

Short Circuit | Episode 148

Are Apartments a Nuisance? Private Property and the Rise of Zoning

ANTHONY: Hello and welcome to *Short Circuit*. Your podcast on the Federal Courts of Appeals. I'm your host Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. Except this particular podcast, won't be about the Federal Courts of Appeals indeed. To a large extent, it won't even be about courts or legislatures at all, but, and this is important point, it will nevertheless be about the law and how the law comes to be.

Today is a special *Short Circuit*. We will be returning to an occasional series of conversations about cities, housing, and property rights.

A few months ago, we spoke with Charles Marohn of the organization, Strong Towns, as you may remember, about city planning and top down management versus spontaneous development. And today we have a similar theme of central planning, spontaneous [00:01:00] organization, and the relationship between the two.

I'm very pleased to have with us, Molly Brady an assistant professor at Harvard Law School to discuss an article she is working on, which will be published in the Harvard Law Review and will be available shortly online.

It's called *Turning Neighbors into Nuisances*. It sounds like a Woody Allen, Allen movie, by the way, Molly. Welcome to the *Short Circuit*.

MOLLY: Thank you so much for having me I'm so excited to be here.

ANTHONY: Well, there is so much to talk about in your draft article. As listeners will know, once they're able to read it themselves, I recommended it to anyone interested in current fights about affordable housing and zoning and property rights that has been so much in the news lately. It's also just fascinating legal history. To my eyes, as someone who has written about emergent orders and the creation of lawn and non-purpose of way, it jumps out to me as a case study and all that. But before we go into any of those tangents, let's [00:02:00] just have you give us an overview of what you're writing about and why you like reading 19th century property deeds.

MOLLY: I love 19th century property deeds. That's independent and predates this paper, but the paper itself basically emerged out of reading a bunch of interesting private law cases in which I started to see a form of covenant that I hadn't encountered before.

So, when I teach first year property to my students, we talk about covenants and we typically teach them either in the context of talking about very famous racially restrictive covenants or in talking about big suburban developments and homeowners' associations. But as I was reading these 19th century cases, I kept coming across these covenants in which people were promising not to engage in nuisance uses or in noxious uses. And sometimes they would say, spell out 50, 75 different things that they considered nuisances. And as someone who teaches property and land use, I had never heard of these things. So, it seemed like a story worth telling. And [00:03:00] then as I kind of unpack, why were people making promises from the 1820s onwards not to engage in tortious land uses?

I found a really interesting story about the emergence of the apartment, the ways that property owners tried to use these covenants to prevent the apartment and failed and how that really contributed to the rise of zoning. So, the paper is a story of these nuisance covenants, a discussion of how the apartment ultimately challenged these covenants and really how that led to the rise of zoning and the outcome, outcome that we saw in the famous case of *Euclid v. Ambler Realty* in which zoning gets upheld as a legitimate use of the police power in part by analogy to nuisance prevention, even though preventing apartments was not something nuisance law did, it became something regulation could do. And so, I think that this story helps to fill in a little missing chapter in how we got to this point where zoning was legitimate.

ANTHONY: And give us a few [00:04:00] examples of, of these, these 50 or the 75 nuisances that, that these deeds would spell out.

MOLLY: Yeah. So, this is where I really fell in love with the--again, I'm an odd person and that I love 19th century property deeds and even earlier ones, but lists are just so fabulous. You know, they start as banning things like cabinet makers, Coopers, turpentine, vitriol, ink makers, all these sorts of things then it continues to extend to basically it just gets added to. So, you have people promising not to engage in bone-boiling or to build a slaughterhouse. And then eventually it becomes circuses, animal menagerie, museums--I'm never really sure why museums ended up on the list, but it just becomes this really specified list of things that people didn't want, which is itself historically interesting as we trace what people thought about different types of uses. And so, you get really specified lists that do in some senses, start to look like boiler plate things that were just [00:05:00] copied from one, one developer to another. But you also see some interesting little sensitivities where there might be, you know, particular things about bans on oil drilling in places with oil drilling or things like that. So, it was a really kind of interesting view into the development of land use and how people were thinking about what they did not want to live near.

ANTHONY: Now, what, tell us a bit about what these developments we're. Like when we think of development today, of course it's some big subdivision, of course there's zoning

also, but yeah, you know, people will have the joint HOAs a lot of time to live in them and that have certain covenants that they have to agree to. But like an 1820, what is a developer doing at that point? What kind of scale are we talking about?

MOLLY: It's a small scale and so probably to about the 1870s, I actually haven't found any covenant that was put on more than about 50 properties, but overwhelmingly you would sometimes have an owner who [00:06:00] might subdivide their lot into three, you know, so a three plot development, which is sort of wild to think about now, but they would put covenants on two of them and maybe retain the third lot for themselves. And so, you had these sorts of covenants going on ranges of property from the really small numbers. And then obviously with the expansion into the suburbs and the development of hundreds of properties by one developer, it expanded along with that, to those, those sorts of numbers

ANTHONY: And are, are, the, so, this is a kind of a particular question, but I, I think it might tell us a lot about what, what was going on. Are most of these properties single, what we in America today called single family homes detached homes, or a lot of them row houses? Are they mother-in-law houses? What do they look like?

MOLLY: Yeah, it's a mix. I'm sorry. You know, in New York it's already sort of row houses and the covenants specify things like [00:07:00] setbacks and they specify, you know, again, often these non-nuisance uses. In other places, you know, I'm thinking of things that start to migrate toward upstate New York, for instance, you did have more detached houses and the attempt to preserve detached houses, but you also have covenants go in on properties that were what we think of today as duplexes and triplexes. Really it depended on the character of the neighborhood and what the existing type of use was that sort of shaped how these early covenants were drafted. But these nuisance covenants, again, were pretty ubiquitous regardless of whether it was row houses or single-family houses or duplexes or anything else.

ANTHONY: And did, did that, did the nuisances adjust a bit, you know, for it? So, I could see like a set of row houses you would be very sensitive as to what your neighbor is doing, even if it's a, you know, a rather innocuous business, as long as there's some noise being made, you're going to be sensitive about that versus one acre lots are gonna be going to be different. Was, was there that much calibration, I guess, in, in these [00:08:00] deeds or did it seem pretty kind of slap dash? You know that we got this from a, from a book and we're going to put the haberdashery in here and the, and the cobbler in here but, you know, no, we're not going to think of putting much else.

MOLLY: Yes, that's a great question. I think it's funny because I'm going to give the law professor answer of little bit of about both. Because I think that there is just copying, you know, I think it's really funny to see in the 1920s, when slaughterhouses are heavily regulated already, people continue to try to contractually ban slaughterhouses, suggesting somebody's got—

ANTHONY: Just to make sure.

MOLLY: Yeah, exactly.

Somebody's got their version of the Westlaw form, right. It was sort of copied over, but then they're tweaking or adding things to it--it's rare to subtract things. So that is itself interesting, but you know, I also have laughed at like, why were cabinet makers it's still perceived as like, especially terrible into the 20th century, it sort of seems insane.

But yeah, I think that there is evidence of additive [00:09:00] copying and, you know, you think about lawyers probably are risk-averse and afraid of being the guy that left the oil refinery out of the covenant and therefore, you know, never getting hired again. So, I think there's a little bit of that going on.

ANTHONY: Now what, the thing that struck me in reading, it was, it's interesting that this emerges at I think the 1820s and goes through the 19th century and, and, you know, we get nuisances added to it. The developments get bigger, of course, as we have more developed, more urbanization and, and, and the, the industrial revolution continues.

But, one thing I don't quite get with the history is, you know, we've had multifamily housing since ancient Rome. The, the, the founding generation colonial America were very familiar with multifamily houses. You know, the, a lot of multifamily only housing burned, for example, in the great fire of London in the 1660s, but nevertheless, that was built back and people were [00:10:00] familiar with it. There were developers back then.

So, what, what happened in sometime in the 19th century, when developers started saying, we don't want, these uses even uses unlike slaughterhouses, that you might not really think of as a nuisance. What changed that people started not wanting those uses near them?

MOLLY: Yeah, so, I do think that, especially with respect to multifamily housing in particular, there's kind of two things that start to change. One is scale, just technologically, you can start to build taller buildings as the 19th century goes on. And so, I always teach about, you know, the equitable building in New York that was conventionally thought of as one of the buildings that people mobilized around how tall and giant it was in deciding to a zone New York. It casts something like a seven-acre shadow if I recall correctly. So, you have to figure

this has to, I always, with my students joke, like this is an era where like, you know, the Titanic icebergs are still a major problem. [00:11:00] So you gotta imagine a seven-acre shadow is a little bit much for people to get used to.

So, I think that there's scale and that that's increasing in interesting ways in the mid to late 19th century, not quite on the scale of, you know, the elevator and really, really tall buildings, but still things like six stories maybe.

And also, I think there's, another thing that is, that is happening in the mid 19th century, which is immigration. Right, so immigrants living in tenements, some of the creation of the tenement housing ideas about the pernicious effects of multifamily housing seem to emerge from both legitimate and illegitimate concerns about 10 minutes. So, on the legitimate side, you know, there was not adequate fire prevention--there were not stairwells to get out of buildings that were reasonably accessible, so that of course made people nervous. But then there was also class panic and, you know, ethnic panic about, immigrants. And I think that that was connected to, to sort of how people perceived, who might be living in multifamily housing.

[00:12:00] But it is interesting, I think, that like these garden square developments moving beyond sort of banning apartments or multifamily housing specifically. These, these garden square developments, even in the urban core, they start to want to ban business. And, and why that is, you know, now we think of one of the amenities of urban living might be your corner bodega or the ability to walk and get a cup of coffee. But whether it's because that was just sort of contractually what people were copying, or that was a preference, we know that there were nuisance lawsuits about things like grocery stores in a predominantly residential area, areas. It's maybe a taste shift, something that for some reason in the mid 19th century became less desirable.

ANTHONY: And let's, let's talk to, about the core of the issue of tenements in apartments in a minute. But on the, on that businesses, you know, today with the automobile, although I don't like it, you understand why a subdivision can get away with just saying there's no businesses. Cause most people can just get in their car in 10 minutes here at any [00:13:00] business you want to be at. But say in 1880, the, you know, although we think of people having horses and carriages back then, that was still pretty, pretty upper-class thing. So for most people, if you need to have anything, you have to walk to a business. So why would people want to live in a division that, that bans those businesses? And I suppose it's that we're still, we're not talking about a modern sub development, we're just talking about a couple blocks. And so you're, even if you ban the grocery store next door to you, you're still going to be able to, to three blocks, get what, get to what you want and is that maybe how people just were trying to organize themselves?

MOLLY: I also think one of the things that emerges as you read these cases, it's sort of fascinating is realizing how, how old the delivery economy is, that like sort of horse drawn

carriages, delivering everybody's groceries and other things seems to have been really prevalent. So that's actually one of the things that also with the rise of [00:14:00] multifamily housing, there's a lot of complaints about there's just going to be more delivery trucks.

And so, I think that like, you know, now, especially in the middle of this pandemic, we're all sort of subsisting on deliveries in one way or another, that's a really old notion. And I think it's actually, yeah, that's, that's some of what's sustaining it and particularly the bigger places like New York, sustaining urban living, even in places that are predominantly residential.

ANTHONY: You know, I hadn't thought about it over the last six months, but this, this delivery grocery that so many of us are doing now is just like the milkman. We haven't really had the milkman in the last 50, 70 years, but he's back--

MOLLY: Exactly same thing.

ANTHONY: --with a bunch of other stuff.

MOLLY: Yeah. Where like, you know, maybe now it's rarer that people feel like running out to the grocery store instead they get it delivered. And I think there actually was really a lot of that in the 19th century, particularly among, you know, the upper classes and middle upper class.

ANTHONY: Wow. Well, so new, we've talked a bit about nuisances and how some of these businesses, you know, at common law would be considered a nuisance like slaughter [00:15:00] house. It's okay, we, we know we need slaughterhouses, but they have to be in their own place with plenty of room around them. Then there's kind of in between types of uses and then there's just people, right, multifamily buildings. So, we have this, you described this interesting war since between the idea of the tenement and the idea of the apartment. Which today I think we would think are basically the same thing, maybe a tenant is a type of apartment. But people did a lot of work to try to point out they were very different at that time. Can you describe what tenement meant? What tenements, where tenements came from and then, you know, what, how the apartment was a reaction to that?

MOLLY: Yeah, so, tenements come about early 19th century is really contemporaneous actually sort of with the nuisance covenant--1830s ish, I think is generally when we think of them coming about. But they really [00:16:00] arose to house the immigrant population on

rapid notice. And so, a lot of them were shoddily built. They were associated with like bad landlords. They did not have adequate fire protection. They also lacked often indoor plumbing and sanitation. And so, this was not somewhere where you would probably want to live when you, when you moved.

So, tenements are associated again with both class panic, fear about immigration, but also, with legitimate concerns about the lack of sanitation and with really drastic fires. I mean, if you go through the New York times in the mid 19th century, you will read about horrible tenement, fires and fears, and you can understand why people might be worried about how being something with inadequate fire protection, next door to a roadhouse or something like that.

So, in mid 19th century, there's a huge tenement house reform movement--they become subject to regulations. They still even in common law were generally not considered nuisances unless there was some sort of [00:17:00] severe sanitation problem or the like, so that's another area where regulation that started to kind of gap from nuisance in interesting way.

But oddly enough, yeah, the rise of tenement house regulation, made, really sort of created an impetus for the apartment for things that actually would satisfy these requirements of the tenement house regulation by having sufficient sanitation or by having sufficient air and light.

And so, it created kind of this regulation that the market filled with the creation of more upper-class housing. Particularly as it became more expensive to maintain big, fancy mansions in cities like New York, whether be because, you know, the deliveries were expensive or whatever else, there became a real demand for the apartment among the middle and upper classes.

And so that really starts around 1870 and they are trying from the get, go to distinguish themselves from the tenements. So, they're giving the apartments, fancy names, like the Dakota and the Stuyvesant, things like that. [00:18:00]

ANTHONY: And everything was Parisian, right?

MOLLY: Yeah, everything is Parisian, gardens, the Parisian flat. And so, uh, they're really trying to set themselves apart from the tenement and of course, neighbors don't always see it that way when it means more people, more deliveries and also more middle-class residents. Because these were even though they were still very nice apartments, definitely more economically diverse than the Vanderbilt mansion district for instance. So, there is this initial struggle about our apartment tenements. Are they subject to the tenement house regulations? Are they within these covenants that sometimes expressly in that list of 50 things, ban tenements? Do apartments come within those protections?

And the lawyers take pains to try to distinguish them all often in really interesting ways for those of us who love law and language and interpretation, because they go to all of these different dictionaries to try to understand what is a tenement, what is an apartment?

They do the same thing with other uses. One of my favorites is there's a later [00:19:00] dispute, I read about a little in the paper as to what, like, whether there's a difference between a garage for cars and a stable for horses. And you realized that at the time, most dictionaries just find the garage as stable for cars, which like you're imagining the judge, like trying to get to the bottom of this interpretive problem and can't, can't do so.

So, there is like this really interesting interpretive problem about how, what sources should we use to decide what's banned within these covenants. And also, there is a recognition on the part of judges and others, that there is a different class of person living in apartments.

And so, there is a question about, is this a legitimate reason to permit one and not the other would just be about sort of the character of the inhabitant, whether it's a new immigrant or whether it's someone who can afford something a little more of scale.

ANTHONY: Often the, I mean, often these deeds right would have been written, say 40, 50 years before the dispute in question. So even the idea of an apartment didn't exist when it was written.

MOLLY: Right, exactly. And so that's part of the, that's [00:20:00] part of the struggle. It's certainly harder for judges when they're trying to interpret a covenant written much earlier to say, Oh, well, they would have said it if, if they intended to ban it when the thing didn't even exist yet. And so, the, really the, again, the 1870s is when we start to see the apartment, but a lot of these covenants went in on properties prior to that date.

ANTHONY: Now it, it seems in, in most of this litigation that the judges are doing what we are taught in law school happened during this time in a lot of ways, which is they're interpreting this language to allow for alienability and the use of property.

And so, if you can find a good argument that your building is not a tenement, then it's unlikely that the judge is going to enjoin the covenant against you. Is that broadly true that we do we see the exceptions to that? Or is it that, you know, is that pretty much some of [00:21:00] what then leads people into saying, well, we need another tool here, which turned out to be zoning.

MOLLY: I think that's right. That, that it is part of what gives rise to a new tool. It is the case that then as now, restrictions on the free use of property are viewed somewhat skeptically when they're private, at least. And so, the idea that the covenants were restricting the free

use of property, they were sort of strictly, strictly construed. The nuisance covenant tried to get around that problem a little bit, because by saying like, we want to ban all noxious uses. The way that if you were to draft a statute, that was a little bit more broadly, noxious is a broader category than the fifth list of 50 enumerated things. And so, there was a little flexibility for you know, grabbing new types of uses that weren't included in the 50, through this use of this term, noxious or nuisance. But because the apartment is perceived as desirable and good and sort of something that is a, that is desirable, at least among the middle and upper classes, it [00:22:00] is hard for judges to think of them as noxious, which is itself interesting.

ANTHONY: Was there discussion about, you know, cause that, that I understand that impetus in private law to allow the free use of property. Of course, we, we at IJ like the free use of property, but we also have a contract here, at, at the same time. And contracts are usually, you know, interpreted in ways to try to protect the rights that the parties have bargained for.

Was there, is it that contractual rights kinda got left at the side at the expense of, of property rights? Both, again, just in a, in a private law setting or is this because a lot of the owners never signed that covenant in the first place? They bought the property, which, which the covenant runs with the land and so there was this, you know, bias against it. I might, I might even think of it as a, you know, a bias leftover from Thomas Jefferson against the fee tail and, and restrictions that we never agreed to, but are foisted [00:23:00] upon us. Is that, so is there some interplay between those two principles?

MOLLY: Yeah, I think that's exactly it that, you know, covenants, despite being a nightmare for most law students and people who have had to take a bar, they're really fascinating for this reason, which is that their contracts that we might not even be aware of, that maybe just sort of embedded in what we purchase. And so that is definitely something that's going on here. I think sometimes these are sophisticated parties who are buying with knowledge that they can't do X and then maybe they seem less sympathetic. But I think in a lot of instances, these are buried in the record books, which are much more inaccessible than, than they even are now, it's still pretty inaccessible. And so, you know, suddenly you learn that you're forbidden from having your home business by this agreement made in 19 or 1820 when you're a purchaser and 1870. And so that is, I think, what leads to this, you know, this feeling of the free use being restricted, not by my own choice, but by something I think that was kind of buried in a list of 40 restrictions of which I wasn't even aware. Now we could say those people should be, you know, sort of [00:24:00] should be more savvy. And there is a lot of, a lot of that, but I do think that the other thing is there's, there's very much fear about a time duration that you can sense it doesn't really cash out doctrinally. But initially some lawyers are worried in this period that if they try to burden the property for, with covenants, that will last for say more than 25 years that they are doing something a little sketchy. Which kind of makes sense that might be like one generation, right, so we would think, okay, after 25 years people can reassess. But they're nevertheless, despite their

fears, they tried drafting these perpetual ones and that's really the conflict is that something that's been in effect for 50, 70, 90 years really does start to restrict what might be the most optimal development at time too.

And so that leads to this conflict.

ANTHONY: I, I liked some of the, the clever arguments that these lawyers made over the years in trying to turn multifamily housing into a nuisance. Especially you hear this one today, [00:25:00] even the, the argument that, especially right after the revolution, Russian revolution that multifamily housing is going to turn people into communists. Because, you know, I guess they don't farm or, or own property in the, in the, in the way that a good capitalist is supposed to own it. What, what are, what are some of your favorite arguments that were made along the way? Of course, the most pernicious are the, the, the racial and class ones, but, there, there was even a much more than that, right?

MOLLY: Yeah. So, I think the, you know, the patriotism is super interesting just as in its historical moment about fears of communism and the sense that people need a stake in the investment and property encourages people to have patriotic duties. I think, you know, the other one that was really interesting, that is again, sort of dark to be talking about at this moment, but just the palpable difference and the change in tone around the flu in 1918.

So you know, the discussion that, well, [00:26:00] maybe tenements were associated with more disease, maybe apartments weren't necessarily, but after the flu and sort of the perception that, well, we closed all these businesses, like why didn't we close these places where 300 people were living that would seem to lead to a lot of disease.

I thought it was really wild to be reading that in 2020, and also to be seeing similar arguments in the news about, you know, the end of the city and, you know, multifamily housing as, as dangerous for that reason and, you know, uh, sort of flight for that reason. So, that was really interesting. And that I think the other thing, because again, a terrible, awful, you know, fact of history was this realization about the ways that notions of race suicide, in the early 20th century were playing a role in zoning or, or I should say covenant and leader, zoning rhetoric. So, the idea that multifamily housing was discouraging people of means from having children and thus contributing to society in that way. It was where there's a great, you know, great in a horrible way, a quote from one of these [00:27:00] cases where, you know, this judge gives the example of like seeing a woman with a clothed dog, like a that's the worst portrait of degeneracy is a woman walking her little dog and a sweater.

And I just thought this was written in 1919 and so it's so interesting to see that then they were thinking of that as sort of like the portrait of like a, an unfulfilled life, which is just sort of fascinating as a historical matter. So, there's just a lot of cool historical color and seeing how people made these arguments, that multifamily housing was inherently suspect or bad for society.

ANTHONY: But, but despite all that, despite these, uh, uh, racist, classist, I don't know what arguments they couldn't quite get there, right. And was it, was it just that nuisance, you know, there was this kind of, come on factor from people who are increasingly living in cities and being told that multifamily housing is a nuisance, you know, perhaps judges themselves lived in apartments, and [00:28:00] like, are you talking about me or what was it that, that just made this project not quite get there?

MOLLY: Yeah, it's a great question. This is the puzzle of the paper, which is I have this sense and I'll try to describe this more eloquently than it may be in my head, but that tort law's an important site for debate about what we perceive to be harmful. And judges because they are persuaded by precedent, tend to move more slowly and incrementally in deciding what harms are and in responding to technological change.

And one of the interesting things about this story is that contracts sort of come about as a way of expressing a norm of harm. And it's faster contractually to recognize the apartment or declare the apartment harmful. And they're both providing that information through the covenant to judges, you know, saying in their covenants, "we don't want multifamily housing, we want single family housing."

But also, those contracts way, the groundwork, I think for regulation, for the idea that we can declare something harmful rather than [00:29:00] recognizing it as harmful as a judge might in a nuisance case that we can affirmatively say we don't want apartments.

Whereas tort law wouldn't really get there as fast, I don't think. Might it have ultimately gotten there? Yes, but I think that it's, it's a slower movement when it comes through the tort law development, as opposed to contractual specification, or obviously sort of all-in-one regulation.

ANTHONY: Right. And let let's, let's turn now to that to that rise, this shift from, from private law and just recognizing what people were doing, which, I mean, I guess, to take the, hang on a moment, it seems like in some ways, society was saying that these tenements and, and multifamily building be next door to a single family home was a nuisance. But at some extent they, they weren't quite ready to say that. Maybe they never wanted to say that. Just as today, I think, you know, most people wouldn't outright say that having, having a duplex that's next door is an actual nuisance. But [00:30:00] nevertheless planners wanted to get there.

And so, here's a, here's a quote from near the end of your paper that really struck me if you could, lead us out of it. "Even if purchasers of covenant burdened property opt into the rules, effecting some subdivision, once those rules are transmitted into ordinances and codes, it becomes more difficult for those who do not wish to be burdened, to opt."

That eventually was bought by the Supreme Court and of course we live with that as zoning today. Tell us what you meant by, by that quote, and then tell us how it led into the *Euclid*

case. Yeah, so this is one of the things that I, I've always been struck by in teaching land use is how many early zoning ordinances were basically codifications of what was the market covenant, which is so interesting.

And, you know, for a longtime, scholars, my mentor, Bob Alexson among them, have kind of known that homeowners [00:31:00] associations or large amounts of covenanted property are kind of operating as this peculiar private government. But it's, it's really interesting to see the substantive trends as for of rules from private into public.

And so that quote that you read, I think gets it kind of the heart of it. My interest in the dialogue between private and public law here, which is we worry a lot about improper influenced by groups, right? You could think of things like campaign finance law, or we're worried about people, you know, whatever unduly controlling development of things.

This is an interesting way, I think, in land use that like the drafting of a really powerful contract that burdens a lot of people ultimately was used as a template for regulation, in ways that I don't think we've yet really surfaced or understood in part, because just accessing these deeds is challenging.

So, part of my goal here is to sort of show, so we should be sensitive to migration from private to public. And even though there's a template, you have to be really careful because maybe people can more easily leave a homeowner [00:32:00] association if they don't like it. Not everywhere, some places homeowners' associations are quite large and hard to leave. But, you know, we, we know that getting local governments is more challenging than exiting smaller geographic areas, right? So, so I think that's some of what I was thinking about there.

And then to your point about these not quite being nuisances and still not being nuisances today, I think the interesting thing, which is a really, a really great piece of kind of rhetorical mastery, is this idea of the near nuisance or the nuisance adjacent thing.

So, we're just going to talk a lot about light and air and traffic and things that we would typically think of as sort of harmful and bad, but never get to the point of declaring them formally a nuisance. You still see that now with discussions of, you know, when, when people talk about character of the community, that's a factor that was in like ancient nuisance cases and still at every single meeting of a zoning commission nowadays, or a city council you hear, "Oh, we just were worried about neighborhood character."

It's just fascinating kind of the way these concepts are really [00:33:00] are really durable. And so, this nuisance adjacent idea, I think is really what kind of underpins *Euclid*. *Euclid* has always bothered me for a couple of reasons probably, well, there's a few, so to list two, first of all, you know, when you teach it to first year law students, you talk about this analogy to nuisance. So, the *Euclid* case very famously describes apartments or sort of analogizes them to a pig in the parlor rather than the barn yard, which is just a wild quote.

ANTHONY: Which is how I like to describe my friends who live in apartments.

MOLLY: That's right, that's right. But yeah, so, but it's bothered me, always that the court talks about apartments in *Euclid* as though they are nuisances, but they are not.

And that's part of what this history shows is they're never really found to be nuisances. That's always bothered me the gap between private and then this discussion of apartments as businesses.

And the other thing that's bothered me is *Euclid* of course comes about in what, you know, we think of as the Lochner era and so it's always been kind of a mystery [00:34:00] for people who are interested in, in the Supreme Court it's rulings in this time that how does this ruling of severe regulatory interference with property come about in this period?

And then I think that sort of this concept of nuisance adjacent helps us understand that, but also the fact that there were so much respect or, or deference to these widespread contracts about restricting one's property rights.

That psychologically, that may have played a role in getting people to accept the idea that it couldn't develop their property as they wanted. But also, there may kind of have been a freedom of declaring what we don't want. That was perceived to be kind of contractual that then underpins the ruling in *Euclid* that says that, that it's, it's fine to declare certain things like apartments harmful and to ban them from different districts within the community.

So, I think that this story helps us understand how this concept of nuisance adjacency and, and also how the rise of covenants and that spread of covenants sort of underpins what ends up happening in *Euclid* [00:35:00] later on.

ANTHONY: More, more generally, what, you know, what, what critics of like, like many of us at IJ of zoning today would say, about, about the difference between what's in a covenant and what's in an ordinance, of course, is, is exactly what you said in that, that quote I had. And, and when I think about that, I think about, and this, this might get a little far field, but many of our listeners are going to be familiar with, with the Ronald Coase and the idea about contracting for, to contracting, to alleviate harms between two parties and that the whole Coasean Theorem that, that some of them you might've talked about in law school.

But Coasean bargaining as it's called that assumes that, that you know, there's a price point where someone could pay to not have something happen to them, whether that's a nuisance or just something that you want to [00:36:00] protect your, your rights from. And so, you can and do that with a covenant.

You can do that by say, you know, paying someone across the street, not to build a building if you don't want it to. And how zoning is often justified is there is as Coase recognized, there is this collective action failure where you just, it just doesn't work. And so, we need this big, zoning regime to protect single family homes or whatever they use is from outside development.

Was, now I would argue that, that, that just means that there's a, there's a, a lot of preferences that are aggregated here. And so, we're better off not having that zoning because there are a lot of people who lose out when we have zoning. And so, it's better to have people negotiate that. But the court disagreed essentially in the constitutional way in *Euclid* and said that this is, that this kind of regulation is [00:37:00] okay.

Do you think that the court saw this as kind of a collective action problem? Or do you think it was more a classist type of thing, as you, as you were saying, is as it's comments about apartments in the, seem to indicate that this is how everyone's doing it, we're just going to allow, what what's in private law to become public law or, or did they have more sophistication than that?

MOLLY: Yeah. I always teach *Euclid* as a classic mixed motives case. And I often have my students read closely the paragraph where they talk about the opinions of experts and I'm quoting there. And they sort of go through things where you say where you sort of saying, yeah, that seems like something you would want to legitimately prevent ex ante.

And then they talk about the apartment and the family, like sort of things that are much more suspect. And so, I think of, of zoning as sort of mixed motives, really classically of, [00:38:00] of both being about class and about, you know, legitimate things like wanting to prevent the factory from going in the place where it would be undesirable.

Now, of course, Coasean bargaining tells us maybe we would get to a place where the factory would not want to locate there, whether that's because, you know, there's some price or some bargain that could be struck or because as we know, there would be sort of socially bad effects for the factory that decides to, you know, locate and really hurt a bunch of people.

But it's interesting that I do think that there is a sense that zoning solves the collective action problem, even in the court's mind. The proponents of zoning, the city planners and lawyers who make the arguments in its favor, simultaneously portray private law is both too flexible and too inflexible. It's really hard to pin down what exactly they're trying to get out. They're saying, "Well, it's not good enough at preventing things like apartments or it's unpredictable. Sometimes judges will suspend a covenant because of changed circumstances or something that's just far too unpredictable," but then they'll also say things like, "Oh, and you know, these [00:39:00] covenants have been in effect for a long time and are describing uses that are no longer present, so it'd be better to get this into public law where it'd be both more frequently updated and more durable." Well, what we know, and again, Bob Alexson has written a great paper on this called the "zoning straight jacket" was that zoning never, it's not like things that became single family ever became anything else. There was no evolution, and so now with that history in mind, it's useful to remember, I think all that coast, that every solution has costs. It's not just the transactions costs of private bargaining, but it's also the cost of the inflexibility and with the massive economic effects that we now know zoning has had.

ANTHONY: Right. Well, let's, let's take that in our time left, up to today and right, today, we have a lots of critiques zoning. We've had some funny discussion in the political discourse in the last month or two about zoning by the president. We don't need to get into that, but overall there's a, there's a lot more realization that zoning presses, pushes up the [00:40:00] cost of housing, whether it's single-family, multifamily, what, what have you. It doesn't allow for organic change within a community that, that you need over time.

What can your findings tell us about, you know, how people trying to reform the system can go about it? Whether that's a, whether tactically or, you know, how their understanding of the relationship between private law and public law could, could influence policymakers who are trying to fix things today.

MOLLY: Yeah, so this is sort of my most adventurous claim and the one I'm probably least persuaded of myself, but I'm really intrigued by the ways that private law lets us deliberate about harms that may become subject to future regulation. I've actually written another paper in which I also engage this theme on of all things, light projections onto property and whether those are trespasses or nuisances. And I think there's an important dialogue that takes place in public law or a private law that can [00:41:00] inform how we think about regulating. But I think it's something we have to pay attention to in the land use context, because a lot of the things that were declared harmful through these covenants, ultimately those same arguments were marshaled in support of regulation in ways that judges were prying to hear because of having decided years of these private law cases.

And so, I think sometimes, you know, these, these widespread contracts that run for a long time can act as kind of trial balloons for regulation in ways that we might not have expected. And where I see this now, and this is again, a little adventurous, but you know, things like the solar panel or like home sharing, those are being written into covenants and judges are being or judges are hearing arguments that, you know, home sharing falls within, again, the old nuisance covenant that it falls within a noxious use. And so--

ANTHONY: Vacation rental versus long term rental.

MOLLY: Right, yeah. This is a site for thinking about what are the things we view as harms that later may become subjective tomorrow's [00:42:00] regulation. And so, I think to the extent we're trying to anticipate the directions that judges are likely to take when they are evaluating regulation that affects property.

It's useful to at least look at the arguments made and evaluate what we think of them, whether we think it's sort of manipulated evidence or whether we think it's really actually valid legal argument. I think it's a, it's a good site for thinking about how we are deliberating

about harm in the private law context, which doesn't get as much attention as public law in part, because it's just harder to do the work of evaluating deeds and paying attention to HOA regulations.

It's much easier to use kind of the free information, public law to track what's happening. But yeah, I would like to redirect us toward private a little bit.

ANTHONY: Well, as I often try to remind people, you know, law often, as they say the, the product of the human action, but not necessarily a human design.

When it's in a private context and of course when a legislature or city council legislates, it it's very much of human design. [00:43:00] But then we have unanticipated human action unfortunately following, from that.

Well, I'd like to thank very much Professor Brady for coming on this, this podcast to talk about this, this fascinating paper.

Again, it will be available shortly online on her, a webpage, and also on a SSRN the social science resource network for all of those interested in freeing up property rights to protect to, to, alleviate affordable housing and allow us to create more housing for people and to better exercise or property rights and better get along with our neighbors. I encourage the article to all of you.

So, thank you again very much for coming on Molly. Anything, else to leave us with?

MOLLY: No, thank you so much for having me. This was really fun.

ANTHONY: You bet. And next time we'll be talking again about the Federal Courts of Appeals. And in the [00:44:00] meantime, I will again, remind all of you to get engaged.