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Reforming Local Property for an Era of National Decline

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ABSTRACT

Following a century of rapid growth, the global human population is predicted to crest and then decline in the coming generations. Some industrialized countries are already grappling with the economic and societal consequences of population loss. Others, including the United States, have only started to realize that decline might arrive on their doorsteps far sooner than originally anticipated, a prospect for which policymakers and legal scholars are presently unprepared.

Global and national demographic change threaten to cause far-reaching dislocations, and local municipalities, too, will be asked to reckon with the aftermath. Yet local governance in the United States has long followed a dominant vision of population growth, with decline left stigmatized as a regional anomaly—as a symptom of crisis rather than a discrete catalyst for it. The growth gospel prevents local officials from preparing for decline

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preemptively when the resources can still be mustered to confront shifting demographics and dwindling tax streams. On the other hand, once a locality enters an era of decline, it runs headlong into vexing problems of property law. Underutilized land cannot simply be deleted or removed. It cannot be exchanged with utilized lands elsewhere in order to retain density, maintain vibrancy, and consolidate local infrastructure. As scholars have explored in the context of climate change, another looming challenge of the coming century, property law's traditional preference for intergenerational stability hinders its utility when preparing for a changing world. Keeping pace requires that the institution evolve to become more adaptive and dynamic.

Drawing upon recent property theory, this Article advocates for a reconfigured tenure form, the callable fee simple, which can be harnessed to create a new intergenerational mechanism for population decline: Future Consolidation Districts, or FCDs. After sketching the contours of an FCD, the Article explores how one could be created in a manner that provides flexibility to tackle future demographic dislocations, overcome implementation and equity challenges, and comport with existing local government and property norms, even while pushing the limits of both. Although today's demographic forecasts may ultimately prove inaccurate, existing regimes cannot, and will not, remain static forever. They should be reconfigured deliberatively in advance rather than by necessity down the road.

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INTRODUCTION

A global demographic revolution is underfoot. According to a widely publicized recent study, the world's human population, currently sitting at 7.8 billion people following a century of breakneck growth, is poised to crest at around 9.7 billion in 2064 and then begin a gradual decline.[1] This

1. *See* Stein Emil Vollset et al., *Fertility, Mortality, Migration, and Population Scenarios for 195 Countries and Territories from 2017 to 2100: A Forecasting Analysis for the Global Burden of Disease Study*, 396 LANCET 1285, 1285 (2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30677-2/fulltext. Population forecasts are an inexact science, however, and this study does not offer the final word on future demographic trends. *See infra* note 26 and accompanying text. Yet while other studies predict that the global population will peak later than 2064, slowing growth and declining fertility are broadly identified as significant trends. *See, e.g.*, Anthony Cilluffo & Neil G. Ruiz, *World's Population Is Projected to Nearly Stop Growing by the End of the Century*, PEW RSCH. CTR. (June 17, 2019), https://www.pewresearch.org/fact-tank/2019/06/17/worlds-population-is-projected-to-nearly-stop-growing-by-the-end-of-the-century/. The United Nations also predicts stalling growth by the end of the

forecast offers the latest reminder that humanity faces a probable future of population shrinkage. Already a number of countries in Europe and Asia have seen their total fertility rates fall below replacement level—defined as 2.1 children born to a woman over her lifetime, the figure necessary to maintain population stability—and several have begun to report raw population decreases.[2] In places like Japan, Greece, Spain, and South Korea, population decline has assumed the urgency of a national crisis.[3]

The United States, too, faces a future of population decline. Data from the 2020 census shows that the nation experienced its second-slowest decade of growth since the census began in 1790, trailing only the Great Depression years of the 1930s.[4] While the United States is still growing

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century. *See* Rick Gladstone, *The Globe Is Going Gray Fast, U.N. Says in New Forecast*, N.Y. TIMES (June 17, 2019), https://www.nytimes.com/2019/06/17/world/americas/un-population-aging-forecast.html.

2. Vollset et al., *supra* note 1, at 1285.

3. *See* Vollset et al., *supra* note 1, at 1285, 1290–91 (predicting that Japan and Spain will see population declines over 50% by 2100, and predicting also that Greece's population peaked in 2017 and South Korea's would peak in 2031); *see also* Daniel Moss, *South Korea Needs More Babies and Immigrants*, BLOOMBERG (Jan. 4, 2021, 5:01 PM), https://www.bloomberg.com/opinion/articles/2021-01-04/south-korea-s-first-population-decline-has-few-easy-fixes-in-covid-era (regarding population shrinkage in South Korea); Kwang-Hee Jun, *The Transition to Sub-Replacement Fertility in South Korea: Implications and Prospects for Population Policy*, 3 JAPANESE J. POPULATION 26 (2005), http://www.ipss.go.jp/webj-ad/WebJournal.files/Population/2005_6/jun.pdf (same); Pavlos Papadopoulos, *Population Decline Tops Greeks' Concerns*, KATHIMERINI ENG. (Oct. 3, 2020, 6:30 PM), https://www.ekathimerini.com/news/250360/population-decline-tops-greeks-concerns/ (regarding Greece); Graham Keeley, *Spain Battles Rural Depopulation*, VOICE OF AM. NEWS (Mar. 18, 2021, 8:11 AM), https://www.voanews.com/europe/spain-battles-rural-depopulation (regarding Spain); Sasha Ingber, *Japan's Population Is in Rapid Decline*, NPR (Dec. 21, 2018, 4:54 PM), https://www.npr.org/2018/12/21/679103541/japans-population-is-in-rapid-decline (regarding Japan).

4. William H. Frey, *Census 2020: First Results Show Near Historically Low Population Growth and a First-Ever Congressional Seat Loss for California*, BROOKINGS INST. (Apr. 26, 2021), https://www.brookings.edu/research/census-2020-data-release/; *see also* Sabrina Tavernise & Robert Gebeloff, *U.S. Population Over Last Decade Grew at Slowest Rate Since 1930s*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/2021/04/26/us/us-census-numbers.html.

and has not yet reached the perilous position of countries in Europe and East Asia, demographic warning signs nevertheless abound. Birth rates in the U.S. have dropped perilously.[5] Immigration rates have fallen.[6] Sperm counts in men have declined.[7] And due to the COVID-19 pandemic, birth rates have fallen appreciably since 2019.[8] The

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5. Rich Mendez, *U.S. Birth and Fertility Rates in 2020 Dropped to Another Record Low, CDC Says*, CNBC (May 5, 2021, 12:01 AM), https://www.cnbc.com/2021/05/05/us-birth-and-fertility-rates-dropped-to-another-record-low-in-2020-cdc-says.html; Stephanie H. Murray, *How Low Can America's Birth Rate Go Before It's a Problem?*, FIVETHIRTYEIGHT (June 9, 2021, 10:00 AM), https://fivethirtyeight.com/features/how-low-can-americas-birth-rate-go-before-its-a-problem/.

6. Anthony Knapp, *Net International Migration Projected to Fall to Lowest Levels This Decade: Net Migration Between the U.S. and Abroad Added 595,000 to National Population Between 2018 and 2019*, U.S. CENSUS BUREAU (Dec. 30, 2019), https://www.census.gov/library/stories/2019/12/net-international-migration-projected-to-fall-lowest-levels-this-decade.html. Even so, immigration is forecasted as the primary driver of U.S. growth in the coming decades. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/. While immigration thus can offer a valuable short or medium-term solution to decline, its role in stemming population decline weakens as demographic change affects larger numbers of countries. *See* James Gallagher, *Fertility Rate: "Jaw-Dropping" Global Crash in Children Being Born*, BBC NEWS (July 15, 2020), https://www.bbc.com/news/health-53409521. Without immigration, the United States would begin losing population after 2035. William H. Frey, *Reducing Immigration Will Not Stop America's Rising Diversity, Census Projections Show*, BROOKINGS INST. (Feb. 19, 2020), https://www.brookings.edu/research/reducing-immigration-will-not-stop-americas-rising-diversity-census-projections-show/.

7. *See* Kate Kelland, *Sperm Count Dropping in Western World*, SCI. AM. (July 26, 2017), https://www.scientificamerican.com/article/sperm-count-dropping-in-western-world/; Miranda Bryant, *Falling Sperm Counts "Threaten Human Survival," Expert Warns*, THE GUARDIAN (Feb. 26, 2021, 2:00 PM), https://www.theguardian.com/us-news/2021/feb/26/falling-sperm-counts-human-survival. *But see* Nathaniel Scharping, *Sperm Counts Are on the Decline. Is the Human Race in Danger?*, DISCOVER MAG. (May 1, 2021, 1:00 PM), https://www.discovermagazine.com/health/sperm-counts-are-on-the-decline-is-the-human-race-in-danger (questioning the extent of these findings).

8. *Compare* Melissa S. Kearney & Phillip Levine, *The Coming COVID-19 Baby Bust: Update*, BROOKINGS INST. (Dec. 17, 2020), https://www.brookings.edu/blog/up-front/2020/12/17/the-coming-covid-19-baby-bust-update/, *with* Sandra Johnson & Shannon Sabon, *Deaths Outnumbered Births in Half of All States Between 2020 and 2021: New Census Bureau Population Estimates Show COVID-*

pandemic's impact on demography may ultimately prove only a temporary one,[9] yet some researchers expect it will accelerate larger demographic trends that were already brewing prior to its onset.[10] The Census Bureau predicts that the United States will have a population of 400 million in 2058,[11] a downward revision of an earlier forecast, asserted in reports only ten years earlier, that the country would reach 439 million people by 2050.[12] Now it is predicted that the U.S. population will peak in 2062 and then enter a stage of decline.[13] If the projection proves true, a majority of the Americans who must confront decline in the 2060s are already alive today.[14]

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19 Impact on Fertility and Mortality Across the Nation, U.S. CENSUS BUREAU (Mar. 24, 2022) https://www.census.gov/library/stories/2022/03/deaths-outnumbered-births-in-half-of-states-between-2020-and-2021.html.

9. Moss, *supra* note 3 (discussing the challenges of stemming population decline in the context of the pandemic); Conor Dougherty, *The Californians Are Coming. So Is Their Housing Crisis.*, N.Y. TIMES (Feb. 12, 2021), https://www.nytimes.com/2021/02/12/business/economy/california-housing-crisis.html (discussing population shifts exacerbated by the pandemic).

10. *See* Philip N. Cohen, Baby Bust: Falling Fertility in US Counties Is Associated with COVID-19 Prevalence and Mobility Reductions 2–4 (July 4, 2021) (unpublished manuscript), https://osf.io/preprints/socarxiv/qwxz3/; Daniel Griswold, *More Immigration Needed to Offset COVID-19 and America's Demographic Decline*, MERCATUS CTR. (Dec. 7, 2020), https://www.mercatus.org/publications/trade-and-immigration/more-immigration-needed-offset-covid-19-and-america%E2%80%99s-demographic (noting that "the COVID-19 pandemic has accelerated certain demographic trends that were already heading in a worrisome direction"); Courtney Vinopal, *The U.S. Birth Rate Began Dropping Years Before the Pandemic. Here's Why*, PBS (May 13, 2021, 1:24 PM), https://www.pbs.org/newshour/nation/how-the-coronavirus-pandemic-has-changed-the-way-americans-think-about-pregnancy.

11. JONATHAN VESPA, DAVID M. ARMSTRONG & LAUREN MEDINA, U.S. DEP'T OF COM., U.S. CENSUS BUREAU, DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060, at 2 (Feb. 2020), https://www.census.gov/library/publications/2020/demo/p25-1144.html.

12. *See* Grayson K. Vincent & Victoria A. Velkoff, U.S. DEP'T OF COM., U.S. CENSUS BUREAU, THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050, at 10 (2010), https://www.census.gov/content/dam/Census/library/publications/2010/demo/p25-1138.pdf.

13. Vollset et al., *supra* note 1, at 1291.

14. The Census Bureau projects that the median age of the U.S. population will be 43 in 2060, indicating that over 200 million Americans in 2060 have

The magnitude of this slow-developing crisis has escaped the attention of legal scholars. While climate scholars have urged us to prepare for the Anthropocene Era, a dawning age where humans exert consequential control over nature,[15] there have been few calls to prepare for the demographic changes borne out by a different form of human influence: the control we exert over reproductive biology.[16] In particular, decline threatens the stability of two legal institutions that are fundamentally grounded in anathema concepts: local government law, driven by visions of growth and development; and property law, which anticipates and endorses long-term stability and static norms. Both institutions are woefully unprepared for a future of decline.

This Article aims to shed light upon the problem before the prospect and ramifications of population decline become more pronounced. It first offers a critique of existing local government and property law regimes. Then, drawing and building upon recent property scholarship, it proposes an intergenerational mechanism for reconfiguring local property in advance of accelerated demographic change.

Part I introduces the concept of population decline, first as a matter of demographic theory and intergenerational law, and second in the context of its prickly relationship with local governance. This Part demonstrates how local decline has been viewed by stakeholders and scholars as a symptom of socioeconomic ills, not as a discrete demographic

already been born. *See* Press Release, U.S. Census Bureau, Older People Projected to Outnumber Children for First Time in U.S. History (Mar. 13, 2018), https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html. But because population growth in the coming decades will rely disproportionately on immigration, see Budiman, *supra* note 6, many of these future Americans are not yet citizens today.

15. *See infra* notes 35–37 and accompanying text.

16. Relatedly, though, property scholars have recently begun to approach the broader role of present and future demographic change in shaping property regimes. *See, e.g.*, Michael C. Pollack & Lior Jacob Strahilevitz, *Property Law for the Ages*, 63 WM. & MARY L. REV. 561, 564–65 (2021) (advocating for property reforms in areas that impact senior citizens, assessed against the forecast of an aging population over the coming 40 years).

possibility, thus sowing an environment where the political mandate to confront decline emerges too late to muster the resources necessary to confront it.

Part II examines the central role played by property law in facilitating these cycles of local decline—and at the same time, the role property is *capable* of playing in preparing for future dislocations. Whereas traditional property law is characterized by a tension between stability and adaptability, this Part concludes by considering a new tenure form, the callable fee simple, that aims to balance these competing tensions in a manner that promotes intergenerational utility. Building upon the callable fee model, Part III then proposes a new tool for local property law: the Future Contraction Districts (FCDs). Creating FCDs could permit adaptive and unified responses to population decline in the future, encourage a recalibrated perspective on local property and growth today, and facilitate new market behavior and land use opportunities in the meantime, even if, ultimately, population decline never comes to pass. This Part argues that local officials should use zoning reform as an opportune gateway for implementing FCDs and preparing in a limited yet meaningful fashion for the challenges likely to emerge in coming generations.

The Article concludes by emphasizing the impermanence and unpredictability of existing systems. No locality will truly grow forever, notwithstanding that the operative model of local governance assumes otherwise, and no private property right is truly everlasting, even if property law is facially built around the foundational concept of long-term stability. Predictions of future trends are necessarily clouded in uncertainty. But even if coming decades do not produce the demographic shifts currently feared, infusing intergenerational adaptability into local property law still offers flexibility for future public stewards and also a refined approach to growth and decline for those making land use decisions today.

I. LOCATING POPULATION DECLINE

Grappling with the prospect of future population shrinkage demands, as a starting point, an assessment of how decline operates in national and subnational frameworks. When do national demographic shifts occur, and why? How does decline manifest in local governance theory and the local government lifecycle? And how have legal scholars addressed the intergenerational questions the issue tends to raise? Some of these questions are relatively novel, raised in recent years by scholars confronting a new, uncertain century likely to be marred by climate change. Others reflect age-old cycles of human expansion and contraction. For localities, however, past experience may prove a poor tonic for addressing population loss because demographic shifts that were once local or regional in character now stand to play out at the national level—albeit still with a local twist.

A. *Decline in Policy and Law*

National population decline is a recognized feature of demographic transition, a theory that describes how countries experience falling birthrates as they undergo economic and social development.[17] The theory is traditionally explained through a four-stage lifecycle. In the first stage, a pre-industrial or low-income country displays both high birth rates and high death rates, a product of underdeveloped medical and public health systems.[18] Population growth remains low until the second stage, when

17. The theory was formally articulated by Frank W. Notestein in the 1940s and 1950s. *See* ROBERT WOODS, THE DEMOGRAPHY OF VICTORIAN ENGLAND AND WALES 18 (2000).

18. *See* Richard Knight, *Can We Be Sure the World's Population Will Stop Rising?*, BBC NEWS (Oct. 14, 2012), https://www.bbc.com/news/technology-19923200; John Bongaarts, *Human Population Growth and the Demographic Transition*, 364 PHIL. TRANSACTIONS ROYAL SOC'Y: BIOLOGICAL SCIS. 2985, 2985 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2781829/.

the country experiences an economic transformation—traditionally from an agrarian to an industrial society[19]—and its death rate declines even as its birth rates remain high, contributing to a rapid demographic change signified by a high rate of population growth.[20] Growth then slows at stage three, as birth rates now begin to fall, and eventually a country finds itself at stage four, where both birth and death rates remain low and the population flatlines or even begins to decline.[21] Demographers debate what comes next. While some argue that continued economic and social development may usher in a "stage five" where fertility rates again begin to rise,[22] other studies have pushed back on this theory, pointing to national-level data indicating that late-stage societies are still characterized by decline, not by growth.[23]

A prediction of population decline in the United States thus fits squarely with the traditional view of demographic change in high-income countries. At the same time, however, ongoing debates between social scientists indicate that long-term demographic forecasts should be approached with a degree of caution. The familial and cultural forces that have shaped the childbearing decisions of recent generations might change in the future. Women's rights and access to birth control may be rolled back.[24] Governmental

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19. Bongaarts, *supra* note 18, at 2985.

20. *See id.*; Knight, *supra* note 18.

21. For an analysis of theories underpinning fertility decline in the later stages of demographic transition, see Oded Galor, *The Demographic Transition: Causes and Consequences*, 6 CLIOMETRICA 1 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4116081/pdf/nihms-526936.pdf.

22. *See* Mikko Myrskylä, Hans-Peter Kohler & Francesco C. Billari, *Advances in Development Reverse Fertility Declines*, 460 NATURE 741, 743 (2009).

23. *See* Hampton Gray Gaddy, *A Decade of TFR Declines Suggests No Relationship Between Development and Sub-Replacement Fertility Rebounds*, 44 DEMOGRAPHIC RSCH. 125, 125 (2021); *see also* Ron Lesthaeghe, *The Second Demographic Transition: A Concise Overview of its Development*, 111 PNAS 18,112, 18,112 (2014) (discussing the second demographic transition).

24. *See* Christopher Murray, Dir., Inst. for Health Metrics and Evaluation,

interventions to stem population decline, thus far ineffective, may someday bear fruit.[25] And two forces that already shadow the arc of the twenty-first century—climate change and automation—may create unanticipated societal dislocations. The effects of transformational variables are, by definition, difficult to predict, underscoring the hesitance that accompanies demographic predictions.[26] Readers of this Article in forty years, if any, may well scoff at the prophecies it cites.

But the challenge of predicting the future should not stymie efforts to confront it today. Newly updated forecasts and accelerated demographic trends suggest there is a strong probability the United States will face population decline in the coming generations. So too does the realized arrival of decline in other high-income countries, many of which are only now scrambling to address its impacts.[27] It behooves policymakers and scholars to think soberly about the various

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Speaker at Council on Foreign Relations Meeting (July 15, 2020) (discussing the threat to female reproductive rights in the context of demographic change), *in The Emptying Planet: The Global Impact of Declining Fertility Rates, A Virtual Roundtable*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/event/emptying-planet-global-impact-declining-fertility-rates-virtual-roundtable.

25. *See id.* (discussing a moderately successful intervention in Sweden, as contrasted against interventions in Singapore, Taiwan, and Japan); Gallagher, *supra* note 6 (also contrasting Sweden against other countries); Noriko O. Tsuya, *Low Fertility in Japan—No End in Sight*, ASIAPACIFIC ISSUES, no. 131, June 2017, at 1, 3–4, https://www.eastwestcenter.org/publications/low-fertility-in-japan%E2%80%94no-end-in-sight (regarding interventions in Japan).

26. *See, e.g.*, Brian Thiede, *Climate Change Will Likely Influence Fertility Rates*, NEW SEC. BEAT (Sept. 16, 2019), https://www.newsecuritybeat.org/2019/09/climate-change-influence-fertility-rates/ (discussing the varied ways climate change could affect fertility).

27. Spain, for example, implemented a national initiative to confront demographic change in 2017, despite the United Nations predicting in 2000 that Spain would see significant population decline by 2050 and have the highest percentage of elderly people in the world. *See* MINISTERIO DE POLÍTICA TERRITORIAL Y FUNCIÓN PÚBLICA, ESTRATEGIA NACIONAL FRENTE AL RETO DEMOGRÁFICO [MINISTRY OF POLITICAL TERRITORY & PUBLIC FUNCTION, NATIONAL STRATEGY TO COMBAT THE DEMOGRAPHIC CHALLENGE] (2017), https://www.mptfp.gob.es/dam/es/portal/reto_demografico/Estrategia_Nacional/directrices_generales_estrategia.pdf (in Spanish); Xavier Bosch, *Spain Faces Massive Decline in Population*, 320 BRIT. MED. J. 891, 891 (2000).

institutions that will be disrupted by demographic change.

To be sure, the causes and effects of these disruptions cut both ways. In some respects decline is a trend to celebrate. Revolutions in public health and women's rights over the past century have reduced childhood mortality, created and expanded access to contraception and education, and made the workforce more egalitarian, even as once-rigid gender roles associated with raising children have slowly begun to erode.[28] As an effect of these revolutions, women in many countries are able to genuinely choose how many children they wish to have, if any—a sea change in the global movement for reproductive rights.[29] Population decline can also be celebrated as a matter of environmental health. With shrinking populations, the pace of global resource exploitation and environmental denigration may slow, reducing, to a degree, the natural disasters and humanitarian crises caused by climate change.

Yet these appreciable silver linings should not obscure that decline is also a cause for alarm. Systematic population loss threatens significant societal dislocations. Decline challenges bedrock institutions rooted in the gospel of growth: the labor and stock market; pensions and social safety nets; tax revenues and national debt.[30] When

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28. *See* Vollset et al., *supra* note 1 (noting these as factors in population decline).

29. Jedediah Purdy, *The New Biopolitics*, DEMOCRACY, no. 1, Summer 2006, at 6, 7, https://democracyjournal.org/magazine/1/the-new-biopolitics/ (discussing the choice not to have children as a dominant driver in population decline). *But see* Lyman Stone, *How Many Kids Do Women Want?*, INST. FOR FAM. STUD. (June 1, 2018), https://ifstudies.org/blog/how-many-kids-do-women-want (discussing the gap between desired and actual birthrates).

30. *See* Tim Jackson, *The Post-Growth Challenge: Secular Stagnation, Inequality and the Limits to Growth* 2 (Ctr. for Understanding of Sustainable Prosperity, Working Paper No. 12, 2018), https://www.cusp.ac.uk/wp-content/uploads/WP-12-The-Post-Growth-Challenge-1.2MB.pdf (discussing the dominant "growth fetish" and noting that "[t]he pursuit of economic growth has been a defining feature of the global economy for well over half a century;" the paper advocates for a "post-growth" "new normal"); *see also* Juan F. Jimeno, *Fewer Babies and More Robots: Economic Growth in a New Era of Demographic and*

populations fall, there are necessarily fewer people to educate, employ, and turn into consumers.[31] There are fewer people to pay taxes, finance healthcare costs for an aging population, and provide those healthcare services.[32] National economies are presently unprepared to grapple with the multivariate consequences of decline.[33] In this manner, the demographic transition can be likened to other societal dislocations threatened by the Anthropocene Era, most notably the risks posed by climate change. As with climate change, the scale and scope of prospective population loss may appear overwhelming and difficult to conceptualize from our present viewpoint. As with climate change, then,

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Technological Changes, 10 SERIES 93, 96–97 (2019) (discussing the macroeconomic implications of population decline).

31. Economists have explored and debated how slowing population growth may contribute to the concept of secular stagflation, where growth and productivity slow while prices rise. *See* CHARLES GOODHART & MANOJ PRADHAN, THE GREAT DEMOGRAPHIC REVERSAL: AGEING SOCIETIES, WANING INEQUALITY, AND AN INFLATION REVIVAL 119, 204 (2020).

32. *See, e.g.*, Lele Li, Tiantian Du & Yanping Hu, *The Effect of Population Aging on Healthcare Expenditure from a Healthcare Demand Perspective Among Different Age Groups: Evidence from Beijing City in the People's Republic of China*, 13 RISK MGMT. & HEALTHCARE POL'Y 1403, 1408–09 (2020); *The Growing Cost of Aging in America Part 1: An Aging Population and Rising Health Care Costs*, MILKEN INST. SCH. OF PUB. HEALTH GEO. WASH. UNIV. (Apr. 6, 2018), https://onlinepublichealth.gwu.edu/resources/cost-of-aging-healthcare/. *But see* Ludwig Dittrich & Dana Stara, *The Impact of Aging Population on the Rise of the Health Care Cost in the Czech Republic*, 19 INT'L ADVANCES ECON. RSCH. 11, 11, 16 (2013) (assessing literature questioning the role demographic change plays in rising health care costs).

33. Romania, for example, has seen a declining population since 1990, which has depleted tax revenues and weakened national health and social security systems, causing further economic challenges and continued emigration. *See* Cristian Gherasim, *Romania's Population to Drop Significantly in the Next Decades*, EU REP. (May 14, 2021), https://www.eureporter.co/world/romania/2021/05/14/romanias-population-to-drop-significantly-in-the-next-decades/; Sorin Melenciuc, *Romania's Demographic Decline Speeds Up This Year on Fewer Births*, BUS. REV. (Apr. 10, 2019, 11:23 AM), https://business-review.eu/business/romanias-demographic-decline-speeds-up-this-year-on-fewer-births-199431; Eugen Tomiuc, *Romania: Poverty Compounds Population Drop (Part 4)*, RADIO FREE EUR./RADIO LIBERTY (Oct. 19, 2001, 12:00 AM), https://www.rferl.org/a/1097762.html. In this manner, cycles of national decline can mirror those seen at the local level. *See infra* Section I.B.

the demographic transition calls for an approach that is both wide-ranging in scope and proactive in nature.[34]

Climate change also offers a legal blueprint for population decline. In response to the accelerating crisis posed by global climate change, a number of scholars have challenged the existing legal paradigm, arguing that the law must evolve and become more adaptive—and in doing so, must look decades and even centuries into the future to prepare for an era increasingly characterized by environmental upheaval.[35] In an era defined by a changing climate, per this reasoning, legal systems can no longer operate based upon static assumptions and past experiences; rather, they must experiment and nimbly look ahead.[36]

Climate scholars have framed their call for proactive

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34. In the terminology of climate change scholarship, commentators have called for reforms in environmental law and other legal regimes that embrace both forward-looking mitigation and adaptation strategies. *See, e.g.*, Robin Kundis Craig, *"Stationarity Is Dead"—Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENV'T L. REV. 9, 18–30 (2010); James E. Parker-Flynn, *The Intersection of Mitigation and Adaptation in Climate Law and Policy*, 38 ENVIRONS ENV'T L. & POL'Y J. 1, 40–46 (2014).

35. *See, e.g.*, ROBERT R.M. VERCHICK, FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD 242 (2010); Robert R.M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENV'T L. & POL'Y F. 23, 24 (2012); Yee Huang et al., *Climate Change and the Puget Sound: Building the Legal Framework for Adaptation*, 2 CLIMATE L. 299, 305 (2011) (calling for a new legal paradigm and noting that "[b]ecause the impacts of climate change are likely to occur over several decades, if not centuries, adaptation planning must extend over an equivalent timeframe"); Katrina M. Wyman & Nicholas R. Williams, *Migrating Boundaries*, 65 FLA. L. REV. 1957, 1961 (2013); Robert L. Fischman, *Letting Go of Stability: Resilience and Environmental Law*, 94 IND. L.J. 689, 693 (2019).

36. *See* Fischman, *supra* note 35, at 689 (Professor Fischman explains that "[s]tatic law will yield to experimentation and moral imperatives for change" because "[h]istoric variation in the environment once served as a reliable guide to future behavior. . . . Now climate change and other environmental stressors are tipping systems into behaviors that no longer remain within the confines of precedent."); Jessica Owley, *Climate-Induced Human Displacement and Conservation Land*s, 58 HOUS. L. REV. 665, 670 (2021) [hereinafter Owley, *Climate-Induced Human Displacement*] ("[A] shift away from the most rigid definitions and tools for conservation lands is more likely to accommodate climate adaptation that includes migration.").

intervention as a moral and legal imperative. Drawing upon legal concepts of waste and stewardship, scholars have adopted the doctrine of intergenerational equity to guide the forward-looking vantage of climate scholarship.[37] At its core, intergenerational equity imposes a duty upon current generations to think and act longitudinally across the past, present, and future: to repair the environmental mistakes of the past, maintain and improve environmental health in the present, and to adapt human development and behavior to prepare for future environmental challenges.[38] The doctrine thus asks current generations to serve as trustees, entrusted with a fiduciary duty to consider the interest of their collective descendants.[39] In the context of climate change, then, the duties posed by intergenerational equity serve as a rallying cry for introspection, adaptation, and action *today*, both as a matter of law and policy.

These principles can similarly apply to the issue of

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37. *See, e.g.*, Anthony L.I. Moffa, *Wasting the Planet: What A Storied Doctrine of Property Brings to Bear on Environmental Law and Climate Change*, 27 J. ENV'T L. & LITIG. 459, 467 (2012) (exploring intergenerational equity in the context of environmental law); E. Lees, *Property in the Anthropocene*, 43 WM. & MARY ENV'T L. & POL'Y REV. 541, 550 (2019) (describing intergenerational equity as holding "the earth in trust for future generations"); Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulation*, 20 GEO. MASON L. REV. 725, 727 (2013) ("Intergenerational equity calls for equality among generations in the sense that each generation is entitled to inherit a robust planet that on balance is at least as good as that of previous generations."(quoting Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198, 200 (1990))). *See also generally* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989) (formulating the concept); David M. Forman, *Applying Indigenous Ecological Knowledge for the Protection of Environmental Commons: Case Studies from Hawai'i for the Benefit of "Island Earth,"* 41 U. HAW. L. REV. 300, 309–13 (2019) (discussing the history of the concept); Lydia Slobodian, *Defending the Future: Intergenerational Equity in Climate Litigation*, 32 GEO. ENV'T L. REV. 569, 571 (2020); James C. Wood, *Intergenerational Equity and Climate Change*, 8 GEO. INT'L ENV'T L. REV. 293, 297–307 (1996); Sharon Buccino, *Our Children's Future: Applying Intergenerational Equity to Public Land Management*, 31 COLO. NAT. RES. ENERGY & ENV'T L. REV. 509, 512 (2020).

38. Moffa, *supra* note 37, at 467.

39. *See* Lees, *supra* note 37, at 543; *see also* Eagle, *supra* note 37, at 727.

demographic change. As fiduciaries for future generations, the precepts of intergenerational equity demand that current stewards first look backwards—to correct the boundless growth gospel of the past—and then look forward, to lay the foundation for a future of manageable and sustainable population change. There are surely a number of arenas where today's stewards could start their task. This Article will focus on local government and property law, two legal regimes that have played a central role in American population growth, and, therefore, must also play a role in preparing for future demographic decline.

B. *Decline in the Local Government Experience*

In an era of tepid growth and declining populations on a national or global scale, local governments, too, will be forced to reckon with demographic shrinkage. Municipal decline in the United States is historically viewed as an anomaly, a fate reserved primarily for Rust Belt cities and rural small towns, generalized through lenses of postindustrial decay and suburban growth.[40] But if a declining city is considered an aberration when the national population is growing, local decline becomes common—and then widespread—as national growth begins to slow.[41] This process is necessarily

40. *See* Justin B. Hollander & Jeremy Németh, *The Bounds of Smart Decline: A Foundational Theory for Planning Shrinking Cities*, 21 HOUS. POL'Y DEBATE 349, 349–50 (2011) (examining a prevailing historical view of population decline being part and parcel of postindustrial urban decay and suburban growth).

41. Japan offers a prominent example of the relationship between national and local decline. Although the country has reported a declining population since 2009, and recently reported a raw decrease in population between 2015 and 2020, Tokyo bucked this trend and continued growing until last year, when it began to report a small population decline. Tokyo now joins an increasing number of Japanese metropolitan regions experiencing decline. *See Japan's Population Fell by 868,177 Over Five Years, 2020 Census Shows*, JAPAN TIMES (June 25, 2021), https://www.japantimes.co.jp/news/2021/06/25/national/japan-population-decline/; Hideyuki Sano, *Japan Property Funds Feel Pinch as Tokyo Population Drops Amid Pandemic*, REUTERS (Nov. 2, 2020, 9:44 PM), https://www.reuters.com/article/japan-property-population/japan-property-funds-feel-pinch-as-tokyo-population-drops-amid-pandemic-idUSKBN27J07Y; *Japan Population Declines*

an uneven one. When birth rates decline and populations age, larger cities with diverse housing options might in fact experience a period of growth, as household sizes shrink and urban living becomes more appealing to young workers and retirees alike.[42] Ultimately, though, it is challenging for local population trends to escape the shadow of national demographic change.[43] When taking into account the vast number of local governments in the United States,[44] probability suggests that a percentage of these, perhaps an appreciable one, will continue to grow even following a national shift towards demographic decline. But the zero-sum reality of a slow or no-growth country is that today's boomtowns might be tomorrow's ghost towns—and crucially, that localities may suffer this fate without the pains of deindustrialization commonly associated with American urban decline to date.[45]

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at Fastest Pace Yet, with Only Tokyo Seeing Significant Growth, JAPAN TIMES (July 12, 2018), https://www.japantimes.co.jp/news/2018/07/12/national/japan-population-declines-fastest-pace-yet-125-2-million-government/; Sophie Buhnik, *From Shrinking Cities to* Toshi no Shukushō*: Identifying Patterns of Urban Shrinkage in the Osaka Metropolitan Area*, 23 BERKELEY PLAN. J. 132, 142 (2010); Yukiya Iwasaki, *Shrinkage of Regional Cities in Japan: Analysis of Changes in Densely Inhabited Districts*, 113 CITIES, June 2021, at 1, 2.

42. *See* Sylvie Fol & Emmanuèle Cunningham-Sabot, *Urban Decline and Shrinking Cities: A Critical Assessment of Approaches to Urban Shrinkage*, 674 ANNALES DE GÉOGRAPHIE 359, 366–67 (2010), www.cairn-int.info/journal-annales-de-geographie-2010-4-page-359.htm.

43. *See id.* at 371–73 (reviewing research of national demographic change and city shrinkage; noting that other factors were also at play in Eastern Germany and Eastern Europe where national and local population decline accompanied the end of the Cold War).

44. According to 2017 census figures, there are over 38,000 general purpose local governments in the United States. *2017 Census of Governments*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html (Oct. 8, 2021) (tbl. 2, Total Local Government Units – General Purpose Governments).

45. *See* Fol & Cunningham-Sabot, *supra* note 42, at 369 (describing urban shrinkage as a "global phenomenon" because "[e]ven if, at any given moment, the shrinkage of certain agglomerations is accompanied by growth of cities located in another part of the world, it is not impossible that these latter cities will undergo shrinkage themselves within a relatively short time").

The history of local population decline in the United States presents a cautionary tale. With their revenues beholden to local taxes, communities often face an accelerating downward spiral when their population base begins to erode, one that precipitates other economic, societal, and governance problems and ultimately triggers further population loss.[46] As residents leave a locality, economic activity and social cohesion dissipate.[47] Local governments are forced to raise taxes to provide services to the residents who remain, many of whom are often lower-income and less able to pay for legacy infrastructure.[48] This process triggers further rounds of exit among those who can afford to leave and tax increases for those stuck behind.[49] Ultimately, the tax base erodes more quickly than the city can reduce local services.[50] The municipality is burdened

46. KARINA PALLAGST ET AL., BERKELEY INST. OF URB. & REG'L DEV., THE FUTURE OF SHRINKING CITIES: PROBLEMS, PATTERNS AND STRATEGIES OF URBAN TRANSFORMATION IN A GLOBAL CONTEXT 1, 7 (2009), https://escholarship.org/uc/item/7zz6s7bm#main (discussing the "downward spiral" caused by decline); Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1210–11 (2014) [hereinafter Anderson, *New Minimal Cities*] (discussing the cycle of population decline).

47. *See* Maria Helena Guimarães et al., *Residents' Preferred Policy Actions for Shrinking Cities*, 37 POL'Y STUD. 254, 256–57 (2016).

48. David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 132–33 (2017); *see also* Rachel S. Franklin, *The Demographic Burden of Population Loss in US Cities, 2000–2010*, 23 J. GEOGRAPHICAL SYS. 209, 220 (2021).

49. *See* Schleicher, *supra* note 48, at 113; Ben Beckman, Note, *The Wholesale Decommissioning of Vacant Urban Neighborhoods: Smart Decline, Public-Purpose Takings, and the Legality of Shrinking Cities*, 58 CLEV. ST. L. REV. 387, 395–96 (2010) (discussing the "challenging mismatch between tax receipts and municipal outlays" when municipal populations decline); Anderson, *New Minimal Cities*, *supra* note 46, at 1209–10 ("Government that gets smaller in the wrong ways—for instance, through the deterioration of public safety and schools—simply fuels the attrition of residents and businesses; and that, in turn, means more individuals taking losses on their investments in a piece of land or an enterprise, further losses to tax revenue, and further cuts to services."); Clayton P. Gillette, *How Cities Fail: Service Delivery Insolvency and Municipal Bankruptcy*, 2019 MICH. ST. L. REV. 1211, 1213 [hereinafter Gillette, *How Cities Fail*].

50. A local government may be obligated to maintain certain infrastructure

with excess service and infrastructure costs, prompting officials to postpone needed investment and chop needed services haphazardly, leaving the community a less healthy and appealing place to live.[51] Finally, in the last stage of decline, devastated by teetering fiscal capacity and decreasing sources of tax revenue, the locality might find itself unable to escape the burden of legacy costs—pension costs often foremost among them[52]—causing the government to enact predatory revenue-generation practices that target vulnerable demographics who have not yet moved away.[53] These cycles have played out prominently in large industrial cities across the United States since World War II, as suburban growth, white flight, and postindustrial economic transitions have triggered social and fiscal crises in the urban core.[54]

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or services notwithstanding a degree of population loss. *See* Michael Pappas, *A Right to Be Regulated?*, 24 GEO. MASON L. REV. 99, 108 (2016) (discussing Jordan v. St. Johns Cnty., 63 So. 3d 835 (Fla. Dist. Ct. App. 2011), and the concept that residents may hold a protected property interest in the government's continued maintenance of a resource); John Lovett, *Moving to Higher Ground: Protecting and Relocating Communities in Response to Climate Change*, 42 VT. L. REV. 25, 51–52 (2017) (also discussing *Jordan v. St. Johns County*). *But see* Gillette, *How Cities Fail*, *supra* note 49, at 1213 (arguing that even notwithstanding fiscal distress and population decline, services may be oversupplied in some cities as a consequence of patronage and other political decisions).

51. *See* Witold Rybczynski & Peter D. Linneman, *How to Save our Shrinking Cities*, PUB. INT., no. 135, Spring 1999, at 30, 36–37 (regarding deferred infrastructure and the attractiveness of a shrinking municipality to residents and workers); Justin B. Hollander, *Can a City Successfully Shrink? Evidence from Survey Data on Neighborhood Quality*, 47 URB. AFFS. REV. 129, 132 (2011) (discussing diminished tax revenues, services, and fiscal capacity); Brent T. White et al., *Urban Decay, Austerity, and the Rule of Law*, 64 EMORY L.J. 1, 49 (2014) (demonstrating that urban decline weakens the rule of law).

52. Anderson, *New Minimal Cities*, *supra* note 46, at 1146–47.

53. *See generally* Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107 (2020); *see also* Robert A. McBride, *Policing for Profit: How Urban Municipalities' Focus on Revenue Has Undermined Law Enforcement Legitimacy*, 9 FAULKNER L. REV. 329, 340 (2018); Jodi Rios, *Racial States of Municipal Governance: Policing Bodies and Space for Revenue in North St. Louis County, MO*, 37 LAW & INEQ. 235, 237 (2019).

54. *See generally* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1987) (regarding suburban growth);

As a consequence of this history, legal scholarship on local decline in the United States has focused almost exclusively on shrinkage caused by a precipitating crisis.[55] Commentators have explored local population loss caused by deindustrialization in the Rust Belt, the foreclosure crisis of the 2010s in the Sun Belt, and natural disasters such as Hurricanes Katrina and Sandy.[56] Attention has also turned more broadly to local governments facing pronounced vacancy and financial distress, stemming in large part from a population exodus that occurred in the past. Yet two significant perspectives are missing from the legal literature. First, decline is routinely assessed through a retrospective lens, one that looks at localities facing shrunken populations today, not those that are currently growing and might be vulnerable to contraction in the future.[57] Second, decline is

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EDWARD MCCLELLAND, NOTHIN' BUT BLUE SKIES: THE HEYDAY, HARD TIMES, AND HOPES OF AMERICA'S INDUSTRIAL HEARTLAND (2013) (regarding post-industrial transitions).

55. Scholarship on decline more broadly is also a relatively new concept in the field of local law. *See* Georgette Chapman Phillips, *Zombie Cities: Urban Form and Population Loss*, 11 RUTGERS J.L. & PUB. POL'Y 703, 705 (2014) ("Historically, legal scholars have paid particular attention to local land use as a method to controlling growth. Not nearly enough attention, however, has been paid to local land use law as a method of managing population shrinkage." (footnote omitted)).

56. *See* Schleicher, *supra* note 48, at 135 (discussing shrinkage in Detroit and Atlantic City); Michelle Wilde Anderson, *Losing the War of Attrition: Mobility, Chronic Decline, and Infrastructure*, 127 YALE L.J.F. 522, 540–41 (2017) [hereinafter Anderson, *Losing the War of Attrition*] (discussing Flint and other Great Lakes cities); Samir D. Parikh & Zhaochen He, *Failing Cities and the Red Queen Phenomenon*, 58 B.C. L. REV. 599, 601–02 (2017) (discussing cities facing "financial Armageddon"); Beckman, *supra* note 49, at 389, 391, 446 (discussing Detroit, Youngstown, Buffalo, and Cleveland); Samir D. Parikh, *A New Fulcrum Point for City Survival*, 57 WM. & MARY L. REV. 221, 231–32 (2015) [hereinafter Parikh, *A New Fulcrum Point for City Survival*] (discussing municipalities facing fiscal distress).

57. *See* sources cited *supra* note 56; *see also* Phillips, *supra* note 55, at 705 (mentioning "Detroit, St. Louis, Pittsburgh, and Cleveland"). As an arguable exception, climate scholarship envisions that a number of communities will become uninhabitable or undesirable as a consequence of rising oceans or other impacts of climate change, thus causing population loss in these areas and climate-induced migrations on a national or global scale. *See, e.g.*, Owley, *Climate-Induced Human Displacement*, *supra* note 36, at 686–87 (discussing climate change migration). Even so, climate scholarship still operates against the

viewed as a consequence of an external economic or social transition; underexplored is the prospect that demographic change might itself become a precipitating factor in a world of aging populations and falling birthrates. In short, decline is seen as an acute anomaly set against a backdrop of growth—as a symptom of crisis rather than a catalyst for it.[58] This perspective stands in contrast with a growing body of non-legal scholarship that recognizes municipal population decline as a discrete looming issue.[59]

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backdrop of population growth or stability; while some places may lose residents due to climate change, other places are expected to benefit. *See, e.g.*, Anderson, *Losing the War of Attrition*, *supra* note 56, at 525 (due to climate change, "many weak areas are located away from the coasts, including the Gulf," which "means that mobility tomorrow will look different than it does today, and it would be wise not to burn the bridges that will allow a cost-effective return to the Rustbelt's strategic interior location at the shores of the Great Lakes").

58. Some commentators approach in passing the issue of national demographic change spurring local population decline. *See, e.g.*, Parikh, *A New Fulcrum Point for City Survival*, *supra* note 56, at 221 ("Municipalities have historically enjoyed immense stability. This era of tranquility is over, and fiscal deterioration is accelerating."); Anderson, *Losing the War of Attrition*, *supra* note 56, at 541 (in the context of climate change, noting that "[w]ith these changes looming ahead, phrases like 'strong city' and 'weak city' begin to look temporary"); Anderson, *New Minimal Cities*, *supra* note 46, at 1215 (in the context of pension reform, noting that national-level population decline has become an issue in Western Europe).

59. *See, e.g.*, Hollander, *supra* note 51, at 130–33 (looking at Germany and the Midwestern United States to argue for smart decline); Stefanie Döringer et al., *A Meta-Analysis of Shrinking Cities in Europe and Japan. Towards an Integrative Research Agenda*, 28 EUR. PLAN. STUD. 1693, 1693–94 (2020) (identifying shrinkage as a significant global issue when comparing and contrasting decline research in Japan and Europe); Fol & Cunningham-Sabot, *supra* note 42, at 362 (summarizing international literature and arguing that decline must become a "structural, long-term component of urban development"); Karina Pallagst, *The Interdependence of Shrinking and Growing: Processes of Urban Transformation in the USA in the Rust Belt and Beyond*, *in* SHRINKING CITIES: INTERNATIONAL PERSPECTIVES AND POLICY IMPLICATIONS 59, 60 (Karina Pallagst, Cristina Martinez-Fernandez & Thorsten Wiechmann eds., 2013) (noting that demographic decline is a mainstream urban planning topic in Europe yet less so in the United States and arguing that "many cities" in the U.S. need to plan for shrinkage, which requires a new planning paradigm to replace existing urban planning approaches); Michael Ribant & Xuwei Chen, *A Typology of U.S. Shrinking Cities*, 72 PRO. GEOGRAPHER 152, 152 (2020) (illustrates shrinkage as a nationwide problem, one that extends beyond the realm of postindustrial economic transition, by examining and categorizing 367 shrinking

C. *Decline in Local Government Theory*

Local governments have a prickly relationship with the issue of population loss. As a matter of human history, cycles of growth and decline mark the typical lifecycle of a town or city.[60] As a matter of local governance, however, decline is incompatible with the dominant operative theory of boundless growth and diffuse development. Growth theory emerged in the United States during a period of twentieth-century industrial might, and gazing forward from that vantage point in time—an era when birth rates rose and regional economies boomed[61]—local leaders readily adopted

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cities in the United States); Maxwell Hartt, *The Prevalence of Prosperous Shrinking Cities*, 109 ANNALS AM. ASS'N GEOGRAPHERS 1651, 1663–65 (2019) (challenging the view that population decline is solely a symptom of economic decline). As with legal scholarship, however, non-legal research in the United States still also views population decline as a symptom of non-demographic crises. *See generally, e.g.*, Hollander & Németh, *supra* note 40 (examining literature on population decline, which historically has been viewed through a social construct of suburban growth and urban decay); Fol & Cunningham-Sabot, *supra* note 42 (same); Rybczynski & Linneman, *supra* note 51 (examining central city decline against the backdrop of suburban growth); Andreas Luescher & Sujata Shetty, *An Introductory Review to the Special Issue: Shrinking Cities and Towns: Challenge and Responses*, 18 URB. DESIGN INT'L 1 (2013) (discussing Rust Belt and Sunbelt decline during the Recession as a product of economic forces); Andrea Sarzynski & Thomas J. Vicino, *Shrinking Suburbs: Analyzing the Decline of American Suburban Spaces*, 11 SUSTAINABILITY 5230 (2019) (exploring suburban shrinkage).

60. *See* Fol & Cunningham-Sabot, *supra* note 42, at 364 ("The decline of cities has been a reality as long as cities themselves have existed."); Phillips, *supra* note 55, at 708 ("History is replete with once thriving cities that dwindle to nothing."); Rybczynski & Linneman, *supra* note 51, at 39 (noting decline in ancient Rome and Venice); Schleicher, *supra* note 48, at 134 (discussing literature contrasting urban growth and decline in France and Briton in the early modern era). The historical prevalence of decline in urban history does not necessarily indicate, however, that population shrinkage is just as inevitable to the city lifecycle as death is to the biological one. *See* Hollander & Németh, *supra* note 40, at 352–54 (comparing "neighborhood life cycle theory" with "alternative neighborhood change theory").

61. *See generally* WILLIAM H. FREY & ALDEN SPEARE, JR., REGIONAL AND METROPOLITAN GROWTH AND DECLINE IN THE UNITED STATES ch. 3 (1988) (chapter on "Components of Metropolitan Growth and Decline"); THE GOLDEN AGE OF CAPITALISM: REINTERPRETING THE POSTWAR EXPERIENCE (Stephen A. Marglin & Juliet B. Schor eds., 1990).

the assumptions that their municipalities would grow for the foreseeable future, that any population loss was merely temporary, and the implication, ultimately, that these communities would continue to exist in perpetuity.[62]

The "growth machine" theory has maintained a firm hold in city halls across the United States.[63] Today, acting on this mindset, elected officials pursue development as a way to improve—and prove—the size and economic strength of their communities.[64] Mayors promote population growth as a barometer of successful governance.[65] And even stakeholders

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62. *See* Hollander, *supra* note 51, at 130 (noting growth theory as dominant); Fol & Cunningham-Sabot, *supra* note 42, at 361 ("Urban stakeholders have always been convinced of the need for growth . . . with shrinkage conceived until now only as a blip in a process in which recovery would necessarily follow." (citations omitted)). Regarding the worldview in which growth theory emerged, see Beckman, *supra* note 49, at 396 (discussing industrial U.S. cities as characterized by growth, yet noting that "[i]n hindsight, these cities were themselves temporary phenomena"); *see also* James L. Tatum III, *To Disappear A City*, 69 SYRACUSE L. REV. 105, 106 (2019) ("Under most assumptions, cities, towns, and other municipalities are expected to exist in perpetuity. . . .").

63. The concept was originally articulated by Harvey Molotch. *See* Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309 (1976). *But see* Vicki Been, *City Nimbys*, 33 J. LAND USE & ENV'T L. 217, 220 (2018) (describing the urban growth machine model as "overly-simplistic" but a "useful generalization"). Been pushes back on the traditional generalization of larger cities driven by growth and smaller local governments (i.e., suburbs) driven instead by exclusion. *Id.* Yet for purposes of this Article, both pro- and anti-growth perspectives act against a background assumption of growth as a baseline phenomenon. *See infra* note 66 and accompanying text.

64. Pallagst, *supra* note 59 (discussing planning in U.S. cities as focused on growth and development); Beckman, *supra* note 49, at 397 (observing that "growth-oriented economic-development initiatives spend current revenue in an attempt to recreate the population growth that was the sine qua non of America's great historical cities"); Richard Schragger, *Does Governance Matter? The Case of Business Improvement Districts and the Urban Resurgence*, 3 DREXEL L. REV. 49, 49 (2010) [hereinafter Schragger, *Does Governance Matter*] (discussing the preoccupation with "creating a market-oriented environment" at the municipal level to attract residents and business). This is not to say, however, that economic development initiatives indeed have a causal connection with local growth. *See generally* Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311 (2010).

65. *See, e.g.*, Matthew Dolan, *Mayor Aims to Reverse Detroit Exodus*, WALL ST. J. (June 22, 2014, 7:44 PM), https://www.wsj.com/articles/mayor-mike-duggan-aims-to-reverse-detroit-exodus-1403480663 (quoting Detroit's Mayor

who are *opposed* to growth nevertheless frame their opposition against a backdrop that accepts population increase as a baseline reality.[66]

Communities experiencing population loss are not immune from the prevailing growth mentality. Here, too, local leaders maintain a rhetoric of growth in the face of decline. Historically, a host of interventions and initiatives—ranging from wholesale neighborhood demolition to regional government—have been identified as ways to increase the population of an area losing residents.[67] When population decline becomes acute, cities have sometimes shifted their rhetoric to embrace "smart decline," a diffuse doctrine that among other concepts promotes rightsizing infrastructure and services, repurposing vacant land for nonresidential uses, and taking measures to develop and activate greenspace.[68] But even local governments that acknowledge

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Duggan that "[t]he single standard a mayor should be defined on is whether the population of the city is going up or going down"); Editorial, *Lori Lightfoot's Wide-Awake Take on the 'Illinois Exodus,'* CHI. TRIB. (Apr. 19, 2019, 1:10 PM) (discussing Mayor Lori Lightfoot's focus on population growth in Chicago), https://www.chicagotribune.com/opinion/editorials/ct-edit-illinois-exodus-population-chicago-cook-20190419-story.html.

66. Legal commentators have explored two closely related interest groups that oppose local growth: homevoters who push local policies that maximize residential real estate values, often to the detriment of development, and the broader category of NIMBYs (not-in-my-backyarders), who oppose development plans and projects in their communities, sometimes driven by exclusionary motives and sometimes by concerns of gentrification and displacement. *See, e.g.*, WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001) (discussing homevoters); Been, *supra* note 63, at 222 (discussing NIMBYs). Despite opposing and at times stymying local development, homevoters and NIMBYs still share a belief rooted in growth, as both factions tend to oppose development on the fear and possibility that it will lead to further development in their communities. *See* Been, *supra* note 63, at 243. Even stakeholders opposed to growth, therefore, operate within a framework that anticipates growth in the future.

67. Beckman, *supra* note 49, at 397 ("Tax abatement, gentrification, slum clearance, urban-growth boundaries, urban homesteading, land banks, aggressive annexation, and the formation of regional governments have all been advocated as ways to subsidize central-city growth.").

68. *See generally* Lisa Berglund, *Critiques of the Shrinking Cities Literature*

decline still hold out hope for renewed population growth.[69]

For example, in 2013, officials in Detroit released a plan called Detroit Future City that expressly adopted smart decline as the city's global approach to development and service provision going forward.[70] The plan nevertheless oriented itself around the prospect of future growth. Rather than truly breaking from the growth machine norm and planning for a prospect of long-term population decline, scholars have charged that Detroit Future City offered in fact a pro-development rubric that attempted instead to *reset* growth—to create new markets and drive new investment in certain neighborhoods but not in others.[71] Research on other localities experiencing population loss has found a similar disconnect: while the present reality of decline is acknowledged by local leaders, planning documents still anticipate a future rebound.[72]

The growth machine model's intractability is easy to understand. When population growth is viewed as a sign of successful governance, decline becomes a stigma, a political issue that is pushed into the future rather than addressed in

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from an Urban Political Economy Framework, 35 J. PLAN. LITERATURE 423 (2020) (summarizing the literature on smart decline solutions to local population loss). The concept of "smart decline" is derived from the theory of smart growth, an equally diffuse theory that advocates for controlled growth. *See* Pallagst, *supra* note 59; *cf.* Jen Gray-O'Connor, *Solutions in Search of Problems: The Construction of Urban Inequality in "Smart Growth" Discourse*, 53 BERKELEY J. SOCIO. 89, 92–93 (2009).

69. *See* Phillips, *supra* note 55, at 707.

70. *See* DETROIT FUTURE CITY, 2012 DETROIT STRATEGIC FRAMEWORK PLAN 10, 11 (2013), https://detroitfuturecity.com/wp-content/uploads/2014/02/DFC_ExecutiveSummary_2ndEd.pdf.

71. Berglund, *supra* note 68, at 429–30; *see also* Andrea J. Boyack, *A New American Dream for Detroit*, 93 U. DET. MERCY L. REV. 573, 626 (2016) (examining Detroit's decline through the lens of revitalization).

72. *See, e.g.*, Megan E. Heim LaFrombois, Yunmi Park & Daniel Yurcaba, *How U.S. Shrinking Cities Plan for Change: Comparing Population Projections and Planning Strategies in Depopulating U.S. Cities*, J. PLAN. EDUC. & RSCH., June 23, 2019, at 1, 8–10, https://doi.org/10.1177/0739456X19854121.

the present.[73] A politically opportune time to tackle population decline therefore never arises. Before decline, during an era of growth, the notion that stakeholders might want to prepare for future population loss is anathema to local political thought and practice.[74] Efforts at this point to anticipate decline must overcome entrenched local inertia and could run quickly into strong headwinds—such as a legal regime built around growth,[75] opposition from private interests and public employees towards proposed service reductions,[76] and the prospect or concern that by merely

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73. *See* Pallagst, *supra* note 59 (describing the taboo of shrinkage); Maxwell Hartt, *Shifting Perceptions in Shrinking Cities: The Influence of Governance, Time and Geography on Local (In)action*, 25 INT'L PLAN. STUD. 150, 150 (2020), (discussing the stigma of shrinkage planning); Schragger, *Does Governance Matter*, *supra* note 64, at 65 (noting that "the failure of the city has often been viewed as a moral failure"). In other contexts, as well, government actors defer decisions about thorny policy issues that implicate or may restrain development. *See, e.g.*, Alexander B. Lemann, *Assumption of Flood Risk*, 51 ARIZ. ST. L.J. 163, 177–81 (2019) (discussing Congressional inertia regarding flood insurance programs).

74. Scholars have documented the issue of local decision-making driven by the exigencies of present political interests, notwithstanding the adverse impact of those decisions on future residents of the community. *See* Clayton P. Gillette, *Can Municipal Political Structure Improve Fiscal Performance?*, 33 REV. BANKING & FIN. L. 571, 572 (2014) [hereinafter Gillette, *Municipal Political Structure*]. Similarly, others have noted that local governments are prone to inertia and path dependency, which complicates efforts to address novel and future-facing issues. *See generally* Gabriel Eidelman, *Failure When Fragmented: Public Land Ownership and Waterfront Redevelopment in Chicago, Vancouver, and Toronto*, 54 URB. AFFS. REV. 697 (2018).

75. *See* Sean B. Hecht, *Local Governments Feel the Heat: Principles for Local Government Adaptation to the Impacts of Climate Change*, 47 J. MARSHALL L. REV. 635, 640 (2013) (discussing the challenge of overcoming governmental inertia when planning for a future crisis rather than waiting for its arrival); Phillips, *supra* note 55, at 707 (describing land use laws as focused on growth, not decline); Robert R.M. Verchick & Lynsey R. Johnson, *When Retreat Is the Best Option: Flood Insurance After Biggert-Waters and Other Climate Change Puzzles*, 47 J. MARSHALL L. REV. 695, 697 (2013) (noting, in the context of climate adaptation, that the goal of "managed retreat" runs into a property law regime designed to promote opportunity and stability).

76. *See, e.g.*, Bob Oakes, *Polls Shows Strong Opposition from Boston Residents to MBTA Service Cuts*, WBUR (Dec. 3, 2020), https://www.wbur.org/news/2020/12/03/massinc-poll-mbta-service-cuts-koczela (discussing transit cuts in Massachusetts); Adam Schuster, *Illinois Public Services Being Cut to Pay*

planning for shrinkage, local leaders might inadvertently be facilitating it.[77] All the while, a developing or ostensibly healthy community continues to grow in a manner that might later prove unsustainable and unstable, driven by growth machine policy and pro-growth land use law.[78]

Local governments fare no better trying to intervene *after* decline has morphed into a demographic reality. The longer population stagnation has already set in, the more likely a locality faces an eroding tax base and attendant fiscal distress, not a recipe conducive to successful governmental interventions.[79] Governments in the throes of population decline must make difficult, almost impossible decisions: which basic services to cut, which neighborhoods to prospectively decommission, and how to prioritize increasingly depleted resources for the people who have remained—all decisions that implicate equity concerns and tend to have disparate impacts on minority and low-income residents.[80] A stigma against shrinkage planning persists

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Unsustainable Pension Cost, ILL. POL'Y, https://www.illinoispolicy.org/reports/illinois-public-services-being-cut-to-pay-unsustainable-pension-cost/ (last visited May 30, 2022) (discussing pension cuts in Illinois); *see also* Anderson, *New Minimal Cities*, *supra* note 46, at 1188–1205 (exploring the rights held by residents to a minimal degree of service provision in a distressed city).

77. *Compare* Anderson, *Losing the War of Attrition*, *supra* note 56, at 528, *with* David Schleicher, *Surreply: How and Why We Should Become Un-Stuck!*, 127 YALE L.J.F. 571, 572 (2017) (debating whether service reductions are a problematic cause of population loss or a necessary response thereto).

78. *See* Phillips, *supra* note 55, at 719 (observing that "most of the existing law is zoning for the control of growth; not zoning for planned decline").

79. *See supra* notes 48–51 and accompanying text (discussing tax base erosion and fiscal distress as part of the cycles of local population decline); *see also* Huang et al., *supra* note 35, at 300 (noting, in the climate change context, that adaptation becomes more costly and painful the longer it is pushed into the future); Parikh, *A New Fulcrum Point for City Survival*, *supra* note 56, at 242–48 (arguing that municipal debt restructuring becomes more challenging as its fiscal standing becomes more dire).

80. *See* REBECCA BRATSPIES ET AL., CTR. FOR PROGRESSIVE REFORM, FROM SURVIVING TO THRIVING: EQUITY IN DISASTER PLANNING AND RECOVERY 9–10 (2018), https://cpr-assets.s3.amazonaws.com/documents/survivingthriving_0918.pdf (discussing equity issues that arise where policymakers are reactive in the face of crisis); Schleicher, *supra* note 48, at 137–38 (discussing decisions to

even where decline is acute, finally weakening only as the issue becomes more dire.[81] Eventually, once the point of dire decline has been reached and many residents of means have left the locality, attempts to implement austerity or smart decline measures will ultimately demand some form of forced consolidation—of neighborhoods, services, or both—against the likely opposition of the remaining populace.[82] Even in Youngstown, Ohio, where the city's Youngstown 2010 Plan serves as the textbook blueprint for smart decline policies, local leaders lacked the political will to *require* residential consolidation.[83] While residents were offered incentives to move out of certain neighborhoods in the interest of consolidation, many declined the offer and the city refused to use eminent domain.[84] Detroit likewise decided not to use eminent domain as a tool for smart decline, ensuring that consolidation would remain a touted yet elusive planning

allocate scarce resources and determine which neighborhoods to maintain). *See generally* Victoria Morckel, *Flint (MI) Missed an Opportunity to "Right Size" with Its Water Crisis*, 86 J. AM. PLAN. ASS'N 304 (2020) (discussing the decommissioning of infrastructure in Flint, Michigan).

81. Only when decline is longstanding or has become particularly acute does public opinion begin turning towards pro-shrinkage measures. *See* Hartt, *supra* note 73; Phillips, *supra* note 55, at 724 ("It requires strong political will to suggest zoning for shrinkage. Unfortunately, this will rarely exist absent dire circumstances."). Otherwise, smart decline policies may still remain unpopular amongst local voters. *See* Christopher Weber, *The Amazing Shrinking City: Can Smart Decline Improve Urban Life?*, ENV'T MAG. (Mar. 1, 2011), https://emagazine.com/smart-decline/; *see also* Hollander & Németh, *supra* note 40, at 356 (smart decline initiatives often require a disengaged public).

82. *See supra* notes 46–54 and accompanying text (discussing the cycles of local decline); *supra* note 68 and accompanying text (discussing the concept of smart growth); *see also* Schleicher, *supra* note 48, at 137–38 (discussing the difficulty in shrinking neighborhoods and consolidating services in Detroit).

83. *See* THOMAS A. FINNERTY JR. ET AL, CITY OF YOUNGSTOWN, YOUNGSTOWN 2010 CITYWIDE PLAN (2005), https://www.wrtaonline.com/wp-content/uploads/2020/09/Youngstown-2010-Citywide-Plan-full.pdf; *see also* Liz Boardman, *As Residents Leave, Locals Shrink Smartly*, AM. CITY & CNTY. (July 1, 2008), https://www.americancityandcounty.com/2008/07/01/as-residents-leave-locals-shrink-smartly/.

84. *See* Boardman, *supra* note 83.

goal.[85]

Taken together, these challenges yield an unsurprising yet vexing conclusion: there is simply no optimal time to plan for local demographic decline. Too early and the concept is stigmatized as a matter of politics and marginalized in the realms of policy and law. Too late and the city lacks the resources to adapt and the political will to take drastic measures. At the period of transition, moreover, where growth has stagnated but decline has not yet accelerated, it may be difficult for stakeholders to realize that such a transition is already underway.[86] In short, localities looking to the future face a paralyzing conundrum: the political mandate to confront decline emerges too late to muster resources that no longer exist and plan for a sustainable decline that has already begun.

II. AN OPPORTUNITY FOR PROPERTY RECONFIGURATION

What to do? How can a locality break out of this conundrum? Faced with a looming prospect of global population stagnation, planners, administrators, and other stakeholders must reconfigure their approach to growth by

85. *See* Peter D. Salins, *Rethinking Urban Planning in Detroit—and Beyond*, *in* URBAN POLICY 2018, at 95, 105, 111 (Manhattan Inst. ed., 2018), https://www.manhattan-institute.org/html/urban-policy-2018-rethinking-urban-planning-detroit-and-beyond-11520.html (noting that "popular outrage" prevented implementation of Detroit Mayor David Bing's original plan to consolidate residents and services). With consolidation via eminent domain proving politically toxic in Detroit, elected officials in the 2010s steered clear of the topic, choosing instead to embrace an anti-consolidation platform. Mayor Mike Duggan, who succeeded David Bing in 2014 and was reelected to a third term in 2021, ran on the platform that "every neighborhood has a future"—a pointed rebuke to consolidation. *See* EVERY NEIGHBORHOOD HAS A FUTURE: MIKE DUGGAN'S NEIGHBORHOOD PLAN, DUGGAN FOR DETROIT CAMPAIGN (2013), https://detroit.cbslocal.com/wp-content/uploads/sites/15909782/2013/09/duggan-crime-reduction-plan.pdf (last visited May 30, 2022); *see also* Editorial, *Duggan Turns Focus to Neighborhoods*, DET. FREE PRESS, Feb. 24, 2016, at 11A ("Every neighborhood has a future, Detroit Mayor Mike Duggan promised, during his 2013 campaign to become this struggling city's leader.").

86. *See* Anderson, *New Minimal Cities*, *supra* note 46, at 1205 (discussing the creep of "[c]ultural and social bankruptcy" that precedes financial bankruptcy).

shifting the time horizon of the growth machine model. In a shift from its current form—which approaches present-day growth as a precursor for perpetual future growth—the model should approach growth today proactively, armed with the understanding that population decline *might* become a future reality.[87] This shift does not demand pessimistic political visions or drastic austerity measures on the mere prospect of future decline. Rather, it calls for built-in flexibility. It asks that policy decisions guiding growth today also provide future generations the tools to react and adapt to demographic change tomorrow.[88] By imbedding current practice with future flexibility, policymakers today can also institutionalize the prospect of smart decline, thus cushioning the political headwinds smart decline policies may otherwise face if implemented down the road.[89]

Of course, reconfiguring growth policies to prepare for future decline is a tall order, one that could touch upon a number of disciplines, ranging from urban planning to economics to public administration. Yet at the core of local growth reconfiguration sits the looming specter of property law. Property law encourages growth by facilitating development. Foundational precepts of property law orient around the value of economic productivity,[90] while land use

87. Proactive planning has been broadly posited as a necessary departure from the often-reactive approach seen in municipal administration. *See, e.g.*, Parikh, *A New Fulcrum Point for City Survival*, *supra* note 56, at 252–55 (regarding debt restructuring).

88. A similar call has been made in the context of climate change and adaptation. *See* Fischman, *supra* note 35, at 693; Hecht, *supra* note 75, at 640.

89. *See infra* note 151 and accompanying text (discussing the concept of alternatively binding or facilitating future local actors); *see also* Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401, 403 (2016) (arguing that risks can be easier to regulate at their inception).

90. *See* Nehal A. Patel, *Mindful Use: Gandhi's Non-Possessive Property Theory*, 13 SEATTLE J. FOR SOC. JUST. 289, 294 (2014) (identifying economic efficiency as a core principle of property law); Joseph H. Guth, *Law for the Ecological Age*, 9 VT. J. ENV'T L. 431, 450–57 (2008) (discussing how property law developed to promote economic growth); Owen Alderson, Comment, *Abandoning Corporate Ontology: Original Economic Principles and the Constitutional*

and zoning law emerged alongside the growth machine theory and treat growth as a normative baseline.[91] This Part explores the promising yet problematic role that property law plays in the intergenerational process of population decline, and it identifies a model that corrals property's predisposition for long-term stability in a manner that artfully imbues the doctrine with future flexibility, an appealing approach when preparing for the consequences of demographic change.

A. *The Role and Challenge of Property Law*

Cycles of local government decline are inescapably intertwined with local land use. Where populations fall, property is the resource that becomes abandoned, blighted, and underutilized.[92] Densities decrease and gaps emerge in the urban fabric, making infrastructure and service delivery inefficient and costly.[93] Accordingly, when tax revenues shrink and localities look to reduce costs, property also becomes a target of crisis response. Leaders aim to chop municipal services via geographic consolidation and by decommissioning or reengineering municipal infrastructure

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Corporation, 22 U. PA. J. CONST. L. 561, 576 (2020) (noting the historical view that property rights are associated with economic growth).

91. *See* Steven P. Frank, Note, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 230 (2009) (describing Euclidean zoning as encouraging and defining growth in the postwar era); *see also* Eliza Hall, Note, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 922 (2007) (describing Euclidean zoning as a "framework uncannily conducive to sprawl"); *supra* note 78 and accompanying text.

92. *See* Hollander, *supra* note 51, at 132.

93. Rybczynski & Linneman, *supra* note 51, at 37. *But see* Maxwell Hartt & Jason Hackworth, *Shrinking Cities, Shrinking Households, or Both?*, 44 INT'L J. URB. & REG'L RSCH. 1083, 1092 (2018) (arguing that population decline is significantly accompanied by a decrease in average household size, which to a degree may reduce population densities without decreasing the number of occupied housing units in a city).

to support a more concentrated service area.[94] Consolidation enables localities to focus on areas of stability, lessening the public costs that are both directly (e.g., infrastructure and services) and indirectly (e.g., health, blight, and safety) associated with a geographically piecemeal process of decline.

Where consolidation is not viable, localities turn to smart decline policies that also focus on property interventions.[95] Density gaps are addressed through smart decline programs to bring agriculture, art, recreation, or community stewardship to bear on vacant parcels.[96] These efforts may improve community engagement, decrease crime, and stem the residential exodus from the locality[97]—all normatively

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94. *See* Beckman, *supra* note 49, at 398 (discussing the benefits of geographic service consolidation); *see also* Tatum, *supra* note 62, at 106 (discussing the general issue of shrinking a locality without attendant shrinkage of infrastructure and services). *But see* Michelle W. Anderson, *The Western, Rural Rustbelt: Learning from Local Fiscal Crisis in Oregon*, 50 WILLAMETTE L. REV. 465, 499 (2014) (pushing back on the concept of consolidating or decommissioning land uses in response to population decline, at least in certain contexts, because "historic places and modes of living have existence value, even when they have trouble attracting residents and businesses in a competitive system"); Anderson, *Losing the War of Attrition*, *supra* note 56, at 538–41 (acknowledging that local infrastructure funding is premised on growth, yet advocating for national infrastructure investment in shrinking localities). Scholarship has also proposed down-zoning, decentralization, and enhanced suburbanization in response to center city decline, see Rybczynski & Linneman, *supra* note 51, at 31, a position applicable to a period of suburban and regional growth at the expense of urban cores, less so to an era of across-the-board regional or national decline.

95. *See* Hollander & Németh, *supra* note 40, at 354 (describing smart decline as a response to less land and fewer land uses).

96. *See* Berglund, *supra* note 68, at 428 (summarizing smart decline literature and programs, which focus on vacant space activation initiatives); Weber, *supra* note 81 (discussing parks and greenspaces).

97. *See* Gunwoo Kim et al., *Urban Regeneration: Community Engagement Process for Vacant Land in Declining Cities*, 102 CITIES, Apr. 27, 2020, at 1, 6, https://www.sciencedirect.com/science/article/abs/pii/S0264275119307450 (article 102730) (discussing the relationship between smart decline and community engagement); Amy E. Mersol-Barg, Note, *Urban Agriculture & the Modern Farm Bill: Cultivating Prosperity in America's Rust Belt*, 24 DUKE ENV'T L. & POL'Y F. 279, 284 (2013) (discussing the ability for urban agriculture to decrease neighborhood crime); Melanie J. Duda, Note, *Growing in the D: Revising Current Laws to Promote A Model of Sustainable City Agriculture*, 89 U. DET.

valuable goals. But they arguably offer palliative remedies that do not solve the issues at the heart of population shrinkage.[98] Smart decline programs instead run headlong into a stark problem of property law: underutilized lands cannot simply be deleted or removed. They cannot be exchanged with utilized parcels elsewhere in the municipality as a means of retaining density, maintaining vibrancy, and consolidating local infrastructure.[99] Moreover, much of the land in question tends to be privately owned—both the utilized properties that still require local services and the interspersed, underutilized ones that do not.[100] In short, while decline pushes local leaders to seek geographic solutions, intransient property quickly starts getting in the way.

This is not to say that traditional property law lacks a mechanism for rearranging or consolidating private land. Notably, private property can be taken by eminent domain

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MERCY L. REV. 181, 184 (2012) (same); Amy E. Frazier et al., *The Spatio-Temporal Impacts of Demolition Land Use Policy and Crime in a Shrinking City*, 41 APPLIED GEOGRAPHY 55, 59 (2013) (reviewing how demolition of vacant buildings impacts crime); Daniel Hummel, *Right-Sizing Cities: A Look at Five Cities*, 35 PUB. BUDGETING & FIN., no. 2, Summer 2015, at 1, 8 (articulating smart decline measures, in part, as an attempt to "right-size" a locality and make it more attractive to prospective residents).

98. *See* Phillips, *supra* note 55, at 722 (noting that "[t]hose who do write about zoning and population loss focus instead on specific palliative remedies such as urban farming and land banks" (footnotes omitted)).

99. The notion that density is vital for community health and vibrancy was most famously articulated by Jane Jacobs. *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 151 (1961).

100. Detroit offers a stark example of underutilized private land. Although it is estimated that 24 to 40 square miles of the city are vacant, a significant amount of vacant land is owned and controlled by private parties, which makes development projects challenging and provides disproportionate power to large private landlords in the planning process. *See* John Gallagher, *Social Media is Arguing About How Much Vacant Land Is in Detroit—And the Number Matters*, DET. FREE PRESS, https://www.freep.com/story/money/business/john-gallagher/2019/10/26/detroit-vacant-land/4056467002/ (Oct. 28, 2019, 9:48 AM); Louis Aguilar, *Detroit's Battles Over Once-Cheap Land Are 'Sign of New Era,'* DET. NEWS, https://www.detroitnews.com/story/news/local/detroit-city/2019/06/12/detroits-battles-over-once-cheap-land-sign-new-era/1257351001/ (June 11, 2019, 11:39 PM).

for public use—a process, however, that is monetarily costly where property is valuable and politically costly even where it is not.[101] Public entities can also engage in bargaining with private owners or enact legislation that incentivizes or encourages the sale of certain private properties; yet these efforts risk derailment by just one or several holdouts exercising veto power over a comprehensive planning scheme.[102] Zoning can also prod private owners towards specific land uses over time.[103] Yet, thus far, zoning has been largely sidelined and underutilized as a tool of smart decline.[104] In recognition of these property law limitations,

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101. Ruoying Chen, *Invited Takings: Supermajority, Assembly Surplus, and Local Public Financing*, 100 IOWA L. REV. 2309, 2311 (2015) (noting local government hesitance to use eminent domain); Frank S. Alexander, *Louisiana Land Reform in the Storms' Aftermath*, 53 LOY. L. REV. 727, 729 (2007) (noting the challenge of using eminent domain as a crisis-response tool in post-Hurricane Katrina New Orleans); Lovett, *supra* note 50, at 33 (observing that in many cases, "when local communities reject the proposed use of eminent domain, government officials invariably comply with their demand"); *supra* notes 83–85 and accompanying text (discussing Youngstown and Detroit's decisions not to use eminent domain as a tool to consolidate property uses and address population decline). *But see* Beckman, *supra* note 49, at 391, 398 (advocating for eminent domain as a tool of smart decline, despite labeling it a "last-resort strategy"; likewise arguing that the financial costs of eminent domain can be offset by reduced service delivery in decommissioned neighborhoods).

102. *See* Beckman, *supra* note 49, at 391 ("With any municipal-contraction plan, however, a small number of unwilling owners could destroy the projected efficiency gains by refusing to relocate."); Boardman, *supra* note 83 (discussing the refusal of many Youngstown residents to move neighborhoods, notwithstanding incentives offered from the city). On the issue of land consolidation and holdout vetoes more broadly, see Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1490–91 (2008).

103. *See, e.g.*, Sarah Schindler, *The "Publicization" of Private Space*, 103 IOWA L. REV. 1093, 1117 (2018) ("Zoning is one of the most powerful tools that municipalities have for extracting public goods from private parties.").

104. In Youngstown, despite creating a much-heralded plan to embrace and restructure the city around the reality of population loss, translating that plan into zoning regulations implicated political, economic, and legal hurdles that blunted the plan's extension into zoning law. *See* Brent D. Ryan & Shuqi Gao, *Plan Implementation Challenges in a Shrinking City: A Conformance Evaluation of Youngstown's (OH) Comprehensive Plan with a Subsequent Zoning Code*, 85 J. AM. PLAN. ASS'N 424, 440 (2019); Pallagst, *supra* note 59; *supra* note 91 and

scholars have proposed a number of alternative models and reforms designed to facilitate fractured land consolidation in a manner that overcomes the challenges posed by eminent domain, holdout vetoes, and other traditional tools.[105] Other models offer additional creative ways to configure property *after* a community has reached the latter stages of population decline.[106]

Yet still missing from these tools and reforms is a paradigm that enables intergenerational land use adaptability.[107] Just as growth planning requires built-in flexibility that allows future generations to confront the prospect of long-term population decline, so too must property law evolve to embrace flexibility and adaptability across generations. Reconfiguring local growth and decline

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accompanying text (discussing zoning's pro-growth posture).

105. *See, e.g.*, Heller & Hills, *supra* note 102, at 1468 (advocating for "land assembly districts"); Chen, *supra* note 101, at 2313–14 (advocating for "invited takings"). Similarly, scholars have advocated for more flexibility at the local jurisdictional level, such that municipalities have greater ability to dissolve, merge, and consolidate. *See* Anderson, *New Minimal Cities*, *supra* note 46, at 1219–20.

106. *See, e.g.*, Nate Ela, *Urban Commons as Property Experiment: Mapping Chicago's Farms and Gardens*, 43 FORDHAM URB. L.J. 247, 258–86 (2016) (discussing property experimentalism in Chicago neighborhoods already experiencing vacancy and divestment); Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUS. & CMTY. DEV. L. 140, 140 (2005) (discussing land banks as a tool to address vacant, abandoned, and foreclosed properties); Anne E. Kline, *A Case for Connecticut Land Banks*, 88 CONN. BAR J. 210, 210 (2015) (same). Other models used in the context of growth may also offer creative reconfigurations in the context of decline. *See, e.g.*, Eagle, *supra* note 37, at 760–65 (applying transferrable development rights and exactions to prospective climate change challenges).

107. Perhaps the closest is the land banking model, which in theory can act as a repository of property during periods of decline in anticipation of future revitalization and growth. *See* Frank S. Alexander, *Land Use Planning by Design and by Disaster*, *in* LAW AND RECOVERY FROM DISASTER: HURRICANE KATRINA 37, 38 (Robin Paul Malloy ed., 2009) (describing land banking as "a land use structure that permits inventories of land to be held in reserve in order to respond to the shifts in market conditions and determinations of the social good"). By its nature, however, this focus on revitalization still positions itself against a normative baseline of future growth. *See, e.g.*, MICH. COMP. LAWS ANN. § 124.752 (West 2022) (finding "development" and "economic growth" as central purposes of land banks in Michigan).

demands a reconfiguration of property law, too.[108] Should a growing municipality face decline in the future, local policymakers will need more than eminent domain, zoning plan updates, and palliative smart decline measures to manage excess resources.

B. *Adaptability in Intergenerational Property Law*

Reconfiguring property law on an intergenerational level necessarily implicates temporal property rights held across time. As with climate change, where intergenerational equity imposes obligations upon current stewards of the environment, property law may need to modify—or arguably, reset[109]—the temporal rights held by property owners today in the interest of future generations.[110] If property rights in the future are less absolute, municipalities will have more flexibility to adapt to population shrinkage and reassemble the built environment proactively, without resorting to the problematic traditional tools at their disposal. At the same time, however, making property rights more flexible in the future should not eviscerate the underpinning values they are designed to protect today.[111]

Property law is no stranger to this balancing act.

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108. A number of scholars have called for more dynamic and adaptive modern approaches to property. *See, e.g.*, Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 840 (2013); Eric Biber, *Law in the Anthropocene Epoch*, 106 GEO. L.J. 1, 46 (2017); Fischman, *supra* note 35, at 704–05; Lynda L. Butler, *Property's Problem with Extremes*, 55 WAKE FOREST L. REV. 1, 45 (2020); Huang et al., *supra* note 35, at 332.

109. *See infra* notes 119–121 (discussing temporal limitations recognized in traditional property law).

110. *See generally* Lees, *supra* note 37 (exploring the interplay between stewardship obligations and property rights).

111. *See* Troy A. Rule, *Property Rights and Modern Energy*, 20 GEO. MASON L. REV. 803, 805 (2013) (discussing the need to balance between flexibility and stability in property law, while noting that "the most equitable and efficient adjustments to property-rights regimes are those that *respect* rather than *disregard* property owners' existing entitlements"); *see also* Eagle, *supra* note 37, at 746 ("A strong system of private property rights promotes economic well-being and also protects individual liberty and autonomy.").

Principles of stability and adaptability are both fundamental to core property doctrines, and navigating between these principles is a core task when reconfiguring property for an Anthropocenic age of decline.[112] On the one hand, property regimes are famously designed to be static across time.[113] In the realms of real property and land use, in particular, doctrines ranging from Euclidean zoning to eminent domain to fee simple ownership all advance values of predictability and stability; they provide interest-holders with rights, incentives, and assurances that encourage their investment into a property today with the expectation of protecting that value in the future.[114] This goal of stability traces its roots to fundamental precepts of English common law, where cohesive intergenerational land ownership served as a driving force behind primogeniture and other intestacy doctrines.[115] Stable property rights might have promoted efficient uses and reduced costs in an agrarian society.[116] But in a modern urban setting, static rights across time can

112. *See* Biber, *supra* note 108, at 46 (discussing the pressure modernization of property systems will pose in the Anthropocene on doctrinal property rules). Some scholars envision that the Anthropocene will mark an era in human history with no appreciable historical precedent, with climate change placing such stressors on existing law that adaptability will necessarily overcome the system's preference for stability. *See* Fischman, *supra* note 35, at 710–11.

113. *See* John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463, 474–76 (2007) (summarizing and citing literature on the concept); Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 862–74 (same).

114. *See* Hall, *supra* note 91, at 918 (regarding zoning); Butler, *supra* note 108, at 42–47 (regarding eminent domain); Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1461 (2016) (regarding the "everlasting" fee simple); *see also* David M. Becker, *Debunking the Sanctity of Precedent*, 76 WASH. U. L.Q. 853, 858 (1998) (describing the fee simple absolute as an estate that "reflects infinity," which is grounded in the framework that "when it comes to land, one must presume that the time frame is forever").

115. *See* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 399 (2006) [hereinafter Priest, *Creating an American Property Law*]; Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 277–78 (2015).

116. Fennell, *supra* note 114, at 1459.

create costly intergenerational externalities, borne out at the local level where the allocation of private rights today may impact countless future neighbors, development plans, and land use regimes.[117] Static property doctrines arguably treat the city itself as a static concept too.[118]

On the other hand, property law's stability has nevertheless been tempered by a degree of flexibility and adaptation across time. Even traditional property law recognizes certain temporal limitations: institutions viewed in one light as static have also, at times, evolved to embrace adaptive change, or themselves grew out of a dynamic response to changing conditions. Euclidean zoning was first endorsed by the Supreme Court as a modern response to urban realities, while the Fifth Amendment's takings clause is viewed by some justices to permit government actions that reflect incremental changes in foundational property principles.[119] Static property law today is often the product of evolutionary adaption in the past.[120] As part of this

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117. *Id.* at 1496 ("Maintaining dominion over a physical thing in perpetuity is no longer a particularly good way of ensuring access to the relevant stream of payoffs over time."); Biber, *supra* note 108, at 48 (discussing spillover costs in the Anthropocene); Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENV'T L.J. 121, 122–23 (2011) [hereinafter Owley, *Changing Property in a Changing World*] (discussing the intergenerational issues caused by static, perpetual conservation easements today).

118. Phillips, *supra* note 55, at 705 ("At best, traditional zoning law treats the city as a static concept; at worst, it imposes antiquated and unforgiving strictures that fail to provide enough flexibility for organic and dynamic change."); *see also* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 401–14 (2021) (examining how zoning codes often "freeze" land uses in established neighborhoods).

119. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–87, 397 (1926); *see also* John G. Sprankling, *Property Law for the Anthropocene Era*, 59 ARIZ. L. REV. 737, 748 (2017) (discussing Vill. of Euclid, 272 U.S. 365); *see also* Phillips, *supra* note 55, at 719–20 (same).

120. *See* Rule, *supra* note 111, at 803 ("Some of the most influential property scholarship of the past half century has centered on this evolutionary process, identifying factors that tend to spark the initial formation of property rights in an asset, influence the optimal structuring of new property-rights regimes, and

evolution, land use doctrines have adopted temporal limits on property rights in a number of contexts: in estates, where a defeasible fee can cut short an ownership interest in the future; in zoning, where code changes and non-conforming uses can operate to gradually shift static environments over time; and in the doctrines of covenants and waste, both of which adjudicate disputes between generations.[121]

Simply put, the relationship between property rights and time is a delicate one.[122] Property rights are permanent yet subject to change. Property rights give present generations control over future ones—that is, unless such control is tempered or altered by an existing or novel application of property law. This balancing act offers one option for addressing the prospect of future decline: local policymakers can simply be passive to the issue of demographic change, continuing to implement growth machine and "smart growth" policies while remaining neutral to the possibility of population loss in the future and electing not to prepare for it. If and when a demographic transition occurs, whereby national growth stalls and then begins to fall, local leaders can hope that property law will evolve to meet this new reality. Just as the *Euclid* court decided in 1926,[123] courts may view population decline as a modern challenge that

warrant adjustments to such regimes over time."); *see also generally* Karrigan S. Börk, *An Evolutionary Theory of Administrative Law*, 72 SMU L. REV. 81 (2019) (exploring evolution in legal systems). Indeed, efforts to make property law less intergenerationally static go back centuries. *See, e.g.*, Timur Kuran, *The Provision of Public Goods Under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 LAW & SOC'Y REV. 841, 868 (2001).

121. *See* Sprankling, *supra* note 119, at 747–57; Moffa, *supra* note 37, at 470–79. *See generally* John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209 (2007) (discussing the importance of waste doctrine during times of radical and dramatic change in property law); Celeste Pagano, *Where's the Beach? Coastal Access in the Age of Rising Tides*, 42 SW. L. REV. 1, 17–19 (2012) (discussing rolling easements).

122. Regarding the concept of legal time generally, see Frederic Bloom, *The Law's Clock*, 104 GEO. L.J. 1 (2015).

123. *See Vill. of Euclid*, 272 U.S. at 386–87 (describing zoning code as a modern response to modern complexities of urban life).

property regimes must accommodate—all the more pressing if climate change is simultaneously causing widespread dislocations and legal upheaval.[124] Efforts to decommission neighborhoods, consolidate services, and bring vacant private land into public control may be sanctioned, notwithstanding any infringement upon private property rights that would appear ultra vires or unconstitutional today.[125] History has not been kind to this passive, wait-and-see decline strategy.[126] But in a world where shrinkage has become the norm—not merely a Rust Belt phenomenon chalked up to post-industrialization, fiscal mismanagement, and race—courts and public stakeholders might be more receptive to radical innovations.

The delicate relationship between property rights and time offers another option, however: local governments can pursue proactive steps to prepare for decline, taking actions that support private property rights today while simultaneously creating temporal limitations on those rights in the future. This process grants future local officials flexibility to pursue some of the measures listed above—i.e., decommissioning neighborhoods, consolidating services, and bringing vacant private land into public control—with a secure rather than speculative legal power to do so.

C. *A New Approach to Intergenerational Property Law*

The above discussion brings us to the crux of this Article: how, exactly, could a proactive property approach to decline be implemented? If existing property tools are insufficient, how can the legal regime be reconfigured to bolster existing

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124. *See* Biber, *supra* note 108, at 46 (arguing that the Anthropocene will pressure traditional property doctrines, including the takings doctrine).

125. *See* Lees, *supra* note 37, at 586 (exploring whether the concept of private property may become "endemically problematic" in the Anthropocene such that it should be abandoned).

126. *See supra* notes 46–54 and accompanying text (discussing the historical cycles of decline in local government).

tools, or add new ones, to the property arsenal?

Professor Lee Anne Fennell has charted the blueprint of an answer. In an article titled "Fee Simple Obsolete,"[127] Professor Fennell challenges the prudence of perpetual property rights across time, as epitomized most popularly by the fee simple absolute, and provides a framework for bringing temporal limitations into private property ownership.[128] Her article advocates for two new tenure forms: the callable fee simple, where property is sold subject to a call option, such that it could be repurchased in the future if certain conditions are met; and the floating fee simple, a form of estate whereby owners could periodically shift their interests from one geographic parcel to another.[129] Both concepts offer a mechanism for securing private property rights today while also permitting flexibility in the future. Specifically, a callable fee simple would enable local governments to create "callblocks"—synchronized, presumably contiguous properties that could share the same trigger conditions and someday be recalled en masse into public ownership. The trigger condition would therefore have two purposes. First, it would offer an alternative to inadequate current options for public land assembly.[130] Second, by establishing clear metrics for when a property might get recalled, a callable fee simple could still encourage investment, alienability, and productive use—especially where the trigger condition appears remote in the future or unlikely to occur.[131]

A floating fee, meanwhile, aims to loosen the connection between property estates and geography across time. As

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127. Fennell, *supra* note 114.

128. *See id.* at 1459.

129. *Id.* at 1465.

130. *See supra* note 102 and accompanying text (discussing land assembly challenges); *supra* note 105 and accompanying text (discussing proposals to remedy these challenges).

131. Fennell, *supra* note 114, at 1486–87.

Professor Fennell notes, modern property owners might not gain value from the particular plot of land their house or business occupies; rather, ownership value derives from the spatial position of the property—its proximity to other residences, amenities, and institutions.[132] Granting owners all rights across time, yet tying those rights to a specific parcel of land, is an inefficient allocation of resources for private and public stakeholders alike. The floating fee simple thus affirms private property rights (by giving owners spatial flexibility) while also giving local governments another tool for reconfiguring development patterns in the future.

Professor Fennell's proposal also navigates the balancing act between property's competing instincts of stability and adaptability. While Professor Fennell calls for legislative action to codify these new tenure forms, she also maintains that they fit within the existing numerous clauses that organize the estate system today.[133] A callable fee, in particular, is consonant with current and traditional approaches to the defeasible fee simple.[134] Like defeasible fee simples, a callable fee carves an estate out of the fee simple absolute, conditioned or limited by a circumstance that *might* terminate the estate rather than see it continue in perpetuity.[135] The two are perhaps distinguished more in

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132. *Id.* at 1490 ("In cities, it is the relative spatial position of real property, not the land itself, that principally accounts for a parcel's value."); *id.* at 1496 (describing "buildings and plots of land less as ultimate repositories of value than as mechanisms for accessing value that resides elsewhere").

133. *See id.* at 1510. On the value of standardized property forms, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 69 (2000); Meredith M. Render, *The Concept of Property*, 78 U. PITT. L. REV. 437, 471 (2017) (describing the numerus clauses principle as foundational to property theory). Regarding the interplay between standardization and dynamism, see Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1610–18 (2008).

134. Fennell, *supra* note 114, at 1465.

135. *See* Bruce M. Kramer, *Property and Oil and Gas Don't Mix: The Mangling of Common Law Prop. Concepts*, 33 WASHBURN L.J. 540, 544 (1994) (discussing

form than in function.[136] As generally applied, the defeasible fee is tied to events arising on the property itself; for example, a property may revert to the grantor or a third party if not used or managed in a certain way, or if certain activities are—or are not—conducted upon it.[137] The callable fee simple, meanwhile, looks not to the whims of a single owner, but rather to the government's assessment of macro conditions that inform change on a neighborhood or city-wide level. This distinction advances two property law objectives where a callable fee simple is used. First, administrative and enforcement concerns are diminished when the government holds the right of reverter or reentry in place of a private party.[138] Second, while a current owner might chafe at the restrictions placed by the prior owner on a property—the classic issue of "dead hand control"[139]—a callable fee's trigger condition could anticipate external societal dislocations. Thus, the callable fee would act not at the command of an outmoded dead hand but instead as an escape valve in the

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the distinction between the fee simple determinable, which uses words of limitation, and the fee simple subject to condition subsequent, which uses words of condition). While this distinction can be important, both offer a manner by which a defeasible fee simple may end. *See* Roger W. Andersen, *Present and Future Interests: A Graphic Explanation*, 19 SEATTLE U. L. REV. 101, 106 (1995).

136. *See* D. Benjamin Barros, *Toward A Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 18 (2009) (arguing that "[m]ost of the differences between the fee simple determinable, the fee simple subject to condition subsequent, and fee simple subject to executory limitation are marginal and unnecessary").

137. *See, e.g.*, Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENV'T L.J. 51, 89 (2011) ("[A] grantor creates a fee simple defeasible because he wants to control the behavior of the grantee with respect to the land.").

138. *See* Molly S. Van Houweling, *Disciplining the Dead Hand of Copyright: Durational Limits on Remote Control Property*, 30 HARV. J.L. & TECH. 53, 67 (2017) (discussing statutory reforms to the defeasible fee simple based, in part, on concerns that "the present-day owners of such possibilities often cannot be ascertained or located and it becomes impossible to obtain releases in the ordinary manner" (quoting Hiddleston v. Neb. Jewish Educ. Soc'y, 186 N.W.2d 904, 907 (Neb. 1971) (Newton, J., concurring))).

139. *See id.* at 63–68 (discussing "dead hand control" generally).

face of significant future change.[140]

In this manner, creating temporal limitations within the framework of a callable fee simple comports squarely with property law theory. As much as forward-looking stability is fundamental to property law, social science has demonstrated how people struggle to think decades into the future.[141] When owners seek stable property rights, then, they surely care to ensure stability today, in the present, and in many cases also care to maintain that stability for children and grandchildren. But our connection to property grows looser as we begin to consider great- and great-great-grandchildren. In the language of Professor Margaret Radin's personhood theory of property, a parcel of land might be quintessentially "personal"—a function of living on the property today and holding memories of people and experiences tied to that land in the past.[142] The property becomes more fungible and thus replaceable as one gazes into the distant future, however, with no memories to sustain those ties and as the people and conditions upon on the property become more abstract.[143]

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140. *See* Christopher Serkin, *The Wicked Problems of Zoning*, 73 VAND. L. REV. 1879, 1902 (2020) (citing to studies on hedonic adaption, the capacity for humans to adopt to future changes, including significant adverse ones).

141. *See* Jane McGonigal, *Our Puny Human Brains Are Terrible at Thinking About the Future*, SLATE (Apr. 13, 2017, 10:01 AM), https://slate.com/technology/2017/04/why-people-are-so-bad-at-thinking-about-the-future.html (discussing the concept and summarizing a study that found most Americans "*rarely* or *never* think about the 'far future,'" defined as "something that might happen 30 years from today"); *see also* Serkin, *supra* note 140, at 1902 (citing to studies about consumer behavior and humans' poor capacity to predict how a product will affect them in the future). Our imperfect relationship with the future impacts our ability to assess future risk, notably in the context of climate change. *See, e.g.*, Lemann, *supra* note 73, at 217; Molly J. Walker Wilson, *Cultural Understandings of Risk and the Tyranny of the Experts*, 90 OR. L. REV. 113, 165 (2011).

142. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982) (setting forth the distinction between "personal" and "fungible" property); *see also* Eduardo M. Peñalver, *Property's Memories*, 80 FORDHAM L. REV. 1071, 1073 (2011) (regarding the connection between property and memory).

143. *See* Radin, *supra* note 142, at 960. *But see* Fennell, *supra* note 114, at 1514 (acknowledging that "new tenure forms would undervalue and disrupt the deep

Protecting static rights thus makes progressively less sense as the time horizon lengthens. Even though current and prospective property owners seek rights that will last in perpetuity, human expectations operate on a shorter scale; it is not considered or expected that an estate will truly last as long as advertised.[144] A callable fee simple can capitalize on that disconnect. It can inject adaptivity into the void beyond the reaches of human expectation. For this reason, Professor Fennell's model has been identified by scholars as a mechanism to prepare for climate change.[145] Its precepts extend to the Anthropocene's other looming societal transformation, as well. Demographic change offers an opportunity to put the model into practice.

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connections that people form with land"); Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 YALE L.J.F. 458, 464, 466–68 (2017) (highlighting individual connections people form to a place).

144. Individual expectations have been incorporated into property theory, often in the context of takings doctrine. *See* Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENV'T L. REV. 281, 316–17 (2002); Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437, 445 (2000); Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 225–26 (1995). The focus on expectations has been critiqued for bringing variable future possibilities into property rights and prioritizing economic interests. *See* Eagle, *supra*, at 445 ("The lack of a clear demarcation between ownership rights as protected by the Constitution and the range of expectations that a landowner or regulator or judge might glean about the future is an aspect of our jurisprudence that makes it more likely that the law of grabber and grabbee will prevail."); Arnold, *supra*, at 317 (noting "the primacy of property-as-commodity inherent in an expectations theory"). Endorsing intergenerational expectations would require, per this understanding, a finding that today's interest-holder reasonably expects to realize economic value on their investment decades or centuries into the future. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1657–58 (2003) (critiquing that an expectations analysis can implicate normative assumptions about what is "reasonable").

145. For the most direct examination of Professor Fennell's scholarship in the context of climate change, see Sprankling, *supra* note 119, at 767.

III. CREATING A PROPERTY MODEL FOR POPULATION DECLINE

The callable fee offers a compelling vehicle to prepare for population decline. In a given community, a callblock of properties could share a common trigger condition associated with demographic change. A decrease in population, changes in density, a slowing rate of growth, or an increasingly aged populace—or some combination of one or more of these factors—could prompt the callblock's recall when manifested on a neighborhood, regional, or city-wide basis.[146] Under an alternative yet similar approach, the trigger condition could address the issue from the opposite direction, looking not at demographic decline in a vacuum but instead in the context of excess service provision, i.e., where services or infrastructure in a callblock neighborhood exceed to some degree the number of residents living and working there. A model already exists for quantitively appraising the ability of local infrastructure to keep pace with *growth*.[147] A callable fee's trigger condition could simply flip that switch in the context of decline.

Under either approach, the properties would revert to public ownership once the trigger condition occurs, granting the local government a viable way to reduce services and decommission neighborhoods across a contiguous swath of parcels, ideally accomplished without the political and monetary hurdles of eminent domain.[148] The callable fee

146. Professor Fennell touched upon the prospect of population or density change driving a callblock's trigger condition. *See* Fennell, *supra* note 114, at 1484 ("Thus, a trigger condition might be significant population changes that are not matched by commensurate densification (or de-densification) within the callblock.").

147. Adequate public facilities ordinances, also called concurrency ordinances, seek to ensure that growth occurs in lockstep with infrastructure capacities. *See* S. Mark White & Elisa L. Paster, *Creating Effective Land Use Regulations Through Concurrency*, 43 NAT. RES. J. 753, 754 (2003); Serkin, *supra* note 140, at 1904–06; *see also* Gillette, *How Cities Fail*, *supra* note 49, at 1227 (noting the quantifiable nature of service reductions).

148. Regarding the hurdles posed by eminent domain, see *supra* notes 84–85, 101 and accompanying text. Regarding the question of cost and whether the

thus offers an adaptive backstop to decline. It provides an outlet from the cycles of divestment, tax base erosion, and predatory revenue generation that traditionally accompany population loss by giving local governments a tool they ordinarily lack: the ability to be geographically incisive—to direct resources towards areas of consolidation and population stability, to permit resource reductions in other areas, and to accomplish this reallocation without the pitfalls often seen where smart decline initiatives are pursued.[149]

Callblocks mitigate most crucially against the pitfalls of smart decline by giving future politicians political cover to implement these wholesale measures. When a property is subject to a trigger condition, the trigger itself can shape expectations over time by establishing a new default perspective on the neighborhood's future.[150] For example, if the call option arises when local population density falls below 1,000 people per square mile, we can expect that residents will have an evolving relationship with this figure over time. At first, when density in the neighborhood is significantly higher—perhaps 5,000 or 10,000 people per square mile—the trigger condition appears remote and abstract. As densities decline the condition becomes more tangible and a new status quo emerges; perhaps the 1,000 person-per-square mile figure even comes to represent a meaningful dividing line between a viable and unviable neighborhood. Finally, as local density approaches the trigger condition, action by the government is now expected. Local leaders still have flexibility in exercising the call

government must pay to exercise a call option in this context, see *infra* note 158 and accompanying text.

149. *See supra* notes 81, 98, 104 and accompanying text (discussing smart decline).

150. In a similar vein, see Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 44 (proposing default sunset provisions on existing public monuments; while future governments could still take affirmative action to prolong the sunset date, doing so would flip the baseline presumption from one of inaction (not applying a sunset provision) to action (applying the sunset provision at default)).

option. But now they operate in an environment where *not* exercising the option reflects a departure from baseline.[151]

A similar phenomenon can play out if the trigger condition never comes to pass. In these situations, even as the adaptive safety valve built into the callable fee remains dormant, the trigger condition still offers a voice in planning and development decisions. It asks, first and foremost, that residents and officials think along a broader time horizon than they are accustomed to using.[152] It signals a locality's stance on *what* form decline would take if manifested, which offers a countervailing opportunity to fashion a commensurate local definition of growth.[153] And all the while, it can inform planning documents and zoning codes, serving as a rubric for how the city grows even if it never ultimately experiences decline.

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151. This furthers a valuable anti-entrenchment goal. In theory, when a government conveys a defeasible fee simple, the limitations or conditions tied to that property may entrench the decisions of subsequent governments. *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 901–02 (2011) (setting forth the issue and discussing the concern that "the government has kept the property in its policy tentacles after the transfer"). Entrenchment can both facilitate and inhibit normative policy. A poor policy decision today could bind policymakers tomorrow, just as a positive, yet politically challenging choice could embed itself in a manner that eases political headwinds in the future. *See id.; see also* Matthew Titolo, *Leasing Sovereignty: On State Infrastructure Contracts*, 47 U. RICH. L. REV. 631, 637 (2013) (discussing the issue in context of infrastructure privatization). Yet regardless of the policy values at stake, the very concept of entrenchment cuts both ways, too. A decision today might bind legislators tomorrow—*or* a decision today could grant greater legal flexibility and political maneuverability to those future legislators. The callable fee simple aims to epitomize the latter approach.

152. *See supra* note 141 and accompanying text (discussing the challenge of thinking into the distant future).

153. The line between growth and decline can be a fine one, both in policy and in practice. *See, e.g.*, *supra* note 86 and accompanying text. Offering a clearer strategy for one can bolster the local approach to the other.

A. *Sketching the Framework*

The above discussion indicates several ways to apply Professor Fennell's proposal in the context of demographic change, at its core by incorporating an assessment of population decline or excess service capacity into a trigger condition that returns a set callblock of properties to public ownership. But what trigger condition should be used? What will occur until the condition arises? And what then? Drawing on the principles and priorities discussed above, this Section will attempt to sketch the framework of a callable fee simple as applied to future demographic change.

As a starting point, in order to encourage development and alienability in the present while also creating a future backstop of flexibility, the trigger condition should be tied to quantifiable, longitudinal data that operates on a decade-to-decade basis, not a month-to-month or year-to-year one. Decennial census data immediately comes to mind. The census is taken every ten years and provides a relatively accurate snapshot of national population trends;[154] further, it is constitutionally mandated and unlikely to be discontinued in the foreseeable future.[155] A community could easily adopt census data as its core indicator of decline. Using census data, a callblock could be triggered when the population within a municipality falls by a significant percentage from one census to the next—say, twenty percent or more—or by a lesser but still significant percentage, perhaps ten percent or more, across two consecutive

154. *See* Tammany J. Mulder, *Accuracy of the U.S. Census Bureau National Population Projections and Their Respective Components of Change* 1, 38–39 (Population Div., U.S. Census Bureau, Working Paper Series No. 50, 2002), https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0050.pdf (noting improved census accuracy over time); *see also* D'Vera Cohn, *How Accurate Will the 2020 U.S. Census Be? We'll Know More Soon*, PEW RSCH. CTR. (Dec. 14, 2020), https://www.pewresearch.org/fact-tank/2020/12/14/how-accurate-will-the-2020-u-s-census-be-well-know-more-soon/ (explaining the tools and programs used to review census accuracy).

155. *See* U.S. CONST. art. I, § 2, cl. 3 (directing that an enumeration of the population occur "every . . . Term of ten Years").

decennial censuses. This would reflect a cautious, longitudinal approach that aims to promote stability and alienability in the present and short-term future, with the trigger condition approaching only after the demographic situation truly turns dire on the ground.

Adoption of the trigger condition would set market and planning forces in motion. All properties subject to the callable fee would be labeled as such, on deeds and planning documents alike, demarcating the parcel as designated for future recall. A neighborhood full of these properties could then be termed a Future Contraction District (FCD).

Let's briefly imagine a city that has just created an FCD. We will assume the city is currently experiencing slow but steady growth, ranging perhaps from five to ten percent over the past few decades. We will also assume that the second trigger condition—a ten percent decline in two subsequent censuses—is adopted as the FCD's standard for recall. At first, the properties in the FCD might realize no impact from the callable fee model. The trigger condition at this point is remote and abstract. Properties will still be alienated and devised much like other properties in the city. Perhaps the properties will command mildly lower market values, particularly if zoned commercial or industrial and being committed towards long-term use by a corporate entity. At the same time, though, the city is still growing. Any discount to be found in the FCD might well entice lower-income residents and entrepreneurial business ventures, perhaps counterintuitively turning the FCD into a creative hub and instead boosting its property values.[156]

If and when the city's demographics change and its

156. On the concept and economic value of attracting the "creative class" to a locality, see generally RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE (2002). *See also* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 96 & n.133 (2013) (noting critiques of the connection between the creative class and economic growth, yet still observing that many local governments have embraced the idea).

population growth stagnates and then declines, the FCD's value can be expected to fall once that decline appears to reflect a long-term trend. A couple divergent possibilities can now be imagined. On the one hand, the FCD's population might decline faster than the city's at large, as the looming trigger condition facilitates an exodus of residents and investments from the neighborhood—a situation that may lend some geographic cohesion to decline occurring citywide because other neighborhoods will gain some of these residents, giving local officials a head-start on service consolidation. On the other hand, the FCD's population decline offers residents an alternative and novel tenure option: the ability to acquire a property interest with more security and equity than a leasehold, but one that is, simultaneously, also cheaper and perhaps not quite as everlasting as a fee simple absolute.[157] This "in-between" tenure option grants flexibility to property owners who are on the fence about the city's future, both current property owners contemplating an exit and prospective owners seeking a bargain. Certainly, if the city's rate of population decline begins to slow or reverse, FCD properties will carry an investment appeal for those bullish about the community's future.

But alternatively, at the final step of our hypothetical, we can imagine a scenario where the city's population does indeed decline by ten percent in two consecutive census administrations. Now the callback has been triggered. The local government's call option could provide two variable next steps. Following Professor Fennell's articulation, the properties could revert to public ownership via a public call option, a step that might require some compensation tied to their then-minimal market values.[158] Under a more

157. Professor Fennell posits that this "in-between" option could expand housing choice and housing stock within a community, thus providing housing options to a larger number of families. *See* Fennell, *supra* note 114, at 1513–15.

158. *See infra* notes 173, 194–200 and accompanying text (discussing the Fifth Amendment takings implications). Professor Fennell contemplates that property

conservative approach, drawing on the zoning doctrine of nonconforming uses, properties could simply be treated as undevelopable natural, recreational, or passive space under local zoning code and owners given a period of time to align their use with this new classification. Either way, rather than pursing piecemeal, incomplete, and ultimately ineffective approaches to smart decline, as in Detroit and Youngstown, local leaders will now have the ability to consolidate services and decommission neighborhoods in a unified manner.[159]

Even so, as a matter of politics and practicality, residents and businesses in the FCD cannot be expected to pack up and leave the neighborhood overnight. As indicated with the second approach, but equally applicable to the first, an amortization or sunset period for nonconforming uses is in order.[160] Commercial, industrial, and investment properties could be granted a specific grace period before services will be withdrawn. Owner-occupied residential properties could be granted a longer grace period, perhaps via another adaptive use of property law—by turning the callable fee into a life estate, with the measuring life determined by the person living on the land when the trigger condition occurs. When that person dies the amortization period ends, as a consequence alleviating concerns of individual displacement

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reconfiguration will entail some constitutional "just compensation," see U.S. CONST. amend. V, but also notes that reconfigurations have occurred in the past without payment to private interest-holders. *See* Fennell, *supra* note 114, at 1498–1500.

159. The flexibility offered by an FCD can also swing the other way: by promising flexibility *if* decline becomes a reality, local leaders have a tool that makes preemptive austerity measures less compelling, including passive or active decisions to reduce infrastructure or service spending, decisions that themselves can accelerate population exit. *See* Anderson, *Losing the War of Attrition*, *supra* note 56, at 528, 537.

160. Just as callable fee simples are not incompatible with defeasible fee estates, so too does the winding-down process described here resemble doctrines already well-established in property law—for example, the doctrine of nonconforming uses in the face of zoning change. *See* Sprankling, *supra* note 119, at 765.

while also creating a grace window that might extend for a number of years.[161]

Our hypothetical ends once all grace periods are over. The municipality now can reduce services to the FCD, direct and consolidate those services elsewhere, and update its zoning code to reflect a new reality, one where the FCD's operative legal regime is no longer tied to the growth machine. Depending on the needs of the community and the resources available, the properties in the FCD could be demolished and dedicated towards conservation; alternatively, they could be left in their current state, a passive and economical solution that leaves open the door to redevelopment in the future. Under any approach, the FCD will no longer command resources and services, which can help stabilize the locality in two important ways. First, the locality's savings from decommissioning the FCD may temper predatory revenue generation practices that often yield inequitable impacts, serving only to accelerate cycles of decline.[162] Second, by disproportionately concentrating decline within the FCD, communities can reduce the density gaps that otherwise tend to emerge in the urban fabric of a shrinking city, a situation that also stresses public finance and health and accelerates those same decline cycles.[163]

This sketch presents just one possible approach and only a few of the contingencies and alternatives that may arise in the process.[164] Inherent when planning for the future—and

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161. Of course, a locality could decide to set a shorter timetable. Too short, however, and the government increases the risk of equity concerns and takings violations. Under a longer grace period, yet one still short of the life estate model, residents are given more time to strengthen their attachments to the properties and accrue more mobility challenges as they age. *See* Pollack & Strahilevitz, *supra* note 16, at 565–66 (discussing the higher relocation costs faced by older people).

162. *See supra* note 53 and accompanying text (discussing predatory revenue generation efforts during the final stages of local decline).

163. *See supra* note 93 and accompanying text (discussing density gaps in the context of decline).

164. *See* Fennell, *supra* note 114, at 1486 ("Of course, the callable fee is not a

especially when planning for an era that will be conspicuously different from our own—is an overriding caveat of uncertainty. We cannot say with confidence how population decline will operate on a national or local level.[165] Consequently, there is no crystal ball that explains unequivocally how a callable fee simple model would or should operate, either. But we can appreciate that the model offers flexibility in the future that does not exist today. Moreover, we can also expect that the model will encourage and diversify planning and market behavior away from a pure growth machine ideology even before population decline arrives.

B. *Addressing Implementation Concerns*

A neighborhood of callable fee estates—or as termed above, an FCD—offers future policymakers an appealing reconfiguration of private property law. But today's policymakers might not share the sentiment. Worried about a bond rating arriving next week or an election scheduled next year, today's officials don't always have the luxury to think into the future.[166] As Professor Fennell noted in "Fee Simple Obsolete,"[167] and as others have similarly acknowledged in the context of climate change,[168] the prospect of a better model in the future still poses pesky legal and administrative hurdles today.

The FCD model therefore raises several key questions even as it aims to address others. First and foremost, *how*

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single approach but rather a family of possibilities with a number of moving parts—strike prices, time intervals, and trigger conditions.").

165. *See supra* notes 22–26 and accompanying text (assessing variables and assumptions that can cloud demographic forecasts).

166. *See, e.g.*, Gillette, *Municipal Political Structure*, *supra* note 74, at 572.

167. Fennell, *supra* note 114, at 1497 (asking how to handle "the initial transition that is required to get such a system of limited fees started in the first place").

168. *See, e.g.*, Sprankling, *supra* note 119, at 758 ("Major legal change is difficult to implement, for reasons that are both prudential and practical.").

can a local government convert a fee simple estate into a callable fee? If a new development is carved and subdivided out of public land, the local government could transfer the parent parcel subject to a trigger condition, effectively creating a callable fee in the same manner as a defeasible fee simple.[169] But local growth does not necessarily occur on a blank canvas. In a community that is largely built-out, property is already splintered between public and private ownership.[170] These are perhaps the very neighborhoods where an FCD model is needed.[171] The standard solutions for gaining control over property, meanwhile—piecemeal acquisition of land or eminent domain—both bring our endeavor back to the static, costly, and muddled interventions that a longitudinal reconfiguration of property law is expressly trying to avoid.[172] And a wholesale conversion of fee simple properties to the callable fee model, standing alone, might invite Fifth Amendment takings challenges.[173]

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169. *See supra* notes 134–137 and accompanying text (comparing callable fees with defeasible fee simples).

170. *See supra* note 100 and accompanying text (explaining that vacant land in Detroit is fractured between public and private ownership).

171. Fennell, *supra* note 114, at 1497 ("The places where reconfiguration is likely to be most valuable going forward may very well be already developed and fragmented among many owners.").

172. *See supra* notes 84–85, 101 and accompanying text (regarding eminent domain); *supra* note 102 and accompanying text (regarding land assembly through voluntary acquisition); *see also* Fennell, *supra* note 114, at 1497 (noting that "concerns about eminent domain form part of the rationale for using limited fees to ease reconfiguration").

173. *But see* Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools "Takings-Proof,"* 28 J. LAND USE & ENV'T L. 157, 189–90 (2013) (discussing ways that climate adaptation strategies could withstand a takings challenge, and noting that even some more aggressive adaptation measures could be analyzed as a "partial taking" under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), rather than a "total" taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a standard that tends to be favorable towards the state action); *see also* Mulvaney, *supra* note 108, at 840 (advocating for a takings doctrine that reflects modern principles and addresses modern challenges).

The second key question moves from the "how" of reconfiguration to the "where" of an FCD model. History indicates that the decision of *where* to locate a callblock will necessarily implicate equity concerns. The traditional cycles of divestment and decline have left behind disparate racial and economic impacts.[174] So, too, does the history of government interventions into local growth and mobility more broadly.[175] How can we envision a more just FCD, one that does not encourage future leaders to disproportionately decommission low-income neighborhoods?

Finally, a third key question returns to the proposition that policymakers and citizens alike struggle to confront long-range issues. As discussed above, human psychology does not embrace long-term thinking.[176] Neither do the strictures of local governance.[177] Why should residents and their leaders care today—and indeed, care to the degree required to overcome inertia and reconfigure property law?

Answering these questions is the challenge of property reconfiguration. There is no magic tonic that effortlessly creates and implements new tenure forms, ensures just and equitable treatment for those who may be impacted by its future dislocations, and provides the political will needed for these measures to get placed into motion. Yet this Article will suggest, as a starting point, an organizing objective that can

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174. *See supra* notes 48, 53, 54 and accompanying text.

175. Infamously, government has played a role in significant local demographic transitions over the past century, with transformative processes such as suburban growth and urban renewal driven by governmental action and serving to entrench segregation in American cities. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017). *See also* Verchick & Johnson, *supra* note 75, at 698 (noting that "efforts to keep people out or relocate them are highly susceptible to discriminatory motives and disparate impacts"). More recently, smart decline measures have also faced criticism for creating or deepening racial and economic distinctions between local neighborhoods. *See generally* Berglund, *supra* note 68 (citing commentators).

176. *See supra* note 141 and accompanying text.

177. *See supra* note 74 and accompanying text.

confront these hurdles: zoning for density.

Before examining how density could overcome the challenges and advance the goals of local property reconfiguration, it is worth acknowledging the normative value density offers to local development and growth—and, as well, to local decline. During times of growth, dense development serves economic, public safety, quality of life, and environmental goals; it facilitates social cohesion, reduces transportation costs, and mitigates against the spread of sprawl, among other interests.[178] A dense built environment also proves advantageous during times of decline. Where development is more compact, the effects of demographic shrinkage can be less acute: density promotes the agglomeration of economic activity, which lends fiscal resilience to denser metropolitan areas facing decline,[179] and it encourages consolidation of infrastructure and services, reducing a shrinking city's per-capita carrying costs.[180] The benefits of density are therefore unsurprising when

178. *See generally* Sarah J. Fox, *Planning for Density in A Driverless World*, 9 NE. U. L. REV. 151, 174–76 (2017) (discussing the environmental, transit, and anti-sprawl values of density); ROBERT BURCHELL ET AL., TRANSIT COOP. RSCH. PROGRAM NO. 39, THE COSTS OF SPRAWL—REVISITED (1998), http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rpt_39-a.pdf (regarding the interplay between density and social cohesion); Erick Guerra, Xiaoxia Dong & Michelle Kondo, *Do Denser Neighborhoods Have Safer Streets? Population Density and Traffic Safety in the Philadelphia Region*, J. PLAN. EDUC. & RSCH., May 5, 2019, at 1, https://doi.org/10.1177/0739456X19845043 (regarding density and public safety). *See also* Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 124–28 (2019) (discussing the benefits of density and the concept of "density mandates").

179. *See* Arthur Nelson et al., *Compact Development as a Factor in Income Resilience Among Shrinking Counties in the United States*, *in* SHRINKING CITIES: A GLOBAL PERSPECTIVE 301, 301, 308 (Harry W. Richardson & Chang Woon Nam eds., 2014).

180. *See supra* note 94 and accompanying text (discussing infrastructure consolidation); *see also* Phillips, *supra* note 55, at 736–39. Commentators have further noted that population decline is accompanied by smaller household sizes, a trend that calls for more diverse housing and thus a move away from low-density, single-family development. *See* Hartt & Hackworth, *supra* note 93, at 1092; *see also* Fennell, *supra* note 114, at 1483, 1513 (advocating for density as a goal of property reconfiguration).

considering future population decline. If the ills of decline are driven, in part, by falling density levels in local communities,[181] it follows that communities starting from places of higher population densities will be relatively buffered when demographic change begins.

In recent years, proponents of density have pushed local governments to reform their zoning codes through residential "upzoning," a change in classification to permit more intensive uses and thus, generally, a denser built environment.[182] Coming at a time of rising housing costs and a national reckoning with institutional racism, upzoning has been recognized as a way to increase housing supply and affordability while promoting economic mobility, in theory reducing racial inequities in high-income urban areas.[183]

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181. *See supra* note 93 and accompanying text (discussing the issues posed by declining density and emerging gaps in the urban fabric).

182. *See* Richard W. Bartke & John S. Lamb, *Upzoning, Public Policy, and Fairness—A Study and Proposal*, 17 WM. & MARY L. REV. 701, 702 n.10 (1976) (setting forth a definition of "upzoning"). Regarding the recent push for upzoning in a number of American cities, see Erika Bolstad, *Trending: Upzoning for Affordability*, 85 APA PLAN. MAG., no. 9, Oct. 2019, at 12, 12; Elmendorf, *supra* note 178, at 125–26.

183. Minneapolis made headlines in 2018 for its embrace of zoning reform, approving a "Minneapolis 2040" plan to upzone the majority of the city. *See* Patrick Sisson, *Can Minneapolis's Radical Rezoning Be a National Model?*, CURBED (Nov. 27, 2018, 12:45 PM), https://archive.curbed.com/2018/11/27/18113208/minneapolis-real-estate-rent-development-2040-zoning; Steven P. Katkov & Jon Schoenwetter, *Minneapolis's Great Experiment: An Introduction to the Minneapolis 2040 Comprehensive Plan*, BENCH & BAR OF MINN. (Mar. 2, 2020) https://www.mnbar.org/resources/publications/bench-bar/articles/2020/03/02/minneapolis-s-great-experiment-an-introduction-to-the-minneapolis-2040-comprehensive-plan. Arguments for upzoning have gained steam in the aftermath of Minneapolis's move and as part of a larger societal reckoning with the racial impact of traditional zoning codes. *See, e.g.*, Laura Bliss, *The Upzoning Wave Catches California*, YIELD PRO (Apr. 20, 2021), https://yieldpro.com/2021/04/the-upzoning-wave-catches-california/; Sarah Holder & Kriston Capps, *The Push for Denser Zoning Is Here to Stay*, BLOOMBERG (May 21, 2019, 7:00 AM), https://www.bloomberg.com/news/articles/2019-05-21/to-tackle-housing-inequality-try-upzoning; Andy Mannix, *In Minneapolis, a Test Case for Cities Looking to Solve Affordable Housing Crisis*, STAR TRIB. (Apr. 27, 2019, 7:49 PM), https://www.startribune.com/in-minneapolis-a-test-case-for-cities-looking-to-solve-affordable-housing-crisis/509165002/; Joe Cortright, *Will Upzoning Ease Housing Affordability Problems?*, CITY OBSERVATORY: CITY COMMENTARY (May 15,

Density advocates can point as well to research showing that upzoning raises property values.[184] At the same time, however, upzoning initiatives face resistance from local residents who oppose development and from other, often separate coalitions that are concerned about gentrification and displacement.[185] The fate of local upzoning efforts vary widely. While Minneapolis famously upzoned much of the city in 2018, setting a new bar for other initiatives across the country, activists in other cities have not yet realized the same measure of success.[186]

Upzoning thus might be politically viable in some neighborhoods of a municipality but not in others. It might enjoy city-wide support but face micro-local opposition on a neighborhood by neighborhood basis, hampering the effort's political feasibility.[187] With these hyperlocal political considerations in mind, commentators have advocated tying upzoning and downzoning changes into packaged deals, for example by requiring that a downzone in one neighborhood be accompanied by denser zoning elsewhere.[188] Linking

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2019), https://cityobservatory.org/will-upzoning-ease_affordability/.

184. *See, e.g.*, Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 URB. AFFS. REV. 758, 759 (2020); *see also* Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RSRV. L. REV. 513, 520–27 (2020) (discussing the economic value created by upzoning).

185. *See* John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1283–84 (2020); Dan Wu & Sheila R. Foster, *From Smart Cities to Co-Cities: Emerging Legal and Policy Responses to Urban Vacancy*, 47 FORDHAM URB. L.J. 909, 929–30 (2020).

186. *See supra* note 183 and accompanying text (discussing Minneapolis); Laura Bliss, *The Last Days of SB50, California's Doomed Upzoning Bill*, BLOOMBERG (Jan. 30, 2020, 3:37 PM), https://www.bloomberg.com/news/articles/2020-01-30/california-sb50-upzoning-bill-has-one-last-chance; Philip Kiefer, *Seattle and Minneapolis: A Tale of Two Upzones*, STREETS BLOG USA (May 21, 2019), https://usa.streetsblog.org/2019/05/21/seattle-and-minneapolis-a-tale-of-two-upzones/.

187. *See supra* note 66 and accompanying text (discussing NIMBYs and neighborhood-level exclusion).

188. *See* Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget,"* 62 CASE W. RSRV. L. REV. 81, 104–05 (2011) [hereinafter Hills &

together these two divergent policy measures helps bind current and future officials to the normative goal of zoning reform.[189] The approach also gives those officials a bargaining tool to employ when engaging with different factions in the community.

Another perk to upzoning bargains—and to densification measures more broadly—is an ability to boost property reconfiguration efforts in the face of long-term decline. When officials navigate between, and bargain with, competing local factions on the question of zoning reform, the callable fee simple can, and should, operate as another tool in the municipal arsenal. Rather than merely seeking an equilibrium between upzoning and downzoning measures across a city, local officials can bring callable fees into the mix. For example, if a sublocal community group is pushing to downzone its neighborhood—or similarly, if the group is resisting an upzoning proposal—the callable fee can serve as both a carrot and stick at the negotiating table.[190] The community group can get its desired outcome and ensure or maintain a low-density zoning classification, but as part of the resulting bargain the locality may instead zone that neighborhood into a newly formed or enlarged FCD, imposing a callable fee tenure upon the area. Meanwhile,

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Schleicher, *Zoning Budget*]; Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 95 (2015) (arguing for binding comprehensive plans that package together different zoning changes across multiple neighborhoods, making them less likely disregarded by future piecemeal considerations).

189. *See* Hills & Schleicher, *Zoning Budget*, *supra* note 188, at 104–05.

190. On the role of sublocal institutions in zoning, see, for example, Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 999–1000 (2013) (discussing and promoting the role of sublocal neighborhood institutions in the zoning process). Formal and informal sublocal institutions play an important role in negotiating matters of local governance, both in the realm of zoning and on other policy fronts. *See* Nestor M. Davidson & David Fagundes, *Law and Neighborhood Names*, 72 VAND. L. REV. 757, 811 (2019); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 517 (1997); Stephen R. Miller, *Legal Neighborhoods*, 37 HARV. ENV'T L. REV. 105, 107–08 (2013); Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1336 (2014).

upzoned or higher-density neighborhoods within the city would not be subject to the same fate and would not be zoned within an FCD. These tradeoffs can be justified on policy grounds. Given that low-density uses generate more costs when populations fall and that higher-density development is more resistant and adaptive to demographic change,[191] a zoning scheme embracing the former is likely prone to accelerate, if not instigate, the cycles of decline.[192] Stated otherwise, low-density zoning is arguably more justified where it is accompanied by land tenure reform that anticipates its adverse long-term consequences.

These bargains and decisions could occur piecemeal, in response to zoning debates that emerge organically and with the effect of gradually creating and expanding upon FCDs over time. Better yet, however, localities could pursue the approach first reinvigorated by Minneapolis and now being advanced elsewhere: city-wide upzoning as an alternative to incremental reform. Where neighborhood factions resist these efforts, the callable fee simple can again serve as a cudgel of political negotiation. Most boldly, local officials could declare that the entire city will either be upzoned *or* zoned into an FCD. This strategy could produce a couple outcomes. On the one hand, if the trigger condition appears remote and abstract, residents may discount the FCD designation and care more to prevent densification, lending political and legal credibility to the former. On the other hand, where the trigger condition is more tangible or a

191. *See supra* notes 178–181 and accompanying text (discussing the relationship between density, growth, and decline).

192. Research indicates that demographic decline affects rural and suburban areas before affecting urban ones. *See* Fol & Cunningham-Sabot, *supra* note 42 (discussing urban growth in the face of national decline); *see also* Sano, *supra* note 41 ("Although Japan's total population has been dropping since 2009, capital Tokyo has defied the trend, attracting young workers from all over the country."). These patterns are driven by a number of variables, however, and decisions to upzone or downzone a given locality do not necessarily translate into the urban-rural divide seen in demographic data. For purposes of this Article, it is worth noting that density is associated with the consequences of population decline, regardless of whether it is a significant instigating cause.

neighborhood is dominated by institutional owners, upzoning may be viewed as the preferable outcome. Fewer FCDs will be created, but the locality will be more geographically consolidated, still enabling it to prepare for decline.

In either event, upzoning helps address the key operative questions posed above: the how, where, and why of reforming tenure forms to implement a callable fee model. To the first question, a callable fee model can be implemented through zoning code reform that introduces the FCD as a discrete zoning classification within the community. As indicated above, a standalone zoning change that introduces use and development sunset dates, even if tied to a far-off trigger condition, might invite a Fifth Amendment takings challenge.[193] Yet such a challenge could be rebutted on several fronts. Precedent exists for making prospective changes to property rights without implicating Fifth Amendment property rights,[194] and here, by creating an FCD that consciously does not impair property rights in the present or near future, the local government leaves untouched most of the sticks in the property bundle. The government is *not* physically occupying the property or completely depriving an owner of its use or value, either of which would yield a less deferential judicial standard, but rather causing an impairment short of complete deprivation.[195] Indeed, arguably, the impairment being contemplated is a particularly minimal and narrow one. It

193. *See supra* note 173 and accompanying text.

194. *See* Fennell, *supra* note 114, at 1500 (discussing abolition of the fee tail); Priest, *Creating an American Property Law*, *supra* note 115, at 441 (same); Sprankling, *supra* note 119, at 765 (discussing nonconforming uses).

195. *See* Wolf, *supra* note 173, at 162–68 (describing the different Fifth Amendment takings categories, assessed from the perspective of prospective climate change regulation, and noting that *Penn Central*'s standard is most deferential to the government (citing, among others, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992); and Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978))).

comes to pass only if a trigger condition arises in the future, and even then, as envisioned above, residents could be given an effective life estate to continue using their properties until the FCD's callblock becomes final, effectively modifying only their property interest of intergenerational inheritability.[196] Viewed through the lens of a personhood or expectations theory of property, these contingent, prospective, and gradually implemented restraints should sit at the very edge of our sense of private property rights.[197]

A takings challenge becomes less formidable when a callable fee is coupled with an upzoning initiative. In practice, zoning reform to increase a neighborhood or city's density has not been viewed as a possible taking,[198] which suggests equally that the threat or shadow of upzoning also should not implicate Fifth Amendment rights.[199] Against this backdrop, the callable fee simple can be advocated as a compelling governmental tool. Where upzoning is opposed by residents or disfavored by local stakeholders, the parallel creation of an FCD is justifiable as a reasonable counterbalance. If increased density mitigates against the symptoms of population decline, then a neighborhood left unchanged by this zoning reform—or indeed, a neighborhood subject instead to downzoning and lower density classifications—is more likely to generate public externalities in the event of population decline and thus in greater need of property reconfiguration.[200] The

196. *See supra* note 161 and accompanying text.

197. *See supra* notes 142–144 and accompanying text (discussing personhood and expectations theories in property law); *see also* David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 761–62 (2019) (introducing and applying "property edges theory").

198. *See* Christopher Serkin, Penn Central *Take Two*, 92 NOTRE DAME L. REV. 913, 923 (2016) (noting that upzoning "seldom raises takings problems").

199. *See generally* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 554 (2001) (asking whether, and when, an upzoning might instead be considered a "givings").

200. Judicial review of these actions could apply the deferential regulatory takings doctrine. *See supra* note 195 and accompanying text. But it could also be

government's justification will be no less acute on the backend. In a scenario where the trigger condition has occurred and all grace periods have terminated, the public's interest in consolidating development, services, and infrastructure in lower density neighborhoods will be a product of the now-established reality of decline.

In this manner, upzoning and density can also frame the "where" of a callable fee model. Whether applied incrementally or as part of a transformative, city-wide zoning reform, establishing FCDs in low-density and lower-density sections of the city advances the aim of demographic change preparedness. It adds a layer of adaptability atop the otherwise static zoning code, in essence creating future flexibility in the very places where municipal law anticipates an oversupply of property to people. A focus on lower-density neighborhoods further mitigates against equity concerns. Higher-density zoning classifications are shown to promote housing access and economic diversity, whereas lower-density classifications are associated with racial homogeneity and exclusion.[201] This is not to say that density

challenged as an exaction under the murky unconstitutional conditions doctrine, which is generally applied in the permitting context, but could, as some legal commentators have feared, expand to other land use controls after *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013). *See* Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 173 (2019) (noting these concerns but finding that "*Koontz*'s footprint is thus far rather light"); *see also* Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109, 124 (2021) (discussing the "murky" doctrine); Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. PA. J. CONST. L. 207, 244 (2018) (same). Even so, by coupling FCDs with lower-density zoning, local governments can argue that an "essential nexus" and "rough proportionality" exist between the conditions the former places on private owners and the public impacts posed by the latter. *See Koontz*, 570 U.S. at 606 (the state cannot "pursue governmental ends that lack an essential nexus and rough proportionality to [private] impacts"). In the context of prospective climate change regulation, see Eagle, *supra* note 37, at 752 (discussing climate change measures short of eminent domain where the government provides a "modicum of environmental justification or . . . permit[s] the owner to retain a modicum of benefit" (footnotes omitted)).

201. A deep body of research has explored the connections between zoning density, housing, diversity, and exclusion. *See, e.g.*, Jonathan Rothwell & Douglas

offers a perfect solution to these and other issues of intergenerational displacement, considering that upzoning can also cause discriminatory dislocations and when evaluating the inequitable impacts of historical demographic transitions.[202] But density offers a starting proxy.

Finally, ongoing debates over density and zoning—which have already gained momentum and prominence—can be used as a gateway for addressing future issues of population decline that are more challenging to place within the public consciousness and thus the crosshairs of local officials. Even stakeholders who are unmoved by the prospect of long-term population decline may find FCDs an appealing tool in the debate over zoning reform. Likewise, those who see value in preparing for demographic change can still couch their position in the housing and development needs of today. Stated otherwise, advocates can utilize the prevailing growth machine ideology—one where increased density is needed for

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S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 780–82 (2009); Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290, 291 (2011); Arthur C. Nelson, *Exclusionary Practices and Urban Sprawl in Metropolitan Atlanta*, 17 GA. ST. U. L. REV. 1087, 1096 (2001); Michael B. de Leeuw et. al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 363 (2008); Matthew Resseger, The Impact of Land Use Regulation on Racial Segregation: Evidence from Massachusetts Zoning Borders 2 (Nov. 26, 2013) (unpublished manuscript), https://scholar.harvard.edu/files/resseger/files/resseger_jmp_11_25.pdf; Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6 (2016); Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST. 5 (Oct. 18, 2017), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf; Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 278 (2009); Arnab Chakraborty & Andrew McMillan, *Is Housing Diversity Good for Community Stability?: Evidence from the Housing Crisis*, J. PLAN. EDUC. & RSCH., Nov. 2, 2018, at 1, 2, https://journals.sagepub.com/doi/10.1177/0739456X18810787.

202. *See* Bradley Pough, *Neighborhood Upzoning and Racial Displacement: A Potential Target for Disparate Impact Litigation?*, 21 U. PA. J.L. & SOC. CHANGE 267, 276–79 (2018); *see also supra* notes 48–54, 175 and accompanying text.

future population gains—to prepare in lockstep for the other side of the coin: a future where density gaps are a liability in the face of population loss.

CONCLUSION

This Article has advanced a limited solution to a hazy yet looming problem. The exact contours of future population decline in the United States necessarily invite speculation, as do all predictions about an embryonic era that might not closely mirror our own. When will decline begin and then accelerate, if ever? How will it be regionally dispersed? How will the transformative changes of the coming decades and centuries—spurred by automation, climate change, advances in health and science, and other processes that have not yet begun—exacerbate or temper the prospect of population decline? These are questions we cannot answer today.

What can be said with some confidence, however, is that significant demographic shifts, already well underway in a number of the world's largest economies, are likely on the horizon for the United States, too. Whether or not these predictions come to pass, traditional property law must nevertheless become less static and more adaptive in the Anthropogenic era. Local governance, meanwhile, must move away from the growth machine model. No municipality will truly grow forever, after all, and no private property right is truly everlasting.[203] Temporal limits will ultimately present themselves, as they have in the past. It is better to prepare sooner rather than later for their arrival. With this perspective in mind, this Article has proposed one mechanism for challenging the gospel of growth and promoting dynamism in local property law: introducing the callable fee simple as a tenure form, aggregated as a callblock within a neighborhood and zoned as a Future

203. *See, e.g.*, Owley, *Changing Property in a Changing World*, *supra* note 117, at 154 (describing conservation easements as "illusory" because it is "unrealistic to assume that these conservation easements will actually be perpetual").

Contraction District.

Implementing and enforcing a callable fee does not require public officials to recreate the wheel. Rather, the model draws upon existing property law concepts, such as Euclidean zoning and defeasible fee simples, that themselves reflect property's tension between its static and adaptive natures. In doing so, however, the callable fee aims to anticipate and embrace intergenerational adaptation in a manner the traditional doctrines do not, a proactive approach to the evolution of property law and the changing private and public interests that inform it. Municipalities that plan today will have more tools to face population decline tomorrow. In the interim period, an FCD's mere presence in a community will also compel residents and officials to view growth, decline, and intergenerational planning in a different light—and, perhaps, even encourage proactive reconfigurations to address other brewing Anthropogenic challenges.