistent attacks on local tactics to exclude minorities through “exclusionary zoning.”<sup>9</sup> Critics argued that local land use regulation was used

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1. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 24-25 (Harvard Univ. Press 1990).

2. OTIS L. GRAHAM, JR., *TOWARD A PLANNED SOCIETY: FROM ROOSEVELT TO NIXON* 140 (Oxford Univ. Press 1976).

3. DAVID R. GODSCHALK, *INTRODUCTION TO PLANNING IN AMERICA: LEARNING FROM TURBULENCE* 1, 4 (David R. Godschalk ed., 1974).

4. See Lester B. Lave, *Health, Safety, and Environmental Regulations, in SETTING NATIONAL PRIORITIES: AGENDA FOR THE 1980S* 131, 139 (Joseph A. Pechman ed., 1980) (discussing how the 1977 amendments to the Clean Air Act required the EPA to create new standards to protect air quality).

5. GRAHAM, *supra* note 2, at 176.

6. See generally LOUISE A. MOZINGO, *PASTORAL CAPITALISM: A HISTORY OF SUBURBAN CORPORATE LANDSCAPES* (2011) (discussing how corporations moved from central cities to America’s suburbs).

7. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 390-91 (Bantam ed., 1968).

8. See generally THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA (Xavier de Souza Briggs ed., 2005) (discussing the effects of social segregation).

9. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, URBAN AND

“by the people who already lived within the arbitrary boundaries of a community as a method of keeping everybody else out. Apartments, factories, and ‘blight,’ euphemisms for blacks and people of limited means, were rigidly excluded.”<sup>10</sup> Although some scholars advocated for a constitutional “right” to housing, they had little success.<sup>11</sup>

Most states delegated the power to control land use to local governments, and those powers were largely unaffected by federal rights legislation. Existing state land use laws were procedural in nature, addressing issues such as public hearings, notice to neighbors, opportunities for variances, and judicial review; they made little attempt to tell local governments what kind of land uses to encourage or discourage.<sup>12</sup> The assumption was that, if the local governments followed proper procedures, they would make wise decisions; but the reality was that “local governments represent[ed] the people already there,” not the rest of the country’s mobile and expanding population.<sup>13</sup>

### III. REGIONAL DEVELOPMENT

Business interests tended to see metropolitan areas from a different perspective. They prospered from growth of the metropolitan area, and resented local opposition to land uses necessary to accommodate regional growth, such as freeways, sewage treatment plants, and power lines. The developers of locally unwanted land uses<sup>14</sup> argued that the construction of necessary infrastructure was prevented by a local attitude called “not in my back yard,” or “nimby,” as it became widely known.<sup>15</sup> These groups sought state or federal override of local objections to necessary regional facilities.<sup>16</sup>

Some people advocated major changes in federal policy to overcome suburban resistance, such as the construction of new

RURAL AMERICA: POLICIES FOR FUTURE GROWTH 58-59 (1968).

10. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 242 (Oxford Univ. Press 1985).

11. See *Why a Right to Housing Is Needed and Makes Sense*, Editor’s Introduction to *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 1, 1-2 (Rachel G. Bratt et al. eds., 2006) (discussing the benefits of establishing a right to housing).

12. RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 153-54 (Univ. of Wis. Press 1966).

13. THE TASK FORCE ON LAND USE AND URBAN GROWTH, *THE USE OF LAND: A CITIZENS’ POLICY GUIDE TO URBAN GROWTH* 225 (William K. Reilly ed., 1973).

14. See DOLORES HAYDEN, *A FIELD GUIDE TO SPRAWL* 54 (2004) (referring to a landfill and dump in Zapata, Texas as a “LULU”).

15. REILLY, *supra* note 13, at 239.

16. *Id.* at 246-48.

towns<sup>17</sup> or the encouragement of new development in rural regions far removed from “megapolitan areas.”<sup>18</sup> But despite some tentative moves in these directions, the government was not prepared to force such drastic changes.

Property rights groups formed to try to persuade the courts to back the rights of landowners to develop their land in the way that they chose, but the complexity of the issue defied simple solutions.<sup>19</sup> Local governments, under pressure from angry voters, continued to reject unwanted development no matter how adversely landowners were affected. The real decision maker in suburban land use decisions was often the hostile audience.<sup>20</sup>

#### IV. ENVIRONMENTAL ACTIVISM

The late 1960s had also seen the beginning of a nationwide movement that viewed “pollution” as a technologically-generated evil that needed to be punished.<sup>21</sup> Conservationists who worried about the loss of open space merged with groups concerned about pollution and began using a new term—“environmentalist.”<sup>22</sup> Environmental groups argued that local governments were often thwarting national environmental objectives.<sup>23</sup> Whereas civil rights advocates used terms such as “exclusionary zoning” to describe local efforts to prevent construction of low-income housing,<sup>24</sup> and urged new legislation to limit those efforts,<sup>25</sup> it was often the environmental groups that spearheaded new state limits on local land use decision making.<sup>26</sup>

Environmental advocates began to use the term “urban sprawl” to describe the unwillingness of local governments to protect ecologically vital areas.<sup>27</sup> Never easy to define, sprawl was originally a term used by engineers and economists to deplore the

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17. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 9, at 62.

18. NAT'L GOALS RESEARCH STAFF, TOWARD BALANCED GROWTH: QUANTITY WITH QUALITY 47, 60 (Leonard Garment ed., 1970).

19. JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 154-55 (2d ed. 1998).

20. BABCOCK, *supra* note 12, at 140-41.

21. BARRY COMMONER, THE CLOSING CIRCLE: NATURE, MAN, AND TECHNOLOGY 177 (1971).

22. ADAM ROME, THE BULLDOZER IN THE COUNTRYSIDE: SUBURBAN SPRAWL AND THE RISE OF AMERICAN ENVIRONMENTALISM 139 (2001).

23. NOREEN LYDAY, THE LAW OF THE LAND: DEBATING NATIONAL LAND USE LEGISLATION 1970-1975 17-18 (1976).

24. See ROBERT G. HEALY, LAND USE AND THE STATES 24-25 (2d ed. 1979) (describing how communities would use housing prices and zoning laws to exclude the poor and working class).

25. LYDAY, *supra* note 23, at 22.

26. JOHN M. DEGROVE, LAND, GROWTH, AND POLITICS 371 (1984).

27. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 61 (1971).

fiscal and social impacts of “the wasteful pattern of urban scatteration.”<sup>28</sup> These technicians particularly disliked “leapfrogging,” by which developers skipped over the vacant land most easily connected to existing infrastructure to build on more distant and cheaper land that required costlier services.<sup>29</sup> But until the idea of sprawl was picked up by environmental advocates, it had little influence.<sup>30</sup>

The environmental movement focused on the impact of suburban sprawl on natural areas that were quickly disappearing, such as wetlands, hillsides, and flood plains.<sup>31</sup> By focusing on visual images of land to be protected, environmental advocates garnered broader support than had been given to those who made more technical arguments based on engineering, aesthetics, and recreation.<sup>32</sup> Like the other groups, however, environmentalists found that “[o]ne of the most persistent and intractable roadblocks to environmental objectives was land development,” which remained under local control.<sup>33</sup> So as the '60s ended, three different interest groups were looking for ways to modify local land use practices, with different objectives in mind.

#### V. RICHARD NIXON, ENVIRONMENTALIST?

President Nixon took office in 1969, and during his first term (1969-1973) the federal government enacted a wide range of new environmental legislation, much of which remains as key components of today's environmental law.<sup>34</sup> Nixon surprised environmentalists by taking the offensive, “insist[ing] that his administration was leading the public crusade to stop environmental abuse.”<sup>35</sup> “Nixon wanted to be seen as a new Theodore Roosevelt, a Republican champion of efficiency and technological improvement” who would bring peace between human development and nature.<sup>36</sup>

In 1970, the President selected noted Republican conservationist, Russell Train, as Chairman of the Council on Environmental Quality (“CEQ”), an agency that had been

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28. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 9, at 60.

29. HAYDEN, *supra* note 14, at 56.

30. See ROME, *supra* note 22, at 229 (discussing how some local governments refused to regulate land use and, even when they did, their efforts were inadequate).

31. *Id.* at 154-81.

32. *Id.* at 128-29.

33. SAMUEL P. HAYS, A HISTORY OF ENVIRONMENTAL POLITICS SINCE 1945 66 (2000).

34. ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE ENVIRONMENTAL MOVEMENT 128 (1993).

35. GRAHAM, JR., *supra* note 2, at 214.

36. GOTTLIEB, *supra* note 34, at 109.

authorized by the new National Environmental Policy Act.<sup>37</sup> This was seen as an auspicious beginning because Train combined “involvement in protecting the environment with political, administrative, and social skills unmatched in the [conservation] movement since Gifford Pinchot.”<sup>38</sup>

The President also used a reorganization plan to merge parts of existing cabinet departments into a new agency, the Environmental Protection Agency (“EPA”), which consolidated the federal power to enforce national environmental standards.<sup>39</sup> New pollution control legislation granted both CEQ, and especially EPA, wide discretion in setting standards.<sup>40</sup>

## VI. NATIONAL LAND USE POLICY PROPOSALS

The anti-exclusion, anti-“nimby,” and anti-sprawl groups shared a common desire to weaken local governments’ land use control powers; but because these groups had different and often conflicting objectives, they found it difficult to convince federal policymakers to confront the longstanding power of local governments to make land use decisions.<sup>41</sup> Nevertheless, federal policymakers wanted to respond to public concern about local policies<sup>42</sup> without direct federal exercise of land use regulations, so they began to search for politically feasible means of using federal leverage to persuade the states to exercise more influence on local land use decisions.<sup>43</sup>

Senator Henry Jackson, a powerful centrist Democrat from the State of Washington,<sup>44</sup> “opened the debate in January 1970 by proposing a National Land Use Policy Act” that offered grants to states that would adopt powerful statewide land use plans.<sup>45</sup> He tried to avoid the risky political strategy of direct federal involvement in land use decisions; instead, he hoped to encourage the state governments to reclaim their inherent authority to adopt land use plans at a level above that of the local communities, and to accomplish this without demanding state compliance with substantive federal standards.<sup>46</sup>

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37. J. BROOKS FLIPPEN, *CONSERVATIVE CONSERVATIONIST: RUSSELL E. TRAIN AND THE EMERGENCE OF AMERICAN ENVIRONMENTALISM* 87 (2006).

38. PHILIP SHABECOFF, *A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT* 102 (1993).

39. GOTTLIEB, *supra* note 34, at 129; SHABECOFF, *supra* note 38, at 130.

40. Lave, *supra* note 4, at 137.

41. LYDAY, *supra* note 23, at 24-25.

42. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 9, at 125.

43. NATIONAL COMM’N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 30 (1968).

44. GRAHAM, JR., *supra* note 2, at 220.

45. ROME, *supra* note 22, at 236-37.

46. LYDAY, *supra* note 23, at 6-7.

President Nixon wanted to respond with his own bill, which he believed should be less reliant on planning and more insistent on state regulation,<sup>47</sup> both to protect lands of regional value and to assist development that was necessary for a region but thought undesirable by local constituents.<sup>48</sup> The President directed his Chief of Staff for Domestic Policy, John Ehrlichman, to handle the bill.<sup>49</sup> Ehrlichman in turn told CEQ Chairman, Russell Train, to come up with an alternative to the Jackson bill; but even working with his talented staff members, Bill Reilly and Boyd Gibbons,<sup>50</sup> “Train struggled to craft his own proposal.”<sup>51</sup>

One of CEQ’s first strategies was to publicize the various innovative regulations that some states were already undertaking to reduce local autonomy in land use decision making.<sup>52</sup> In 1971, it published a study of interesting state legislation relating to land use, which showed that some states were already using a variety of means to achieve state land use objectives.<sup>53</sup> Citing this study in support, the Nixon administration proposed its own National Land Use Policy Act of 1971 that would offer federal funds to those states that met national standards for protecting areas of critical concern while also promoting development of regional benefit; as an added incentive, in such states, “federal projects and activities significantly affecting land use” would need to be consistent with the state’s program except in “cases of overriding national interest.”<sup>54</sup> This kind of consistency standard was a prominent feature of President Nixon’s soon-to-be-adopted Coastal Zone Management Act.<sup>55</sup>

Meanwhile, the White House became preoccupied with other matters. The President was campaigning for reelection in 1972, and land use policy was not one of the hot button issues.<sup>56</sup> After

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47. ROME, *supra* note 22, at 237.

48. COUNCIL ON ENVTL. QUALITY, *supra* note 27, at 20, 61.

49. LYDAY, *supra* note 23, at 25. Nixon knew that Ehrlichman had practiced as a land use lawyer in the State of Washington. *Id.*

50. RUSSELL E. TRAIN, A MEMOIR 188-90 (2000).

51. FLIPPEN, *supra* note 37, at 116.

52. SIDNEY PLOTKIN, KEEP OUT: THE STRUGGLE FOR LAND USE CONTROL 183 (1987).

53. See generally FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (President’s Council on Environmental Quality, 1971) (analyzing nine land use regulations for the purpose of determining how these government entities addressed complex land use issues).

54. National Land Use Policy Act of 1971, H.R. 4332, S. 992, 92d Cong. § 106 (1971).

55. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: THE FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 214 (Sept. 1973).

56. JOHN EHRLICHMAN, WITNESS TO POWER: THE NIXON YEARS 317, 325-28 (1982).



easily winning a second term, President Nixon initially looked forward to 1973 with optimism. His confidence was only mildly disturbed by hints of economic decline and reports about a politically-motivated burglary. In this promising environment, John Ehrlichman thought it was time to move land use legislation forward in Congress. He and Train met with Jackson, who agreed to combine the administration bill and the Jackson bill, and to hold Senate hearings.<sup>57</sup>

#### VII. CONGRESSIONAL DEBATE, 1972-1974

The initial Congressional hearings on land use policy were uneventful, and Train later wrote that he was initially disappointed that there was so little public response to the President's National Land Use Policy proposal.<sup>58</sup> However, the environment had strong emotional appeal, and "[n]o member of Congress could afford to be against a better environment."<sup>59</sup> Jackson's Interior Committee was familiar with western public lands, but had little experience with the issues of metropolitan growth that concerned land use reform advocates, so few members raised serious questions.<sup>60</sup> Various amendments to the legislation were debated in the Senate, which eventually approved a version of the bill in 1972.<sup>61</sup>

In the House, powerful Congressman Wayne Aspinall was opposed to national land use policy legislation, so it went nowhere until 1973.<sup>62</sup> When Congressman Aspinall was defeated in the 1972 elections, Congressman Morris Udall announced his intention to push land use legislation in the House, which signified to all interest groups that enactment of some form of national land use policy bill was a real possibility.<sup>63</sup>

Not surprisingly, few local governments welcomed change.<sup>64</sup> As the likelihood of actual passage increased, some business groups also began to see the proposals as having a direct impact on their particular development opportunities, and various trade associations opposed the bill.<sup>65</sup> Business interests tried to utilize the rhetoric of the rights revolution by claiming that the laws

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57. LYDAY, *supra* note 23, at 29.

58. RUSSELL E. TRAIN, *POLITICS, POLLUTION, AND PANDAS: AN ENVIRONMENTAL MEMOIR* 107 (2003).

59. ROBERT CAHN, *FOOTPRINTS ON THE PLANET: A SEARCH FOR AN ENVIRONMENTAL ETHIC* 37 (1978). Cahn, a former environmental journalist for the *Christian Science Monitor*, was appointed by President Nixon as a member of the CEQ. *Id.*

60. PLOTKIN, *supra* note 52, at 169-71.

61. COUNCIL ON ENVTL. QUALITY, *supra* note 55, at 214-15.

62. LYDAY, *supra* note 23, at 32.

63. PLOTKIN, *supra* note 52, at 191.

64. *Id.* at 186.

65. ROME, *supra* note 22, at 245.

would deprive them of their property rights, but the bill's lack of specificity diluted the argument.<sup>66</sup> Much of the concern about the land-use bill had less to do with property rights<sup>67</sup> than with the potential federal power inherent in the discretion to give grants for state plans.<sup>68</sup>

Proponents of the Act were reluctant to identify specific substantive changes in policy that its reforms would bring about, fearing that they would antagonize opponents of those specific policies.<sup>69</sup> They insisted that their goals were merely procedural and would bring long-range economic benefits.<sup>70</sup> Such benefits, however, would be widely distributed among the general public, making it hard for most of these prospective beneficiaries to see any direct connection between the reforms and their daily life.<sup>71</sup>

Senator Muskie, who had guided many of the other environmental bills, complained that the bill was too process-oriented and lacked federal policy guidance.<sup>72</sup> The format of the proposed Act seemed out of sync with the "rights revolution," because the government would be "managing risks rather than vindicating individual rights."<sup>73</sup> If you were anti-exclusion, anti-sprawl, or anti-"nimby," the bill offered you no guarantee that it would create any specific right that would end these practices.

As the year progressed, President Nixon's interest in domestic policy issues waned even further. He found the Watergate affair occupying more of his time as the year 1973 progressed. John Ehrlichman resigned in April, leaving no one in the White House who cared about domestic policy, including the President.<sup>74</sup> Russell Train later wrote that Nixon never did become personally concerned about land use issues<sup>75</sup> and that the White House had begun to send mixed signals on environmental issues as early as mid-1971.<sup>76</sup> As Congress began talking about impeachment, Nixon saw conservative senators as his best hope of support, and in 1973 he withdrew his support from any meaningful land use legislation.<sup>77</sup> Even so, the House defeated the bill by only seven votes.<sup>78</sup>

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66. LYDAY, *supra* note 23, at 51.

67. ROME, *supra* note 22, at 245.

68. GRAHAM, JR., *supra* note 2, at 239.

69. PLOTKIN, *supra* note 52, at 173.

70. *Id.* at 185.

71. LYDAY, *supra* note 23, at 2.

72. PLOTKIN, *supra* note 52, at 184.

73. SUNSTEIN, *supra* note 1, at 29.

74. EHRLICHMAN, *supra* note 56, at 331-32.

75. TRAIN, *supra* note 58, at 106.

76. *Id.* at 118.

77. FLIPPEN, *supra* note 37, at 118.

78. LYDAY, *supra* note 23, at 39.

## VIII. OPEC SETS AMERICAN LAND USE POLICY

During 1972, the economy of the industrialized world was booming and predicted to grow at a dramatic rate. But the growth was fueled by cheap oil, and demand was catching up with supply.<sup>79</sup> "Even in the 50s, the United States depended significantly on the world economy," but for most Americans "that dependence was hidden from view and seemed of little direct consequence."<sup>80</sup> As a result, the world was becoming more dependent on the Middle East for its petroleum.<sup>81</sup> The oil producing countries had formed a cartel, the Organization of Petroleum Exporting Countries ("OPEC"), which was beginning to demonstrate its power in the early 1970s by forcing a series of gradual increases in the world oil price.<sup>82</sup>

The first oil shock came in the autumn. On October 6, 1973, Egypt and Syria launched military operations against Israel that took both Israel and the United States by surprise. The United States provided munitions and other support to Israel. Counterattacks by Israeli troops overcame the invaders and captured territory from both Egypt and Syria. A cease-fire on October 25 ended the military operations, but the impact on the U.S. was determined when, on October 16, 1973, the Arab oil ministers agreed to an oil embargo and cut in production. They would provide oil to "friendly states" at previous levels but cut exports to others, with the most severe cuts to the U.S.<sup>83</sup>

Panic struck the American consumers, most of whom were highly dependent on their motor vehicles. As Daniel Yergin put it in his prize-winning history of the oil business:

In the United States, the shortfall struck at fundamental beliefs in the endless abundance of resources, convictions so deeply rooted in the American character and experience that a large part of the public did not even know, up until October 1973, that the United States imported any oil at all.<sup>84</sup>

After the Arab boycott, domestically produced crude oil that sold for \$3.00 during the 1960s rose to \$9.00 in the free market.<sup>85</sup> "[I]n a matter of months, American motorists saw retail gasoline prices climb by 40 percent—and for reasons they did not understand. No other price change had such visible, immediate,

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79. COUNCIL OF ECON. ADVISERS, ANNUAL REPORT, 1974 108 (1974).

80. Ralph C. Bryant & Lawrence B. Krause, *World Economic Interdependence*, in SETTING NATIONAL PRIORITIES: AGENDA FOR THE 1980S 71, 72 (Joseph A. Pechman ed., 1980).

81. DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER 567 (1991) [hereinafter PRIZE].

82. DAVID HOWARD DAVIS, ENERGY POLITICS 72-73 (1974).

83. PRIZE, *supra* note 81, at 607.

84. *Id.* at 616.

85. DAVIS, *supra* note 82, at 74.

and visceral effects as that of gasoline.”<sup>86</sup>

The construction industry also crashed.<sup>87</sup> Fixed investment slowed overall, and the stock of housing stagnated.<sup>88</sup> Conservation of energy cut projected demand, particularly for motor vehicles and gasoline.<sup>89</sup> Americans discovered that rising fuel costs forced them “to think about when, where, and how they [were] going places.”<sup>90</sup> Adam Rome describes the effect this had on the idea of national land use policy:

In 1973, the economy began to slump, and then the oil embargo led to a dramatic increase in energy prices. The economic crisis quickly changed the political situation. For the first time, the nation began to suffer both serious inflation and rising unemployment. . . . As a result, the idea of regulating development became much harder to sell.<sup>91</sup>

The change of government in Iran in 1979 brought about a second oil shock that again depressed the American economy,<sup>92</sup> and accelerated consumer attempts to cut overall use of energy.<sup>93</sup>

Then, in 1986, Americans found out that Saudi Arabia could effectively control our motor fuel prices. The Saudi’s determination to increase production was the trigger for the “third oil shock,” an unexpected price reduction, in which oil prices collapsed from over \$30 per barrel in late 1985 to \$10 a few months later.<sup>94</sup> The third oil shock caused people to forget for a while how much they depended on the cooperation of foreign governments, and they flocked to purchase a new innovation, the sports utility vehicle.<sup>95</sup> American automakers loved the short-term profits that SUVs offered and reduced investments in energy-efficient technologies.<sup>96</sup> The Reagan administration derided the need to worry about energy and believed the free market would bring about the most efficient result.<sup>97</sup>

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86. PRIZE, *supra* note 81, at 616.

87. PLOTKIN, *supra* note 52, at 194.

88. COUNCIL OF ECON. ADVISERS, ANNUAL REPORT, 1975 27-28 (1975).

89. PRIZE, *supra* note 81, at 718.

90. TOM VANDERBILT, TRAFFIC: WHY WE DRIVE THE WAY WE DO 165-66 (2008).

91. ROME, *supra* note 22, at 248.

92. Bryant & Krause, *supra* note 80, at 72.

93. COUNCIL OF ECON. ADVISERS, ANNUAL REPORT, 1980 108-09 (1980).

94. PRIZE, *supra* note 81, at 750.

95. See generally KEITH BRADSHAW, HIGH AND MIGHTY: THE DANGEROUS RISE OF THE SUV (2004) (discussing the safety and environmental issues associated with SUVs).

96. IAIN CARSON & VIJAY V. VAITHEESWARAM, ZOOM: THE GLOBAL RACE TO FUEL THE CAR OF THE FUTURE 287 (2007).

97. DANIEL YERGIN, THE QUEST: ENERGY, SECURITY, AND THE REMAKING OF THE MODERN WORLD 531-33 (2011) [hereinafter QUEST].

## IX. GLOBALIZATION AND LAND USE

Although the United States had no national land use policy, American economic policy had been supporting freedom of trade and discouraging the kind of "industrial policy" that the Saudis were using.<sup>98</sup> Neoclassical economic theory maintained that, if every nation specialized in the things it could do best, then free trade would increase global prosperity.<sup>99</sup> Throughout the last half of the twentieth century, the trend was toward "the reduction of barriers to the free movement of goods and capital."<sup>100</sup> Most economists opposed "protectionism," and although pressure from the domestic textile industry had led administrations from Kennedy to Nixon to use voluntary agreements to try to reduce clothing imports, these efforts had little impact.<sup>101</sup>

The oil shocks of the 1970s raised issues about potential protection for an even more powerful industry, automotive manufacturing. Japan adopted a highly successful industrial policy that promoted exports, including automobiles: in 1954 U.S. automakers produced about eighty percent of passenger cars sold here; by the mid-70s, it was about thirty-five percent.<sup>102</sup> Japanese automakers were best prepared to respond to the oil shocks of the '70s, because, in oil-deprived Japan, high fuel prices were a long-term fact of life, so their cars contributed to a forty percent improvement in fuel efficiency between 1978 and 1987.<sup>103</sup> Even though the value of the dollar to the yen declined in 1978 to about half of its 1971 value,<sup>104</sup> Japan significantly constrained manufacturing in the United States by promoting efficient manufacture of small motor vehicles.<sup>105</sup>

No country presented more of a challenge to international trade and monetary arrangements in the 1970s and 1980s than Japan. Japan tested the support for free trade in many important sectors of the world economy by adopting a national industrial policy based on exports, not only for cars, but for a wide range of products.<sup>106</sup> By the late seventies Japanese firms dominated industries as varied as steel, watches, radios, motorcycles, optics,

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98. COUNCIL OF ECON. ADVISERS, *supra* note 88, at 33.

99. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* 263-64 (2007).

100. ROBERT Z. ALIBER, *THE NEW INTERNATIONAL MONEY GAME* 186 (7th ed. 2011).

101. WILLIAM DIEBOLD, JR., *INDUSTRIAL POLICY AS AN INTERNATIONAL ISSUE* 99-104 (1980).

102. *Id.* at 161.

103. CARSON, *supra* note 96, at 24.

104. EZRA VOGEL, *JAPAN AS NUMBER ONE: LESSONS FOR AMERICA* 226 (1979).

105. IRA C. MAGAZINER & ROBERT B. REICH, *MINDING AMERICA'S BUSINESS: THE DECLINE AND RISE OF THE AMERICAN ECONOMY* 275 (1982).

106. VOGEL, *supra* note 104, at 10-11.

and ships, in addition to automobiles.<sup>107</sup>

Today it is the policies of India and China that are testing continued American support of free trade. India has had significant success in encouraging outsourcing of many jobs in a wide range of the high-tech service industries that are growing rapidly worldwide.<sup>108</sup> With processes such as financial advice, equity research, and patent filing all being performed from India, the range and complexity of services being offered from India is becoming ever more complex.<sup>109</sup> For example, many pharmaceutical and biotechnology companies have chosen India for research facilities.<sup>110</sup>

Today, however, concern about China's industrial policies has dominated American discussion.<sup>111</sup> Since the early 1980s the annual rate of economic growth in China has averaged a remarkable ten percent.<sup>112</sup> China has adopted a currency policy that threatens to monopolize many types of manufacturing,<sup>113</sup> and has led to a shift away from manufacturing in the United States and other traditional industrial countries.<sup>114</sup> Economist Robert Aliber points out that China has mimicked the export-led policies adopted earlier by Japan and South Korea. The thrust of these policies was to maintain a low value for the currency and wages so that exports would grow at a rapid rate.<sup>115</sup>

Canada has also adopted an industrial policy to promote exports of its extensive reserves of bitumen from the oil sands of Northern Alberta.<sup>116</sup> American policymakers must now weigh the security advantages of getting oil supplies from a friendly neighboring country against complicity in the impacts on ecology and climate that are caused by destruction of boreal forest and related watersheds on our own continent.<sup>117</sup> If the United States were to adopt a policy not to import bitumen, however, then Canadian companies are eager to build pipelines to the coast of

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107. *Id.*

108. FRIEDMAN, *supra* note 99, at 129-36.

109. MARK KOBAYASHI-HILLARY, *OUTSOURCING TO INDIA: THE OFFSHORE ADVANTAGE XII* (2d. ed. 2010).

110. See generally PROBIR ROY CHOWDHURY, *OUTSOURCING BIOPHARMA R&D TO INDIA: A PRACTICAL GUIDE* (2011) (analyzing India's biotechnology industry).

111. ALIBER, *supra* note 100, at 315-24.

112. *Id.* at 315.

113. TED C. FISHMAN, *CHINA INC.: HOW THE RISE OF THE NEXT SUPERPOWER CHALLENGES AMERICA AND THE WORLD* 258-62 (2005).

114. ALIBER, *supra* note 100, at 317.

115. *Id.* at 319.

116. QUEST, *supra* note 97, at 253-57.

117. See generally ANDREW NIKIFORUK, *TAR SANDS: DIRTY OIL AND THE FUTURE OF A CONTINENT* (2010) (discussing the environmental, political, and social problems that have arisen as a result of Canada's bitumen industry).

British Columbia and ship the oil to Asian markets.<sup>118</sup>

American policy continues to support free trade and free markets—important and valid goals—but is anything resembling a free world market feasible in a globalized economy made up of nations that promote their own industrial policies? Nations will need to develop their own policies incrementally to respond to each other and hope that they have the natural resources and brains to make their policies effective.

#### X. CONCLUSION: THE NIXON YEARS REVISITED

Will history remember President Nixon for the environmental legislation that passed during his first term? In retrospect, people who worked with the president thought that he had little personal interest in environmental issues.<sup>119</sup> But he apparently sensed that a new attitude toward land was taking hold across the nation,<sup>120</sup> and he wanted to be seen as an activist who was doing something backed by a high purpose.<sup>121</sup>

But the decision to tape conversations in his private office probably doomed Nixon's hope for history's acclaim. Nixon was wholly involved with the Watergate investigations in 1973.<sup>122</sup> The release of the tapes showed how petty the president's personal views were, and how they occupied his mind to the exclusion of domestic policy issues.

The administration's inability to resolve the energy crisis added to President Nixon's Watergate-induced unpopularity.<sup>123</sup> After Nixon's resignation, President Ford pointed to "the energy crisis [of] last winter" as proof that "we cannot achieve all our environmental and all our energy and economic goals at the same time. . . . The need to move toward greater self-sufficiency in energy is one of the major challenges of the decade ahead . . ." <sup>124</sup>

Would a National Land Use Policy Act have made a difference? In retrospect, neither the public nor the private sector of the U.S. economy is as powerful today as it was in 1973, and their ability to establish policy has diminished. All levels of American government are coping with foreign governments' policies that limit our options. Any national land use policy would

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118. Chips Cummins & Edward Welsch, *Canadians Push New Routes for Oil*, WALL ST. J. ONLINE, Nov. 25, 2011, <http://online.wsj.com/article/SB10001424052970204517204577046304089844464.html>.

119. TRAIN, *supra* note 58, at 118.

120. ROME, *supra* note 22, at 224.

121. GRAHAM, JR., *supra* note 2, at 189.

122. See generally EHRlichman, *supra* note 56, at 341-91 (describing the President's involvement in Watergate).

123. GRAHAM, JR., *supra* note 2, at 241.

124. *President's Message to Congress*, in COUNCIL ON ENVTL. QUALITY, FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVTL. QUALITY v (1974).

have been unsuccessful in the modern world unless it was continually adaptable to change.



