The Reinvention of Ownership:

The Embrace of Residential Zoning and the Modern Populist Reading of Property

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This Article portrays the adoption of zoning laws as a turning point in U.S. legal history where a new meaning was ascribed to the institution of ownership. It explores the historic 1926 decision of Village of Euclid v. Ambler Realty Co., in which an ardently conservative Supreme Court upheld the constitutionality of residential zoning. Unlike existing explanations, which view the revolutionary decision either as a timely embrace of modern regulation or as the product of middle-class interests, this Article perceives it as an outcome of the evolving image of private property. In pondering residential zoning, U.S. lawyers, who were still attached to a Jeffersonian populist conception of ownership, grappled with the realities of the twentieth century. The populist conception of ownership advocated the proliferation of small landholding, but novel actualities forced legal and political thinkers to reconsider the specific form of small landholding that was to become prevalent. The yeoman, the quintessential owner of old, morphed into the suburbanite, the new model owner. Because this new model of the small landholder was adopted, property rules had to be revised. The internal balance within the concept of property was accordingly reworked, and the focus of the regulation of property rights shifted in a manner that corresponded to the needs of the new model owner. The entitlements associated with a property right in land became mostly concerned with assuring the homeowner's security—protecting her from intrusions and changes in the residential environment. This change inevitably meant that property would entail less liberty of action than it had before, since an owner's activities could interfere with the stability of the neighborhood and the security of other owners. The subsequent changes in residential zoning laws

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both reflected and enabled this legal transformation that was made in order to maintain, in a modern world, property’s traditional populist role. This account of the legal adoption of zoning seeks to highlight how ownership’s ideological underpinnings endure while the concept’s specific components evolve.

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Introduction

A detached single-family home in a residential neighborhood can symbolize many things. It can indicate freedom and security. It can represent success and personal attainment. It can stand for the promise of America. The spread of homeownership can also exemplify a darker side of the American dream: in the midst of the worst recession in recent memory, rampant homeownership, in the eyes of many, embodies reckless lending practices, mindless public policies, and the resulting economic collapse. But above all else, the detached owner-occupied house stands for a certain idea of private property. The modern homeowner is not merely the product of readily available mortgages or of generous public subsidies; she is first and foremost the upshot of a profound reform in the law of property.

Before President George W. Bush could endeavor to create an “ownership society”; before President Bill Clinton could proclaim a “National Homeownership Day” (later to be expanded by his successor into “National Homeownership Month”) and then pressure Fannie Mae to increase mortgage lending to low-income people; indeed, before government could even assume the role of promoting homeownership as it did following the New Deal, a

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1. The proliferation of homeownership was the driving force (and the result) of a subprime mortgage market run wild that directly led to the financial meltdown of 2008. It also impeded recovery, as Americans found out that most of their wealth was tied up in one asset that had lost much of its value and that curbed their ability to leave distressed communities for other locales where jobs were available. See, e.g., Andrew J. Oswald, The Housing Market and Europe’s Unemployment: A Non-Technical Paper, in HOMEOWNERSHIP AND THE LABOUR MARKET IN EUROPE 43 (Casper van Ewijk & Michiel van Leuvensteijn eds., 2009) (claiming that high unemployment is caused by the decline of the rental market and rise of homeownership). Accordingly, calls have been made for the abandonment of the American embrace of suburban homeownership in favor of policies that would promote renting. See A. Mechele Dickerson, The Myth of Homeownership and Why Homeownership Is Not Always a Good Thing, 84 IND. L.J. 189 (2009); Richard Florida, How the Crash Will Reshape America, THE ATLANTIC, Mar. 2009, at 44; James Surowiecki, Home Economics, THE NEW YORKER, Mar. 10, 2008, at 62; The Road Not Taken, THE ECONOMIST, Mar. 21, 2009, at 31. But see Rachel D. Godsil & David V. Simunovich, Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership, 77 FORDHAM L. REV. 949 (2008).

2. “We’re creating... an ownership society in this country, where more Americans than ever will be able to open up their door where they live and say, ‘Welcome to my house. Welcome to my piece of property.’” Remarks to the National Association of Home Builders, Columbus, Ohio, 3 PUB. PAPERS 2323, 2323 (Oct. 2, 2004).

3. Proclamation No. 6807, 60 Fed. Reg. 29,955 (June 6, 1995). In the Proclamation, President Clinton explained, “homeownership is the cornerstone of our economy and a common thread in our national life.” Id.


5. Steven A. Holmes, Fannie Mae Eases Credit To Aid Mortgage Lending, N.Y. TIMES, Sept. 30, 1999, at C2. Fannie Mae and Freddie Mac are government-sponsored enterprises that purchase and securitize mortgages. The federal government took over the two corporations and placed them into conservatorship in September 2008, as it was feared that the financial crisis would lead to their collapse. Stephen Labaton & Edmund L. Andrews, In Rescue To Stabilize Lending, U.S. Takes over Mortgage Lending Titans, N.Y. TIMES, Sept. 8, 2008, at A1, A15.

6. For a survey of interventions in housing markets in the form of subsidies and taxes, see EDWARD L. GLAESER & JOSEPH GYOURKO, RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE 88-118 (2008). In fact, one of the most important subsidies to
deeper transformation had to occur. The concept of ownership and its relation to regulation had to shift. An altered image of ownership, that is modern while at the same time traditional, that is new but still intertwined with old tenets of American democracy, had to emerge. Once this process of reimagining one of our most basic social and legal institutions was complete, governmental policies serving the new notion not only became necessary but also evolved to transcend political debate.\textsuperscript{7} In order to comprehend the role of homeownership in the context of current day U.S. law and politics, this Article will explore that historic transformation in the notion of ownership, which occurred early in the twentieth century.

It was not the action of a major policymaker that set the wheels in motion for this dramatic legal change. Rather, it was a real estate developer’s acquisition of land in the 1920s. When Ambler Realty purchased a vast tract of land in the Village of Euclid, Ohio, it could not have imagined that this single action was destined to leave an everlasting mark not only on that single Cleveland suburb but also on the entire Nation. Ambler would have probably forsaken this future distinction: for the uninvited notoriety among property lawyers, historians, urban planners, and real estate developers, it paid a hefty price—75\% of the value of parts of the land it had purchased. Ambler Realty did not believe that overnight the Village of Euclid could take away so much of the land’s value without paying it any compensation. Most legal commentators of the time shared this disbelief.\textsuperscript{8} Accordingly, after the Village of Euclid adopted a comprehensive zoning ordinance that limited the use of Ambler’s land to single- and two-family dwellings,\textsuperscript{9} Ambler petitioned the federal court for an injunction. The Federal District Court for the Northern District of Ohio accepted Ambler’s argument that the ordinance, in limiting an owner’s freedom of action, infringed on property rights in an unconstitutional manner.\textsuperscript{10}

homeownership predated the New Deal—interest on mortgage payments has been tax deductible since the inception of the modern federal income tax. The original act allowed for the deduction of “all interest paid . . . on indebtedness.” Indebtedness, of course, included home mortgages even though they were not very popular in the 1910s. Revenue Act of 1913, ch. 16, 38 Stat. 114, 167.


9. The Village of Euclid was by no means the only municipality in America to adopt a zoning ordinance during the 1920s. By the end of the decade, there were nearly 800 municipalities that had adopted such controls. In fact, such proliferation was promoted by the proponents of zoning, as a means to present the Court with a \textit{fa\textsuperscript{\textquoteleft}t accompli} when litigation would arise, forcing the Court to stop a growing tide of public action if it sought to strike down zoning. In addition, an Advisory Committee on Zoning appointed by Secretary of Commerce Herbert Hoover drafted a Standard State Zoning Enabling Act, presented by the federal government as a model act in 1924. TOLL, \textit{supra} note 8, at 193-94, 201-02.

10. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 312, 314, 316 (N.D. Ohio 1924). Ambler’s petition was based on both the Federal and Ohio Constitutions. Since the relevant provisions of the two are practically identical, I will follow the Court and refer solely to the U.S. Constitution.
Yet then, in a decision that seemed to come like a bolt from the blue, the Supreme Court reversed the lower court’s ruling, thereby changing the course of U.S. property law. In accepting the municipality’s appeal in Village of Euclid v. Ambler Realty Co., the Court did much more than sanction the pecuniary loss suffered by Ambler Realty; it endorsed a new form of urban planning that would revolutionize the American landscape. Modern residential zoning was constitutionally born. The Court ushered in a new era in the history of property—an era in which ownership was to mean something different from what it had meant in the preceding century. In post-Euclid America, ownership came primarily to signify security rather than freedom.

Ambler Realty, to its dismay, found itself on the losing side of history, as it continued to adhere to the notion of ownership as freedom. It could hardly have believed its misfortune. Zoning’s supporters were equally amazed. Even in hindsight, the result of the case is extremely surprising. After all, the Supreme Court that deliberated the case was the Court we now know as the "Lochner Court." The Lochner Court Era, which lasted roughly from 1890 to 1937, was characterized by ample judicial reliance on the doctrine of "substantive due process" to strike down federal and state regulation of private business. Commentators at the time and ever since have come to view the infamous decision in Lochner v. New York as the emblem of this jurisprudence. There, a law specifying maximum working hours for bakers was invalidated as an unconstitutional interference with the right to contract. Such an approach seemed to have spelled doom for zoning, and the proponents of zoning knew it.

Nonetheless, the Court decided to reverse the district court’s ruling and to uphold the Village of Euclid’s zoning ordinance by a six-to-three majority. Strangely, zoning had found its champion in the most unlikely source: the majority opinion was written by Justice Sutherland, soon to be a member of the Supreme Court. The zoning movement itself conceived the Village of Euclid’s appeal as a weak case for several reasons. The village did not conduct a scientific survey before enacting the ordinance, and the resulting ordinance struck many as arbitrary in some of its aspects, especially in the size and location of zones it allocated to industry. Finally, the movement preferred the Court to consider an appeal of a judgment in which zoning had been vindicated rather than the other way around. Daniel R. Mandelker & Robert A. Cunningham, Planning and Control of Land Development 71 (2d ed. 1985); Toll, supra note 8, at 229, 232-33, 236.

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15. Id. at 64-65.
17. One of Justice Stone’s former clerks noted in passing that Justice Sutherland was writing a majority opinion holding the zoning ordinance to be unconstitutional, when conversations with the dissenting Justices (especially Stone, so he believes) “shocked his convictions and led him to request a reargument, after which he changed his mind and the ordinance was upheld.” Alfred McCormack, A Law Clerk’s Recollections, 46 Colum. L. Rev. 710, 712 (1946). Obviously, the truth of this claim cannot be ascertained. Prior documents written by Justice Sutherland with regard to the zoning cases.
the notorious "Four Horsemen" that repeatedly struck down key components of President Franklin Roosevelt's New Deal legislation. This decision has accordingly become "the one part of Sutherland's record that . . . continue[s] to puzzle conservatives." Justice Sutherland was joined by the "liberals" on the bench—Justices Holmes, Brandeis, and Stone—as well as by Justice Sanford and by Chief Justice Taft. The three remaining Horsemen dissented without filing an opinion. If only to highlight the extraordinary nature of the odd alliance that upheld this controversial measure, it merits mentioning that Justices Sutherland and Holmes and Chief Justice Taft penned the three contending opinions in the celebrated case of Adkins v. Children's Hospital of the District of Columbia, in which Sutherland's majority opinion breathed fresh life into the gradually crumbling Lochner ruling. It might not be too gross of an exaggeration to claim that "no American legal institution of the twentieth century has managed to recruit a more improbable ensemble of judges to support it [than zoning]."

The supposedly progressive Euclid decision was and remains one of the oddities of the seemingly conservative Lochner Court jurisprudence. This fact may account for the relative neglect of this decision by legal historians (in contrast to the interest it has always sparked among historians of zoning and

indicate that he supported them all along. See Robert C. Post, Defending the Lifeworld: Substantive Due Process in the Taft Court Era, 78 B.U. L. REV. 1489, 1543 n.259 (1998). Justice Sutherland was even less likely to have formed a negative opinion (or any other opinion) following the first hearing of the case—since he did not participate in it. In addition, other sources close to the Justices argued that the rehearing was suggested by Justice Stone himself, who "as a new member of the Court . . . was not fully conversant with the situation." Arthur V.N. Brooks, The Office File Box—Emanation from the Battlefield, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 3, 17 (Charles M. Haar & Jerold S. Kayden eds., 1989). It should also be noted that while the case was reargued, in order for a majority intending to strike down the ordinance to transform into a six to three majority to refrain from doing so, at least one other Justice (apart from Sutherland) must have switched his vote. At the time, Justices Van Devanter, McReynolds, Sutherland, and Butler, who "staunchly opposed New Deal legislation were derided as the 'Four Horsemen of the Apocalypse' because their strident warnings about the dangers of governmental regulations seemed to prophesy the imminent demise of capitalism and democracy." See William G. Ross, The Hughes Court 1930-1941: Evolution and Revolution, in THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 223, 246-48 (Christopher Tomlins ed., 2005).

Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights 70 (1994); see also Robert C. Ellickson & A. Dan Tarlock, Land Use Controls: Cases and Materials 50 (1981); Toll, supra note 8, at 252. The lawyers representing the losing appellees in the case expressed a great deal of surprise at the fact that Justice Sutherland, of all the Justices on the Court, was the author of such an opinion. Brooks, supra note 17, at 20-21.

For more on the standing of the Lochner ruling in the 1920s and on the claim that in fact Lochnerism was on the decline long before the Constitutional Revolution of 1937, see infra notes 92-93 and accompanying text.

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planning). Such an anomaly in the Court's jurisprudence requires explanation if we are to better understand the Progressive Era and the Court that confronted it. Furthermore, even regardless of its specific historical contours, the decision stands out as a watershed in the development of U.S. property law.

True, it is a misconception to view Euclid as the first anchor of zoning on this side of the Atlantic. Still, Euclid was unique. The ordinance at issue was not merely meant to stop the intrusion of industry or commerce, or to regulate building standards. The novelty was in the attempt to institute by law the single-family (or two-family) house residential area. In so doing, and by ensuring local control of development, Euclid was indispensable to the creation of the modern residential suburb, which has left a lasting impact on U.S. urbanism.

More broadly, Euclid laid the groundwork for all modern forms of land use regulation. Without the Court's decision in Euclid, there could have been no constitutional basis for contemplating environmental regulations, preservation ordinances, exclusionary and inclusionary zoning, anti-sprawl

24. For a detailed history of the Village of Euclid ordinance and the litigation that ensued, see TOLL, supra note 8, at 213-53. For information regarding the litigation, see also Michael Allan Wolf, "Compelled by Conscientious Duty": Village of Euclid v. Ambler Realty Co. as Romance, 1997(2) S. Ct. Hist. 88.

25. It was preceded by several important regulatory measures. In 1901, New York enacted its Tenement House Act, aimed at humanizing living conditions in Manhattan's Lower East Side. New York first regulated housing practices in the Tenement House Act of 1867, which mandated that every housing unit have fire escapes and every room have a window. The Act of 1901, however, was the first instance of comprehensive regulation of building standards. See Steven E. Andrachek, Housing in the United States: 1890-1929, in THE STORY OF HOUSING 123, 163-68 (Gertrude Sipperly Fish ed., 1979). It was followed by similar acts adopted in other states, such as Connecticut, New Jersey, and Wisconsin. See, e.g., Lawrence M. Friedman & Michael J. Spector, Tenement House Legislation in Wisconsin: Reform and Reaction, 9 AM. J. LEGAL HIST. 41 (1965). California adopted anti-nuisance laws, which aimed at zoning out Chinese laundries in San Francisco. See, e.g., Soon Hing v. Crowley, 113 U.S. 703 (1885); Barbier v. Connolly, 113 U.S. 27 (1884). San Francisco also adopted the first municipal ordinance imposing residential segregation based on race—struck down by the federal circuit court in 1890. See In re Lee Sing, 43 F. 359 (C.C.D. Cal. 1890); NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN 71-72 (2001). In addition, the Supreme Court approved height regulations enacted by the Massachusetts legislature for Boston (for the first time, extending disparate treatment to different districts of the city) and a Los Angeles ordinance barring brick kilns from residential districts. Hadacheck v. Sebastian, 239 U.S. 394 (1915); Welch v. Swasey, 214 U.S. 91 (1909). In fact, in a series of decisions handed down in the first two decades of the century—and often ignored by historical accounts of the Court's land use jurisprudence—the supposedly property-rights oriented Fuller and White Courts sided with the State. Joseph G. Hylton, Prelude to Euclid: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900-1920, 3 WASH. U. J.L. & POL'Y 1 (2000).


27. For more, see ROGER W. FINDLEY ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 335-47 (7th ed. 2006).


policies,\textsuperscript{30} and pro- or anti-gentrification measures.\textsuperscript{31} In other words, had the lower court's opinion carried the day, the U.S. land market of the twentieth century would have been governed by the rules of the nineteenth century. On an even more profound level, property, as a legal and political institution, would have borne in the twentieth century the same meaning it had in the nineteenth century. As I hope to demonstrate in this Article, it is here, in the reinvention of the essence of property, that one finds the true significance of the \textit{Euclid} decision.

I intend to supplement the prevalent accounts of the decision, which, though not wholly incorrect, remain unsatisfactory. Two straightforward explanations for the Court's seminal but seemingly uncharacteristic decision have emerged over the years. The first perceives the Court as finally realizing in \textit{Euclid} that a new era had dawned in which social and economic interdependence, the key term among realist jurists,\textsuperscript{32} necessitated novel and progressive regulatory responses, such as zoning.\textsuperscript{33} The second views the decision as a glaring example of the Supreme Court's proclivity for serving the middle classes, which were enamored with the suburbs.\textsuperscript{34} While these explanations are far from baseless, they oversimplify the Court's attitude, and thus, misstate the decision's legal significance. In this Article, I promote a more complex understanding of the story that will, in certain ways, bring the two narratives together. Such a nuanced approach can better explain how the Justices, who clearly adhered to different schools of thought, were able to converge in \textit{Euclid}.

The account I will propose conceives of \textit{Euclid} as the reflection of a traditional American conception of property adapted to the realities of the twentieth century. At the heart of this American conception is a belief in the liberating power of property, which leads to a commitment to the proliferation of ownership. It can be dubbed the populist conception of property. This conception was introduced and promoted by the Jeffersonian Republican ideology of the late eighteenth and early nineteenth centuries; it persisted into


\textsuperscript{32} On the importance of the interdependent nature of the new economy for progressive legal reasoning, see, for example, Lawrence Lessig, \textit{Understanding Changed Readings: Fidelity and Theory}, 47 Stan. L. Rev. 395, 461 (1995).

\textsuperscript{33} See discussion infra Section II.A.

\textsuperscript{34} See discussion infra Section II.B.
and beyond the twentieth century; and it was, and still is, shared by progressives and conservatives alike. It calls for property for all. But the property to be dispersed widely should have, according to this theory, a certain character in order to achieve its democratic goals. This desired character evolves as economic, demographic, and social conditions change. Euclid, I will argue, represents an important moment when Jefferson's model owner, the yeoman, who had already been transformed during the nineteenth century into a land speculator, turned into the suburbanite. This insight explains why Euclid was much more than an anticipation of the New Deal or merely an anomaly in the Lochner Court's jurisprudence; why it did more than just pave the way for the varied forms of modern land use and real estate market regulations listed above. Euclid was a major turning point in the history of the function assigned to property in our liberal society.

This Article's main thrust will be to illustrate how Euclid exposed a clash between constant ideological beliefs and changing urban sensibilities. This clash generated a pragmatic shift in the legal conceptualization of property, which allowed for the preservation of the core values traditionally associated with ownership. On the one hand, the Court was loyal to old and unwavering Jeffersonian tenets stressing the liberating function of property and the accompanying idea that every citizen should have access to a small landholding. On the other hand, the Court had to face a new world in which the old conception of property, geared toward the needs and desires of the yeoman and small-scale industrialist, could no longer protect—let alone satisfy—the interests of the small landowner and entrepreneur. Property, in its traditional reading, could no longer adequately serve its liberating and egalitarian roles. For this reason, the Court changed its conception of property by shifting the emphasis of property rights—at least in the residential district—from dynamic development to tranquil security.

The Euclid Court handed down a new definition of property rights, diverging from the old nineteenth-century image and meaning attached to it by U.S. courts (and in this sense reverting to English models formerly rejected in the United States). The purpose of a property right in its new conceptualization was to guarantee the homeowner's security, to assuage her fears that intemperate development might someday deprive her landholding of its existing suburban environment. Inevitably, in order to perform this charge, the new property right vested in the owner a much more limited freedom to

35. For example, it served as a weapon to discredit communism during the Cold War. See LIZABETH COHEN, A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 125 (2003).

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develop her land than property rights had previously done. Because an owner’s activities on her land might interfere with the stability of the neighborhood and the security of other nearby owners, her liberty of action had to be constrained. The reinvented property right was all about security, even at the expense of freedom. It remains so. We still live today with this definition of property rights, instituted by Euclid, even though its success might ultimately lead to the downfall of some of the legal tools—among them zoning—that earlier were indispensable to its creation and maintenance. 37

In order to grasp the full dimensions of this new definition of property, I will first briefly present the relevant factual and doctrinal background for the Euclid analysis, exploring the notion of “suburban” zoning and the state of constitutional property jurisprudence in the 1920s. Then, in Part II, I will turn to the two established accounts of the Euclid decision as presented above—the laudatory one and the censorious one—and examine their shortcomings. This discussion will pave the way for Part III, which will set forth the explanation based on the Jeffersonian populist conception of property. Finally, in Part IV, I will examine the implications of this explanation, both for the historiography of the Lochner Court, and for our understanding of the American conceptualization of property in the twentieth century and beyond.

I. Background

A. The Village of Euclid’s Ordinance and the Term “Suburb”

In November 1922, the Village of Euclid, still largely farmland and comprising fewer than ten thousand people, adopted an ordinance that divided the municipality into six classes of use districts. In the most restricted of these classes, the uses of land were limited to single-family dwellings, while in the

37. Over the last few years, the idea of zoning has come under effective legislative attack. Ballot initiatives have been promoted, and in some states adopted, seeking to stop regulatory takings, reverting to the idea—rejected in Euclid—that government effectively takes private property when zoning laws limit how it can be used. This effort to “strengthen property rights” has been further fueled by the backlash to the Court’s decision in Kelo v. City of New London, 545 U.S. 469 (2005), though that decision dealt with the Public Use Clause of the Fifth Amendment, not the Takings Clause. In Kelo, the Court allowed the City of New London, Connecticut, to take the properties of plaintiff homeowners as part of an economic development plan, even though the municipality planned to have the properties eventually transferred into the hands of other private owners. Id. at 469-70. For more on the Public Use Clause, see infra note 51. See ARIZ. REV. STAT. § 12-1134 (LexisNexis 2010) (adopted in 2006 by citizen initiative); OR. REV. STAT. § 195.305 (2007) (Oregon’s famous Measure 37, adopted in 2004 by citizen initiative, was upheld by the Oregon Supreme Court in MacPherson v. Dep’t of Admin. Servs., 130 P.3d 308, 322 (Or. 2006), and was somewhat modified by Measure 49, approved by the state voters in 2007); TEX. GOV’T CODE ANN. § 2007.021-026 (Vernon 2007); see also FLA. STAT. ANN. § 70.001 (West 2007) (adopted by the legislature in 2006). In addition, California, Washington, and Idaho voted on ballot initiatives that would have curtailed regulatory takings. See California Proposition 90 (2006); Idaho Proposition 2 (2006); Washington Initiative 933 (2006). Nevada and Montana had the regulatory taking component of their initiatives removed from the ballot by state courts for technical reasons. See Montanans for Justice v. Montana, 146 P.3d 759, 776-77 (Mont. 2006); Nevadans for the Prot. of Prop. Rights, Inc. v. Heller, 141 P.3d 1235 (Nev. 2006).
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second class (the one at issue in the case), the permitted uses were extended to include two-family detached dwellings. In the third class, the introduction of apartment buildings and public institutions was allowed; in the fourth class, commercial activities were authorized; and in the fifth and sixth classes, industry and manufacturing were permitted. The ordinance thus envisioned a scheme of segregated yet diverse land uses. It did not commit the Village to function as a purely middle-class residential community serving the adjoining urban core of Cleveland. It was, in this respect, characteristic of the zoning efforts of the time. It differed from some later zoning laws, which dedicated a municipality in its entirety to single-family homes or banned apartment buildings.

The ordinance thus envisioned a scheme of segregated yet diverse land uses. It did not commit the Village to function as a purely middle-class residential community serving the adjoining urban core of Cleveland. It was, in this respect, characteristic of the zoning efforts of the time. It differed from some later zoning laws, which dedicated a municipality in its entirety to single-family homes or banned apartment buildings.

The contrast between the specific contents of these ordinances highlights a preliminary definitional problem that ought to be addressed. Throughout the discussion of zoning and the Euclid decision it is almost impossible to avoid resorting to the term “suburb.” Justice Sutherland himself, in the opening lines of the Euclid opinion, characterizes the Village of Euclid as “practically a suburb” of the city of Cleveland. What does that classification intimate?

Given the contents of the ordinance, the Village of Euclid does not meet the stereotypical idea of a suburb. The word suburb means literally “beyond the city” but it normally evokes a much narrower category of settlements: locales that consist primarily—if not solely—of middle-class detached residences set in the greenery of an open, park-like setting. Broken down to discernable elements, the definition involves low population density, high rates of homeownership, relatively elevated social status, and residents who make long commutes to work. This definition, employed by social scientists, lacks a

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38. The ordinance also established three classes of height districts and four classes of area districts (each of the latter had different mandatory minimum lot sizes).

39. Not only did most zoning ordinances at the time allow for nonresidential uses within the city limits, but many also dedicated vast tracts of land to such uses. The ordinances adopted in the 1920s mimicked the groundbreaking New York City zoning ordinance from 1916 and were exuberantly optimistic as to their respective cities’ growth prospects. They accordingly tended to include zoning allocation for business space set at fantastic levels. The practice was called overzoning. Burbank, California, for example, with a population of 20,000, designed its ordinance to allow for a population nearly seven times that number. But the street frontage it zoned for business use would have been enough to serve 1.5 million people. Boulder, Colorado, allocated more than six times its actual business area. For more, see TOLL, supra note 8, at 204-07.

40. See, for example, the zoning ordinance challenged in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

41. See, e.g., S. Burlington Cnty. NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975). In that case, the ordinance-zoned parts of the town for industry and others for retail use, but permitted only single-family, detached dwellings in all residential zones. Apartments (and attached townhouses) were not allowed anywhere in the township.


44. See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 6-10 (1987). Jackson sums up the American suburban experience: “affluent and middle-
legal component: it does not require the suburb to be a separate political unit. Hence, while the Village of Euclid as a whole would not be defined as a suburb, specific neighborhoods within it—namely, those in which the use of land was limited to single- or two-family detached dwellings—would.

This distinction renders the definition inoperable for legal purposes. The suburb is not one of the entities recognized as such by local government law, and, as a descriptive phrase, it does not necessarily correspond to the nature of any of the existing entities. For legal and policymaking purposes, “suburb” is an informal, vague, and therefore not particularly useful term. This understanding is as true today as it was when the Village of Euclid adopted its famous ordinance. If anything, the designation “suburb” has been rendered even less coherent in light of recent demographic and economic trends in metropolitan areas, and the extraordinarily diverse nature of the municipalities that currently surround traditional urban centers. Indeed, the United States Census, in surveying metropolitan areas, eschews the term suburb completely—opting instead to define only principal cities and core urbanized areas.

The dichotomy that emerges at this early stage of the discussion is between the suburb as an idea or an imaginary space and the suburb as a real place or legal notion. While the first is extremely important, influential, and seemingly clear, as will be discussed at length in Part III, the latter is muddled and incoherent. From a purely legal-formal perspective, the term is irrelevant and confusing; the relevant notion is that of residential zoning. At issue is the municipal decision to limit the uses of land in certain parts of the municipality—but not necessarily in all of its lands—to detached houses. The class Americans live in suburban areas that are far from their work places, in homes that they own, and in the center of yards that by urban standards elsewhere are enormous.” Id. at 6.

45. The recognized forms of municipal government are cities, boroughs, towns, villages, townships, plantations (in Maine) and locations (in New Hampshire). In addition, there are county governments (in Louisiana, these are called parishes and in Alaska, boroughs). See LYNN A. BAKER & CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW 46-49 (3d ed. 2004).

46. Hence the problematic nature of the basic premise of claims that American law serves the “suburbs.” For an example of such an argument, see Kenneth A. Stahl, The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law, 29 CARDozo L. REV. 1193 (2008).

47. Consider, for example, Camden, New Jersey; Orange County, California; Oak Park, Illinois; Westchester County, New York; Cambridge, Massachusetts; East St. Louis, Missouri; Arlington, Virginia; and Village of Euclid, Ohio. These very different places can all be considered “suburbs” of a central city. Or, take the example of San Jose, California—now more populous than the central city to which it was historically subservient (San Francisco).

48. According to the definitions instituted by the Office of Management and Budget, a metropolitan statistical area is “associated with at least one urbanized area that has a population of at least 50,000. The Metropolitan Statistical Area comprises the central county or counties containing the core, plus adjacent outlying counties having a high degree of social and economic integration with the central county as measured through commuting.” Standards for Defining Metropolitan and Micropolitan Statistical Areas; Notice, 65 Fed. Reg. 82,228, 82,238 (Dec. 27, 2000). A metropolitan area thus may consist of more than one urbanized core. In fact, it might also include more than one principal city (though normally the latter is the largest city). There is no term describing communities within the metropolitan area that are too small to meet the definitions of either urban core or urban cluster.
Euclid Court had to determine whether such a decision runs afoul of constitutional standards.

B. Constitutional Limits on the Regulation of Property in the Euclid Era

Two clauses in the Bill of Rights deal with the protection of private property. The Due Process Clause, incorporated in the Fifth and Fourteenth Amendments, bans federal and state governments from depriving persons of property "without due process of law." The Takings Clause of the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." This latter prohibition has been applied to the states through the Fourteenth Amendment. 49

Neither of these clauses removes from the states their police power, recognized in the common law and encompassing the original power of government to pass legislation regulating private conduct to protect the public welfare. These constitutional provisions do, however, place limits on this state power to regulate uses of private property. They subject a purported exercise of the police power to two formally distinct constitutional tests. Under the due process test, in order to fall within the legitimate purview of the police power, the regulation must promote the interests of the public generally, as distinguished from those of a particular class. Actions made under the guise of the police power ought to be reasonably necessary for serving the general public safety, health, or morals. 50 According to this doctrine of substantive due process, which the Court developed in the late nineteenth and early twentieth centuries, if the courts are not persuaded that a regulatory measure in fact accomplishes these legitimate goals of the police power, they must strike it down as an unconstitutional deprivation of property without due process of law.

Under the takings test, if the alleged police power measure amounts to an exercise of the eminent domain power, compensation is mandated. When exercising the police power, a state is not obliged to compensate the affected private property owner in every circumstance; but when the eminent domain power is invoked, the Fifth Amendment mandates compensation. 51 Thus, the

51. This means that, technically speaking, as a takings case (as opposed to a due process case), even if Euclid had been decided in favor of Ambler Realty, the village need not have forsaken its plan altogether. Takings cases are only about compensation. If a takings claim is accepted by the court, the governmental intrusion upon private property is not voided—the government is merely obliged to pay due compensation. As a practical matter, of course, the government may choose to abort the action to avoid the expense (and given the cost of paying compensation to all those affected by zoning, the policy would have certainly been unsustainable had it been deemed a taking necessitating compensation). For a plaintiff to be able to stop governmental action altogether (even when the government is willing to pay her just compensation), she must rely on another requirement listed in the Fifth Amendment, which holds that a taking must be made for a "public use." Ambler Realty could not have persuasively argued
takings test tasks the courts with discerning the point at which an alleged exercise of the police power encroaches on private property rights to such an extent as to render it an employment of the eminent domain power.\(^5\)

Until the 1870s, courts held that for an exercise of the police power to cross the line separating that power from the eminent domain power, a physical act carving out a part of the land and removing it from the hands of the owner had to occur. Therefore, regulations that merely reduced the value of land by restricting various uses (as did the later ordinance in *Euclid*) were not considered takings because they did not physically appropriate the land.\(^5\)

Accordingly, and since the Due Process Clause was rarely employed to strike down police power measures, nineteenth-century America abounded with regulation, limiting the use of private land to promote fire safety, health, and morals.\(^5\)

All this started to change a few years after the Civil War, at the same time when the Supreme Court was developing its substantive due process jurisprudence.\(^5\) The first step was made in 1871 when the Supreme Court accepted the petition of owners whose land was destroyed by flooding caused by a governmentally authorized dam. The Court rejected the respondents' argument that the land had not been literally and physically "taken" from the owners. As the Court explained:

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\text{[I]t would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use.} \text{\(^5\)}
\]

that the Euclid zoning ordinance did not meet this standard. The Public Use Clause implies a ban on the confiscation of land for a future, post-taking use that is not "public." In interpreting the term, the Court has traditionally accorded legislators much latitude, finding almost all proposed future uses of land that are believed by the taker to generate a public benefit to be public uses. Lately, some Justices and many commentators have questioned the wisdom of this approach. See *Kelo v. City of New London*, 545 U.S. 469, 497-501 (2005) (O'Connor, J., dissenting).


55. After the Civil War, there was a marked increase in the number of federal due process and takings cases, as the post-war constitutional amendments applied the Due Process Clause, and, by the Court's interpretation, the Takings Clause to the states. Before that, a challenge to a state exercise of the eminent domain power had to be filed under the Contract Clause of the Constitution in Article I, Section 10.

This shift has been explained as a result of the judicial confrontation with an emerging reality in which the most significant forms of property were incorporeal. As land ceased to be the central form of wealth, conceptions of property based on old principles of landholding became anachronistic. They struck observers as alien to a modern economy dominated by intangible objects, such as stocks. In this new world, the physical attributes of an asset seemed less and less important. Judges were thus pressed to redefine the nature of interference with property rights—even those in land—more abstractly; not as an invasion of some physical boundary but as any action that reduces the market value of property.\footnote{57} These redefinition efforts were not unrelated to new ideological trends. Only when joined by a strong shift to individualism during the 1870s, did the gradual movement away from traditional physical definitions of property produce a major judicial expansion in constitutional doctrine.\footnote{58} A legal move was afoot: a conception of the right of property as social and relative was being replaced by an individualized interpretation of the right.\footnote{59} As a result, the lax attitude toward regulation of property came into question.

Absorbing the new value-based, nonphysical definition of property, the Court took the final and most dramatic step in reinventing takings law in the 1922 case of \textit{Pennsylvania Coal Co. v. Mahon}.\footnote{60} In an opinion delivered by Justice Holmes, the Court for the first time struck down a land use regulation as an unconstitutional taking of property. Justice Holmes reasoned that a state law forcing mining companies to conduct their operations in a way that would not undermine support for surface structures (even in cases such as the one before the Court, in which the owners of those structures had contracted to allow the mining company to undermine said support) made it commercially impracticable to mine certain varieties of coal, and thus, had very nearly the same effect for constitutional purposes as appropriating or destroying the right to mine coal.\footnote{61} Though Justice Brandeis, in dissenting from Holmes’s opinion, tried to cling to old conceptions of a physical taking and of an expansive police power,\footnote{62} “regulatory takings” law was born. From then on, the vast majority of takings cases would revolve around the question whether the regulation challenged “goes too far,” as Holmes put it,\footnote{63} and is thus a taking.\footnote{64} This was


58. Kainen, supra note 57.

59. NOVAK, supra note 54, at 47, 240.

60. 260 U.S. 393 (1922).

61. \textit{Id.} at 414.


63. \textit{Id.} at 415.

clearly an issue of degree, which left much to the discretion of the courts.65 One of the first cases inviting the Court itself to exercise this discretion and to probe the limits of the new doctrine was Euclid.

C. The Court’s Decision

In Euclid, the Supreme Court ruled that the zoning ordinance under scrutiny remained within the scope of the state’s police power.66 The Court did not even mention the Pennsylvania Coal decision.67 Apparently, Justice Sutherland found that the ordinance satisfied the substantive due process test, since it promoted the general public welfare. The case revolved around the provisions of the ordinance that placed parts of Ambler Realty’s land in the second category of the Village of Euclid’s use districts, where only single-family or two-family detached residences could be constructed. In his majority opinion, Justice Sutherland explained that it was easy for the Court to dispense of Ambler’s challenge to the exclusion of industry from its land by relying on...

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65. This approach to legal problems and to the role of the courts in solving them befits the more realist jurisprudence, characteristic of Justice Holmes, en route to replace the debunked categorical thinking of Classical Legal Thought. See Duncan Kennedy, The Rise and Fall of Classical Legal Thought (2006); Joseph W. Singer, Legal Realism Now, 76 Calif. L. Rev. 465 (1988) (reviewing Laura Kalman, Legal Realism at Yale: 1927-1960 (1986)).

66. The Court set a rather lenient reasonableness test for zoning ordinances (only clearly arbitrary and unreasonable ones were to be struck down), which were also to enjoy a presumption of validity. For more on the Euclid standard and later judicial attitudes toward it, see Jerold S. Kayden, Judges as Planners: Limited or General Partners?, in Zoning and the American Dream, supra note 17, at 223. The Court was to find this presumption rebutted, and to strike down a zoning ordinance for its unreasonableness, two years later, again in a decision written by Justice Sutherland, in Nectow v. City of Cambridge, 277 U.S. 183 (1928). The reasonableness standard represents a blurring of the lines between takings law and substantive due process law. Steven J. Eagle, Property Tests, Due Process Tests and Regulatory Takings Jurisprudence, 2007 BYU L. Rev. 899, 906-07. In Euclid, the Court did not find it necessary to distinguish the Takings Clause from the Due Process Clause (therefore the decision could, at least originally, be read as a substantive due process case). Euclid, in this sense, sowed the seeds of the Agins v. Tiburon formula, according to which a governmental action that does not "substantially advance" a legitimate state interest is a taking. 447 U.S. 255, 260-63 (1980). Agins was overruled in 2005 when the Court held that this formula had invaded takings jurisprudence from the substantive due process jurisprudence that the Court had abandoned in the late 1930s. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

67. Justice Sutherland’s opinion never mentions the Pennsylvania Coal decision, despite the fact that the district court, in striking down the zoning ordinance under review, heavily relied on it. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 311-14 (N.D. Ohio 1924). Treanor argues that Sutherland did not cite Pennsylvania Coal since Holmes’s balancing property jurisprudence, established in that case, was not clearly articulated at the time. Sutherland and others failed to understand it and appreciate its applicability, and hence Euclid relied on classic police power rationales. See Treanor, supra note 64, at 862-63.
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precedents. The crux of the case was the provisions of the Village of Euclid’s zoning ordinance that barred commercial activity and apartment houses. Sutherland then moved on to uphold the constitutionality of these restrictions as well. In the next Parts of this Article, I will examine first the explicit reasoning provided by the Court for this ruling and then turn to the underlying causes, clues for which may be detected in Justice Sutherland’s opinion.

II. The Prevalent Accounts of the Court’s Embrace of Zoning

A. Zoning as the Progressive Regulatory Response to the New Interdependent City

Justice Sutherland provides the main explanation for his ruling in favor of the Village of Euclid in the following paragraph:

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. . . .

In these sentences, Justice Sutherland describes two changes: one in urban reality, and another, necessitated by the first and introduced by the decision, in the legal regime. Much of the appraisal of Euclid and of its place in the Lochner Court’s legacy has been based on these words of Justice Sutherland. In this Section, I will trace this common explanation of the Euclid decision that perceives it as a timely legal reform introduced in response to real world

68. Justice Sutherland cited the following cases: Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) (dealing with a city ordinance requiring the consent of a majority of the property owners for the placement of billboards in residential areas); Hadacheck v. Los Angeles, 239 U.S. 394 (1915) (discussing the Los Angeles kiln regulation); Reinman v. Little Rock, 237 U.S. 171 (1915) (pertaining to a regulation banning livery stables from certain parts of the city); and Welch v. Swasey, 214 U.S. 91 (1909) (concerning the Boston height regulation).

changes. I will first show why *Euclid* departed from traditional legal doctrine and laissez-faire ideology, but then I will question the validity of the urban transformations mentioned by Justice Sutherland as a justification for this departure. I will thereby show that it is a mistake to perceive *Euclid* as an endorsement of new forms of regulation in reaction to objective developments. Common wisdom notwithstanding, the novelty of the decision lies elsewhere.

1. **Euclid** as the Product of the “Living Constitution”

As presented by Justice Sutherland, *Euclid* is the product of the “living Constitution” being adjusted to the new realities of modern urbanism. When this line of argument is accepted at face value, *Euclid* represents a rare instance of the *Lochner* Court demonstrating flexibility and realism. Here, a Court that at the time (and still today) was often criticized for being unable to grasp the changing social and economic realities of the Progressive Era, for hanging on to old notions suitable to bygone times, undertook an exploratory move forward.

Many have interpreted the decision in this fashion, and hence, extol it as one of the clearest manifestations of the adaptability of legal doctrine. Robert Post notes, “Justice Sutherland authored for the Court a strongly forward-looking opinion. . . . Sutherland boldly invoked the ‘comprehensive reports’ of ‘commissions and experts’ to portray urban land as subject to ‘complex conditions’ of interdependence. . . .” Charles Haar and Michael Wolf present “the language and legacy of *Euclid* as an example of Progressive jurisprudence. Imbued with the spirit of late nineteenth-century pragmatism and grounded in early twentieth-century political and ideological realities.” The Justices in *Euclid* “endorse[d] the view that legislative and administrative efforts often result in social and economic progress for the commonweal.”

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70. The notion of the Constitution as a living, flexible document whose interpretation can and should change as time passes can be traced to Chief Justice John Marshall’s famous words from *McCulloch v. Maryland* that “the [C]onstitution [was] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” 17 U.S. (4 Wheat.) 316, 415 (1819).

71. Most famous in this context was Roscoe Pound’s denunciation of the chasm between “law in books” and “law in action.” Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

72. Post, supra note 17, at 1542-43.


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sums up this perspective by hailing the decision as “one of the most important opinions justifying [legal change].”

2. The Relationship Between *Euclid* and Traditional Doctrine and Principles

Not all have embraced this vision of change. Some commentators believe the decision did not reflect any doctrinal shift and was no more than the product of existing property and tort rules. These writers contend that traditional nuisance law—to which Justice Sutherland refers in his opinion—is key to understanding the approval of zoning by a court deeply immersed in substantive due process jurisprudence and committed to the protection of property and contract rights from regulation. The argument asserts that as the common law defined the perimeters of substantive due process, zoning was saved because it was premised upon the common law governing nuisances. The common law grants an owner a cause of action against a neighbor who interferes in an unreasonable and substantial fashion with her use or enjoyment of land. Law has thereby always restricted property rights. Zoning not only fit in with the traditional common law, but also, in that manner, was fully compatible with the *Lochner* jurisprudence—which allowed interferences with property and contract rights only when those interferences could be derived from common law categories.

Yet, it is very hard to rest the whole decision upon the relatively narrow shoulders of nuisance law. To accept such a theory, we must believe that Justice Sutherland (and his brethren) failed to see that even though both are related as forms of regulating conflicting land uses, zoning represented a giant

AND THE AMERICAN DREAM, supra note 17, at 31, 54 (attributing the decision to Sutherland’s ability to adjust to the realities of a changing world).


doctrinal leap from nuisance law.\textsuperscript{79} And even if we assume that zoning was nothing more than an adjustment in the law of nuisance, we still have to explain how nuisance law helped to legitimize the specific contents of the Village of Euclid's zoning ordinance. The ordinance banned uses, such as the construction of apartment buildings, which had never before been deemed nuisances in U.S. law. In fact, the very offensive effects of apartment buildings that Justice Sutherland mentioned as necessitating their exclusion from the residential district have traditionally been rejected as grounds for a nuisance claim in most of the states. Sutherland explains that apartment buildings "interfer[e] by their height and bulk with the free circulation of air and monopoliz[e] the rays of the sun which otherwise would fall upon the smaller homes."\textsuperscript{80} The vast majority of U.S. courts, however, would hold (then and now) that an owner is not liable in nuisance for any interference with her neighbor's interests in a free flow of light and air. As the rule in most jurisdictions goes, there is no "easement for light and air" in the absence of an explicit contract to that effect between the two neighbors.\textsuperscript{81} The zoning ordinance, therefore, did not merely codify nuisance law rules. It created new rules. Post justifiably dismisses the argument that the decision was based on common law conceptions of nuisance law and holds that it was much more innovative.\textsuperscript{82} Haar and Wolf perhaps best characterize Sutherland as seeking guidance in the common law but by no means allowing it to control the scope of the police power.\textsuperscript{83}

Even if \textit{Euclid} was a doctrinal innovation, however, some have argued that it represented no departure from traditional theory. Joel Paschal, Justice Sutherland's early biographer, claimed that the decision could squarely be situated within nineteenth-century laissez-faire ideology. He contended that the decision actually resonated with Herbert Spencer's Social Darwinist theory, which exerted a decisive influence on U.S. conservatives at the time in general and on Sutherland throughout his career in particular.\textsuperscript{84} Spencer vehemently denied the existence of a social quality in man. It was solely the growth of

\textsuperscript{79} For a discussion of some of the important differences between nuisance as a private law claim and public zoning laws, see infra notes 111-115 and accompanying text.

\textsuperscript{80} Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

\textsuperscript{81} The case most famously stating the rule is \textit{Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.}, 114 So. 2d 357, 360 (Fla. Dist. Ct. App. 1959).

\textsuperscript{82} Post, supra note 17, at 1544.

\textsuperscript{83} Haar & Wolf, supra note 73, at 2178-79. Kenneth Stahl has argued that "asserting that zoning for the protection of the single-family home was merely an application of nuisance law principles" enabled the Court to "recapitulat[e] zoning as a collective private property right belonging to the community," as a local entitlement rather than a delegation from the state. Stahl, supra note 46, at 1266-67.

\textsuperscript{84} \textsc{Joel F. Paschal}, \textsc{Mr. Justice Sutherland: A Man Against the State} 9-15 (1951). Herbert Spencer, the nineteenth-century English philosopher, was probably the most prominent promoter of Social Darwinism at the time. See \textsc{Richard Hofstadter}, \textsc{Social Darwinism in American Thought} (1955). Perhaps the most famous reference to his work appeared, paradoxically, in Justice Holmes's celebrated dissent in the \textsc{Lochner} decision, where he forcefully stated: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" (Spencer's first published book). \textsc{Lochner v. New York}, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
numbers that was responsible for the existence of any social state. Hence, according to his theory, over-population is capable of justifying political power—and was indeed applied in this manner to Sutherland’s legitimization of zoning. But this interpretation of Spencer is somewhat contrived, especially because it cannot distinguish the case of zoning from other forms of modern regulation, to which Spencer, Sutherland, and other conservatives were hostile. Consequently, the general opinion is that Sutherland was, at the very least, taking a step or two beyond Spencer.

3. Change and the Lochner Court

The decision cannot be written off as simply an offspring of traditional nuisance doctrine and laissez-faire principles. Grasping the interdependent nature of modern life, the Court apparently tossed aside the laissez-faire ideology with which it has often been associated. Justice Stone’s biographer has gone so far as to argue that the Euclid decision, coming as it did soon after the nomination of Stone, was part of the swing of the Court during the second half of the 1920s from right to left, a swing that would eventually deeply trouble Chief Justice Taft. Eric Claeys, a modern conservative commentator, has lamented the decision for the same reason. In Euclid, he contends, the Court traded its old natural rights freedom-oriented ideology for the Progressives’ relativistic, communitarian, governance-oriented ideology.

While Claeys’s description of a seismic shift is certainly greatly exaggerated, the more subtle line of reasoning—highlighting the flexible and even progressive outlook of the Court revealed in Euclid—is not that far-fetched. The common view of the Lochner Court as a static archconservative bastion, eventually toppled by the Constitutional Revolution of 1937, no
longer commands universal respect. Robert McCloskey, for example, explains
that most of the era’s Justices had played some part in practical affairs and their
hostility to regulation in general was tempered with the realization that
particular circumstances cannot always be governed 
by dogmatism. As a result,
in practice, they used the veto power, inherent in substantive due process and
other doctrines, selectively and judiciously. “The vision of judicial tyranny that
emerges from some of the critical literature of the 1920s and 1930s” is,
McCloskey argues, “pretty remote from the fact.”93 In a somewhat similar vein,
Hadley Arkes, Justice Sutherland’s sympathetic biographer, explains
Sutherland’s decision in Euclid as emanating from an oft-ignored but
fundamental moral inclination among conservative Justices to presume in favor
of local regulations rooted in genuine concerns—in this case, health concerns—
associated with the police power. Conservatives such as Sutherland, Arkes
claims, were deeply committed to natural rights, but they did not assume that
these rights were not limited. Zoning laws, for Sutherland, began with the
maxim sic utere tuo ut alienum non laedas (“use your property so as not to
damage another’s”).94

Even without accepting Arkes’s attempt at humanizing the whole body of
conservative jurisprudence of the Lochner Court,95 it is clear that the Euclid
case illustrated that Justice Sutherland had “a strain of constitutional realism”
(which was also apparent in a few other cases).96 Sutherland and other
conservative members of the Court were able to absorb some strands of the
earlier and more conservative progressive-realistic legal critique.97 When
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examining whether a public measure was promoting the general welfare rather than some class interest and was thus a constitutional exercise of the police power, they were willing to expand the definition of “general welfare” and to take into account a richer set of facts discerned by scientific observations. Euclid might indicate this growing openness on the part of the Court to claims regarding new realities affecting the public health and might reflect the Justices’ willingness to rely, in accordance with the spirit of the times, on planners’ and other experts’ opinions proving these developments.

Furthermore, Euclid is not the sole anomaly in the Court’s otherwise conservative jurisprudence of those years. There are a few others, perhaps most notably the Nebbia decision where the Court allowed the regulation of milk prices. Such decisions have led some to argue that in 1937 there was no revolution—Lochnerism (in its narrow sense) had died before in a gradual process.

4. Did Urban Realities Change in a Manner Justifying Legal Change?

Euclid can be read as an indicator of the Court’s readiness to catch up with the march of history. But Justice Sutherland’s reasoning to that effect in Euclid can be faulted for two major historical mistakes: one in his portrayal of legal history, the other in his narrative of urban history. As can be deduced from the discussion in Section I.B of this Article, Justice Sutherland’s estimation that regulations acceptable in the early twentieth century (such as those examined in Euclid) would not have been upheld a hundred or even fifty years earlier is somewhat improbable. “Regulatory taking” was a term coined only four years earlier, while previous courts had been reluctant to strike down regulations that did not actually remove title. Hence the perception of the Court as loosening its constitutional standards with the aim of accommodating new developments in everyday life is misleading. In addition, there is yet another, and much more important, question for contemplation: did new

98. The best known example of this attitude was in the Court’s handling of the “Brandeis Brief” in Muller v. Oregon, 208 U.S. 412 (1908). The Court commented positively on the brief, which extensively surveyed researches in the social sciences regarding working women’s lives rather than focusing on legal arguments, in support of the successful effort by Louis Brandeis (at the time, still a lawyer) to defend a maximum working hours law for women. Id. at 419-23.

99. On the triumph of American professionalism in the Progressive Era and the ensuing judicial appropriate deference to expertise, as evident in Euclid, see Haar & Wolf, supra note 73, at 2182-84. The zoning movement was quite aware of this new public and judicial attitude: litigating cases around the country, it deliberately adopted in advance a tactic of heavy reliance on scientific evidence, so as to cater to the preferences of the courts—and the public. Martha A. Lees, Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926, 56 U. Pitt. L. Rev. 367, 398-401 (1994).


102. In fact, even loss of title did not guarantee compensation, as the example of the removal of roads from private hands indicates. See NOVAK, supra note 54, at 121-30.
objective developments warranting such accommodation truly exist, as Justice Sutherland and the many commentators who have celebrated the decision over the decades argue?

Counterintuitively, it is far from clear that the answer should be yes. Justice Sutherland would have liked for us to believe that new realities appearing on city streets required new planning regulations—just as the advent of automobiles dictated traffic regulation. This analogy that Justice Sutherland employs in his opinion is deeply flawed. Automobiles were a new reality; they did not roam the streets of ancient Rome or colonial Boston. Dynamic and diversified urbanism was no such new reality; very far from it. The city has been the stage for numerous and varying uses since time immemorial. Never was "urban life . . . comparatively simple," as Sutherland reminisces.103 Commerce, government, industry, leisure facilities, and residences were all mixed together on the streets of the ancient, medieval, renaissance, baroque, and colonial cities. In many of these cities, these differing and competing uses of land took place not only on the same street but also within the same building. Cities, as complex human conglomerates, never effectively segregated land uses. Throughout history, the city has been a hodgepodge of assorted individuals, establishments, pursuits, and interactions.104 There was, in this respect, nothing new about the urban reality of the early twentieth century (or of our own times).

True, the nineteenth century witnessed the introduction of manufacturing on a scale unknown before; but, as explained in Section I.C of this Article, Euclid was not dealing with the exclusion of industry. Therefore, the only relevant change was a change in social norms, which beginning in the eighteenth century, in a gradual process, started calling for the separation of home from work, and then for the separation of home from city. Business and congestion—unlike automobiles—were not new; the innovation was the popular reluctance to have a residence in proximity to a place of business or planted in the midst of urban congestion.105 The recent emphasis on the nuclear family and the cult of domesticity generated a new housing preference that trickled down from the upper to the middle classes.106

105. This is not to say that the automobile was irrelevant to this development. By reducing the price of land within acceptable commuting time to city jobs, it rendered suburban lands more accessible to lower classes and commercial uses, rendering the task of keeping those lands exclusive more difficult. Robert H. Nelson, Zoning Myth and Practice—From Euclid into the Future, in ZONING AND THE AMERICAN DREAM, supra note 17, at 299, 300-01.
106. FISHMAN, supra note 43, at 31-38.
Attentiveness to these new sensibilities and desires of the upper and middle classes seems to have implicitly informed the Court's opinion even more than new objective developments. Let us now turn our attention to the role of these sensibilities and desires.

B. Zoning as the Middle Class's Defensive Regulatory Response to the New Diverse City

The *Euclid* decision can be, and has been, read as purposefully serving tangible class interests. Following many other commentators, I will show in this Section how zoning corresponded to the housing interests of the middle classes in the early twentieth century. But while this Section will illustrate that if the legal acceptance of zoning is to be understood, class interests, and more specifically, middle-class interests, must be considered, it will also aim to explain why these tangible interests cannot——by themselves——paint the complete picture. Parts III and IV will accordingly add more layers to the class interests explanation presented in this Section. The starting point for any such discussion, however, is the Court's attitude toward the middle-class residential neighborhood.

1. The Importance of Zoning for the Maintenance of the Detached-Residence Neighborhood

Nowhere has the middle-class suburban urge been more apparent in U.S. housing rhetoric than in the disparaging view of apartment houses. It should be recalled that Justice Sutherland regarded the constitutionality of the exclusion of apartment buildings from the detached-residence neighborhood as the main issue before the Court. The prominence given to this aspect of the Village of Euclid ordinance is somewhat surprising: Ambler Realty was not seeking to build apartment houses on its land but rather fancied industrial and commercial development. Nonetheless, the Court, swayed by the litigation tactics of both parties, focused on this issue, upholding the ordinance's ban on apartment buildings. Justice Sutherland justified this move in the following terms:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the

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107. The Court could have easily avoided the constitutional issue for several other reasons as well. See Haar, *supra* note 78, at 334-35.
rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

Apartment houses "retard," "destroy," "monopolize," "interfere," and "deprive;" they are "mere parasites," which "take advantage" of a desirable environment created by others while carrying "disturbing noises," and bringing an "occupation" of the streets. Obviously, faced with the onslaught of these invading Huns—a nuisance if there ever were one—the peaceful single-family residences should be allowed to mount barricades—in the form of zoning—to fight back.

Though derogative and intolerant, Justice Sutherland's description does make economic sense. Indeed, what renders the suburban dream so elusive is that when a desirable "naturalistic" and exclusive environment is found, developers are quick to buy empty spaces and subdivide them into smaller and smaller lots to reap larger dividends—thereby destroying the area's exclusive character. By legitimizing zoning, the Court allowed the government to intervene and break this vicious and inefficient cycle. If localities were not able to exclude denser development, then, at least theoretically, all neighborhoods could become dense. Owners would be locked into a coordination problem. An owner would have no incentive to invest in her residential property since at any given time her neighbor might be tempted to construct lucrative commercial facilities or apartment buildings whose presence would devalue her residential property. Zoning solves this problem.

Unlike nuisance law, zoning assures stability. While the private law's nuisance cause of action deals with one specific, already existing problem in the present environment, leaving room for future change, zoning freezes in the current uses of the land forever (or until the zoning ordinance is amended—a legally and politically complicated move). Nuisance law places the cost of

108. Euclid, 272 U.S. at 394-95.
109. Id. at 394.
110. Duncan Kennedy, Legal Economics of U.S. Low Income Housing Markets in Light of "Informality" Analysis, 4 J. L. Soc'y 71, 89-92 (2002). Before the advent of zoning, this process actually happened—as single-family units were divided into smaller and smaller units to house larger numbers of lower-class families (or to solve other economic or construction problems encountered by a developer). See Sam Bass Warner, Jr., Streetcar Suburbs: The Process of Growth in Boston, 1870-1900, at 161-62, 178-86 (2d ed. 1978) (presenting the example of Central Dorchester).
111. A rezoning ordinance is much more likely to count as a taking (and thus require the payment of just compensation) than an original zoning ordinance, since an owner might be found to
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initializing litigation on the landowner, ex post, after her enjoyment of her land
has already been disturbed. Zoning frees her from this burden, making the
municipality an ex ante preventer of conflicting uses. Moreover, if private law
bestows upon a landowner the ability to bring a nuisance suit against one user
of land bothering her today—with no assurances for the future—zoning laws
serve her better: they will fend off for eternity all greedy subdividers. Zoning
laws thereby protect investments in single-family homes from the depreciating
effects of other uses112 and are a particularly useful mechanism for the
maintenance of exclusive neighborhoods.113

2. The Desirability of the Detached-Residence Neighborhood

Zoning can thus be justified, as it was by Justice Sutherland, as an
efficient tool of land use regulation,114 whose goal is to assure the stability of
exclusive neighborhoods. Yet for this economic analysis to be meaningful, it
must assume this latter goal. It must be accepted that detached-residence
neighborhoods carry inherent value, that is to say, that they are a good to be
promoted. While Justice Sutherland’s opinion and simplistic forms of economic
analysis might imply otherwise, the desirability of neighborhoods with
detached single-family houses is not a given; it is by no means preordained.
Rather, it is a product of social preferences. Modern society has placed a
premium on this form of living.115 The important question then, is not whether
zoning laws are efficient in promoting the construction and maintenance of
exclusive neighborhoods, but rather to whom, and why, such living
environments are perceived as beneficial.

have vested rights in the existing zoning classification. See, for example, the discussion in Stone v. City
of Wilton, 331 N.W.2d 398 (Iowa 1983). Vested rights are established when it can be shown that the
owner had reasonable investment backed expectations that the zoning ordinance would not be changed.
An interference with such expectations constitutes a taking. Kaiser Aetna v. United States, 444 U.S. 164,
175 (1979). In the reverse case, neighbors may be successful in portraying an amendment to the zoning
ordinance lifting a development restriction formerly placed on a specific parcel as an instance of illegal
“spot zoning.” See 7 PATRICK ROHAN, ZONING AND LAND USE CONTROLS § 38A.01 (1978). In addition,
even when such a move is legally possible, it is extremely difficult to undo residential zoning schemes
given the realities of municipal politics. In the words of a property owner from Greenwich, Connecticut,
who could not get permission to change the use of his land from residential to commercial, in his town
“no one can get elected unless he swears on the Bible, under the tree at midnight, and with a blood oath
to uphold zoning.” Ralph Blumenthal, Pressures of Growth Stir Zoning Battles in Suburbs, N.Y. TIMES,
May 29, 1967, at A1, A13 (quoted in TOLL, supra note 8, at 296).

112. M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY
PLANNING 148, 156 (1983).

113. Kennedy, supra note 110, at 89. For the advantages zoning presented in the 1920s over a
nuisance-based system of land use law, see Andrew A. Lundgren, Beyond Zoning: Dynamic Land Use

114. For an elaborate economic analysis of the costs and benefits associated with different
forms of land use regulation, including zoning, see Robert C. Ellickson, Alternatives to Zoning:

115. See CONSTANCE PERIN, BELONGING IN AMERICA: READING BETWEEN THE LINES 81-128
(1988) (arguing that homeownership in a “nice” neighborhood is often perceived as the top rung in the
long climb up the ladder of life).
Exclusive neighborhoods were extremely appealing to the middle classes when *Euclid* was decided. They still are today. This appeal can be attributed to domesticity ideals, which focus on separating the unnatural, hectic work sphere from the home sphere that is envisioned as a quiet haven. Domesticity ideals flourished during the nineteenth century and continued to influence the way people understood their surrounding world in the early twentieth century. These ideals shaped reformers’ schemes for bettering that world. At least originally, domesticity ideals were based on gendered notions: the market world was seen as the exclusive province of men; home and family were deemed the special province of women. As an outcome of these concerns, the legal reform movement of the time made the middle-class home “the focus, even the issue itself... Business was allowed full play in the factory, but the market was highly regulated when it touched the home.”

The legal protection of the single-family residences neighborhood clearly corresponds to this pattern. True, it must be acknowledged that Justice Sutherland’s thinking and reasoning in *Euclid* cannot easily be dispensed with as gender-biased. As a Republican Senator from Utah, Sutherland sponsored the Nineteenth Amendment guaranteeing women’s suffrage. Perhaps even more importantly, shortly after he joined the Court, he authored the *Adkins* majority opinion, striking down a statute setting minimum wages for women. Justice Sutherland thus dismissed the idea that women should receive any special protective treatment due to their sex. At the very least, that decision shows that gender bias alone could not displace his basic anti-regulatory instincts. This does not mean, however, that the desire to isolate the middle-class home sphere and its inhabitants from risk and commotion was irrelevant to the adoption of zoning. While Sutherland might not have been anxious to create a safe environment for women, he was very much concerned with providing such an atmosphere for children. He thus frets in *Euclid* about the

116. Lees, supra note 99, at 415-20; Stahl, supra note 46, at 1245-51. The lawyers representing the Village of Euclid indeed tried to portray the village as protecting the American home. Brooks, supra note 17, at 6-7, 23.


119. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553 (1923) (“We cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.”). A number of leading feminists at the time cited the decision as a progressive statement regarding the equal rights of women. Randle, supra note 74, at 52-53. Sutherland’s modern supporters have relied on this aspect of his *Adkins* opinion to justify a decision that lies in disrepute. See, e.g., Arkes, supra note 19, at 13-14.
damage suffered by children deprived "of the privilege of quiet and open spaces for play."\textsuperscript{120} 

According to the cult of domesticity, children were to be sequestered in the safe home sphere. Middle-class children were to be kept away from "harm's way." Harm's way often meant contact with the poor or minority cultures.\textsuperscript{121} This was—and remains—a key issue. Domesticity ideals fixated the middle classes on exclusive neighborhoods. Yet, exclusivity referred not only to the spatial and architectural attributes of the neighborhood, but also to its social qualities. Not only were certain buildings and activities to be kept out of the home sphere, but certain sorts of people were also to remain on the outside. Zoning fed the American appetite for income segregation.\textsuperscript{122} In addition, it had clear racial overtones. In this context, there is another piece of legal history to consider if the puzzle that is the \textit{Euclid} decision is to be solved.

Nine years before the \textit{Euclid} decision, the Court ruled in \textit{Buchanan v. Warley} that a municipal ordinance establishing exclusively white residential areas was unconstitutional.\textsuperscript{123} The \textit{Buchanan} decision blocked the direct route to residential segregation. Zoning, however, enabled municipalities to pursue the same segregationist goals indirectly.\textsuperscript{124} Cities could not legally zone out minority residents, but they could zone out affordable housing. Given the correlation between race and class in America, such measures effectively limited minorities' access to the zoned areas. Zoning thus fits the "possessive investment in whiteness" framework suggested by George Lipsitz.\textsuperscript{125} Zoning laws allowed the beneficiaries of past discrimination to keep reaping its material advantages even after an anti-discrimination measure had been adopted by the Court. They enabled the value of whiteness, in this case represented by higher home values in exclusive suburbs, to persist. White homeowners were, thereby, able to protect their gains and pass them on to succeeding generations.

123. 245 U.S. 60 (1917).
124. The same goals could be achieved by participants in the real estate market by using the tools of private law. Until the landmark decision of \textit{Shelley v. Kraemer}, 334 U.S. 1 (1948), racially restrictive covenants, upheld by the Court the same year in which \textit{Euclid} was handed down in \textit{Corrigan v. Buckley}, 271 U.S. 323 (1926), were constitutional and common. It should also be noted that several municipalities adopted explicitly racial zoning ordinances even after the Court found them to be illegal. Jon C. Dubin, \textit{From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color}, 77 \textit{Minn. L. Rev.} 739, 749-50 (1993).
Therefore, zoning was, as Lawrence Friedman argues, "a restriction on property rights; but for the benefit of the middle-class mass."\textsuperscript{126} The Court, under the patrician leadership of Chief Justice Taft, was in its composition an establishment of the ruling elite,\textsuperscript{127} and its \textit{Euclid} decision had clear racial and class connotations. The ruling can consequently be construed as aiming to help the middle classes live their bourgeois utopia by excluding the lower classes—and particularly, minorities—from their turf.\textsuperscript{128} Thus understood, \textit{Euclid} sowed the seeds for exclusionary zoning. Today, it is clear that while zoning laws were often presented, as they were in \textit{Euclid}, as tools for spatial engineering, they have developed and functioned to a great extent as measures of social engineering. They have been employed to control not just the environment, but community composition as well.\textsuperscript{129}

It is hard to claim that the \textit{Euclid} Court could not have foreseen this eventuality. By the mid-1920s, it had become clear that zoning's \textit{raison d'être} was the promotion of social homogeneity in residential districts.\textsuperscript{130} Contemporary commentators, academics, lawyers, and even judges, progressive and conservative alike, had already exposed this prospect.\textsuperscript{131} Furthermore, the lower court deciding \textit{Ambler Realty Co. v. Village of Euclid} had also found zoning laws to constitute a taking of property without just compensation specifically because they classified and segregated the population along race and income lines.\textsuperscript{132}

3. The \textit{Lochner} Jurisprudence and "Class" Legislation

The Supreme Court reversed the decision without addressing this forceful argument upon which the district court's conclusion was based. Presumably, as those scholars who perceive zoning laws as being little more than the fruit of middle-class interests would argue, the Court found no issue with such classification and segregation, since it served the dominant classes in U.S. society. Still, when phrased solely in terms of tangible class benefits, even this explanation of \textit{Euclid} is lacking. It can arguably explain why conservative

\begin{itemize}
\item \textsuperscript{126} \textsc{Lawrence M. Friedman}, \textit{American Law in the 20th Century} 401 (2002).
\item \textsuperscript{127} Seven of the Justices were well-educated sons of upper-class Protestants of old American stock. Even the two exceptions were very much part of the social elite: Justice Brandeis was a member of the German-Jewish aristocracy, and Justice Sutherland, though originally a poor Mormon immigrant, was by this time a parvenu plutocrat. Garrett Power, \textit{Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court}, 21 J. Sup. Ct. Hist. 88 (1997).
\item \textsuperscript{128} See Chused, \textit{supra} note 121, at 604-15; Randle, \textit{supra} note 74, at 40-43; Wolf, \textit{supra} note 26, at 253-59.
\item \textsuperscript{130} \textsc{Toll}, \textit{supra} note 8, at 196-97.
\item \textsuperscript{131} \textit{Id.} at 259-62; Lees, \textit{supra} note 99, at 380-92.
\item \textsuperscript{132} 297 F. 307, 316 (N.D. Ohio 1924).
\end{itemize}
Justices supported zoning, but not why progressive Justices (namely, Brandeis and Stone) concurred. Furthermore, it is hard to square such an account with the Court’s commitment in that era to the principle of neutrality in government. The *Lochner* Court’s jurisprudence was steered by the legal dogma that an exercise of the government’s police power is only legitimate when it serves the general public welfare. As noted in Section I.B, a regulation adopted merely for the sake of the well-being of a specific set of citizens, of one class of individuals, was, according to this legal guideline, in violation of substantive due process. Clearly, in an age of progressive legislative reform, such a judicial attitude was prone to harm the lower classes disproportionately. Nonetheless, the *Lochner* Court tended to be true to its abhorrence of “class” or “special” legislation, no matter which class benefitted from the legislation. It is, therefore, not easy to imagine the Court so blatantly serving the tangible interests of the middle classes in *Euclid* in defiance of its own jurisprudence and legal philosophy.

The Court, we should also remember, refused to recognize these interests as a permissible basis for state action when it decided the fate of expressly racial zoning. In *Buchanan v. Warley*, a Louisville ordinance making it unlawful for a black person to reside in a block where a majority of the houses were occupied by whites (and vice versa) was struck down, but not because it denied the black buyer (who could not move in) the equal protection of the laws. Instead, the Court focused on the interference with the property right of the white seller, whose freedom to contract with the black buyer and thereby alienate his land was, as Justice Day explained, restricted in violation of the Due Process Clause. The ordinance reviewed in *Euclid* was treated differently, and was allowed to further, again at the expense of an owner’s freedom, the same class interests the Court refused to acknowledge as legitimate grounds in *Buchanan*. The Euclid zoning ordinance thus must have been perceived as promoting an additional public interest, one that was, at least

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134. *Gillman*, *supra* note 97, at 1-18, 46, 103, 125, 127; *see also* Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 139 (1998).

135. *Buchanan v. Warley*, 245 U.S. 60, 73, 82 (1917). The petitioner in the case was the white seller of a house, who sought to enforce the contract of sale on the defendant, the black buyer (the head of the local NAACP branch), who argued that because of the racial ordinance he could not legally perform the contract. The Court ruled in favor of the petitioner, relying on substantive due process. It therefore did not reach the alternative basis for the petition—the Takings Clause. Thus, the decisions in *Euclid* and *Buchanan* were based on different legal provisions. The analysis was, however, inevitably, almost identical: under both the Takings Clause and the Due Process Clause; for the municipality to win, it must have been able to show that the regulation was a legitimate exercise of the police power. The difference between the clauses, as the law stood at that early time, would have only become relevant if the municipality had failed to meet this task. Under substantive due process analysis, the regulation is then voided. Under takings analysis, the municipality is then forced to pay just compensation (or voluntarily renounce the ordinance). For more on the *Buchanan* decision, see, for example, James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 *VAND. L. REV.* 953 (1998); and Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 *VAND. L. REV.* 881, 934-44 (1998).
seemingly, class neutral. According to Buchanan, the mere desire to preserve residential segregation, even if it benefitted a large class of citizens, could not justify an exercise of the police power that limited the freedom of an owner to use or sell her land as she saw fit. That was the legal principle to which the district court adhered when it ruled against the Village of Euclid.

But the Supreme Court apparently believed that the lower court failed to identify accurately the purpose of the residential zoning regulation. It overruled the district court’s decision because it was of the view that this specific use of the police power could be justified as advancing the general public welfare, and not the interest of just one class of citizens. But how? What allowed zoning to be perceived as transcending its function in serving the middle classes? What made it more than just bourgeois? What made it American?

III. An Alternative Account: Zoning as a Means to Promote a Reimagined Jeffersonian Populist Conception of Property

Section II.A of this Article showed how Euclid could be perceived as the Court’s reaction to urban change. Section II.B illustrated the ways in which Euclid served middle-class interests. Both Sections, however, concluded that neither account can fully explain the decision. Euclid does not merely typify legal flexibility when confronting real world change, nor does it simply stand for intransigent judicial adherence to the wishes of the middle classes. In this Part, I will present what I believe to be the lynchpin that binds these two explanations together. I will attribute the result of Euclid to a traditional American commitment to the redeeming qualities of ownership and the necessity to construct a society based on a certain form of property distribution, as adjusted to the circumstances of the modern age.

A. The Jeffersonian-Jacksonian Surge in the Progressive Era: “Old Progressives” and “Old Conservatives”

To best comprehend the U.S. property tradition in its Progressive Era embodiment, it is helpful to begin the discussion not with Justice Sutherland, but with Justice Brandeis, his ideological nemesis on the Court, who in this case opted to join Sutherland’s majority opinion. Justice Brandeis represents an important strand in U.S. political and legal thought. The man behind Woodrow Wilson’s “New Freedom,” he personified “old progressivism”—a progressivism still attached to Jeffersonian and Jacksonian ideals.136 Old progressivism, in its belief in the capacity of each and every American to compete and succeed independently if only assured a fair playing field, differed

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from “new progressivism.” The two forms of progressivism were most prominently at odds in their respective attitudes toward governmental regulation. While old progressivism called for a government whose role was limited to restoring competition to the market—that is to say, to removing barriers placed by the modern corporate economy in the way of the ambitious citizen—new progressivism wholeheartedly embraced administrative management. It advocated a strong government comprehensively employing regulatory powers, which it saw as vital in a new reality teeming with strong players who were not going to disappear. In such a world, new progressives believed that the common man lacked the power to stand up for himself independently. In their view, it was naïve to believe that it could be otherwise, to hope as old progressives did that a long-lost past could somehow be restored. The two competing progressive variants clashed most famously in the presidential election of 1912, when Woodrow Wilson, campaigning under the banner of “New Freedom,” defeated Theodore Roosevelt, the champion of “new progressivism,” or, as he dubbed it, “New Nationalism.”

In its suspicion of expansive regulation enforced from above, and in its conviction that big market players can and should be broken up by legal action, old progressivism shared much with the “old conservatism” that characterized the Lochner Court. Over the past few decades legal historians have repudiated the long-held belief that the Lochner Court was pro-big business (“new conservative”). As they show, the Lochner Court’s abhorrence for regulation and redistribution was not an answer to the interests and needs of the newly consolidated major business interests. In actuality, the Court was adhering to old Jacksonian notions regarding the natural power of small independent businesses and the danger inherent not only to large-scale government, but also to large-scale private enterprises.

B. Zoning as a Jeffersonian-Jacksonian Scheme of Regulation

This ideological positioning enabled conservatives and progressives—old conservatives and old progressives—to find common ground when considering zoning. At first blush, zoning is the archetype of new progressivism, of central regulation introduced in order to deal with the irreversible interdependence of

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138. HORWITZ, supra note 57, at 7, 86; see also CUSHMAN, supra note 134, at 139; GILLMAN, supra note 97, at 1-18, 61-62. On the attitude of Jeffersonians and especiallyJacksonians to consolidation and competition, see ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 334-41 (1945); and Herbert Hovenkamp, The Classical Corporation in American Legal Thought, 76 GEO. L.J. 1593, 1610-12 (1988). This attitude was most famously exemplified in the seminal decision of Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).
modem life. But zoning is much more than that. In essence, and as already seen, it is a tool for assuring the survival (and eventual entrenchment) of a chosen way of life. Zoning, in its American interpretation, protects the small homeowner, freeing her from the specter of big business—in the form of industry, commerce, or apartment building development—moving in on her. Zoning thus promotes the aspiration for residential areas comprising many “independent” homeowners living on their own land.139

This image of the small homeowner corresponds to the ingrained Jeffersonian vision of the independent yeoman.140 Thomas Jefferson was convinced that the yeoman’s economic self-reliance assured his freedom and political autonomy. Hence, increasing the number of American yeomen strengthened the national capacity for self-determination. Accordingly, old conservatives and old progressives both viewed the proliferation of small landholding as a bulwark of democracy. Loyal to Jefferson’s worldview, they saw in the small owner the promise of a thriving civic society and a healthy economic market, constructed on a robust foundation of an independent, active, and involved citizenry. Residential zoning, which insulated the esteemed independent owner from new urban threats, could thus enjoy the imprimatur of Jefferson. The suburbanite was the modern yeoman; protecting her meant protecting the republic.

Residential zoning not only realized the Jeffersonian vision, but it also bore a striking resemblance to Jefferson’s own scheme for the fulfillment of that ideal. In fact, zoning perfected his early plan by solving the temporal handicap that always plagued Jeffersonianism. In 1784, Jefferson headed a committee of the Confederation Congress dealing with the methods by which lands in the Old Northwest (the area between the Mississippi and Ohio rivers) would be surveyed and sold to settlers. The ordinance he proposed was to divide the land, regardless of terrain, by means of a rigid grid, consisting of units of equal size that would be sold to individual farmers.141 While this plan aimed at constructing yeomen communities and could have created them for the short-term, it could not have assured the maintenance of such communities: settlers could become speculators, aggregating units or putting them to uses conflicting with those desired by Jefferson and the other planners. Modern

140. On the yeoman’s key role in Jefferson’s view of democracy, see WILENTZ, supra note 36, at 47-48; and Stanley N. Katz, Thomas Jefferson and the Right to Private Property in Revolutionary America, 19 J. L. & ECON. 467, 470-74, 480-81 (1976).
141. The Confederation Congress adopted the land ordinance in May 1785. While the grid of Jefferson’s plan was retained, the size of the units was changed. Heeding the protests of the New Englanders, who warned of fragmentation, the basic units were to be townships six miles square, subdivided into sections one mile square. The provisions for sale benefitted land speculators, rather than settlers. By this time, Congress was above all concerned with raising funds from the sale of the lands in order to deal with a crippling national debt. See Reginald Horsman, The Northwest Ordinance and the Shaping of an Expanding Republic, WIS. MAG. HIST. 21, 26-27 (1989).
residential zoning was an improvement on this practice: it not only reincarnated Jefferson’s Northwestern land policy, with all its rigidity and emphasis on small individual lots, but also promised to create communities that would transcend the original’s ephemeral nature. Unlike the yeoman of old, the new suburbanite will not become a land speculator in due course; zoning laws will make sure that she will not be able to convert her land into more lucrative uses such as retail or apartment buildings. The modern residential neighborhood thus appeared as the new and improved means of promoting Jefferson’s vision of a republican empire.

Related tenets of Jacksonianism similarly vouched for zoning. Jacksonians, such as the old conservatives and old progressives on the Court, always firmly believed in the power of competition among many small- and medium-sized players. Bigness, in their worldview, was both unnatural and dangerous. It was the product not of initiative and economies of scale, but of the ability of those enjoying political and economic prominence to game the system to the detriment of the honest common man and of the welfare of society at large. Once achieved, such bigness undermined local political and economic independence. Applied to housing patterns, this stance endorsed a residential neighborhood consisting of many small single-family homes as

142. On the yeoman becoming a speculator, and on how, following the first decades of the nineteenth century, American rural society ended up attached not to land but to land values, see Hofstadter, supra note 136, at 40-42, 46.

143. The temporal dilemma that supposedly plagues any plan of land reform was a main argument of Robert Nozick, who claimed that a principle promising property for all would early on be frustrated by the owners’ right to transfer their property. Robert Nozick, Anarchy, State, and Utopia 160-63 (1974). Jeremy Waldron’s reply to Nozick is that limitations on the ability to transfer property can prevent this result. Jeremy Waldron, The Right To Private Property 422-25 (1988). Zoning fulfilled this exact function. Interestingly enough, some prominent commentators at the time failed to realize this potential of zoning. Ernst Freund argued that zoning, while promising in Europe, was inappropriate for the United States. The main reason he cited was that urban spaces in America, unlike their counterparts in Europe, were in constant flux since local districts kept changing. Zoning, so he argued, could not fit into this built environment, based on a particular national psyche.

[Therefore the] illusion that zoning can fix the character of neighborhoods in permanence should not be entertained. If zoning can produce the standard of stability that is characteristic of cities in older countries, it will render a valuable service, but more than that can hardly be expected, and even such stability will mean a change in the national temperament which at present combines the lowest degree of local attachment with the highest degree of sensitiveness as to neighborhood associations.

Ernst Freund, Some Inadequately Discussed Problems of the Law of City Planning and Zoning, in Planning Problems of Town, City and Region 79, 91 (1929). While zoning cannot assure absolute stability—and thus, for example, even some first-ring suburbs have not been immune to cycles of decline and gentrification—it is undeniable that on the whole, zoning has allowed for the persistence of certain patterns of development in certain locations.

opposed to mammoth apartment buildings. It is no coincidence that Justice Sutherland referred in his decision to the danger of apartment buildings "monopolizing" residential areas; monopoly, as the antonym of small competing actors, was the Progressive Era's obsession.

Physically, the big apartment building—no less than the factory or department store—represented a modern mechanical intrusion into an imagined pastoral environment, as made evident in the passage from Justice Sutherland's opinion quoted in Section II.B. The apartment building struck Justice Sutherland and his contemporaries as something of a Machine in the Garden, to apply Leo Marx's celebrated metaphor. Marx demonstrated that the pastoral ideal has defined the meaning of America ever since its discovery and still dominates the national imagination. As others have shown, the affinity for the rural was very much on the minds of Americans in the late nineteenth and early twentieth centuries. Jerry Frug has argued that Sutherland's (as well as others') support of local zoning was "articulated in the anti-urban language of sentimental pastoralism." Apartment buildings became the epitome of urbanism, and thus, they aroused the American (and English) anti-urbanist instinct of which Jeffersonianism is a clear manifestation.

In spurring this antagonism toward multi-family houses, the form and size of the buildings played a major role, but these were not the sole—or even main—culprits. After all, if the concern regarded solely the height and bulk of apartment buildings, then using height and density regulations to mandate adjustment in these characteristics of the structures would have been the answer—not exclusion. But the aversion to apartment buildings ran deeper: when imagining an apartment house, the Euclid Justices and other Americans

147. Marx, supra note 139, at 3-11.
148. WARNER, supra note 110, at 11-14, 89, 153-54.
pictured a Lower East Side tenement, and not, for example, the elegant buildings of Paris's boulevards.

It is easy to forget that until the 1960s the condominium as a form of ownership, established in Europe for centuries, was unknown in the United States (the cooperative did arrive earlier, but never gained much popularity). This meant that up to that time, in America, residents of apartment buildings, almost by definition, were renters. Since fee ownership could not, at least in practice, be vertically divided, separate ownership of individual apartments was practically unattainable. Legally unable to own the discrete units in the building, residents had to lease them from the owner of the building. Thus, they were always tenants, and a tenant is the antipode of the independent owner. A tenant is dependent on her landlord, and consequently, cannot perform her role as a free citizen in a democracy and a market economy. In the words of Salmon Chase, a member of President Abraham Lincoln's cabinet and a Supreme Court Justice, a liberal nation is marked by "freedom not serfdom; freeholds not tenancy; democracy not despotism; education not ignorance."

Chase was recasting the Jeffersonian ideal, to which tenancy was antithetical. Alarmingly, however, by the early twentieth century, the traditional remedy prescribed by Jeffersonians to the politically emasculating tenancy relationship was quickly becoming obsolete. The anachronistic prescription of yeomanry as a cure-all for the urban malaise was patently ineffective. It was pointless to hope that the apartment-dwelling masses could move to the country and own rural lands, and futile to adopt property law standards that would actively encourage them to do so. There were no more

152. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 94-96 (1994). In a condominium, each buyer owns her unit (while the common property is owned in common by all owners). The cooperative (co-op), on the other hand, is not based on the fee simple ownership model. In a cooperative, the entire building is owned by a corporation, of which the residents are shareholders and from which they lease their units. Co-ops arrived on the American scene much earlier than the condominiums did: in 1880 in New York, Philip G. Hubert, a French émigré architect, organized the first co-op, to serve "gentlemen of congenial tastes, and occupying the same social positions in life." EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 1078 (1999). Ever since, the co-op has mostly served that small class of Manhattans.

153. The common law's estate system does not recognize the condominium. In theory, it might be possible to create a "common law condominium" by utilizing other existing property forms. There is, however, some doubt whether the necessary preliminary move—the carving up of air space into separate units and the conveyance of such units in fee—is allowable. Even if it is, and though many of the issues pertaining to the government of the condominium could be settled by complex arrangements relying on such recognized interests as tenancies in common, determinable fees, and covenants, major issues remain. Therefore, the solution must be sought outside of the common law, and in practice, condominiums did not emerge until the 1960s, when virtually all the states adopted statutes expressly authorizing the creation of condominiums. This move followed the National Housing Act of 1961, which made federal insurance available for condominiums, provided they have the sanction of state law. The first such law was adopted three years earlier by Puerto Rico. See, e.g., Curtis J. Berger, Condominium: Shelter on a Statutory Foundation, 63 COLUM. L. REV. 987, 1001-04 (1963); Jan Z. Krasnowiecki, The Pennsylvania Uniform Planned Community Act, 106 DICK. L. REV. 463, 474-77 (2002).

154. BENDER, supra note 118, at 125 (emphasis added).
“unsettled” lands to the west that could serve as a safety valve or as breeding grounds for the new yeoman. The 1890 United States Census stated that the frontier had ceased to exist, and, as Frederick Jackson Turner famously announced three years later at the World’s Columbian Exposition in Chicago, America had changed forever.\textsuperscript{155} Nor did existing rural communities present much promise for salvaging the independence of the tenement dwellers. Industrialization was in full swing, while agriculture was mired in a deep and miserable depression.\textsuperscript{156} “By 1920, for the first time in the nation’s history, a majority of Americans were city dwellers. In the following decade, some six million more American farmers quit the land and moved to the city.”\textsuperscript{157} It was obvious that the future was in the constantly expanding metropolitan areas, not in the farmlands that were being drained of their inhabitants. The urban tenant was as threatening to democracy as ever, but the rural yeoman could no longer serve as an opposing ideal.

Its closest approximation, however, was readily available. Leaving the countryside did not necessarily suggest moving into the central city. By the end of the 1920s, nearly a third of the metropolitan population lived outside the central city.\textsuperscript{158} Removed from the bustling city center, the suburb with its closed community comprising single-family resident-owned houses, at least superficially, restored the yeoman ideal.\textsuperscript{159} Like Jefferson’s yeomen community, the residential district of detached houses consists of independent individuals minding their own business but also cooperating in their efforts to lead happier lives. As owners of their own land, the residents are free from the yoke of landlords—unlike the residents of apartment buildings. Therefore, they can participate in local politics, speaking in their own authentic voices, and not merely serving as conduits for powerful lords who wield control of their homes to dictate their political behavior. As a result, the suburb is conceptually a genuinely republican community of civic-minded and benevolent residents, governed by the people, and not by an overbearing class of landlords.

Indeed, the suburb was, and still is, a fantasy of such a community. As discussed in Section I.A, it is an image of a place much more than it is a real place. It is usually nothing more than an “imaginary community,” or as Frug defines the neighborhood: “a fantasy community—a (comm)unity that is never achievable.”\textsuperscript{160} Suburbanites view themselves as members of a clearly defined

\textsuperscript{155} Frederick Jackson Turner, The Significance of the Frontier in American History 27 (Frederick Ungar 1963) (1893). The paper was first presented before the American Historical Association during the Exposition.


\textsuperscript{157} David M. Kennedy, Freedom from Fear: The American People in Depression and War, 1929-1945, at 16 (1999).

\textsuperscript{158} Toll, supra note 8, at 192.

\textsuperscript{159} See Mumford, supra note 104, at 500.

\textsuperscript{160} Jerry Frug, Decentralizing Decentralization, in After Identity: A Reader in Law and Culture 165, 170 (Dan Danielson & Karen Engle eds., 1995).
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and close-knit community whose members share with them similar and august attributes. In reality, the residents often have no contact with their neighbors and supposed partners in the mythical autonomous community. In this sense, the ideal of the suburb is similar to that of the nation, which is, in Benedict Anderson's famed phrase, an "imagined community." The suburb, as Richard Sennett explained, is a golden cage of an imagined purified identity and community, reflective of an adolescent inability to endure ambiguity. But, if truth be told, the same could be said of the Jeffersonian ideal; after all, it was a yeomen community imagined from the plantation house atop Monticello.

The image of a republican local community—in the early twentieth century just as in the late eighteenth century—was always powerful yet largely fictitious.

C. A Comment on Jeffersonianism and Mortgaged Ownership

From the vantage point of our own troubled times, it is hard to ignore the fact that the modern Jeffersonian Republican image is fictitious not only in its depiction of the local community, but also in its portrayal of the independence of the individual owner as well. The promised independence often appears thwarted by the association of ownership with mortgages, and hence, an aside about the relationship between the populist conception of ownership and debt might be warranted. A debtor whose property is mortgaged must make regular payments to her creditor. Like a tenant paying rent, if she fails to do so, she might be forced out of her home. She may thus be seen as owner solely by title. Moreover, in some jurisdictions she even fails to gain that formal distinction: approximately ten states still retain today the traditional title theory of mortgages, under which the mortgagor holds title to the property, and the borrower—the resident "owner"—is solely the holder of an interest called the equity of redemption.

This reality might cast doubt on the characterization of the owner as the independent citizen celebrated by Jeffersonian political theory and Jacksonian economic ideology. In fact, as early as in 1872 Friedrich Engels wrote that

161. BENEDICT R. O’G. ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (rev. ed. 1991). Anderson’s thesis is that the nation is imaginary since its members view themselves as related to one another, despite the obvious fact that they never met all their “fellow” nationals and will never meet them in the future. Id. at 13-27.


163. Though Jefferson’s agrarian ideal was sincere and reflected the way he wished to view himself, it was detached from the reality of his life. He was not an independent yeoman toiling his land, but a planter whose lands were worked by an army of approximately 200 slaves, and who was heavily indebted to foreign creditors. JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 161-62, 171 (1996). Jefferson never really made the distinction between yeomen and planters. See WILENtz, supra note 36, at 47.

164. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 (1997). The number is approximate since the law is unclear in some of the states. The alternative theory, adhered to in most of the states, is the lien theory, which grants the lender merely a lien on the property while the borrower retains title to the property.
homeownership frustrates, rather than promotes, the individual’s autonomy. He explained that the accompanying debt lessens the ability of the worker to sever the ties tying her to her employer.165 The indebtedness associated with ownership might very well betray the fictitious nature of the independence supposedly assured by ownership. It might lead thoughtful observers to question the logic behind the celebration of ownership, as it has done following the most recent financial crisis.166

But the point to be made here, in the context of the discussion of Euclid and its embrace of the populist conception of property, is that there is nothing new about this problem. The Jeffersonian yeoman was always—and not just in her late twentieth century or early twenty-first century suburban Sun Belt incarnation—much more independent in fantasy than in actuality. In real life, more often than not, and throughout U.S. history, she has been saddled with debt. Jefferson himself was not an independent yeoman but rather an indebted planter.167 He was acutely aware of the ramifications of this predicament he shared with many of Virginia’s planters,168 warning that as a result “the planters were a species of property, annexed to certain mercantile houses in London.”169 Many were dismayed as the true yeomen, the supposedly independent small farmers, were plagued by the same problem throughout the ensuing century.170 In 1890, about 28% of owner farms in America were mortgaged, and by 1920, the percentage had risen to more than 37%, while in

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165. In criticizing the “bourgeois solution” to the housing problem, according to which workers should become homeowners, Engels writes:

[P]oets live in a world of phantasy, and so do ... [these reformers], who imagine ... that a landowner has “reached the highest ... stage of economic independence,” that he has “a secure hold,” that he has “become a capitalist and ... safeguarded against the dangers of unemployment or incapacity to work, as a result of the real estate credit which would thereby be open to him,” etc. [They] should take a look at the French peasants and at our own small peasants in the Rhineland; their houses and fields are loaded down with mortgages, their harvests belong to their creditors before they are brought in, and it is not they who rule with sovereign power on their “terrain” but the usurer, the lawyer and the bailiff. That certainly represents the highest conceivable stage of economic independence—for the usurer! And in order that the workers may bring their little houses as quickly as possible under the same sovereignty of the usurer, our well-meaning [reformers] carefully point ... to the real estate credit which they can make use of in times of unemployment or incapacity to work instead of becoming a burden on the poor rate.


166. See sources cited supra note 1.


168. Thus, for example, the estates of James Madison and James Monroe were also encumbered with debts and mortgages. See RAKOVE, supra note 150, at 208; Gerard W. Gawalt, James Monroe: Presidential Planter, 101 VA. MAG. HIST. & BIOGRAPHY 251, 254, 260 (1993).


170. See, e.g., J. P. Dunn, Jr., The Mortgage Evil, 5 POL. SCI. Q. 65 (1890).
some Midwestern states it stood at well over 50%. The 1920s witnessed a wave of farm foreclosures that devastated rural America.

Even among the yeoman’s suburban counterparts, chronic indebtedness is not new. The nascent residential mortgage industry supposedly took off in the 1930s following the establishment of the Federal Housing Authority. But even back in 1920, before the New Deal and before Euclid, the United States Census reported that 40% of single-family, owner-occupied residences were mortgaged. For the first time in U.S. history, in some sections of the country—namely the Middle Atlantic and New England states—a preponderance of mortgaged homes was shown. Compare these to the 2000 figure, which, for the nation, stood at 70%.

For the duration of her American story, the owner has been saddled with debt, and yet the power of ownership has not been meaningfully questioned. The ability of jurists, policymakers, and laymen to overlook the fact that in order to become owners individuals must assume debts that render them anything but independent, is highly intriguing, but not novel. Coming to terms with the fact that the owner was never going to be truly independent was an inescapable compromise with modern society. In a commercially interdependent society, a truly independent yeoman who did not meaningfully interact with the outside market and was not dependent on goods and services he could not produce for himself was a chimera. As already seen, by the early twentieth century, the ideal of the yeoman had to be adjusted to urban realities in order to be sustained, and thus the rural model owner was replaced by the metropolitan one. Yet, the almost pre-social notion of the completely independent yeoman had to be rewritten to meet the exigencies of living in a commercial society. Thus, Jefferson could hail the independence of the yeoman as his own debt kept ballooning, and settlers in the West could celebrate their republican independence while Eastern credit was a lifeline to their existence. Debt, like nonagricultural occupations, was anathema to the yeoman populist conception of property in its purest form. Yet, from an early point, it was an inevitable price to pay for the persistence of anything resembling that conception.

Modern ownership came with a price tag that could undermine the same independence that populist ownership was meant to serve. But jurists in the 1920s, just like policymakers later in the century, could downplay or ignore this cost of ownership and still perceive of ownership as a form of landholding.

171. The highest rate was found in North Dakota, where 71% of owned farms were mortgaged. U.S. CENSUS BUREAU, 1920 CENSUS 486.
172. KENNEDY, supra note 157, at 17.
173. For more on the Federal Housing Administration and its impact on the housing market, see JACKSON, supra note 44, at 203-18.
inherently superior to tenancy. Credit was necessary for the proliferation of ownership, and the populist conception of ownership was all about proliferation.

D. The Inclusive Message of Jeffersonianism and of Zoning

The most vital attribute of the image of the closed community of owners, whose undeniable appeal aids in concealing the image’s fictitiousness and costs, is that as a way of life that thrives on exclusion, the ownership society can in theory be open to all. It is important to realize that the negative attitude toward tenants in Euclid did not necessarily imply an attack on the lower classes. This conclusion is the main reason why the class interests-based explanation of Euclid, presented in Section II.B of this Article, is unsatisfactory. It is too simplistic to accuse the Court of assuming “that families unable to afford single-family homes were so undesirable that zoning for the express purpose of keeping such families out of middle-class neighborhoods was a reasonable government response.” Such statements fail to grasp the spirit of Jeffersonianism and of the Progressive Era—in both their promise and prejudice.

A commitment to the values of private ownership and an attachment to the virtues of property may entail not only a steadfast defense of owners but also a cry for land reform. As Jeremy Waldron pointed out, if property is so good, if it is an indispensable part of personality and human existence (in the Hegelian tradition), then everybody should have it. This conviction was the core of traditional republicanism, assuring that even though it was anachronistic in musing on the merits of a disappearing agrarian society, Jeffersonianism was not reactionary. If only tentatively, it always envisioned a redistribution of property. Jefferson’s draft of the Virginia Constitution, in which he sought to provide fifty acres of land to each resident, and his faith in the redeeming role of the West, where he believed that the agrarian idyll could regularly be rediscovered by infinite generations of settlers working their own lands, illustrated the progressive drive of the belief in the owner at the time. This drive was indeed inherent to the logic of Jeffersonianism. As John Taylor, one of Jefferson’s truest disciples, succinctly explained: “[W]ealth, like suffrage, must be considerably distributed, to sustain a democratick republic; and hence, whatever draws a considerable proportion of either into a few hands, will destroy it. As power follows wealth, the majority must have wealth or lose power.” Jefferson and his followers were committed to a planter’s image of

176. Hall, supra note 122, at 924.
177. WALDRON, supra note 143, at 378, 408-15.
178. ELLIS, supra note 163, at 55 (discussing Jefferson’s 1776 Virginia constitutional proposal); id. at 252 (concerning Jefferson’s perception of the West).
ownership, to the view of land as related to lordship. But this commitment engendered an aspiration that everyone shall become a lord—that everyone should be an owner.

More than a century later, the Court’s neo-Jeffersonian endorsement of zoning was, similarly, not a mere attempt to protect suburban property holders by keeping the poor out; it was an effort to expand the detached-residence districts so that they could ultimately turn those members of the lower classes into owners and house them. The Court sought to keep apartment buildings out, in order, paradoxically, to allow their dwellers to eventually move in. Such a policy originated in the belief, characteristic of the genteel reform spirit of the day, that those less fortunate could someday adopt middle-class values and then share in the bourgeois way of life.

A core component of the Progressive worldview was the conviction that changing surroundings would change behavior. The neighborhood consisting solely of detached residences, the new middle-class heaven, presented a novel and better environment eventually to be open to the working-class masses in need of redemption from the squalid living conditions and moral decay of their inner-city neighborhoods. The suburbs would allow immigrants to transcend ethnic differences and antagonisms and become “whites” (as opposed to Anglo-Protestants, Irish or Italian Catholics, and East European Jews, among others) who could live near each other and intermarr with relatively little difficulty. The promise of the residential neighborhoods, in the eyes of the Progressives, was that they would enable poor immigrants of all (or rather, most) persuasions to enjoy the material benefits of middle-class life, and hence, appreciate the superiority of middle-class morals and espouse them. They could serve as “melting pots,” exactly where the cities, ground down by the divisiveness and corruption of their central administrations (the city “machines”) and the separatism of ethnic neighborhoods, had failed. As long as they lived as tenants in the cities, the immigrants could never be independent, and their ensuing state of wretched economic dependence threatened the democratic process. It had them relying on city “machines,” party bosses, and local chieftains of the ethnic neighborhood, who provided apartments and jobs in

180.  Chused, supra note 121, at 601.
181.  LIPSETZ, supra note 125, at 7. For more on the “culture of unity” among European Americans as it became dominant in the 1930s, see id. at 152-55.
183.  The Progressives’ hostile attitude toward city governments, headed as they were by bosses relying on immigrant support was famously made apparent in SAMUEL ORTH, THE BOSS AND THE MACHINE (1919). For more on the Progressives’ plans of Americanization, and on the ensuing differences of opinion between the Progressives and the immigrants, especially with regards to this domain of local democracy, see HOFSTADTER, supra note 136, at 180-86.
return for votes and obedience. But once empowered by homeownership, these same immigrants would shed their dependency on others and become independent citizens who could contribute to the endurance of the American republic. Quite simply, owning a single-family home would turn immigrants into Americans.

As callow as this patrician belief might seem to many, and though it contradicts modern notions of integration, it had some foundation in reality. In his seminal study of the growth of suburban Boston around the turn of the century, Sam Bass Warner found that:

[I]n one important way the suburbs served the half of Boston's population which could not afford them. The apparent openness of the new residential quarters, their ethnic variety, their extensive growth, and their wide range of prices. . . . [T]hese visible characteristics of the new suburbs gave aspiring low-income families the certainty that should they earn enough money they too could possess the comforts and symbols of success. Even for those excluded from them, the suburbs offered a physical demonstration that the rewards of competitive capitalism might be within reach of all. . . . Above all else the streetcar suburbs stand as a monument to a society which wished to keep the rewards of capitalist competition open to all its citizens. Despite ignorance and prejudice, during this period of mass immigration, the suburbs remained open to all who could meet the price.

Later on, following World War II, mass suburbanization would allow even the lower middle classes (as long as they were white) to meet the price and partake in the single-family residence dream. Ownership of a single-family residence was to trickle down, just like refinement had a century earlier, from the upper classes to the middle and even lower classes, setting a new dividing line between them and the underclasses left behind in the inner city. Once more, in America, the badges and comforts of aristocracy were theoretically made available to all.

But for this to happen eventually, more neighborhoods of detached houses first needed to be created and sustained. Zoning was indispensable for this purpose. Zoning policies were accordingly not perceived as merely serving the middle classes. Rather, they were viewed as allowing all members of society to become middle-class. In this manner, we can account for the contrast, highlighted in Section II.B, between the Court's opinion—which strikes modern sensibilities as extremely biased and intolerant—and the Lochner

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184. See, e.g., SONYA FORTHAL, COWHEEWS OF DEMOCRACY: A STUDY OF THE PRECINCT CAPTAIN 57, 60-62 (1946); DAVID H. KURTZMAN, METHODS OF CONTROLLING VOTES IN PHILADELPHIA (1935); JOHN T. SALTER, BOSS RULE (1935).
185. WARNER, supra note 110, at 157, 160.
186. JACKSON, supra note 44, at 244-45.
Court’s jurisprudence, which rejected class legislation. The wording and result of the opinion must be understood in light of the mindset of its authors and contemporary readers; it is their ideas regarding equality and integration that matter. When the Court explained how important it was to have regulations safeguarding “the privilege of quiet and open spaces . . . enjoyed by those in more favored localities,” it was thinking not only of the privileged few already enjoying the quiet and open spaces, but also of all those who might do the same in the future. It was concerned with those in the less favored localities, who, in the Court’s genteel worldview, could improve their lot only if more favored localities could be constructed and protected for their benefit. By expanding the suburbs, zoning laws would promote the proliferation of ownership, creating a more democratic nation in the true Jeffersonian vein. Zoning, in the Court’s estimation, served the general public welfare in the clearest way possible: it enabled suburbanization to expand and fulfill the American promise for all Americans.

E. The Appeal of the Populist Conception of Ownership

The populist conception of property is so irresistible precisely because it can be understood by almost all—regardless of ideological disagreements—as serving the general public welfare. Populist Jeffersonianism is appealing thanks to its duality. On the one hand, it calls for the protection of property rights, but on the other, it advocates their redistribution. It is egalitarian but reassuringly nonradical. It attracts both those dedicated to the supremacy of property rights and the market and those arguing for social reform. It allows jurists and politicians to defend property rights on behalf of the propertyless. As seen in Euclid, tenancy could be denied in order to serve the tenants. The populist conception’s appeal is thereby able to transcend time and ideology.

President Herbert Hoover once declared that:

To possess one’s own home is the hope and ambition of almost every individual in our country, whether he lives in a hotel, apartment, or tenement. . . . Those immortal ballads, Home Sweet Home, My Old Kentucky Home, and The Little Gray Home in the West, were not written about tenements or apartments . . . they never sing songs about a pile of rent receipts.  

His rival and successor President Franklin Roosevelt claimed that when the fulfillment of this dream is open to all, American democracy is fortified: “a nation of homeowners, of people who won a real share in their own land, is unconquerable.”

189. JACKSON, supra note 44, at 172.
190. Id. at 190. Democracy thereby becomes unbeatable since, as Roosevelt explained elsewhere, landholding represses the proletarian psyche, thus averting any potential of revolution.
Clinton, Sutherland and Brandeis, could all wholeheartedly embrace the populist conception of ownership. The conception might at times seem to lack coherence, sophistication, or daring, but it always lacks a strict party affiliation. That Justice Sutherland authored the *Euclid* decision approving of zoning was thus not "a jurisprudential miracle." Far from it. It is no surprise that Justices, liberal and conservative, easily signed off on such a measure. The dissenters, the three remaining conservative Horsemen, simply failed to realize what their intellectual leader, Justice Sutherland, who unlike them, was not "a creature of impulse," immediately grasped. Sutherland understood that zoning was a new and revolutionary tool, requiring a departure from old legal ideas; he also understood, however, that zoning was indispensable to the survival of entrenched American values in a changing world.

IV. Zoning and the Meaning of Property in the Progressive Era and Beyond

The Court accepted zoning because, at its core, it was a mechanism to preserve Jeffersonian notions of property in a new age. What does this tale of change and continuity, of reality and ideology, tell us about the conceptualization of property in America in the twentieth century and about the Court that introduced this new reading of ownership? The following and final Sections of this Article will answer this pivotal question by focusing on the modern legal concept of ownership as it emerged from *Euclid*.

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191. See supra notes 2-5 and accompanying text.


193. On Justice Sutherland in relationship to the other Four Horsemen, see Schlesinger, supra note 137, at 456-57 (quoting Reed Powell, who provided a rather derogatory description of the Four Horsemen, in which Sutherland, though harshly criticized, is the only one of the four given credit for something: his historical and legal intellect); and Burner, supra note 96, at 2133. See also Cushman, supra note 134, at 36. Barry Cushman further shows that Sutherland's record (especially as a U.S. Senator) was far from all-out conservative. Note the difference between Cushman's portrayal of Justice Sutherland and Arkes's, discussed supra notes 95-96 and accompanying text. Though both aim at redeeming his image, the first does so by painting him as less of a conservative than previously assumed, while the second paints his conservatism in brighter colors. In another article, Cushman argues that the same was true for the other conservatives on the Court. Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 Va. L. Rev. 559 (1997).

194. Paschal, supra note 84, at 242-43 ("Had he been a creature of impulse, [Sutherland] might well have joined Butler, McReynolds, and Van Devanter in rejecting the statute. It was a novelty and its approval by the Court undoubtedly involved a recognition of a vast growth in political power.").

195. Another way of explaining the difference of opinion within the otherwise cohesive conservative block is to focus on its members' attitudes toward state as opposed to federal regulation. David Currie has argued that Justices Sutherland and Sanford were somewhat more tolerant of state regulation than their colleagues, Justices McReynolds, Butler, and Van Devanter. David P. Currie, *The Constitution in the Supreme Court, 1921-1930*, 1986 Duke L.J. 65, 142-43. However, since these were mere tendencies, and since much of the evidence for these supposed diverging approaches among the conservatives is to be found in the votes placed in the *Euclid* case itself, the thesis's explanatory power is very limited.
The Reinvention of Ownership

A. Zoning: A Choice Between Property Rights

Most basically in Euclid, the Court realized that in an interdependent urban environment, zoning did not present a clear-cut governmental threat to private property. It understood that on both sides of the zoning conflict stood property rights between which the policymaker must choose.\textsuperscript{196} Zoning damages the values of certain properties, but it does so to promote the values of other properties. Ambler Realty’s holdings took a hit when it was prevented from selling the land to manufacturers or retailers. But at the same time, the values of adjacent lands held by landowners who constructed (or planned to construct) single-family residences were inflated. It cannot simply be said—as Paschal argues—that Justice Sutherland authored a seemingly atypical decision because “he saw in the zoning act not the deprivation of property, but its enhancement.”\textsuperscript{197} Similarly, and as Judge Westenhaver of the district court noted, the ordinance could not be sustained solely “by invoking the average reciprocity of advantage rule.”\textsuperscript{198} The relevant regulation enhanced the value of some properties, but in order to do so, it had to invade other properties. If Sutherland, unlike his fellow conservative Justices, saw zoning as “inherently more protective than destructive of property rights,”\textsuperscript{199} it is only because he chose to categorize some property rights as more worthy of protection than others; it is only because he made a substantive judgment regarding the social role of constitutionally protected property rights.\textsuperscript{200}

For the same reason it is a mistake to claim, as A. Dan Tarlock does, that the decision validated zoning in the abstract “with little appreciation of the capricious distribution of burdens and benefits that result from how zoning actually works.”\textsuperscript{201} The Court was acutely aware of the distributional effects of its decision, which is why Richard Epstein is right but still misses the point when he concludes that “[t]he efficiency of the zoning system was not investigated by Justice Sutherland or, regrettably, by any Justices who have

\textsuperscript{196}. This example is merely one instance of a broader phenomenon. The expansion of the definition of property, see Part I, is too often understood as foreshadowing conservative, or pro-private property rulings (as these classifications are intuitively read). In fact, however, as the category of interests deemed to be property grew, courts were forced to acknowledge the fact that property rights conflicted with one another. Kainen, supra note 57, at 132-33.

\textsuperscript{197}. PASCHAL, supra note 84, at 127. The distinction between regulations that invade property and those that do not lessen its value was critical to the famous nineteenth-century jurist, Judge Cooley. On Cooley’s influence on Sutherland, see id. at 9, 15-20.

\textsuperscript{198}. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 315-16 (N.D. Ohio 1924); RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 115-17 (2008).

\textsuperscript{199}. Burner, supra note 96, at 2139.

\textsuperscript{200}. In this sense, the decision reinforces Gregory Alexander’s influential thesis that property, while functioning as a commodity, also served at times as a means of creating desired social orders. GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997).

\textsuperscript{201}. A. Dan Tarlock, Euclid Revisited, 34 LAND USE L. & ZONING DIG. 4, 6 (1982).
unthinkingly followed that fateful decision.”202 The Court did not care about the impact of zoning on overall social welfare defined in objective monetary terms. It realized that one class of owners would pay dearly for its ruling, perhaps even endure a loss greater than the reward the decision would grant to another class of owners. The decision was about the distribution of benefits and costs, not about their net value. The Court knew it had to choose whose property (or, from another perspective, which property) should be protected; it realized that it was faced with the question of who should reap zoning’s benefits at the expense of others—the industry developer and apartments’ builder or the subdivider and homeowner?

And the Court made its choice. It understood that unlike Pennsylvania Coal, where, as discussed in Section I.B, a regulation was for the first time deemed a taking, Euclid was not “the case of a single private house.”203 The Euclid decision represented a national and historic choice between land uses. It is thus reminiscent of another famous decision: the English case of Rylands v. Fletcher, as interpreted by Francis Bohlen. The defendants there constructed a reservoir to provide water for their mill. Eventually, water from the reservoir flooded mines situated underneath adjacent land, owned by the plaintiffs. The House of Lords held the defendants liable—despite the absence of negligence—reasoning that the water escaped from an accumulation caused by them for a “non-natural” use of land. Bohlen argues that the English lords reached this result since the dominant class, to which the judges were attached by either blood or aspiration, was the landed gentry, opposed to the rising “commercial and artisan classes.”205 The landed gentry, Bohlen explains, had


203. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The case dealt with the challenge to a law that forced the petitioner, the owner of mining rights, to not undermine support for the house built by the owner of the surface rights above. See supra Part I. This is probably the best way of explaining the different results in the two cases (recall that Euclid never mentioned Pennsylvania Coal). It is more persuasive than the account put forward by Carol Rose. Rose has argued that Pennsylvania Coal was unique in the Court’s jurisprudence, standing out as the only case where a regulatory taking was struck down, not because it represented “too much” taking but [because of] the fact that the statute transferred rights from one finite class of property owners to another.” Carol M. Rose, Mahon Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. CAL. L. REV. 561, 581 (1984). But the act contested in Euclid did the same. Just as the state law in Pennsylvania Coal transferred rights from the mining companies to owners of the surface rights, zoning law transferred rights between owners of commercial properties and owners of single-family residences.

204. L.R. 3 H.L. 330 (1868).

an interest in the protection of property as a sphere of total dominion, and in the promotion of traditional uses of land over commercial ones. 206

The first part of Bohlen’s final argument should be rephrased because it ignores Bohlen’s own basic insight that property rights are found on both sides of the conflict. 207 Yet, here he presents the dominion over property as referring solely to security—that is, to the right of quiet enjoyment, of not having one’s land flooded—and not also to liberty of action—that is, to the right to use one’s land as one sees fit, to build a mill and reservoir on it. 208 A more accurate statement would be that the landed gentry sought to place the focus of property rights on security, rather than on freedom. This emphasis on security relates to the second part of Bohlen’s thesis.

The House of Lords chose between legitimate uses of property rights. It favored one group of uses, those deemed by it to be “natural” (traditional homesteading, cultivating, and mining), over another group of uses, specifically modern commercial utilization (for example, the construction of mills and reservoirs). This choice was directed by a certain view of society, a view demarcated by the landed gentry’s preeminence.

Zoning, as explained in Section II.A, cannot be viewed as a direct doctrinal offspring of the common law’s property torts. However, and as stated there, both bodies of law are tools for the regulation of land uses. Both define the perimeters of property rights and thus whenever either is employed to settle a controversy, a choice between property rights is involved. Therefore, the following sentences Bohlen wrote with regard to the specific choice made in Rylands, in the context of English tort law, could easily apply to the specific choice made in Euclid in the context of U.S. property law:

[T]he determination of the proper exercise of rights whose extreme enjoyment mutually interfere the one with the other, cannot be solved by any pre-existing system of rules of law automatically applicable to each new situation. The solution must depend upon the existing social, political and economic conditions and conceptions prevailing at the particular time and in the particular place, the traditional attitudes of mind and habit of thought, even the prejudices, of the class then and there dominating public thought. 209

Just as the English lords were attached to the landed gentry’s ideals, the U.S. Supreme Court Justices were devoted to the ideals of those supporting the new urban settings created by zoning. 210 If Rylands saw the triumph of the

207. Id. at 317-18.
208. For the same cause, his argument that Rylands was not accepted in the United States since property rights in America were less absolute, is misguided. A more accurate description of the idea of property in America can be found in the ensuing pages of this Article.
209. Bohlen, supra note 205, at 318.
210. See TOLL, supra note 8, at 253.
English country house view of property, *Euclid* witnessed the victory of the American suburban home view of property.

The *Euclid* Court chose suburban development over urban development since the former was consistent with a certain ideal with which the Court—in both its progressive and conservative quarters—could identify. As seen in Part III, this ideal was not merely a class interest. It was, and still is, a constitutive part of an American liberal tradition, but one read along strict traditional terms. It is sensitive to patrician and gendered ideals of domesticity and pastoralism, but is not limited to them, as it is a broader ideology of property and democracy. While exclusive in effect, it is inclusive in aspiration.

**B. How the Choice Made in Euclid Should Alter Our Understanding of the Lochner Court**

Partisan opponents in national politics and on the Court could agree on extending preferential treatment to this form of landholding, and thus, they could congregate around zoning. Promises of an ever-lasting Jeffersonian Eden are hard to resist in America—no matter of what political persuasion is the policymaker. This aspect of the analysis of *Euclid* shows that the labels liberal and conservative—at least as applied to the Progressive Era and to property policy—are simplistic. Similarly misleading is the traditional portrayal, championed by the Progressive historians, of the *Lochner* Court as a pawn of "the interests" in their oppression of "the people" on behalf of whom the reformers were supposedly battling. *Euclid* exemplifies the fact that the Court was in sync with the Progressive movement to a much higher degree than traditional accounts hold. Still, this tentative conclusion is different from the one promoted by most modern revisionist readings of the period. Revisionist legal historians have tried to prove that the Court was much closer to the people and more remote from the interests than had previously been assumed. The case of zoning demonstrates that the gap between the Court and the Progressive movement might indeed not have been as wide as traditional Progressive

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212. Thus, while it is important to acknowledge the role of middle-class ideologies of domesticity and pastoralism in the zoning struggle, as done by Lees, *supra* note 99, the discussion cannot end there.

213. *See supra* Sections III.A & III.E.


215. For examples of such revisionist readings of the period, *see* Cushman, *supra* note 134; Gillman, *supra* note 97; Horwitz, *supra* note 57; and McCloskey, *supra* note 13, at 91-120. McCloskey also argues that it was the nation, not the Court, that was most responsible for the absence of more effective social legislation at the time. *Id.* at 101-02; *see also* Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, in *Yearbook of the Supreme Court Historical Society* 53 (1983) (demonstrating that, in actuality, the Court upheld the vast majority of regulations it put to substantive due process review).
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historiography would like us to believe—but for a reason contrary to the one
highlighted by the revisionists. The Court and the movement had a lot in
common because both were espousing, at least in some contexts, traditionalist
hegemonic notions.

Historians have followed Richard Hofstadter in stressing that the
Progressive movement was animated by both a spirit of reform and a spirit of
reaction;\(^{216}\) that it was not the radical, popular, working-class movement it
purported to be; that rather, it was a middle-class, genteel movement from
which immigrants were consistently excluded.\(^{217}\) At heart, the Populists and
Progressives attempted to “hold on to some of the values of agrarian life, to
save personal entrepreneurship and individual opportunity and the character
type they engendered, and to maintain a homogeneous Yankee civilization.”\(^{218}\)

In the legal realm, however, even studies that aim at debunking the old
Progressive story of “the Court versus the People,” remain attached to at least
some of the tenets of Progressive historiography, among them the
characterization of the Progressives as innovative liberal reformers.\(^{219}\) The
main reason for this failing is the almost exclusive focus placed on cases
involving freedom of contract and substantive due process,\(^{220}\) the cause célèbre
of the Progressives. Examining the neglected component of the Court’s
jurisprudence that is the *Euclid* decision allows us to make exploratory steps in
setting aside once and for all the outdated Progressive story. To make more
headway in this direction, a much more extensive examination of the Court’s
jurisprudence is necessary. Unfortunately, such an endeavor is beyond the
scope of this Article. Nonetheless, for its limited effect, this Article helps us
grasp the importance of property law and theory in understanding U.S. legal
traditions and social policies. Specifically, zoning highlights the falsity of the
story depicting the first decades of the twentieth century as a gallant attempt by
fresh forces of good to storm that last stronghold of evil, antiquated forces—the
Court. The former were as committed as the latter to an old and entrenched
American ideology of property.

\(^{216}\) Hofstadter, *supra* note 136, at 18-22.

\(^{217}\) *Id.* at 131-86, 238; Gillman, *supra* note 97, at 148-49.

\(^{218}\) Hofstadter, *supra* note 136, at 12.

\(^{219}\) See, e.g., Cushman, *supra* note 134; Gillman, *supra* note 97, at 192-93. While Gillman tries to redeem the Court from its stereotypical depiction as class-biased and committed to laissez-faire, and to instead situate it within general American constitutional history, he still perceives the Court as representing an anachronistic ideology that was eventually wiped out by the Progressive onslaught.

\(^{220}\) For a critique of this predominant approach, see Kainen, *supra* note 57. Kainen’s analysis expands the focus beyond the textual interpretation of the Substantive Due Process Clause (highlighting the retroactivity jurisprudence of the Court) and creates a framework for understanding the constitutional history of economic rights and the emergence of substantive due process from a vantage point outside the terms established by the debate over *Lochner*. 

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C. Property Rights: From Freedom to Security

Paradoxically, it was this unyielding commitment that led to the truly dramatic aspect of the choice made in *Euclid*: the complete change of course from the traditional legal view of property in America. *Euclid* bridged the more than century-old gap between the English and American conceptions of property. One of property law’s main social functions, as Joseph Singer explains, is to establish “a compromise between the desire for change and the desire for stability.”221 Property rights in England strongly tilted that compromise in favor of the desire for stability, as they were primarily designed to assure security to the owner—as indicated by the *Rylands* decision discussed above.222 In contrast, in the United States the compromise was skewed to the benefit of the desire for change: freedom of the landowner to use her land as she sees fit occupied center stage. Morton Horwitz has shown how this latter conception crystallized in the United States as the idea of absolute dominion over land changed during the nineteenth century. From a concept that provided the owner with an absolute right to prevent any use of her neighbor’s land that conflicted with her quiet enjoyment, absolute dominion morphed into an owner’s absolute right to engage in any conduct on her property, regardless of the injurious consequences to others. Ownership of property came to imply above all the right to develop that property for business purposes; real estate was transformed into just another cash-valued commodity, an instrumental value in the service of the paramount goal of promoting economic growth.223 This uniquely American conception of landed property as dynamic market commodity contrasted with the common law’s static and agrarian conceptions of property. These latter conceptions, well-suited to England’s long-settled land market, were quickly jettisoned by U.S. judges in the nineteenth century, once it was clear they carried profound anti-developmental consequences if applied too rigidly to the New World.224 In the New World, where there was ample land but little commercial development, where there was no aristocracy concerned with land as a possession but many commercial entrepreneurs out to strike it rich by developing and selling land, land was to be regarded primarily as a productive asset, held for speculation and development, rather than as a private domain.225

*Euclid* reconnected the New World to the Old. Roscoe Pound argued that by the 1920s there was a noticeable trend toward the acceptance of the *Rylands* rule in the United States. In his critique of the Bohlen thesis, Pound claimed

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222. See supra notes 204-209 and accompanying text.
223. Horwitz, supra note 57, at 31-54, 70-80, 99, 101-08.
224. Williams, supra note 78, at 278.
that the *Rylands* decision was the outcome not of class interests, but of the collectivism movement. This movement sought, in this context, to subject the landowner to liability at his peril in the interest of general security. The movement could become viable only in a crowded and developed country. England was such a country in the mid-nineteenth century, and America was becoming one by the early decades of the twentieth century.  

*Euclid*, which Pound never mentions, probably because it did not deal with the *Rylands* rule, did reintroduce the *Rylands* conception of property. As already seen, *Euclid* placed the right to security in landholding, to quiet enjoyment of the homestead, at the forefront—at the expense of free exploitation of property and commercial expansion. Having reached an advanced level of development, America could rekindle the pastoral fantasies it shared with England. As an imaginary space, the suburb was much closer to the English countryside than to the bustling city, and for its preservation the same conception of property was required. In neighborhoods with single-family dwellings, as in the English countryside, property rights needed to shield the detached home from commercial expansion, not to enable the owner to develop her land freely. Freedom of action placed in the hands of the potentially greedy owner would inevitably subvert the character of the environment and threaten the stability of detached homeownership; and in these settings, the quality of ownership that was to be protected above others was security against such changes.

The right to private property, as it emerged from *Euclid*, privileged security over freedom. Before *Euclid*, the nineteenth-century American attitude toward legal liability was based on the assumption that the “quiet citizen must keep out of the way of the exuberantly active one,” as a contemporary commentator observed. Against this background:

Euclidean zoning . . . transformed the orientation of property rights. It transformed what used to be a negative liberty into a positive entitlement. Once Euclidean zoning had taken over, each zoned lot came with a security—a legal guarantee that neighbors would use their lots consistently with tastes, standards and economic goals set by the control group in the local community. In the process, Euclidean zoning also shifted a great deal of control over land-use regulations from individual owners to local majorities and expert land-use planners. Each local owner loses substantial freedom to control the use of his own parcel of land, but gains the opportunity to vote on how his neighbors ought to use their properties.

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This contrast between *Euclid* and the conception of property that preceded it still discloses deeper historical fluctuations. The nineteenth-century reconceptualization of property represented an effort to free U.S. law from the restraints on economic development that had been molded by the common law's feudal conception of property. The twentieth-century reversal embodied in *Euclid* reinstated the spirit of those medieval restraints. “The New Feudal System,” as Pound labeled the emerging modern interdependent community, was much more similar to the social order of the Middle Ages, which was based on a self-sufficient community, than to the self-sufficient individual man imagined in the nineteenth century. It therefore necessitated a revival of old conceptions of property, which interpreted property not as merely serving individual needs of protection from governmental power, but as socially situated and performing a communal function. It called for static conceptions of property that relegated an owner’s freedom of action to a secondary role.

D. Zoning: An Embrace of Property Rights, Not of Regulation

The handing down of the decision in *Euclid* was a momentous occasion; it was a break with the recent past. As Haar wrote, extending the police power to include zoning—the regulation of the activities and aspirations of private property owners—“must surely be acknowledged as one of the major judicial innovations of our century as well as the most important redefinition of the nature of private property ever made in United States courts.” But at the heart of the revolution was not, as he claims “an extraordinary expansion of government power into what previously had been considered a relatively autonomous area of private decision making.” Governmental intervention was merely a tool to further an invigorated conception of private property. U.S. zoning was “never meant to tamper with the ethic of private property, [it] was intended instead to secure the interest of property owners by enhancing the economic stability of home ownership . . . .

*Euclid* is so important not because it curtailed the weight of private property in U.S. law—which it did not—but because it altered the internal balance between the components of property rights. And it did so exactly in order to sustain, in a changing environment, the traditionally central role played by private property rights in U.S. law.

229. HORWITZ, supra note 57, at 47.
231. Neo-medievalism was also apparent in the comeback of the restrictive covenant which enabled the creation of homeowners associations, first appearing in the United States at approximately the same time. See infra Section IV.E.
232. Haar, supra note 78, at 334.
233. *Id.*
234. BOYER, supra note 112, at 153.
The adoption of zoning therefore is a clear representation of the peculiar way in which government action in America emerges time and again. In the Progressive Era, statism burgeoned, paradoxically, from individualistic concerns—from the alarm at the growth of concentrated economic power. The Progressives wanted a strong government to counterbalance these interests by reinstating and protecting the small owner or entrepreneur.235 The Progressive agenda called for government action, and yet, it was not a drastic split from the accepted ideological or legal attitude toward government. There was, at least in the realm of property rights, no internal contradiction inherent to this agenda: most Progressives at the time (unlike current-day libertarians) rightly and fully realized that private ownership and regulation are not locked into a zero-sum game. Quite the opposite—regulation is, and always was, necessary for sustaining private property.236 Zoning was one of the tools that allowed Progressives to “keep the benefits of the emerging organization of life and yet to retain the scheme of individualistic values that this organization was [supposedly] destroying.”237

This dynamic that led to the adoption of zoning has too often been misunderstood, leading to regrettable legal results. As this Article has illustrated, Euclid stands for private property rights and for their redefinition. Euclid does not stand for the embrace of regulation, and hence, it does not stand for the empowerment of local governments per se. It cannot serve as a meaningful precedent for deviating from the constitutional principle according to which local governments are mere delegates of the states that have created them.238 Euclid did not inevitably lead to the more recent Supreme Court decisions that bestowed almost limitless legal powers on cities when managing their own affairs, in the process enabling the most blatant forms of exclusionary zoning. While, as a side effect of its operational ruling, Euclid clearly served municipal governments, the fortification of local boundaries and the espousal of localism as a good in and of itself cannot be attributed to the adoption of zoning.239 These were rather the outcome of Court decisions from the 1970s,

235. HOFSTADTER, supra note 136, at 234-35.
237. HOFSTADTER, supra note 136, at 217.
238. Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); 1 JOHN DILLON, THE LAW OF MUNICIPAL CORPORATIONS 448-55 (5th ed. 1911) (expounding the generally accepted “Dillon’s Rule” according to which local government power is restricted to actions authorized by enabling state legislation).
239. For an example of a writer making this attribution, see Stahl, supra note 46, at 1263-68, who argues that Euclid’s revolutionary impact was in holding zoning to be “a local entitlement rather than a delegation from the state, an entitlement every bit as inviolable as the single-family home it was designed to protect.” For a description that is more in line with the argument of this Article, see Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 HARV. L. REV. 1843, 1872 (1994) (arguing that though the Euclid decision was based on the idea that local democratic processes legitimate the exercise of the zoning power, “the local-control rationale in Euclid arguably had more to do with providing a proxy for private control than with promoting the autonomy of cities. . . .
which, for example, upheld, with only flimsy grounding in *Euclid*, a local zoning ordinance limiting the number of unrelated residents living together to two\textsuperscript{240} and that blocked school desegregation efforts that crossed municipal lines.\textsuperscript{241} *Euclid* had little to do with these results, and denying their wisdom does not entail or necessitate eschewing the local power to engage in zoning. A sacrosanct local power to regulate private activities and to control the provision of public services is not, analytically or theoretically, an inescapable culmination of a decision for which local regulation was merely a secondary concern, a means but not an end.

Local regulation was introduced solely as a tool to sustain private property, as this latter institution is understood in Jeffersonian terms. Thus, when doubts began surfacing as to regulation's utility in furthering suburban homeownership, regulation came under attack.\textsuperscript{242} Lawyers and public figures are attacking zoning today under the banner of the same conception of property that in *Euclid* justified zoning. The legitimacy of governmental regulation is being doubted, since it is perceived as interfering with the security aspect of the right to property. Despite this attack on *Euclid*, it will live on. Its operative ruling may dissolve, but the conception of property it introduced will for the foreseeable future remain a constitutive part of U.S. property law.

\textbf{E. Euclid's Conception of Property Eighty-Five Years Later}

*Euclid*'s conception of ownership has persisted even though the current law of property and contemporary urban environments differ from those confronting the *Euclid* Court. Hence, it is instructive to conclude the discussion of the legacy of *Euclid* with a few observations regarding more recent demographic and legal developments and the ways in which they intersect with the security-based suburban conception of property as it emerged from *Euclid*. The two trends presented in the following short paragraphs are, of course, far from being the only relevant ones, yet they carry particular interest, and thus, merit at least tentative and brief presentation.

As explained in Part III, ownership was reinvented in *Euclid* as a response to the demographic patterns of the era. Those patterns prevailed through most of the twentieth century. For more than a hundred years, a consistent double movement—centripetal and centrifugal—remade America's landscape. On the one hand, metropolitan areas grew, and on the other hand, those same

\textsuperscript{240} Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). While Justice Douglas perceived *Euclid* as, along with other unrelated decisions, a governing precedent, Justice Marshall noted that the decision cannot be based on *Euclid*, since *Euclid* dealt with the rights of owners to protection of their property, whereas the regulation at hand was challenged by nonowners claiming interference with their right to free association.


\textsuperscript{242} See sources cited supra notes 39-41.
metropolitan areas endured massive fragmentation as the traditional central
cities lost residents, businesses, and power. Lately, however, this latter process,
commonly—though not necessarily accurately—known as "suburbanization" has encountered a seemingly offsetting trend: "gentrification." "Gentrification is a process . . . by which poor and working-class neighborhoods in the inner-city are refurbished via an influx of private capital and middle-class homebuyers and renters—neighborhoods that had previously experienced disinvestment and a middle-class exodus." Since the aversion to city living conditions was a major driving force in the reinvention of the image of the yeoman landholder, gentrification, as a middle-class reembrace of the city, could have signified a lessening in the power of the Euclid's idea of ownership.

Nonetheless, at least so far, this has not been the case. First, the rediscovery of the central city by some members of the middle class does not imply the negation of the embrace of the single-family dwellings neighborhood. There is no sign that the rise of gentrification has diminished contemporary suburbanization. The processes have in fact come to live side by side in and around the American city. Second, and more importantly for the purposes of this Article's thesis, the fascination with specific inner-city neighborhoods need not—and does not—entail the widespread adoption of tenancy relationships or of a different form of ownership than the one promoted by Euclid.

An urban legal environment that is decidedly different from that which the Euclid Justices encountered greets those members of the middle-class returning to the city today. Living in a multiple-family dwelling nowadays—in the inner-city or elsewhere—does not automatically mean assuming the legal status of a tenant. State condominium laws have made it possible to easily bestow separate ownership of individual units within one building upon residents. Indeed, and not at all surprisingly, the relocation of middle-class residents to inner-city neighborhoods is closely associated with the availability of condominium units for sale in those locales.

243. *See supra* Section I.A.


247. The conversion of existing rental building to condominiums is a major component of the gentrification of neighborhoods. It leads to displacement of local poorer residents and is a clear threat to the character of existing neighborhoods. Accordingly, many municipalities experiencing gentrification have adopted condominium conversion legislation. Condominium conversion legislation may include in the extreme a moratorium with or without the introduction of special permits to allow exceptions. It might also oblige owners to compensate tenants before converting their buildings into condominiums. However, the courts' approach to such legislation has been relatively hostile. *See Frug, supra* note 129,
Yet, condominium laws have done more than merely allow the new city residents to preserve their status as owners even when leaving their detached residences. This legal reform has also enabled them to retain the specific form of ownership originally inspired by the single-family dwelling model envisioned in Euclid. In fact, condominium laws have reinforced it. Homeowners associations and condominiums, which today house more than sixty million Americans, promoted, perhaps even epitomize, the security-focused notion of ownership.

Planned communities, such as condominiums and homeowners associations, are sustained by restrictive covenants. Traditionally, property law placed many restrictions on the ability to create and enforce restrictive covenants, which curtailed the freedom of an owner to use her land. The legal drive to liberalize these old laws, culminating in the adoption of the Restatement (Third) of Property (Servitudes) in 2000, has facilitated the placement of intrusive restrictions on the right of an owner to use her land. Today, such legally enforceable restrictions can, for example, forbid repainting, constructing or dismantling a fence, hanging curtains, planting trees, wok-cooking, or keeping pets. Covenants might also


248. According to estimates, as of 2009, 60.1 million Americans were living in homeowners associations, condominiums, or cooperatives, of which there were 305,400. Homeowners associations account for 52-55% of the totals, condominiums for 38-42% and cooperatives for 5-7%. Industry Data, THE CMTY. ASS'NS INST., available at http://www.caionline.org/info/research/Pages/default.aspx (listing estimates based on U.S. Census Publications, American Housing Survey, IRS statistics of Income Reports, California and Florida state-specific information, related association industry trade groups, and collaboration with industry professionals). RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000) refers to all of these as “common-interest-communities.” In both a condominium and a homeowners association, each buyer owns her unit. The major difference between condominiums and homeowners associations lies in the manner in which common property (those parts of the community other than the individually owned units) is held. In a condominium, the common property is owned in common by all the unit owners (and managed by the condominium board as their agent), while under a homeowners association, the association has title to the common property and the property owners have membership interests in the association.


limit an owner's freedom to lease her property or to sell it on the market. These few examples illustrate the extent to which the restrictive covenant isolates a house in a condominium or homeowners association from potentially destabilizing adjacent uses. They highlight the manner in which the restrictive covenant serves the security aspect of an owner's property right at the expense of her freedom. The restrictive covenant achieves this goal to a degree that could never have been attained by reliance on zoning. Zoning is a form of public regulation serving the security-minded idea of ownership and justified by its relation to it; the restrictive covenant is simply zoning's private law equivalent in this regard. Homeowners associations and condominiums are proof that the security-based definition of ownership, which emerged from *Euclid*, has not only endured, but is actually thriving all around us.

Conclusion

An "ownership society" is a hollow notion if there is no image of ownership governing it. Governmental policies subsidizing and aggressively promoting homeownership cannot be contemplated before a consensus emerges regarding the desired form of ownership. Once such a consensus comes into being, it defines certain forms of public regulation as protecting ownership rather than interfering with it. In fact, such forms of government activity might cease to be perceived as regulation altogether. In America, this transformative moment occurred during the first quarter of the twentieth century. While U.S. jurists and laymen remained attached to a Jeffersonian populist conception of property, they were facing a new world. In order to safeguard the values associated with small landholding, the image of ownership had to shift; in order to survive, the yeoman image had to be reworked into its closest approximation possible in a novel reality. The suburban image of property was born.

In this new image, property was to mean something new. No longer would property entail mainly freedom of action. After *Euclid*, it would first and foremost assure protection from change. Property would still ideologically be perceived as essential to Americans' individual well-being, as well as to the persistence of American democracy, but its content would differ from what it had been before. Property law, the principles of urban planning, as well as federal and state policies, would all have to adapt. For while property's role and promise might remain constant, property itself is anything but a static notion.

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256. Laguna Royale Owners Ass'n v. Darger, 174 Cal. Rptr. 136 (Ct. App. 1981) (holding that a restriction on the right of alienation requiring that the condominium board consent to a sale will be upheld if exercised reasonably); Franklin v. Spadafora, 447 N.E.2d 1244 (Mass. 1983) (upholding a covenant limiting the number of units a person can own in a condominium, thereby barring a sale of a unit from one resident to the other); Worthinglen Condo. Unit Owners' Ass'n v. Brown, 566 N.E.2d 1275 (Ohio Ct. App. 1989) (holding that a condominium declaration prohibited leases).