Nuisance, and Covenants, and Zoning, Oh My!

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Maureen E. Brady, Turning Neighbors Into Nuisances, 134 **Harv. L. Rev.** 1609 (2021).

She has done it again! With her new article, *Turning Neighbors into Nuisances*, Professor Molly Brady once more takes us back into history to enrich our current understanding of property concepts.

Three years ago, I wrote a Jot about Professor Brady's article, *The Damagings Clauses.*[1] That introduction to her work has vastly informed my scholarship on eminent domain and inverse condemnation and I again recommend it to you. In addition, among several other articles, Brady published a piece in 2019, *The Forgotten History of Metes and Bounds*,[2] which contains a compelling history of this method of property demarcation and the social functions it served to encourage development.

In *Turning Neighbors Into Nuisances*, she examines how tort law, contracts, and regulation interacted with each other and evolved into the system of land use regulation we know today.

With fascinating facts from historical deeds, treatises, and cases, Brady brings us into the societal cultures of the 17th century and forward as our communities transformed from agrarian life into the age of the automobile, parking lots, and high density living. Her vehicle for exploring these interactions is the nuisance covenant.

As she explains in the article, the apartment complex—and the attempts to control its prevalence among single-family dwellings by equating it to the tenements housing the poor and immigrant families—served as a test to the nuisance covenant. Brady concludes "apartments served as a focal point for debates among lawyers and judges about the interactions between the common law of nuisance and the proper scope of both contractual and regulatory freedom to define that which we do not want."

Professor Brady begins the article by recognizing the current trend in land use regulation to move away from detached single-family zoning in order to address concerns about the "affordable housing crises, racial and economic segregation, environmental damage attending suburban sprawl, and even overall losses to the United States economy."

Opposition to housing densification, particularly in the suburbs, might bring to mind Village of Euclid v. Ambler Realty Company in which the Supreme Court upheld the constitutionality of zoning, encouraged by the prospect of restricting apartments in a single-family area as "a right thing in the wrong place, – like a pig in the parlor instead of the barnyard." This then leads us to the concept of nuisance and the interaction of this tort with the regulatory power to zone for the public good to avoid harmful uses.

Brady's article "tells the story of the rise and fall of the nuisance covenant toward three different ends: (1) to illustrate how developers and owners used this hybrid legal device to prevent unwanted uses that tort and contract law could not independently exclude from neighborhoods; (2) to indicate how these covenants came to communicate strong messages about the nature of unwanted uses across time and place; and (3) to show how and why the nuisance covenant proved ill equipped to confront a new land-use challenge – the apartment building – and how both its failures and its legacies ultimately shaped the push for formal zoning regulation."

She explains the advantages of nuisance covenants over nuisance law based on the ability to use private covenants to

specifically identify unwanted activities. Some of these activities would qualify for exclusion under common law nuisance, but others were more "nuisance-like" and would probably not satisfy the nuisance requirements, but could be enforced as private covenants.

Brady takes us behind the curtain of history to examine decades of litigation over nuisance covenants and illustrates how this litigation influenced both nuisance law and public property regulation. Specifically, efforts to exclude apartments (as opposed to tenements) using nuisance covenants generally failed in the courts and prompted the move towards zoning regulation.

Turning Neighbors Into Nuisances contributes greatly to our knowledge of not only the underpinnings of our land use regulation system in America, but also the interrelationships of private law and public law as society defined the boundaries of our communal life.

With the continuing scar of racial segregation in our housing patterns, Brady's work identifies what was probably the first racial covenant in 1843, found in the Linden Place development outside Boston that "forbid sales to 'any negro or native of Ireland.'" She then discusses the continuing efforts to exclude the unwanted through racial zoning, racially restrictive covenants, and Federal Housing Administration policies.

Nuisance covenants likely came into existence in both England and American in the early 1800s and these covenants were drafted through the end of the century copying language almost identical to the 1825 covenant litigated in *Barron v. Richard*.[3] As the article notes, this copying of language, even when not relevant to the particular locality, is similar to what we have seen in contract drafting over time. Brady identifies this as the first nuisance covenant case involving enforcement in the United States.

The covenant in *Barron* banned "any livery stable, slaughter house, tallow chandlery, smith's shop, forge, furnace, brass or other foundry, nail or other iron factory, or any manufactory for the making of glue, varnish, vitriol, ink or turpentine; nor for dressing or keeping skins or hides, or any distillery or brewery . . . ." Brady takes us through the replication and expansion of these lists in nuisance covenants as residential communities attempted to separate work from home, and the rich from the poor.

By combining the specification of uses with broad residual clauses using terms such as "nuisance," "noxious," or "offensive," nuisance covenants avoided the strict construction of covenants by using broad language that could cover unspecified or new uses, such as apartments.

I commend to you Professor's Brady's historical dive into the nuisance covenants that gradually led to zoning regulation and the specification of permitted uses to avoid unwanted uses in advance of any harm and without the need to consult the common law of nuisance.

1. *The Damagings Clauses*, 104 **Va. L. Rev.** 341 (2018).
2. *The Forgotten History of Metes and Bounds*,128 **Yale L. J.** 872 (2019).
3. *Barron v. Richard*, 3 Edw. Ch. 96 (N.Y. Ch. 1837), *aff'd sub nom*. *Barrow v. Richard*, 8 Paige Ch. 351 (N.Y. Ch. 1840).

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