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TOWARD AN INCLUSIONARY JURISPRUDENCE: A RECONCEPTUALIZATION OF ZONING

Joel Kosman*

The impetus for this Article came to me during the course of my daily train ride from a relatively well-to-do New York suburb to the university at which I work in the southern end of Manhattan. About fifteen minutes before its arrival at Grand Central Terminal, the train runs through a part of upper Manhattan known as East Harlem, a neighborhood marked, as determined by my admittedly unscientific survey of its apparent attributes, by abandoned and run-down buildings. The poor condition of existing housing brought to mind a problem I had faced while practicing law several years earlier: that despite the wealth of resources being committed to improving the housing conditions of low-income residents of major American urban areas such as New York City, the shortage of affordable housing seemed to be increasing rather than decreasing.

In considering a solution to this problem, I first focused on the city itself. I thought about ways of enhancing city power or better equipping city governments either to attract developers or build housing on their own. It soon became apparent to me, however, that a realistic solution could not be found if the search for answers began and ended with the cities themselves. Solving the problem seemed beyond the capabilities of any given city, if only because the same pattern of run-down housing in core urban areas exists throughout the country. Another readily apparent pattern was the presence of well-to-do suburban municipalities ring- ing these major urban areas. The juxtaposition of the physical beauty of these suburban areas with the physical decay of the cities left me, a recently emancipated New Yorker, asking the admittedly simple, but never-

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theless critical question: why do people living amidst this decay not pick themselves up and leave?

I found zoning to be at the root of the answer to my question. In its most public guise, zoning is the tool by which a local government\(^1\) ostensibly regulates the use of land under its control by, for example, making sure that factories are not built next to residences. In an equally powerful form, however, zoning also seemed to prevent people from moving into various suburban municipalities by establishing certain economic and racial barriers to keep such suburbs homogenous and affluent.

I soon learned, though, that this progression from cities to decay to suburbs to zoning had long ago been recognized by others before me. Writing about zoning in the 1990s, then, raises the question of what a person can productively add to the topic. After all, over sixty-five years ago, in *Village of Euclid v. Ambler Realty Co.*,\(^2\) zoning received its constitutional blessing from the United States Supreme Court as a constitutionally sound manifestation of a local government's police power, and the hegemony of "modern" zoning began. Furthermore, it has been over twenty years since critics and some courts began to identify what they called "exclusionary" zoning, characterized by a local government using its zoning authority to prevent low-income individuals or families from moving into a given municipality.\(^3\) Despite the intended beneficial effects of policing this "type" of zoning, the 1990s opened with an unprecedented low-income housing crisis caused by the barriers erected through

\(\text{Vol. 43:59}\)

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1. I have decided to use the generic labels "local government" and/or "municipality" rather than distinguishing between, for example, local governments of "cities" and those of "suburbs." Although it would seem that the majority of cases that arose from zoning disputes occurred in what would today be considered the "suburbs," the city/suburb distinction seems to have emerged later in the development of the social landscape. Judges writing during zoning's development did not necessarily use precise terms such as "city," nor is the distinction critical for my analysis. What is most significant is the use of the zoning authority. In other words, if exclusion were the end result, it matters not whether it was a city or a suburb behind the exclusion.

The distinction between city and suburb, however, plays a more significant role in connecting zoning to the affordable housing crisis. The rise of the suburb since the end of World War II, coupled with, or spurred on by, the ability of a suburban municipality to exercise its zoning authority in the wake of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), created the necessary dynamic that has contributed so greatly to the affordable housing crisis.


suburban zoning ordinances that consigned the "excluded" to live in increasingly undesirable refuges—the cities.4

After considering and discarding other possible reasons to explain why this critical attention paid to "exclusionary" zoning could not mitigate the housing crisis of the 1990s,5 I hypothesized that the problem might well lie not with exclusionary zoning, but with the very conception of zoning. I realized that "modern" zoning had come to be viewed as an essentially neutral, bureaucratic tool that, in its extreme form, could be used for racially- or class-based exclusionary purposes. As a result, it became impossible to see zoning's racist and classist bedrock, and to recognize that, at its core, zoning is an exclusionary device.

If this thesis were correct, it would be critical to understand better how zoning came to be perceived and accepted as a proper exercise of a local government's police power. Thus, I returned to study the origins of "modern" zoning in this country so that I could examine the development of this legal doctrine, so critical in ensuring zoning's continued survival and so influential in shaping our understanding of what constitutes zoning.

I approached zoning from a structural perspective, considering where and how the doctrine developed rather than accepting its present shape as my starting point. I focused not on the development of a vehicle through which zoning could be utilized or maneuvered around to help resolve the affordable housing crisis, but instead, I took a necessary step back to determine the judiciary's role in shaping (if not creating) the current understanding of zoning. The more I learned about the origins of zoning, the more it became clear that, as currently constituted, the doctrine could recognize only the distinction between "good" zoning and "bad" zoning—a distinction I find largely meaningless. In this state, zoning doctrine could do little to relieve the affordable housing shortage resulting from its own creation in the first place.

4. See, e.g., Anthony L. Cooper, Perspectives on Affordable Housing, L.A. TIMES, Oct. 14, 1990, at M7 (editorial) (arguing that a solution to Los Angeles' housing crisis will come about only through greater acceptance of affordable housing developments in middle- and upper-income neighborhoods); Mary Sit, Out of Reach: For Some Boston-Area Residents, the Quest to Buy a Home has Taken on a Religious Fervor, But Even Prayer Won't Create Affordability, BOSTON GLOBE, Oct. 23, 1990, Economy Sec., at 23 (citing the unavailability of affordable housing to Boston's middle- and low-income residents); Cynthia Todd, Housing Getting Out of Reach for Many, Group's Study Says, ST. LOUIS POST-DISPATCH, Aug. 17, 1990, at 3A (citing studies that illustrate an increasing instability in the nation's housing market).

5. These reasons included: 1) exclusionary zoning is not at the root of the affordable housing crisis; 2) exclusionary zoning needs to be regulated or policed more carefully by the judiciary; and 3) the judiciary cannot adequately police the exclusionary proclivities of local governments. Discussion of these reasons is beyond the scope of this Article.
I cannot say why zoning doctrine developed as it did. It does appear, however, that the judiciary's conception of zoning as largely cemented by the Court in *Euclid*, blinded us to zoning's exclusionary core and facilitated its role as an acceptable, neutral bureaucratic power. It has been through the use of this power that local governments have maintained the beauty and homogeneity of their borders at the expense of those who could not afford to surmount the barriers erected through zoning ordinances.

This Article is, therefore, a first step toward reconsidering what we mean when we talk about zoning. Although this task necessarily involves altering almost seventy years of case law and the resulting legislative authority used by almost all local governments, it is necessary if we are to effectively confront the nation's affordable housing crisis. The hope for this Article is to unearth the racist and classist origins and underpinnings of zoning that so many decades of use and acceptance have buried. To the degree that zoning is deeply implicated in the affordable housing crisis, it seems unrealistic to believe that we can confront the crisis with a distorted, partial understanding of one of its prime causes. Perhaps, by trying to imbue future discussions with a fuller understanding of zoning, we can get a better sense of how zoning might have been, and perhaps should have been, reflected in legal doctrine.

Part I of this Article attempts to reconnect "modern" zoning with its police power predecessors. Part I tells the stories of two such predecessors and discusses the theme of exclusion unifying these uses of the police power and "modern" zoning. First, this Article examines the use of ordinances to disable Chinese laundry owners from conducting their business, while permitting white owners to continue operations. Second, the Article explores the experience of racial zoning and how it prevented caucasians and African-Americans from living side by side.

Part II reviews the writings that are the harbingers of "modern" zoning. It shows how explicitly these writings dealt with and endorsed the exclusionary aspects of zoning. This review also underscores the judicial savvy of these authors and their understanding of the need to package zoning as a tool for achieving legitimate, laudable ends acceptable to the courts.

Part III examines the courts' role in the "modern" zoning movement. Focusing on state court rulings on zoning's constitutionality, it lays the ground work for the *Euclid* decision and shows how, with limited exceptions, modern zoning increasingly came to be legitimated by courts as a laudable use of a local government's police power. It then discusses *Eu-*
Inclusionary Jurisprudence
did itself, the decision that essentially constituted modern zoning doctrine as we know it today.

After tracing the course of the Court's opinion in Euclid, Part IV of this Article concludes by suggesting an alternative formulation based on precedent available to the Court at the time of its decision. The formulation could have dramatically altered then current conceptions of zoning and mitigated, perhaps even avoided, the affordable housing shortage presently facing this country.6

I. "Modern" Zoning's Predecessors

A. The Laundry Cases

Between roughly 1870 and 1890 in San Francisco, California, Chinese immigrants provided the vast majority of the city's laundry service.7 The laundries simultaneously gained popularity as clubs in which the Chinese population could congregate.8 This was also a time of anti-Chinese violence throughout the state of California.9

Although various municipal governments passed laws that discriminated directly against the Chinese, California courts had invalidated these laws.10 Shortly thereafter in San Francisco, the local government enacted laws that sharply curtailed the presence and operations of laundries in the city.11 These laws were based on the danger inherent in the laundries operating with open fires and, like a large majority of buildings at that time, being made of wood.12

6. One specific linguistic convention used in this introduction and throughout this Article deserves explanation. This Article employs the term "modern zoning" to describe zoning as it developed in the second decade of the 20th century rather than the term "comprehensive" zoning. Courts and commentators favored the term "comprehensive" zoning (discussed in Part II) and sought to create a "type" of zoning as distinct from preceding forms of zoning. As it relates to exclusion, "comprehensive" zoning does not differ from any other "type" of zoning and so its use in this Article would only serve to perpetuate a meaningless distinction.

The Supreme Court's discussion in Euclid lends support to this decision. The Court, although acknowledging that the Euclid ordinance was a "comprehensive ordinance," did not rely upon this characterization in reaching its decision, despite the stress placed on the significance of a "comprehensive" ordinance in the brief submitted on behalf of Euclid and in the amicus brief of noted zoning enthusiast, Alfred Bettman. See infra notes 183-95, 212-28 and accompanying text.


8. Id. at 15.

9. Id. at 17.

10. Id.


12. Id. at 27, 30.
In 1884, the San Francisco Board of Supervisors passed an ordinance regulating the location and operation of public laundries and wash houses. Premised on the belief that such establishments, if allowed to propagate without control, would endanger "the public health and the public safety, prejudice[] the well being and comfort of the community and depreciate[] the value of property in their neighborhood," the ordinance required all laundries to obtain certificates from the municipal health officer and the Board of Fire Wardens. The certificates assured that each laundry represented neither a threat to the public health nor created a risk of fire. In addition, the ordinance prohibited the operation of a laundry between 10 p.m. and 6 a.m. on all days, and at any time on Sunday.

At the time these ordinances were passed, "building" ordinances also existed that prohibited both the operation of a laundry in a wooden building and the erection of scaffolding "without having first obtained the consent of the Board of Supervisors." The Board of Supervisors limited the number of laundries and confined existing ones to particular areas within the city through the delay or refusal to grant these necessary permits. Among the reasons given in defense of these ordinances was that laundries created a moral hazard because people, specifically Chinese immigrants, congregated there for nonbusiness purposes.

The United States Supreme Court initially upheld one such ordinance in *Barbier v. Connolly*. In *Barbier*, the Chinese petitioner was arrested for operating his laundry between 6 p.m. and 10 a.m. The Court found the ordinance to be clearly within the scope of a municipality's general police powers, and found the ordinance's regulation of laundries reasonable. Even though the laundry operators were disproportionately Chi-

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13. *Id.* at 27.
14. *Id.*
15. *Id.* at 27-28.
16. *Id.* at 27. The city passed an ordinance one year prior that was substantially the same as the 1884 ordinance, but differed in its territorial reach. See *Soon Hing v. Crowley*, 113 U.S. 703, 707 (1885).
19. *Id.*
20. 113 U.S. 27 (1885).
21. *Id.* at 28-29.
22. *Id.* at 30-31. The Court commented that "[t]he provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a federal tribunal should undertake to supervise such regulations." *Id.* at 30.
nese,\(^23\) the fact that the ordinance was formally applicable to all laundry operators led the Court to hold that the ordinance did not violate the Fourteenth Amendment.\(^24\)

Shortly thereafter, in *Soon Hing v. Crowley*,\(^25\) the Supreme Court upheld a similar ordinance despite the petitioner's explicit introduction of evidence illustrating the ordinance's anti-Chinese bias.\(^26\) Rather than alleging that the ordinance discriminated between different laborers, the petitioner alleged discrimination based on race, claiming that the ordinance arose from racist, not health, safety or welfare motives, and was intended to prohibit the Chinese from operating laundries.\(^27\) The Supreme Court did not find the petitioner's claims dispositive, and instead found that its analysis was controlled by its decision in *Barbier*.\(^28\) The Court again held that the ordinance was a proper exercise of the municipality's police power.\(^29\)

To the Supreme Court, the only discrimination to be reached was that arising where "persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the

\(^23\) Two years later, counsel for Yick Wo indicated in a brief to the Court that of the 320 laundries in San Francisco County, 240 were owned and operated by Chinese immigrants. Brief for Appellant and Plaintiff in Error at 2, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Nos. 1280 and 1281), reprinted in 9 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 5-6 (Philip B. Kurland & Gerhard Casper eds., 1975).

\(^24\) *Barbier*, 113 U.S. at 31. The Court commented that "[a]ll persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions." *Id.*

\(^25\) 113 U.S. 703 (1885).

\(^26\) *Id.* at 710.

\(^27\) *Id.* at 707-11. The petitioner alleged:

"[T]hat the petitioner has for several years been engaged in working for hire as a public laundry in the City and County of San Francisco, and has, in all respects, complied with the laws of the United States and California, and the ordinances of the city and county . . . that there have been for several years great antipathy and hatred on the part of the residents of that city and county against the subjects of China residing and doing business there . . . that owing to that feeling, and not otherwise, and not for any sanitary, police or other legitimate purpose, but in order to force those subjects engaged in carrying on the subject of a laundry . . . to abandon the exercise of their lawful vocation and their only means of livelihood, the supervisors passed the ordinance in question . . . ."

*Id.* at 706.

\(^28\) The Court noted that "the municipal authorities are the appropriate judges." *Id.* at 708. Quoting *Barbier*, the Court held that "the same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced." *Id.* (quoting *Barbier*, 113 U.S. at 30).

\(^29\) *Id.* at 710-11.
same conditions."\textsuperscript{30} In essence, because the municipality limited the universe of the ordinance to everyone engaged in the laundry business,\textsuperscript{31} the Court limited its analysis to that same universe.\textsuperscript{32} If no discrimination existed among those within the universe, and the claim for the need to regulate was at least credible, then no potential discrimination between those within the regulated universe and those in the unregulated universe would be examined.\textsuperscript{33} The plight of the Chinese population relative to the rest of the city fell outside the parameters of legal relevance.

The Court found the petitioner's claim concerning the discriminatory motivation behind the passage of the ordinance to be beyond its judicial competence.\textsuperscript{34} Any investigation into motive would be inconclusive and would not be pursued by the Court,\textsuperscript{35} because "[t]he diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."\textsuperscript{36}

That same year, the plaintiff in \textit{Yick Wo v. Hopkins}\textsuperscript{37} was arrested in San Francisco for violating the San Francisco ordinances that required the issuance of a permit in order to continue operations of a laundry.\textsuperscript{38} Yick Wo had applied to the San Francisco Board of Supervisors for these permits, which were denied. Nonetheless, he continued to operate his laundry business.\textsuperscript{39} After his arrest, he filed a writ of habeas corpus and the action ultimately went to the California Supreme Court.\textsuperscript{40}

\textsuperscript{30} \textit{Id.} at 709. The Court stated that "[t]he specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind." \textit{Id.} at 708-09.

\textsuperscript{31} \textit{Id.} at 703.

\textsuperscript{32} \textit{Id.} at 709-10.

\textsuperscript{33} The Court discredited the petitioner's argument that the ordinance singled out those in the laundry business for discriminatory treatment while exempting other businesses. "There may be no risks attending to the business of others, certainly not as great as where fires are constantly required to carry them on." \textit{Id.} at 708. The threshold question to the Court was the inequitable treatment of parties within the same business. "It is only then, that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." \textit{Id.} at 709.

\textsuperscript{34} \textit{Id.} at 710-11.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.} at 711.

\textsuperscript{37} 118 U.S. 356 (1886).

\textsuperscript{38} \textit{Id.} at 357.

\textsuperscript{39} \textit{Id.} at 358.

\textsuperscript{40} \textit{Id.} at 356.
Despite widespread anti-Chinese sentiment and activities at the time, the California Supreme Court followed *Barbier's* narrow path. The social context of the ordinances did not rise to the level of legal significance, and in its place existed a “blinded” interpretation of the regulation. The analysis itself invoked the two core concepts of the later zoning ordinance decisions: the state’s police power and the public’s general welfare. These concepts served to filter out the surrounding social dissonance.

At the beginning of its analysis, the California Supreme Court acknowledged that regulatory laws such as the one at issue necessarily had an adverse effect on the rights of some. Nevertheless, the court found those hurt by such laws to be compensated sufficiently by the general benefits arising from such ordinances. In San Francisco, a town with numerous wooden buildings, the court accepted the need to regulate a business like the petitioner’s laundry that relied so heavily upon the use of fire and thereby posed a direct threat to the city’s wooden buildings. The court also upheld the Board of Supervisors’ authority to award or deny permits.

On appeal, the United States Supreme Court reversed the California court’s decision. The Court promptly rejected the municipality’s claim that the regulations were necessary to promote the general welfare and noted the racially-based, discriminatory purpose of the ordinance. The Court further found persuasive evidence that over two hundred Chinese

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42. *Id.* at 141.
43. The court stated that “[t]he board of supervisors, under the several statutes conferring authority upon them, has the power to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety.” *Id.* at 142.
44. *Id.* at 141. The court explained that reasonable restraints on the use of an individual’s property may be necessary to prevent “serious mischief” to others. *Id.* The court added:

A large proportion of the laws and ordinances relating to the comfort, safety, health, convenience, good order, and general welfare of the inhabitants of cities and towns, and which we style “Police Laws or Regulations,” have the effect, in a greater or less degree, to disturb and curtail individual enjoyment and personal rights.

*Id.*
45. *Id.*
46. *Id.* at 141-42.
47. *Id.* at 142.
48. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). At the same time that the Court adjudged Yick Wo’s claim, it ruled on a claim of Wo Lee, another Chinese resident who had been convicted of violating the same statute on circumstances similar to Yick Wo. *Id.*
49. *Id.* at 366. The Court by its finding effectively affirmed Yick Wo’s allegations that
immigrants had applied for and been denied permits, while only one of eighty white applicants had been denied a permit. In striking down the ordinance, the Court found that it conveyed unbridled discretion to municipal officers to grant or deny permits, and that the officers had used this discretionary power in an unlawful, discriminatory manner.

To the Court, the facts in *Yick Wo* proved conclusively that the city had used the ordinance particularly against its Chinese residents. The city's inability to offer an adequate explanation for this state of affairs confirmed the Court's view that the city discriminated against the Chinese through the use of the ordinance. The Court found that the city laundry ordinances infringed upon an individual's Fourteenth Amendment equal protection rights, stating that "the very idea that one man may be compelled to hold... any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails."

Thus, *Yick Wo* and *Wo Lee* went free. Despite the Supreme Court's decision, however, the analysis developed in *Barbier* remained intact and

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your petitioner and more than one hundred and fifty of his countrymen have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who are conducting eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioner, and of those of his countrymen similarly situated, is greatly impaired, and in many cases practically ruined by this system of oppression to one kind of men and favoritism to all others.

*Id.* at 359.

50. *Id.* at 374.

51. *Id.* at 366-67. The California Supreme Court had concluded that "the persons selected to discharge governmental duties, by reason of supposed qualification for the several positions in which they are placed, will be found to possess the capacity and integrity essential to a proper administration of the trust reposed in them." *In re Yick Wo*, 9 P. at 142. The Supreme Court disagreed:

We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons... The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.


52. *Id.* at 374.

53. *Id.* The Court concluded that "[t]he fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified." *Id.*

54. *Id.*

55. *Id.* at 370.
reappeared several decades later in the "modern" zoning cases. Under its later incarnation the Court asked whether such a regulatory ordinance promoted the general welfare\footnote{56. The Court in *Barbier* referred specifically to regulations that "promote the health, peace, morals, education, and good order of the people." *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1885).} of a given municipality and, hence, whether it was a valid exercise of the police power.\footnote{57. *Id.* at 30.} All due deference was to be paid to "the determination of the municipality"\footnote{58. *Id.* at 32.} as to the necessity or value of the particular ordinance at issue.\footnote{59. *Id.* at 31-32. The Court concluded: In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the state; they can be remedied only by the state. *Id.* at 32.} Whether intentional or not, this analysis provided an effective mechanism for filtering out the underlying social context of a regulatory ordinance, as seen in *Barbier* itself.

Like "modern" zoning ordinances to follow, San Francisco's laundry ordinances explicitly regulated the use of buildings while implicitly regulating the people in those buildings. It appears that the prejudice which animated the explicit regulation animated the implicit regulation as well. Gordon Whitnall, writing during the rise of "modern" zoning, argued that the order and control sought through the laundry ordinances was similarly sought through "modern" zoning ordinances.\footnote{60. Gordon Whitnall, *History of Zoning*, 155 *Annals Am. Acad. Pol. & Soc. Sci.* 1, 9 (1931).} To Whitnall, however, the racial motivation of the laundry ordinances, properly recognized by the Supreme Court in *Yick Wo*, no longer existed with respect to the modern zoning ordinances, making proper the ends of the "modern" zoning ordinances.\footnote{61. *Id.* Whitnall concluded that: It must be granted that in those early days a laundry was almost synonymous with Chinamen, and the regulation was unquestionably a move towards racial segregation. However, that purpose is not openly stated, and now that the racial element is eliminated, we can look back upon that early legislative act and find that the regulation it imposed, so far as we can reconstruct the conditions that then prevailed and from what we know of the city now, would be thoroughly in keeping with all of the accepted practices of zoning. *Id.*

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based animus was better disguised, or ordinances more carefully written or implemented? What if, for example, particular places where only certain "types" of people lived, such as detached dwellings, were given preferable treatment over other types of buildings, such as apartment buildings, where different types of people lived? If this were the case, the similarities between the unlawful laundry ordinances and the modern zoning ordinances could not be so easily put aside.

B. The Racial Zoning Cases

Roughly twenty-five years after the Supreme Court struck down the ordinance at issue in *Yick Wo*, state courts began hearing challenges to municipalities' racial zoning ordinances. These ordinances sought to prevent any "colored" person from moving onto a "white" block, and any "white person" from moving onto a "colored" block. Enacted essentially under the protection that *Plessy v. Ferguson* "equal but separate" doctrine gave to official expressions of animosity toward the recently emancipated southern black population, these ordinances were designed to be equal by prohibiting both "whites" and "coloreds" from living in blocks designated for the other.

62. See, e.g., Carey v. City of Atlanta, 84 S.E. 456 (Ga. 1915) (Atlanta ordinance); Harris v. City of Louisville, 177 S.W. 472 (Ky. 1915) (Louisville ordinance), rev'd sub nom. Buchanan v. Warley, 245 U.S. 60 (1917); State v. Gurry, 88 A. 546 (Md. 1913) (Baltimore ordinance); State v. Darnell, 81 S.E. 338 (N.C. 1914); Hopkins v. City of Richmond, 86 S.E. 139 (Va. 1915) (Richmond and Ashland ordinances), overruled by Irvine v. Clifton Forge, 97 S.E. 310 (Va. 1918).

63. Courts at this time referred to African-Americans as "colored" or as members of the "colored" race. In order to preserve the sense of this usage, I have used the term "colored" throughout this section and placed it within quotations, even when not quoting directly from a case. In the name of fairness and symmetry, I have placed the term "white" in quotations as well.

64. For example, the self-explanatory title of the ordinance at issue in Buchanan v. Warley, 245 U.S. 60 (1917), was

[a)n ordinance to prevent conflict and ill-feeling between the white and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively.

*Id.* at 70. Residents of one race, however, who at the time of the ordinance's enactment lived on the same block as residents of another race did not have to move. *Id.* In addition, "colored servants in white families" were permitted to stay. *Id.* at 81.


66. Clearly, this was a disputed notion, and parties argued that the true purpose of the ordinance was to keep the "negro" down. The petitioner in *Buchanan* argued:

In the present case it is contended that the [challenge to the ordinance] is met by the provision that white persons shall not occupy buildings in "colored blocks."

... Anatole France has commented upon the absolute justice of the laws which prevent rich and poor alike from sleeping under the arches of the bridge... and
Prior to the Supreme Court's invalidation of racial zoning in *Buchanan v. Warley*, some state supreme courts had accepted, if not endorsed, the theory of racial segregation through police power enactments by upholding racial zoning ordinances. Despite the intended effect of these ordinances, however, the courts characterized them as race-neutral. Even to those state supreme courts that struck them down, the ordinances withstood discrimination claims because they imposed reciprocal prohibitions upon both races.

Reciprocity established formal equality of treatment, the cornerstone of *Plessy v. Ferguson*’s doctrine of “equal but separate,” thereby negating any equal protection claims under the Fourteenth Amendment.

from begging in the public streets. A law which forbids a negro to rise is not made just because it forbids a white man to fall.

Brief for the Plaintiff-in-error on Rehearing at 33, Buchanan v. Warley, 245 U.S. 60 (1917) (No. 33), reprinted in 18 Landmark Briefs and Arguments of the Supreme Court of the United States 491, 526 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter 18 Landmark Briefs and Arguments].

67. 245 U.S. 60 (1917), rev’g Harris v. City of Louisville, 177 S.W. 472 (Ky. 1915).
68. *Harris*, 177 S.W. at 472; *Hopkins* v. City of Richmond, 86 S.E. 139 (Va. 1915).

Apparently, however, racial zoning ordinances were quite common in the South. See, e.g., 1 Va. L. Reg. 330 (Sept. 1915) (setting forth segregation ordinances).

69. *Harris*, 177 S.W. at 476; *Hopkins*, 86 S.E. at 146.
70. See *State v. Gurry*, 88 A. 546, 549-51 (Md. 1913); see also *Carey v. City of Atlanta*, 84 S.E. 456, 458 (Ga. 1915); *State v. Darnell*, 81 S.E. 338, 339-40 (N.C. 1914) (implying reciprocity theory by using examples of both “colored” people and “whites” being deprived of property value by such ordinances). *Cf. Hopkins*, 86 S.E. at 147 (making a similarly strong case for the reciprocity notion in the context of upholding the ordinance).

In dispensing with an equal protection argument, the Kentucky Court of Appeals in *Harris* found that not only was the subject ordinance not discriminatory on its face, but that if its enforcement did prevent members of the “colored” race from living in the most desirable districts of a municipality, no cognizable claim arose under the Fourteenth Amendment. *Harris*, 177 S.W. at 476. To the Kentucky court, the Constitution did not have the responsibility to promote “economic equality”:

[It is contended that the ordinance is violative of the fourteenth amendment because, it will prevent the residence of negroes in the more desirable portions of the city. If such should chance to be its practical effect (though there is nothing in the ordinance itself which warrants the conclusion), we do not understand how this could be construed to be a denial of the equal protection of the law. The enforced separation of the races alone is not a discrimination or denial of the constitutional guaranty; and, if such separation should result in the members of the colored race being restricted to residence in the less desirable portions of the city, they may render those portions more desirable through their own efforts, as the white race has done. Economic equality is not created by statutory declaration nor guaranteed by the fourteenth amendment.

Id.

72. *Harris*, 177 S.W. at 476; *Gurry*, 88 A. at 549, 551; *Hopkins*, 86 S.E. at 144, 147. In rejecting an equal protection claim of the plaintiff, the Maryland Supreme Court wrote: “What is denied one class is denied the other; what is allowed one class is allowed the
State courts analyzed the ordinances by considering whether their passage was an appropriate use of the municipality's police power.\textsuperscript{73} Under this analysis, the courts would uphold such ordinances if their purpose, as articulated by the municipality, was viewed as promoting the general welfare of the municipality.\textsuperscript{74} If the court found that the ordinance promoted the general welfare, any resulting infringement on an individual's property rights was to be borne by that individual.\textsuperscript{75}

Questions about the racial implications of such ordinances entered the analysis only to the extent that segregating the two races promoted the general welfare. Separating the two mutually incompatible races pro-

other. There is, therefore, no such discrimination as is prohibited by the Constitution or statutes securing civil rights, and it is not necessary to discuss that question further." \textit{Gurry}, 88 A. at 551. The Maryland court went even further, finding that, if anything, the ordinance discriminated against white property owners because "whites" owned more property than "colored" people and so would be more adversely affected. The court stated:

\[\text{[I]t cannot be truly said that there is any discrimination in the ordinance against the colored race. Indeed, in its practical operation it would be more burdensome on white people than on colored people, for it is well known that white people own the great bulk of property in Baltimore City, and hence where the property of one colored person would be affected by such an ordinance, those of many more white people would be.}\]

\textit{Id.}

An additional constitutional argument against these ordinances was that they violated the Due Process Clause of the Fourteenth Amendment by depriving landowners of their property rights. \textit{E.g., Carey}, 84 S.E. at 458. According to this argument, by either eliminating an entire class of purchasers or prohibiting owners from moving onto their property if located on a block of the opposite race, these ordinances effectively destroyed property rights without compensation. \textit{Id.; see also Harris}, 177 S.W. at 474-75; \textit{Darnell}, 81 S.E. at 339-40; \textit{Hopkins}, 86 S.E. at 141, 145. To the degree that the ordinances did not infringe upon already vested rights such as those of landowners who already owned or had already sold their property prior to the enactment of the ordinance, state courts did not strike down these ordinances on due process grounds. \textit{Harris}, 177 S.W. at 474-75; \textit{Hopkins}, 86 S.E. at 141, 145. \textit{But see Carey}, 84 S.E. at 458, 459-60 (holding that the ordinance as written violated due process and that the police power is simply subordinate to property rights); \textit{Darnell}, 81 S.E. at 340 (dictum) (questioning whether the ordinance as written would survive due process attack, but invalidating the ordinance as outside the purview of the legislature's general grant of police power to municipalities). The Supreme Court, however, rested its decision on due process grounds. \textit{Buchanan v. Harley}, 245 U.S. 60, 82 (1917).

\textsuperscript{73} \textit{Harris}, 177 S.W. at 476; \textit{Gurry}, 88 A. 549-52; \textit{Darnell}, 81 S.E. at 338-39; \textit{Hopkins}, 86 S.E. at 142-45; \textsuperscript{74} \textit{see also Carey}, 84 S.E. at 460 (Lumpkin, J., concurring specially).

\textsuperscript{74} A court sometimes considered certain threshold issues that could end the inquiry before it reached this stage. For example, one ordinance raised an issue because it covered property rights that had vested prior to the ordinance's enactment. Another ordinance granted residents the power to nullify the ordinance's decree of segregation. Such threshold inquiries, however, were never inconsistent with the police power analysis.

\textsuperscript{75} \textit{See, e.g., Harris}, 177 S.W. at 476; \textit{Gurry}, 88 A. at 549-50, 552-53; \textit{Hopkins}, 86 S.E. at 145; \textsuperscript{75} \textit{see also Carey}, 84 S.E. at 459-60.
moted the general welfare by maintaining the peace and harmony of the municipality otherwise threatened by the two races living side by side.\textsuperscript{76} Various state courts underscored this point by attempting to show how the ordinances served the interests of the "colored" race and should, therefore, be supported by them.\textsuperscript{77} The Maryland Supreme Court noted the acknowledgment by counsel for "colored" citizens of increased racial strife, and buttressed its holding with counsel's admission.\textsuperscript{78}

Ultimately then, an ordinance passed to consolidate and preserve the advantages of racial segregation became a measure designed merely to preserve the peace\textsuperscript{79}—an admirable purpose when taken at face value. Racial segregation was transformed from a tool of domination used by an empowered race to discriminate against an unempowered race to an irrefutable, arguably natural, bureaucratic tool with positive effects on both races. The result was that failure to pass such an ordinance, thereby per-
mitting the hostile races to live in close proximity, became a deficiency in the proper functioning of the municipal government.\textsuperscript{80}

By virtue of the shape of legal doctrine, even a court that believed racial zoning to be consistent with the design of the “heavenly sphere” could, at the same time, maintain that no prejudice existed in the passage or operation of a racial zoning ordinance:

The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either. . . . It is simply to say that, following the order of Divine Providence, human authority ought not to compel these . . . separate races to intermix. . . . When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity . . . it is not prejudice . . . but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.\textsuperscript{81}

Because the ordinance affected both races “equally” and a “higher” normative claim demanded that the races not mix, the court sanctioned the ordinance. Notably absent from this analysis, as well as those of other courts, was any search for ulterior purpose in passing such legislation, and absent was any recognition of the severe inequality that existed between the two races beyond the narrow scope of this law.\textsuperscript{82}

The Supreme Court’s decision in \textit{Buchanan v. Warley}\textsuperscript{83} likewise reflected the legal insignificance of this veiled form of discrimination. The

\begin{itemize}
\item \textsuperscript{80} See, e.g., \textit{id}. at 143. \textit{See generally} 1 Va. L. Reg. 330 (1915).
\item \textsuperscript{81} \textit{Harris}, 177 S.W. at 477 (citation omitted). The court sanctioned the ordinance because a “higher,” normative principle demanded that the races not mix. \textit{Id}.
\item \textsuperscript{82} Perhaps more honest than most courts, the Kentucky court expressed the basic fear that the ordinance served to alleviate dilution of the races. \textit{Id}. But even this fear could become legitimized if seen as a concern of both races. \textit{Id}. The court wrote: In view of the fact that this legislation is upheld partly in recognition of the peril to race integrity induced by mere propinquity, we see but little difference in the prevention by law of the association of white and colored pupils in the schools of the state and in the prevention of their living side by side in their homes. It is said by appellant that “in a man’s house no such association and contact is necessary” as in the schools or on public conveyances. But the court will not close its eyes to the fact that, under the congested conditions of modern municipal life, there is practically as much, if not a greater degree of, association among children of white and colored inhabitants when living side by side than there would be in mixed schools under the direct observation of teachers. \textit{Id}.
\item \textsuperscript{83} 245 U.S. 60 (1917).
\end{itemize}
Court in Buchanan focused on what it perceived as a violation of the due process rights of both parties involved. Although it did not repeat the more strident comments made by the Kentucky Court of Appeals and other state courts about race relations, it implicitly rejected an equal protection claim and tacitly legitimated the municipality's fear of integration. Rather than promoting the civil rights of "colored" persons, the decision rested upon the Court's finding of an unlawful infringement of property rights.

The ordinance at issue in Buchanan violated the Due Process Clause of the Fourteenth Amendment, because it destroyed the property rights of both the "white" seller and the "colored" purchaser. As such, the ordinance exceeded the reach of the municipality's police power. The Court found that the ordinance violated the due process rights of both the seller and the purchaser by destroying property rights without compensation "solely because of the color of the proposed occupant of the premises." In this sense, and in the following analysis, the Court did not raise the status of the "colored" purchaser to that of the "white" seller in any broader social or political context. Rather, although apparently mindful of the historical extent of discrimination against the "colored" race, it analyzed the ordinance within the far narrower context of property rights.

The Court posed the following question:

[Can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?]

In answer to the question, the Court interpreted the Fourteenth Amendment to redress the property-related wrongs suffered by "coloreds" and

84. Id. at 81-82.
85. See supra notes 67-70 and accompanying text.
86. Buchanan, 245 U.S. at 80-81. The Court commented:
   The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.
   Id. at 81.
87. Id.
88. Id. at 82.
89. Id. at 75.
90. See id. at 76-77.
91. Id. at 76, 78.
92. Id. at 78.
“whites” alike. The Court found that the Fourteenth Amendment protected the “colored” purchaser because “[c]olored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color.” The Fourteenth Amendment offered further protection to the “white” seller because “the broad language [of the Amendment] was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States.” While the Court disapproved of the use of race to injure property rights, it did so in a manner that seemed to promote racial blindness rather than racial sensitivity to the motivation behind the passage of the ordinance.

By the end of the Court’s analysis, the racial motivation behind the ordinance had been largely obscured by the strong linkage of the Fourteenth Amendment to property rights. In effect, the Court separated the zoning ordinance’s use of race from its historical context and concluded that it served to damage individual property rights. The Court’s finding disregarded the more pernicious effect of the ordinance—the exclusion of an unempowered group, not merely from buying or selling property, but from the opportunity to ascend to social and economic levels already claimed by the empowered group.

By failing to invalidate the ordinance on the social context of exclusion, which presumably would have entailed finding some sort of unlawful discrimination, the Court protected only those “colored” persons who owned property. And even these people were protected only to the extent they had a claim concerning the sale or occupation of their own

93. The Court held that “the Fourteenth Amendment expressly provided that all citizens of the United States in any state shall have the same right to purchase property as is enjoyed by white citizens.” Id. (citation omitted).
94. Id. at 78-79.
95. Id. at 76.
96. See id. at 79.
97. The Court concluded that “[t]he Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.” Id. at 79.
98. Id.
99. Id.
100. As the petitioner claimed: “No one outside of a court room would imagine for an instant that the predominant purpose of this ordinance was not to prevent the negro citizens of Louisville... from approaching that condition vaguely described as ‘social equality.’” Brief for Plaintiff-in-Error at 32, Buchanan (No. 33), reprinted in 18 LANDMARK BRIEFS AND ARGUMENTS, supra note 66, at 3, 37.
property.\textsuperscript{101} Although the legal doctrine that emerged from the case did signal the ultimate demise of such explicitly racial ordinances, it ignored the more realistic explanation for the ordinance's passage as argued by both the petitioner\textsuperscript{102} and by various amici.\textsuperscript{103} The Court's approach also ignored the effect that these ordinances could have on the ability of the "colored" race to rise within a "white"-dominated society and, more immediately, to live in more desirable neighborhoods of their towns.\textsuperscript{104}

The following section illustrates that these same themes of exclusion and dominance emerged when municipalities began enacting "modern" zoning ordinances. While the modern ordinances did a better job of concealing exclusion and dominance than the racial zoning ordinances, they still employed comprehensive restrictions on land and building use that allowed the empowered group to continue to flourish. This time, however, the Supreme Court would change its prior course and uphold the constitutionality of these laws.

II. "Modern" Zoning Advocates and Skeptics

The rise of modern zoning owes much to the efforts of those city planners who spearheaded the drive to make zoning acceptable to both soci-

\textsuperscript{101} The Court cited the principle that "[p]roperty of a person, whether as a member of a class or as an individual, cannot be taken without due process of law." \textit{Buchanan}, 245 U.S. at 80.

\textsuperscript{102} See, \textit{e.g.}, Brief for Plaintiff-in-Error at 38, \textit{Buchanan} (No. 33), \textit{reprinted in 18 LANDMARK BRIEFS AND ARGUMENTS, supra} note 66, at 516. The Brief stated:

The ordinance was manifestly drawn with great ingenuity in order to place the negro citizens of Louisville in as inferior a position as possible with respect to their right of residence . . . . If one of those who enacted the ordinance were defending his course before his constituents, he would ask their approval just because he had succeeded so well in establishing a permanent superiority for the white race.

\textit{Id.}

\textsuperscript{103} See, \textit{e.g.}, Brief Amicus Curiae on Behalf of Plaintiff-in-Error at 8, \textit{Buchanan} (No. 33), \textit{reprinted in 18 LANDMARK BRIEFS AND ARGUMENTS, supra} note 66, at 402. The Brief stated:

The spirit of the ordinance can be ascertained in no more accurate or satisfactory method than by discovering the way in which its advocates calculated it to act, and the way in which it \textit{actually does act}. They desired to have set apart separate residential districts for the more opulent of the white race, and they employed the most ingenious method ever devised within the history of this government to baffle judicial detection . . . .

\textit{Id.}

\textsuperscript{104} For whatever reason, the Court seemed to accept at least the thrust of the view of the Court in \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896), which rejected the notion that "the enforced separation of the two races stamps the colored race with a badge of inferiority" and believing instead that "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." \textit{Id.} at 551.
ety and the courts. In fact, these city planners, who loosely formed the core of the National Conference on City Planning, functioned much like a special interest group. Rather than working on behalf of urban and suburban areas equally, they directed their efforts towards ensuring the growth of the single family home. The preservation of exclusive residential districts in which these homes were to be located drove many of the proposals that they offered.

According to its proponents, “modern” zoning enabled local governments not only to configure an entire municipality, but at the same time, to control that municipality’s future growth. Unlike so-called “spot” zoning that covered and served the needs of specific districts, “modern” zoning was supposed to balance the needs of all districts. “Modern” zoning also employed comprehensive plans, developed before the actual enactment of zoning legislation, to ensure that all districts received adequate protection.


106. Robert H. Whitten, The Zoning of Residence Sections, 10 PROC. NAT’L CONF. ON CITY PLAN. 34 (1918).

107. Pollard, supra note 7, at 15.

108. One commentator noted:

[Modern] zoning ordinances do not aim to prevent mere harmful uses, but on the contrary, they are comprehensive in that they concern all uses—good, bad and indifferent and generally throughout the entire municipality. Beyond this, they additionally regulate height, proportion of parcels that must be kept open and unbuilt, front, rear and side yardlines, as well as many other carefully planned restrictions upon the use of property.

JAMES METZENBAUM, THE LAW OF ZONING 21 (2d ed. 1930).

109. However laudable the stated goals of “modern” zoning, the planning function, despite a continued formal presence, did not control the zoning function. The zoning function instead drove the planning function, leaving a situation not terribly different from that found in spot zoning. Whereas the purpose of planning might be to ensure that uses and types of buildings were well-balanced and fairly distributed, William B. Munro, A Danger Spot in the Zoning Movement, 155 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 203 (1931), the essence of zoning was to exclude certain uses or types of buildings from certain districts. See Whitten, supra note 106, at 34. Modern zoning, through the planning function, was intended to neutralize the abusive potential of zoning. In reality, however, modern zoning simply legitimized the extension of an exclusionary instrument throughout an entire municipality. City planners touted the planning function, which they had proudly imported from Europe, but focused their attention on zoning resulting in the subordination of planning. By at least highlighting the issue of planning, however, city planners initiated a transformation of the understanding of zoning from an instrument used to exclude certain uses from a particular district to one that ostensibly enabled a municipality to plan rationally for the full spectrum of business, residential and industrial uses. This rhetorical shift also had the presumably intended effect of bolstering a municipality’s argument that its police power could support a “modern” zoning enactment.
“Modern” zoning encouraged the placement of a municipality’s districts in a hierarchy. By allotting industrial, business or residential uses among districts, and by placing the various districts within a hierarchy to protect some districts from less desirable uses more fully, zoning protected those districts deemed worthy of added protection. The districts most in need of protection were those that contained single-family detached dwellings, perceived as the cornerstone of American society and values. The sociological and moral importance of these dwellings warranted their preferential treatment and maximum protection from harmful, non-conforming uses.

City planners would identify “antagonistic types of residential development” that threatened the growth of the exclusive residential districts. The chief antagonist of the single-family detached dwelling was the multiple-family dwelling, most notably the apartment house, which usually housed those people who could not afford to live in lower density housing. By virtue of its size and the number of people living within its walls, the apartment house rivaled the detached dwelling for space, light and air.

According to Newman Baker:

> Apartment houses, built higher than the surrounding homes and extending to the street line, rendered the neighboring homes less desirable. . . . Residence districts were blighted by apartments and stores . . . . Factories and tenements flourished

110. See generally Whitten, supra note 106, at 34 (stating that the first step in zoning is to separate areas required for business and industry from those required for residential purposes).

111. See generally id. (explaining that a small residential area in a business district should not be protected by zoning).

112. See, e.g., Cheney, supra note 105, at 277.

113. Id.

114. Whitten, supra note 106, at 35.

115. See, e.g., id.


Lawrence Veiller, however, argued that “[r]oom-overcrowding” in apartments occurred chiefly among “the Italians, and Russian and Polish Jews, and other Slavic races that in recent years have come to our shores in such large numbers . . . [for reasons] due to greed quite as much as to need.” Lawrence Veiller, The Safe Load of Population on Land, 10 Proc. Nat’l Conf. On City Plan. 72, 74 (1918).

117. Whitten, supra note 106, at 36; see also Newman Baker, Zoning Legislation, 11 Cornell L.Q. 164, 166 (1926) (discussing a land owner’s freedom to use his property for building apartment houses and a neighboring property owner’s relative inability to limit such uses).
but the most desirable citizen built his home far from the city in undeveloped regions and commuted daily to his work.\textsuperscript{118}

As such, the presence of a single apartment building could destroy the value and desirability of surrounding detached dwellings.\textsuperscript{119}

Zoning advocates became dedicated to excluding the apartment house from districts in which single-family dwellings were or could be built.\textsuperscript{120}

As Charles H. Cheney wrote of Portland, Oregon, in language particularly underscoring the idea that apartment houses had no claim to be in a "home-owners’ district,"\textsuperscript{121} the apartment house could not be tolerated to exist next to the single family dwelling.\textsuperscript{122}

By pitting the single-family dwelling against the apartment house and placing the former in the best districts, zoning advocates likely helped inhabitants of single-family homes at the expense of those who needed to rent in order to have a place to live.\textsuperscript{123} After all, as Lawrence Veiller wrote, "[a] city cannot be a city of home owners where the multiple-dwelling flourishes."\textsuperscript{124} Even though this approach meant that those liv-

\begin{flushleft}
\textsuperscript{118} Baker, \textit{supra} note 117, at 168. \\

\textsuperscript{120} See, e.g., Cheney, \textit{supra} note 105, at 277; Whitten, \textit{supra} note 106, at 35. In laying the foundation for the need for zoning, Newman Baker identified not only the existence of "the foreign element" that "drifts to the cities" and establishes "the foreign quarters which can be found in every large city," but also that "[t]he percentage of home owners is decreasing to an alarming extent." Baker, \textit{supra} note 117, at 164-65.

\textsuperscript{121} Cheney, \textit{supra} note 105, at 277.

\textsuperscript{122} \textit{Id.} Cheney wrote:

\begin{quote}
We have proved out here, to our own satisfaction at least, that when the flat and apartment invade home-owners’ districts, they tend to discourage the building of further single family homes within a block or two of where they locate . . . .
\end{quote}

(...) A prospective buyer will go down a block looking for a home or home-site, and if there be one building in the block that is a flat or apartment, or even looks like one, this buyer, nine times out of ten, moves on to a neighborhood where the neighbors will all be of the same home making interest as himself . . . .

\textit{Id.} at 277-78. In a similar context, Lawrence Veiller wrote, in explaining the rise and importance of zoning, that it is not strange, with the increasing difficulties of city life, that men have turned to other methods and endeavored to see whether they could not find a means by which the right of a man to the enjoyment of his property in peace and quiet might be saved to him and his family and not be easily invaded.

\textsuperscript{123} See, e.g., Bruno Lasker, \textit{The Issue Restated}, 1920 \textit{THE SURVEY} 278, 279; Veiller, \textit{supra} note 122, at 104.

\textsuperscript{124} Veiller, \textit{supra} note 122, at 104.
\end{flushleft}
ing in apartment houses were excluded from exclusive residence districts,¹²⁵ this was necessary in order to promote “proper social conditions and the development of true civic spirit.”¹²⁶

To justify this exclusion, zoning advocates relied not only on the promotion of the single-family detached dwelling, but also on the argument that class segregation occurred naturally and ultimately made for happier and better people.¹²⁷ Robert Whitten concluded that homogeneity of economic class made for more active and better informed citizens.¹²⁸ Another city planner, Frederick Law Olmstead, made a similar point when he stressed the importance of taking class and race-based differences into account when building housing.¹²⁹ To Olmstead, “different” people were better left apart.¹³⁰

To advocates of “modern” zoning, much more was at stake than simply affirming natural segregation or placating people’s fears of living with

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¹²⁵. Lasker, supra note 123, at 278-79.
¹²⁶. Veitler, supra note 122, at 104.
¹²⁸. Id. at 27. Whitten wrote: “My own observation is that wherever you have a neighborhood made up of people largely in the same economic status, you have a neighborhood where there is the most independence of thought and action and the most intelligent interest in neighborhood, city, state and national affairs.” Id. Focusing on the “industrial classes,” Whitten, skirting the issue of the actual living conditions, saw only the gains from living within a homogenous enclave. Moreover, Whitten believed that zoning had little to do with such living choices in the first place:

The so-called industrial classes will constitute a more intelligent and self-respecting citizenship when housed in homogenous neighborhoods than when housed in areas used by all of the economic classes . . . . A reasonable segregation is normal, inevitable and desirable and cannot be greatly affected, one way or the other, by zoning.

Id. at 27-28. In 1924, almost 10 years after the Supreme Court’s decision in Buchanan v. Warley, 245 U.S. 60 (1917), Whitten would draft a zoning ordinance adopted by Atlanta that forbade “coloreds” and “whites” from living in the same districts, and would justify the ordinance by arguing that the ordinance did only what would happen naturally. Compare The Atlanta Zoning Plan, 1922 The Survey 114, 115 (criticizing Whitten’s zoning ordinance) with Robert H. Whitten, Social Aspect of Zoning, 1922 The Survey 418, 419. Such an ordinance serves as further evidence of Whitten’s orientation toward various races and classes.

¹²⁹. Whitten, supra note 106, at 44-45 (comment of Frederick L. Olmstead).
¹³⁰. Id. Whitten wrote:

[¶] In any housing developments which are to succeed, one must, of course, consider the requirements and the habits of the people for whom the houses are being built, and where there are requirements in regard to number of rooms, etc., which are more or less coincident with racial divisions, they have to be taken into account . . . . It is desirable . . . not to put artificial barriers in the way of the assimilation of foreign-born, but if you try to force the mingling of people who are not yet ready to mingle and don’t want to mingle, house to house, along the same street, some one has to carry a pretty heavy economic burden . . . .

Id.
“different” people. In fact, much of American life rested on the continued prosperity of the single-family home owner, whose prosperity would be jeopardized by the presence of the “renting class.”

Robert Whitten noted:

As soon as the confidence of the home owner in the maintenance of the character of the neighborhood is broken down through the coming of the store or of the apartment, his civic pride and his economic interest in the permanent welfare of the section declines. As the home owner is replaced by the renting class, there is a further decline of civic interest and the neighborhood that once took a live and intelligent interest in all matters affecting its welfare becomes absolutely dead in so far as its civic and social life is concerned. Zoning is absolutely essential to preserve the morale of the neighborhood.

Further, as far as zoning advocates were concerned, the connection between the decline in property values and the presence of particular classes or races of people seemed irrefutable.

Often the growth or change of districts inhabited by members of a race considered inferior, like the Chinese or negroes, or the desire of some of its members for betterment, brings them into contact with other peoples in the same block... this invasion of the inferior produces more or less discomfort or disorder, and has a distinct tendency to lower property values.

For example, the City Commissioner of Portland, Oregon, in support of a proposed zoning ordinance, cited “the depreciation of Portland homes... by an influx of foreigners.”

Zoning advocates understood that the various types of proposed ordinances would ultimately need to be upheld by state and federal courts. More specifically, they shaped their ordinances to reflect the notion that “modern” zoning ordinances were valid police power enactments that promoted the general welfare.

Because direct exclusion of people...
would never receive judicial sanction, alternatives such as the popularization of home ownership and the preservation of property values were developed.\textsuperscript{137} Whitten, for instance, promoted limitations on construction in exclusive residential districts to prevent the building of apartment houses and thereby preserve such districts.\textsuperscript{138}

Whitten specifically recommended the use of "limitation[s] on the percentage of lot that may be covered [by a building] and regulation of the size of yards and courts."\textsuperscript{139} Buildings such as apartment houses would occupy too large a percentage of the lot to be permitted.\textsuperscript{140} Under such a plan, "high class single family detached houses" could be "protected" and multi-family buildings, while not "prohibited," would become "impossible" to build in residential districts.\textsuperscript{141}

City planners also needed to defend ordinances with provisions containing differing requirements within a hierarchy of districts in a single municipality. One participant at a National City Planning Conference, A.W. Crawford, wanted to know how to defend a provision that mandated more square footage for families living in residential districts, but far fewer square feet for those living in less desirable, presumably mixed-use districts.\textsuperscript{142} In other words, could the general welfare still be pro-

the invasion of objectionable industries or that they will not be subject to adverse decision by our courts?

Veiller, \textit{supra} note 122, at 101. According to Lawson Purdy:

\begin{quote}
The more I have thought of the way that we should proceed to get the courts to see what we wish them to see, the more convinced I am that we should all of us think in terms of value a great deal, popularize the idea of preserving the value of a man's house, of a man's lot. Get that talked about. When you meet one of these judges tell him about it, so that when, bye-and-bye, a case comes before him as a judge, it will be entirely familiar to him.
\end{quote}

Whitten, \textit{supra} note 106, at 41 (comment of Lawson Purdy).

\textsuperscript{137} See, e.g., Whitten, \textit{supra} note 106, at 41-42 (Comment of Lawson Purdy).

\textsuperscript{138} Id. at 36. Whitten noted that "[i]t will be difficult, unless the courts take a very liberal attitude, to show a reason under the police power for the prohibition of the multi-family dwelling \textit{as such} and without regard to yards, courts, open spaces or distribution of population." Id. at 37.

\textsuperscript{139} Id.

\textsuperscript{140} Id.; see also Comey, \textit{supra} note 119, at 160.

\textsuperscript{141} Whitten, \textit{supra} note 106, at 37. In addition, Whitten also recommended the use of minimum land area requirements for each family. Id. at 38. The United States Supreme Court would later approve a similar provision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). \textit{See infra} notes 184-98 and accompanying text.

\textsuperscript{142} Whitten, \textit{supra} note 106, at 39-40 (comment of A.W. Crawford). Newton Baker would subsequently make this argument on behalf of the Ambler Realty Company in the \textit{Village of Euclid} case. Brief and Argument for Appellee at 78-79, \textit{Euclid} (No. 31), reprinted in \textit{24 Landmark Briefs and Arguments of the Supreme Court of the United States} 565, 648-49 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter \textit{24 Landmark Briefs and Arguments}]. The Court in its decision would not address this argument.
moted when the welfare guaranteed to some exceeded that guaranteed to others?143 Whitten's response directed attention away from the disparate treatment of different people based upon their economic status, and instead characterized the provision as addressing the more acceptable concern of population distribution.144 Ultimately, by pitting the single-family dwelling against the apartment house and by providing the best districts for single-family homes, zoning advocates privileged the claims for protection of the property-owning, wealthier residents at the expense of less affluent, renting-class residents.145

The biases found in the proposals of zoning advocates such as Robert Whitten were undeniable, as evidenced in his claim that use and building size restrictions would promote a "more even distribution of population."146 This meant that a municipality's residents would live not simply in exclusive residential districts, but in light commercial or mixed-use districts as well.147 Residents living in such mixed-use districts, however, would be less affluent apartment dwellers. Exclusive residential districts would be preserved for owners of detached dwellings. Similarly, when a person such as Newman Baker argued that zoning needed to protect the "desirable citizen,"148 he clearly meant those who could afford their own home.149

But even as zoning advocates gathered a larger following among municipalities, zoning was not without its critics.150 Bruno Lasker raised doubts about the exclusion of a use in one district but not in another.151 He realized that, rather than promoting the general welfare, such regulation privileged the desires of some at the expense of others.152 Edward Landels echoed Lasker's concerns when he wrote:

143. As Crawford put the question: "'Why should a man who lives at the corner of A and 14th Street require for his family 5000 square feet, while the man who lives at the corner of B and 16th Street wants only 1250 square feet?'" Whitten, supra note 106, at 40 (comment of A.W. Crawford).
144. Id. "[This type of regulation] is a definite and consistent method for regulating the distribution of population, and what can come more clearly within the police power than the prevention of congestion of population, and the securing of the more even distribution of population throughout the city?" Id. at 41.
146. Whitten, supra note 106, at 41.
147. Id.
149. See id.
150. See, e.g., Edward M. Bassett, Constitutionality of Zoning in the Light of Recent Court Decisions, 1924 NAT. Mun. Rev. 492; Lasker, supra note 123, at 278.
151. See Lasker, supra note 123, at 278.
152. See id. Lasker more precisely pinpointed the central difficulty with, and the exclusionary core of, zoning when he wrote:
The state can scarcely be more solicitous of the health or the safety or the morals or the "welfare" of people who live on one side rather than the other of a more or less arbitrarily drawn line. If a duplex dwelling may be prohibited in one district on the grounds of health and safety, it is embarrassing to try and justify ten story apartments in another.\footnote{Landels, \textit{supra} note 119, at 165.}

Even more fundamentally, Lasker questioned why only lower-income people were excluded from single-family districts when single-family districts always occupied the best areas of a community.\footnote{Lasker, \textit{supra} note 105, at 677.} He questioned the rationale behind local governments' determinations to protect the wealthier single-family homeowners at the expense of poorer apartment dwellers.\footnote{Lasker, \textit{supra} note 123, at 278.} The simple answer was that zoning did not seek to protect all uses or all people equally—there existed more desirable and less desirable categories of both.\footnote{Pollard, \textit{supra} note 7, at 15.} To the degree that zoning promoted homogenous uses and excluded apartment houses, particularly in exclusive residential districts, the promotion of homogenous uses necessarily engendered economically homogenous populations in residential districts.\footnote{See Lasker, \textit{supra} note 123, at 278.}

Edward Bassett remained skeptical about the uses to which zoning could be put.\footnote{See Bassett, \textit{supra} note 150, at 492.} Although he placed great faith in the ability of the courts to strike down zoning ordinances that discriminated too obviously against public restriction . . . as soon as it departs from a classification of use districts and attempts to classify a number of home districts, becomes the employing of public power for the purpose of protecting sectional interests. But the city government is supposed to represent the interests of all the people, and no other.\footnote{Id.}

\footnote{153. Landels, \textit{supra} note 119, at 165.}
\footnote{154. Lasker, \textit{supra} note 105, at 677.}
\footnote{155. Why, in this country of democracy, is a city government, representative of all classes of the community, taking it upon itself to legislate a majority of citizens—those who cannot afford to occupy a detached house of their own—out of the best located parts of the city area, practically always the parts with the best aspect, best parks and streets, best supplied with municipal services and best cared for in every way?\textit{Id.}}
\footnote{156. Additionally, while the characterization of the apartment house as less desirable than the single-family home produced biased legislation, "less desirable" uses themselves were not adequately protected "against attack by the home owner or the business man when he seeks to restrain the less desirable use." Pollard, \textit{supra} note 7, at 15.}
\footnote{157. See Lasker, \textit{supra} note 123, at 278.}
particular districts or property uses, he recognized the ease with which zoning could be used towards these ends.

III. "Modern" Zoning, State Courts and *Euclid*

A. State Court Decisions Upholding Zoning Before Euclid

By the time the United States Supreme Court heard oral argument in *Village of Euclid v. Ambler Realty Co.*, a majority of state high courts had upheld differing forms of zoning ordinances. These decisions generally endorsed a doctrinal approach to zoning that featured strong support for a broad interpretation of the police power justified by the perceived need to protect the majority of property owners from threats engendered by urban expansion. This interpretation additionally implied a certain elasticity to the police power. To protect against the threat of haphazard growth, a municipality needed a police power whose reach could adjust to changing conditions and challenges facing a municipality. While use of this power could not have been previously justified because suburbs did not have to fear the dangers of haphazard development, it could now be seen as falling squarely within this power.

At its theoretical core, this approach balanced the individual's right to his property against the "collective" property right of the community at large. A majority of the courts hearing zoning challenges in the decade

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159. *Id.* at 493.
160. *Id.* For example, hospitals could be kept out of exclusive residential districts and left in less prestigious residential districts, and apartment buildings could be excluded altogether.
162. See *Landels*, *supra* note 119, at 163.
163. Specifically, property owners, especially owners of single-family homes, needed protection from the encroachment of cities and their negative attributes, such as noise, congestion and apartment houses—in short, elements that implied the presence of large numbers of people.
165. See, e.g., *Miller*, 234 P. at 383-84; *Beery*, 204 N.W. at 570 *Twin City II*, 176 N.W. at 161; *State ex rel. Carter v. Harper*, 196 N.W. 451, 455 (Wis. 1923); see also *Spector v. Building Inspector*, 145 N.E. 265, 267 (Mass. 1924) (discussing the "problems" that Milton sought to avoid).
166. *Burns*, 149 N.E. at 788; *City of Des Moines v. Manhattan Oil Co.*, 184 N.W. 823, 829 (Iowa 1921); *State ex rel. Morris v. Osborn*, 22 Ohio N.P. (n.s.) 549, 554 (1920); *Wulfsohn*, 150 N.E. at 124.
before *Euclid* favored the collective right of the community. Unfortunately, this two-sided formulation entirely ignored the claims of a third group—those effectively excluded from a community or its most desirable neighborhoods by the operation of a zoning ordinance. Moreover, this formulation framed zoning strictly in terms of property rights, rather than, for example, the equal distribution of people within a municipality's residential districts or the preservation of the opportunity to live in a community or district of one's choice. The claims of those without property generally or, more specifically, those who did not own property in a given municipality, were not incorporated into doctrine, even though, in a real sense, their potential presence in a district or municipality (i.e., in apartment houses) often motivated passage of regulations, and the regulations themselves directly affected their ability to establish a "home" in a desirable environment.

Doctrine as formulated reflected an understanding about what group required the protection of the law. Courts increasingly upheld zoning laws that protected the community of property owners at the expense of the ability of individual property owners to alienate their property without restraint. To this growing number of courts, a self-interested decision by an individual owner to sell property could easily lead, for example, to the building of an apartment house and the ensuing decline of an exclusive residential district. Regardless of whether courts protected the individual property owner or the community of property own-


168. See, e.g., *Osborn*, 22 Ohio N.P. (n.s.) at 555. A notable exception to this trend was the dissenting opinion filed by Chief Justice Brown of the Minnesota Supreme Court, which did take into account these third-party interests. *Twin City II*, 176 N.W. at 163-64 (Brown, C.J., dissenting).

169. Although on one level it is not unsurprising that the courts framed zoning in terms of property rights, zoning affected a sphere far greater than these rights alone. Even zoning advocates were quick to connect zoning to notions of the American home and the moral grounding of American society. See supra notes 188-90 and accompanying text. A broader legal doctrinal understanding of zoning, therefore, was certainly possible. See infra part IV.

170. One opinion which does bring up these issues is the dissent in *Twin City II*. See infra notes 220-22 and accompanying text. Zoning's growth during the twentieth century prevented those without property as well as the small property owner from having the opportunity to live in more desirable neighborhoods. This development of zoning also shifted attention from the exclusion of businesses and apartment houses from residential districts to enforcing minimum size requirements on residential housing.

171. See, e.g., *Burns*, 149 N.E. at 988; *Manhattan Oil*, 184 N.W. at 829; *Wulfson*, 150 N.E. at 125.
ers, however, those without property could do little to avoid being shut out of more desirable neighborhoods.

B. The Factual Context of Euclid and the District Court Decision

Having resisted annexation by Cleveland, the village of Euclid, Ohio, like the neighboring communities of Lakewood, Cleveland Heights, and East Cleveland, had become a "single-family, middle-class residential suburb[]."\(^{172}\) Specifically calling their village municipality a ""residential suburb,""\(^{173}\) the Euclid village council passed a modern zoning ordinance in 1922\(^{174}\) to ""preserve the present character of the Village.""\(^{175}\) Ambler Realty Company (Ambler) owned unimproved land in Euclid near the eastern border of Cleveland. The land was bound by the Nickel Plate Railway to the north and Euclid Avenue, ""the great business and commercial street of the metropolitan area of Cleveland,"" to the south.\(^{176}\) The first 150 feet of Ambler's land could only be used for single-family dwellings, the next 470 feet only for two-family dwellings, and the next 130 feet only for apartment buildings.\(^{177}\) The remainder of the tract could be used for industrial and manufacturing purposes.\(^{178}\) Further, ""[m]any additional restrictions [were] imposed as to the height of any and all kinds of buildings, as to the lot area which may be built on and which

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174. The Village of Euclid ordinance was similar to the first ordinance passed six years earlier in New York City. See Brief on Behalf of Appellants at 54-55, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (No. 31), reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 475-76 [hereinafter Euclid Brief]; Whitnall, supra note 60, at 11. See generally SEYMOUR I. TOLL, ZONED AMERICAN (1969). The New York experience with zoning exemplified the use of zoning to benefit an empowered group at the expense of an unempowered group. In this case, the established merchants of Fifth Avenue benefitted, while the Jewish immigrant garment workers suffered. Id. at 145-46. The Fifth Avenue merchants, however, speaking largely through their organized representative, the Fifth Avenue Association, supported zoning as a solution to the problems of noise, traffic and congestion. Id. at 158.


177. Id.

178. Id.
Inclusionary Jurisprudence

must be left free, and as to the set-back distances from street and lot lines.\textsuperscript{179}

When Ambler brought suit challenging the validity of the ordinances, the district court agreed that Euclid’s zoning ordinance should be struck down.\textsuperscript{180} It found that the ordinance exceeded the municipality’s police power because it did not promote the public peace, order, morals or safety.\textsuperscript{181} As such, the ordinance amounted to a taking of Ambler’s property without just compensation.\textsuperscript{182}

C. The Briefs Submitted to the Supreme Court

1. Brief on Behalf of the Village of Euclid

Even as it rendered its decision, the district court could foresee that the matter would be appealed to the Supreme Court.\textsuperscript{183} On appeal, Euclid relied on the increasing popularity of zoning and the similarity of its ordinance to other states’ judicially-sanctioned ordinances.\textsuperscript{184} The village focused more on the overarching benefits of zoning than upon the precise zoning ordinance at issue. To the appellant, the “basic question” was “whether there be a constitutional power to enact such ordinances as the one in question.”\textsuperscript{185} The village coupled this approach with an exhaustive

\begin{footnotesize}
\begin{itemize}
  \item[179.] \textit{Id.}
  \item[180.] \textit{Id.} at 317.
  \item[181.] \textit{Id.} at 314, 316, 317. The court held:

  Obviously, police power is not susceptible of exact definition. It would be more difficult, even if it were not unwise, to attempt a more exact definition than has been given. And yet there is a wide difference between the power of eminent domain and the police power; and it is not true that the public welfare is a justification for the taking of private property for the general good. . . . A law or ordinance passed under the guise of the police power which invades private property as above defined can be sustained only when it has a real and substantial relation to the maintenance and preservation of the public peace, public order, public morals, or public safety. The courts never hesitate to look through the false pretense to the substance.

\textit{Id.} at 314.

  \item[182.] \textit{Id.} at 312, 317. The court concluded:

  The plain truth is that the true objects of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a straight jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.

\textit{Id.} at 316.

  \item[183.] \textit{Id.} at 308. The court commented that “[t]his case is obviously destined to go higher.” \textit{Id.}

  \item[184.] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

  \item[185.] \textit{Id.} at 475.
\end{itemize}
\end{footnotesize}
review of favorable case law to bolster its argument concerning the increasing acceptance of the zoning authority of municipalities.\(^{186}\)

To establish the connection between the ordinance and the promotion of the general welfare, Euclid argued that zoning ordinances promoted the value of, and rights attendant to, property.\(^{187}\) As such, the ordinance benefitted the community as a whole.\(^{188}\) In particular, Euclid focused on the benefits that accrued when zoning ordinances separated residential and industrial uses.\(^{189}\) In addition to the increased feasibility of building thoroughfares and other benefits of zoning,\(^{190}\) the village presented the ordinance as promoting the "greater public welfare" of the "American home."\(^{191}\) Zoning ordinances would, it was argued, protect "the American People and American Principles" by protecting those districts that contained the single-family dwelling from the harm of encroaching commercial uses.\(^{192}\)

To Euclid, zoning served to stem the tide of change so as to promote what was, to the village, good about America.\(^{193}\) The village portrayed the zoning ordinances as the best means to ensure that everyone in Euclid had a home with a yard.\(^{194}\) Children would have safer and happier upbringings, streets would be cleaner, and a "greater interest in public

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186. Id. at 501-53.
187. See id. at 483-94.
188. Id. at 483.
189. Id. at 483-85. The appellants argued:

Under zoning, the territory is opened to the shop keeper or to the store-keeper only when and only as public consideration and general welfare and as the general trend dictate and the necessary enactment would naturally be noted only when the residence district becomes obsolete or has grown to be worn out or when it presents a situation where the general welfare would be better served if trades or factories or other uses were allowed to come in.

Id. at 485-86.

190. Id. at 485-90.
191. Id. at 490.
192. Id. at 490-94.
193. Id. As Euclid's brief stated:

[M]odern tendencies are rapidly destroying and undermining the continuance of separate and individual homes and residences.

The best minds of America are exhorting Congress and the States to do all that is possible in order to stem and prevent this tendency. As each city grows, there are proportionately less families living in houses than in apartments and tenements and above stores. The bulwark and the stamina of this country has always been credited and conceded to the home owning tendencies of the American People.

Id. at 490-91.

194. Id.
welfare and in civic affairs which usually attends the householder who, by reason of his home, pays taxes” would be promoted.\cite{1993}

2. Brief on Behalf of Ambler Realty Company

Ambler Realty, on the other hand, concentrated both on the use of its land for commercial purposes and on the specific shortcomings of Euclid’s ordinance.\cite{1994} Ambler claimed that the value of its land would be greater if used for business or industrial purposes instead of residential purposes.\cite{1995} Ambler sought to sever the connection between the ordinance and the general welfare,\cite{1996} claiming that the general welfare of the community would be served by enabling Ambler to build as it wished to bring jobs and money into Euclid.\cite{1997} This view of the general welfare emphasized the benefits of economic development.\cite{1998} To the degree that restricting the property to residential development thwarted such development, the general welfare suffered.

Ambler stressed that, even accepting that the protection of a residential district furthered the general welfare, this ordinance protected only the welfare of a particular segment of the community.\cite{1999} Ambler pointed out that in the most restrictive residence district, lot sizes could not be

\begin{itemize}
\item \cite{1993} Id. at 491.
\item \cite{1994} Brief and Argument for Appellee at 8-13, Euclid (No. 31), reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 565.
\item \cite{1995} Id. at 38-39 (citing Ambler Realty Co. v. Village of Euclid, 297 F. 307, 309 (N.D. Ohio 1924), rev’d, 272 U.S. 365 (1926)), reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 608-09.
\item \cite{1996} Id. at 22, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 592. The appellee argued:

How can it be said that this ordinance is addressed to any of the well-known objects of the police power under such circumstances, for the ordinance does not attempt to protect residences from the proximity of industrial undertakings, but only to protect certain sections of land from being occupied by both uses. This section conclusively shows that the ordinance is not designed to protect the health, safety and comfort of the public.

Id.
\item \cite{1997} Id. at 40-42, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 610-12.
\item \cite{1998} The appellees argued that the ordinance “imposes upon the general welfare the burden of having the business and industry of the Village of Euclid and the City of Cleveland diverted to less favorable and less available lands in order to maintain the favorable character for certain residence property.” Id. at 41, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 611. The appellees argued that “[t]his property in the interest of the public welfare, should be devoted to those industrial uses for which it is needed and most appropriate.” Id.
\item \cite{1999} See id. at 17-27, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 587-97.
\end{itemize}
less than 4000 square feet, while the least restrictive district allowed lots as small as 700 square feet. Ambler argued that the size restrictions ran counter to logic, as what would suffice for a family in one section of the village should be adequate for the entire village. It further noted that families living in districts with a larger minimum lot size would be “more prosperously environed” and in “a superior economic ostentation” than those living in districts with smaller minimums. The class-based implications of the zoning ordinance became irrefutable.

Ambler further highlighted the logical incongruity of a zoning ordinance that was intended to benefit more than just a particular class, but resulted in districts with the fewest residents and the most single-family homes receiving the most protection. Ambler pointed out that under Euclid’s ordinance, those districts with the greatest minimum lot size requirements were the same districts which had the fewest number of residents. It stressed that “[t]he lots on which the fewest people live are required to have the largest free area for light and air while those in which the most people live have minimum requirements for ventilation and light.”

203. *Id.*
204. The appellee argued:

Manifestly, if the health, safety and comfort of a family require 5,000 square feet of lot area in one part of the Village of Euclid they require it in all parts of the Village. Conversely, if the health, safety and comfort of a family are adequately provided for by a minimum of 700 square feet of lot area in any part of the Village of Euclid, the same minimum will serve the same purpose in every part of the Village.

*Id.*
205. *Id.*
206. *Id.* at 76-79, *reprinted in* 24 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 142, at 646-49. The appellee challenged the village’s use of its “police power”:

The ordinance is declared to be in fulfillment of a desire of the citizens of the village to “preserve the present character of said village” and to provide “for the general welfare of the citizens thereof,” which may or may not be for the general welfare, as that term is properly used; that is to say, the general welfare which is the basis of the police power does not necessarily mean the particular local and private welfare of the people, or of some of the people, resident within the accidental political limits of the village. The general welfare which recognizes the Village of Euclid as merely a constituent element of our general society and expects it to share the burdens, as it enjoys the benefits common to that society, is the general welfare upon which the police power rests.

*Id.* at 76, *reprinted in* 24 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 142, at 646.
208. *Id.*
Finally, Ambler explicitly addressed what it deemed the “real purpose” of the statute\textsuperscript{209}—protection of those who could afford to live in the exclusive residence districts of the village:

[F]rom [the “most healthful and desirable” residence districts] all are excluded except those who are able to maintain the more costly establishments of single family residences. . . . No apartment house or two-family house can be erected in [these districts], and yet the men, women and children who, for reasons of convenience or necessity, live in apartment houses or in the more restricted surroundings of two-family residences are of all others most in need of the refreshing access to the lake or the better air of the wooded upland.\textsuperscript{210}

Ambler ended with a warning about the power to zone: “It is not the power merely to negative dangerous or anti-social uses, but the power affirmatively to select among admittedly harmless uses those which the political power deems the most popular and to prohibit all others.”\textsuperscript{211} Whosoever controlled the political power would be able to use the zoning authority to their advantage.

3. The Amicus Brief of Alfred Bettman

As counsel filed the briefs on behalf of Euclid and Ambler, an \textit{amicus curiae} brief was filed by Alfred Bettman on behalf of, among other groups, the National Conference on City Planning.\textsuperscript{212} Bettman wrote “solely to discuss the question of the constitutionality of [modern] zoning,” and to urge the Court to affirm its constitutionality.\textsuperscript{213} For Bettman, zoning “represent[ed] a pressing need in growing American cities and urban regions,” such that any “true” zoning ordinance should be upheld.\textsuperscript{214}

\begin{footnotesize}
\footnote{209. \textit{Id.}}
\footnote{210. \textit{Id.} at 78-79, \textit{reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra} note 142, at 648-49.}
\footnote{211. \textit{Id.} at 82, \textit{reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra} note 142, at 652.}
\footnote{212. For a discussion of the role of the National Conference on City Planning in the development of zoning, see supra notes 105-06 and accompanying text. For additional background information on Bettman and his association with the “modern” zoning movement, see Randle, \textit{supra} note 172, at 47-48.}
\footnote{214. \textit{Id.} at 5, \textit{reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra} note 142, at 767. A “true” zoning ordinance was one which featured “a comprehensive distribution of the whole or a major portion of the territory of the community among all the necessary uses of every kind, each with appropriate standards of height and occupancy, all worked out as a community plan for the promotion of the common health, safety and welfare.” \textit{Id.}}
\end{footnotesize}
Zoning ordinances should be permitted to prevent "excessive gathering of human beings within a designated space," and to embody other restrictions to prevent developments that might "have a detrimental effect upon the public health, safety, convenience, morals and welfare."

Bettman argued that, although zoning "[did] aim to improve the good order of the cities," it did not function on behalf of aesthetic concerns. Rather, it sought to promote "those beneficial effects upon health and morals which come from living in orderly and decent surroundings." Without zoning, communities could not help but devolve into "blighted districts whose general conditions are more promotive of sickness and delinquency." Through zoning, "the building of homes is promoted," and the environment "stabilized." After all, "[n]o person who believes in homes and healthful home surroundings can fail to believe in the stabilized residential environment."

Apartment houses, however, did not deserve the same protection as single-family homes. Bettman approved of those state cases that had rejected challenges to zoning ordinances excluding apartment houses

215. Id. at 25, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 787.
216. Id. at 27, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 789.
217. Id. at 29, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 791.
218. Id. In language remarkably similar to that which the Supreme Court would employ, see infra note 241, Bettman continued:
[The man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. This assumption is indubitably correct.

Id. As Bettman articulated:
"Own your own home" is a slogan based on this realization of the advantages, in the way of health, which come from the home which has a surrounding or environment of sunlight, air, quiet, and cleanliness. Parents prefer to bring up children in such environment, not for any snobbish or aesthetic reasons, but because it promotes the health, mental, moral and physical, of the children.

Id. at 32, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 794.
219. Id. at 34, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 796.
220. Id. at 35, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 797.
221. Id.
222. Id. at 14-18, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 776-80.
from "exclusively single-family home districts." Bettman quoted approvingly from an earlier study that underscored the preferential treatment deserved by single-family homes as opposed to apartment houses and other uses. Ultimately, the individual property owner could protect himself only so far as his own property line extended. In the absence of zoning, the property owner could do nothing to protect himself against the self-interested actions of neighboring property owners. Bettman's argument underscored that these factors necessitated zoning. Given its recent growth and the number of state supreme courts upholding modern zoning ordinances, in Bettman's eyes, zoning deserved the approval of the Supreme Court.

D. The Supreme Court Decision

The Supreme Court reversed the district court's decision and upheld the constitutionality of modern zoning. Under the Court's analysis, zoning was an acceptable use of the police power because it shielded an as yet untainted municipality from problems that would adversely affect

223. Id. at 14, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 776.
224. Id. at 39, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 801. Bettman wrote:

Different classes of business and industries are segregated to districts adapted to their needs. Apartments and double houses are allotted to other territories while areas for single houses are always provided. The desirability of zoning laws in suburbs of large cities seems to be proven by the experience of many home communities where it has been tried. Retail business, manufacturing and nuisances are not allowed to creep into residential districts, destroying home values and undermining the elements of permanency and exclusiveness, which make residential districts desirable.

225. See, e.g., id. at 30-37, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 792-99.
226. Id. at 37, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 799. Bettman argued:

The area of the property which the individual himself owns represents the limit of protection which the individual can provide for himself, his property or his family or his business. The community alone, by means of a zone plan, can protect him and his family and his property and his business against the unwholesome, demoralizing and deprecating effects which his neighbors or other property owners may bring upon him, his property, his family or his business by the unregulated uses to which they put their properties.

227. Id. at 5, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 767.
228. Id. at 15-18, reprinted in 24 LANDMARK BRIEFS AND ARGUMENTS, supra note 142, at 777-80.
The Court further encouraged the creation of residential districts and effectively ensured their preservation by approving the use of the police power to zone out all commercial and business uses from such districts. These uses included apartment houses and similar multiple family dwellings.

The Court grounded its decision on two related principles. First, the Court found that, as a conceptual matter, the changes occurring in American society in the early 20th century necessitated zoning. As the country became larger and more complex, municipalities needed the power to control development within their borders and to protect themselves against growth and change. The Court concluded that although certain larger municipalities (such as Cleveland) already displayed the adverse effects of rapid growth, other smaller municipalities (such as Euclid) did not, and therefore needed the power to protect themselves from such effects. To the Court, the continued development of Cleveland posed a direct threat to Euclid and only through zoning authority could Euclid "divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated."

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.

But the village, though physically a suburb of Cleveland, is politically a separate municipality; with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines.
Second, the Court labelled apartment buildings as villains and detached dwellings as victims, thus analogizing the position of Euclid in relation to Cleveland to that of detached dwellings in relation to apartment buildings. To the Court, detached dwellings brought upstanding citizens to the community, while apartment buildings brought congestion, noise and, in general, danger to those who lived in detached dwellings. The result was that the Court found that “home” dwellers needed the protection of the police power.

The claim of the individual property holder received bare analysis by the Supreme Court, despite its prominence in the district court’s decision. However, given the identification of the threat of apartment buildings and the need to protect Euclid and its residents, it followed that the property rights of the community (i.e., Euclid) clearly outweighed any claim that an individual property owner (i.e., Ambler) could make on its own behalf. Instead, the Court focused on the property interests of holders of residential property, whose property and neighborhoods would be threatened by the use of property for commercial or business purposes. Districts zoned for residential use could not tolerate commercial development. To permit Ambler to develop its property in a nonresidential manner would expose Euclid to the “dangers” that “segregation” would supposedly avoid.

The Court went to great lengths to ensure that apartment houses—which the Court had already identified as commercial, as opposed to resi-

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237. Id. at 394.
238. Id.
239. Id. The Court concluded that “[u]nder these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.” Id. at 394-95.
241. Strengthening the Court’s decision to validate Euclid’s exercise of its zoning authority was the Court’s identification of Euclid as an independent sovereignty rather than as a part of Cleveland. Euclid, 272 U.S. at 389.
242. Id. at 389-90. To the Court, the “creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded” formed the “crux of the more recent zoning legislation.” Id. at 390. It is important to note that the Court considered apartment houses to be business or commercial uses.
243. The Court reasoned:
[T]he segregation of residential, business and industrial buildings ... will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorder; preserve a more favorable environment in which to rear children ....

Id. at 394.
244. Id.
dential, structures—could be zoned out of residential districts. Relying upon unnamed and unattributed “commissions and experts” that had produced “comprehensive reports” that “bear every evidence of painstaking consideration,” the Court singled out apartment houses for especial reproach. The Court essentially equated development of an apartment house in a residential district with the myriad of problems that accompanied the unzoned growth of cities. One apartment house would follow another until the residential district of private homes would be destroyed.

Through its characterization of apartment houses, however, the Court effectively ensured that all persons who lived in apartment houses would remain removed from residential districts. More striking was the Court’s failure even to acknowledge that people lived in apartment houses and considered their apartments to be their homes. Apartment dwellers presumably raised children, sought to remain in good health and, in general, shared hopes and fears similar to those living in detached dwellings. The Court in effect granted privileged status to the claim of wealthier

245. Id. at 390. The Court noted at the outset that “[t]he question [of the ordinance] involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.” Id. (emphasis added).

246. Id. at 394-95.

247. Id. at 394.

248. Id. at 394-95. The Court held:
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.

Id. at 394.

249. Id.

250. Id. The Court concluded:

[T]he coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the 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.

Id.

251. In its characterization of the evils that accompany apartment houses, the Court only addresses the impact on residents of private houses, but fails to discuss the equivalent effects on apartment dwellers. See id. at 394-95.
residents, those able to afford single-family homes, to be free from undesirable types of buildings and people. Because the Court's doctrinal formulation categorized apartment houses as a commercial use, and therefore a carrier of problems rather than a candidate for protection, the Court denied apartment dwellers the protection they needed.

The Court formulated zoning doctrine to become a constitutionally legitimate tool to avoid certain conditions thereby compounding such conditions rather than resolving them. If a municipality enacted a zoning ordinance in the early stages of its development, it could simply exile such problems as congestion and noise beyond its borders or, at least, beyond the boundaries of desirable residence districts. Zoning grew in response to the increasing complexity of modern municipalities, but served to divert these complexities onto less developed municipalities, not mitigate the complexities themselves.

252. Id. at 390.
253. As seen in the racial zoning cases, however, the Court justified its decision by resort to the most noble objectives. To ban apartment houses from residential districts would protect people from congestion, noise and nervous disorders, and would help to ensure the appropriate upbringing of children. Id. at 394. The Court ultimately advanced a sanitized view of zoning and, in so doing, effectively created a municipal planning tool—a power designed to help rather than to exclude. The difficulties inherent in apartment houses located in a residential district and, more generally, arising in a small municipality from the increasing complexity of urban life, thereby justified the possession of the authority to zone. Id. at 389-90.
255. At the beginning of its opinion, in partial reliance upon the principles of nuisance law, the Court established a standard to judge uses in connection with “the circumstances and the locality” in which the contested use was located. Euclid, 272 U.S. at 388. When applied to zoning and the problems engendered by urban complexity, this standard operated not to force the use out, but rather to keep the use out.

Assuming that its governing body enacted a zoning measure at an early stage, a locality would always be able to argue that the zoning ordinance was a proper police power enactment if it sought to protect the locality from potential problems. See, e.g., Spector v. Building Inspector of Milton, 145 N.E. 265, 267 (Mass. 1924); Wulfsohn, 150 N.E. at 123. In the case of a suburban municipality, as opposed to a city, such an argument might well be effective because of the less complex nature of the suburban structure. A greater degree of uses therefore would not seem appropriate given the nature of the suburb. A city, however, would have greater difficulty in using the zoning power to restrict problematic uses due to similar uses in existence within the city limits. These inherent urban problems have tempered the effectiveness of zoning in cities. Id. See generally Miller v. Board of Pub. Works, 234 P. 381, 388 (Cal. 1925) (discussing zoning in context of a large city).

Ultimately, the sole limitation imposed by the Supreme Court on a municipality's authority to manage its affairs seems more an after thought than a forceful prescription. The Court declared that it did not mean to “exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.” Euclid, 272 U.S. at 390. However, the Court did not articulate what it meant by the “general public” or what sort of “interest” might be sufficient to “so far outweigh” the “interest of the municipality.” Id.
IV. TOWARD AN INCLUSIONARY ZONING

The shaping of zoning doctrine by the Supreme Court was anything but inevitable. Indeed, the Court's formation of zoning doctrine could have taken a different developmental path yet still have survived constitutional scrutiny. Even accepting that a municipality ought to be able to exert some control over the development of its land, the Court could have emphasized the exclusionary basis of zoning and built safeguards into the municipality's use of zoning power. While the Court may or may not have invalidated zoning, perhaps finding that zoning could never be used to benefit an entire community, it could have set out to develop an inclusionary zoning jurisprudence. The remainder of this Article discusses some of the aspects of this jurisprudence, and identifies where the Court might have looked for precedential support.

A. Rudiments of an Inclusionary Zoning Jurisprudence

Initially, the zoning doctrine should have recognized that people lived in apartment buildings, and that their needs must be taken into account when determining what promotes the "general" welfare. Although apartments may have more impact on a neighborhood than detached dwellings, they should not have been consigned to commercial use. As a residence to many people, apartment houses required more balanced treatment by the courts. People should not have been denied the opportunity to live in a given residential district based upon the type of building in which they chose, or could afford, to live. Second, zoning doctrine needed to acknowledge the degree to which zoning, by design, furthered exclusionary aims by protecting the establishment of single-family residence districts. Third, the Supreme Court needed to give more teeth to its analysis of whether a zoning ordinance was a valid police power enactment. Essentially, a closer look at whether the ordinance truly promoted the general welfare was necessary. A particular zoning ordinance that clustered apartment buildings in particular districts and next to commercial structures was incorrectly viewed as promoting the general welfare, as residents of apartment buildings need healthful living conditions as much as those living in single-family homes. The general welfare would need to identify people as members of historically disadvantaged or disempowered groups rather than viewing general welfare as protecting particular people or residential districts at the expense of others. In other
words, the concept of "general" would have to be expanded to determine what promoted the general welfare.\textsuperscript{256}

In a sense, then, a new zoning jurisprudence requires a reexamination of where people live and who those people are. It also would have to accept that the ideal of owning an American home is just that—an ideal. Policy could be shaped to encourage it, but not punish those who have not yet attained the ideal. As such, the horizons of zoning doctrine would be expanded beyond those living in detached dwellings. Zoning doctrine would be a jurisprudence for the many, not for the few.

\textbf{B. Supportive Precedent Toward an Inclusionary Jurisprudence}

The Supreme Court's decision in \textit{Euclid}, although not lacking in supporting case law, required a different attitude toward zoning. The Court could have done more with available precedent than merely stacking pro-zoning cases up against anti-zoning cases and concluding that pro-zoning cases won the straw poll.\textsuperscript{257} By drawing more heavily upon the anti-zoning cases, the Court could have struck down the Euclid ordinance, while still enabling zoning to be found constitutional.

Some pre-\textit{Euclid} courts recognized that residents of affluent residential districts employed zoning to exclude less well-to-do people and simple commercial activities.\textsuperscript{258} In fact, the district court in \textit{Euclid} understood that zoning benefitted the few and not the many. In a decision essentially ignored by the Supreme Court, the district court wrote that zoning, by design, sought to segregate the rich from the poor.\textsuperscript{259} It concluded that "[t]he purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit [Euclid]. In the last analysis, the result to be accomplished is to classify the population and segregate them..."

\textsuperscript{256} This was one of the fundamental insights in Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 724 (N.J.), cert. denied, 423 U.S. 808 (1975), which included the region's residents among those whose needs were to be weighed in determining whether an ordinance promoted the general welfare. Arguably, however, this insight failed to change zoning doctrine much beyond New Jersey.

\textsuperscript{257} \textit{Euclid}, 272 U.S. at 390. In fairness, the Court did cite to and discuss certain pro-zoning decisions, but with the caveat that "[w]e shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all." \textit{Id}. The Court, however, did not attempt to cull any useful principles from the cases that struck down zoning ordinances.


\textsuperscript{259} \textit{Ambler Realty}, 297 F. at 316.
according to their income or situation in life." As economics dictated where people lived, so zoning along class lines kept people apart, thereby "furthering such class tendencies."

The district court further recognized the link between racial and zoning ordinances as a tool of exclusion. Just as the racial ordinances were struck down, the court asserted, so too should zoning ordinances be validated. To the extent that the purpose behind the racial ordinances was to exclude blacks from certain districts, municipalities would use zoning ordinances "for the purpose of segregating in like manner various groups of newly arrived immigrants."

The New Jersey Supreme Court similarly likened the attempt to keep stores out of exclusive residential districts to the exclusion of people of different races or nationalities from particular districts. The court rejected the municipality's argument that the presence of a store would leave the district "blighted." It held that, just as with an ordinance that attempted to segregate on the basis of race or nationality, it would not apply this ordinance to the plaintiff's property.

Related to this idea was the recognition that if zoning ordinances did not exclude either other people or uses from more exclusive residence districts, then higher density residences or commercial uses should be

260. Id. Several years prior to Ambler Realty, the Texas Supreme Court, in Spann v. City of Dallas, 235 S.W. 513 (Tex. 1921), made a similar observation about exclusion along economic lines fostered by zoning. The court was disturbed about the ability of wealthier home owners to keep smaller home owners from living in the same residence district. The court commented:

It would be tyranny to say to a poor man who happens to own a lot within a residence district of palatial structures and his title subject to no servitude, that he could not erect an [sic] humble home upon it suited to his means, or that any residence he might erect must equal in grandeur those about it . . . . It might proclaim his poverty; it might advertise the humbleness of his station; it might stand as a speaking contrast between his financial rank and that of his neighbors. Yet, it would be his "castle" . . . .

Id. at 516. The court ultimately struck down the ordinance.

261. Ambler Realty, 297 F. at 316. The court stated:

The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic.

Id.

262. Id.

263. Id. at 313. The court drew this conclusion despite its concern about the adverse effect on neighborhoods "whenever the colored or certain foreign races invade a residential section." Id.

264. Id.

265. State ex rel. Ignaciunas v. Risley, 121 A. 783, 786 (N.J. 1923).

266. Id. at 786.

267. Id.
spread out across a community. The Ohio Supreme Court, in *City of Youngstown v. Kahn*,\(^{268}\) considered a zoning ordinance that prevented the appellee from building an apartment building on its property. The court found that the ordinance sought to exclude apartment houses from the healthiest and most beautiful residential district in Youngstown.\(^ {269}\) The court recognized, however, that if apartment houses brought more people or traffic into an area, they should simply not be built in areas that already had many people and heavy traffic.\(^ {270}\) The court's reasoning, premised on the notion that all people have an equal claim to live in a community's nicest locations, highlighted the discriminatory logic behind the Supreme Court's implicit proposition that exclusive residential districts should be protected without regard for those living in apartment houses.

Central to the *Kahn* court's decision was its understanding that apartment house residents made good, if not better, neighbors than those living in detached dwellings.\(^ {271}\) Knowing what it was like to live close together "often makes [apartment house dwellers] more thoughtful with regard to phonographs and pianos than the people who dwell in private houses."\(^ {272}\) The court also rejected the claim that apartment house dwellers might be "less moral *per se*" than those who lived in detached dwellings.\(^ {273}\)

Two dissenting justices in *State ex rel. Twin City Building & Investment Co. v. Houghton*\(^ {274}\) also focused on the apartment dwellers excluded from the finer residence districts.\(^ {275}\) They wrote that "[i]t matters not how mentally fit, or how morally correct, or how decorous in conduct [apartment house dwellers] are, they are unwelcome."\(^ {276}\) The two jus-


\(^{269}\) *Id.* at 844.

\(^{270}\) *Id.* at 844-45. The Ohio court stated:

> It is argued that an apartment house menaces the public health because it increases congestion of population. We fail to see how removing the congestion from an apartment district, and distributing it in a healthful park surrounding, will injure the health of the city at large; rather will it aid the public health.

> It is also urged that this apartment house will result in congestion of traffic and danger to automobiles. The answer to that contention is that removing part of the congestion of traffic from more crowded areas to districts where there is more space, where there are fewer children playing upon the streets, cannot be said to interfere with the public safety.

*Id.*

\(^{271}\) *Id.*

\(^{272}\) *Id.* at 844.

\(^{273}\) *Id.* at 845.

\(^{274}\) 176 N.W. 159, 163-64 (Minn. 1920) (Brown, C.J., dissenting).

\(^{275}\) *Id.*

\(^{276}\) *Id.* at 163.
tices analogized governmental uses of its eminent domain power to other attempts to segregate more directly on the basis of race or nationality. They concluded that "[i]t is the same feeling which often finds expression in the making of distinctions based on race or nationality or upon natural or artificial social status."  

Aside from rehabilitating those living in apartment houses, some pre-Euclid courts also sought to strengthen the image of the apartment house. To these courts, the simple existence of apartment houses did not threaten the general welfare and necessitate the use of the police power to bring about their exclusion. The court in Kahn rejected outright the equation of apartment houses with commercial uses. According to the court, apartment houses created less havoc and were less of a threat to the public safety than nonnuisance businesses. The court found nothing "per se" dangerous about apartment houses and concluded in part that apartment houses might well be less of a fire risk than certain private homes.

In Twin City Building & Investment Co. v. Houghton, the Minnesota Supreme Court rebuffed a municipality’s attempt to use its eminent domain power to keep a three story apartment building out of an exclusive residence district. The court not only recognized that people lived in apartments, but rejected the claim that excluding apartments from a residence district promoted the general welfare. The court also looked at the motivation behind the municipality’s attempted use of the police power and found that residents of exclusive districts sought merely to

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277. _Id._ at 164.
278. _Id._
280. _Kahn_, 148 N.E. at 844-45.
281. _Id._ at 845.
282. _Id._ at 844. "There is not _per se_ more danger from fire from an apartment house than from a private house, for modern apartments are apt to be fireproof . . . Perhaps there is even less danger of fire from an apartment house than from a private house of frame and shingle roof." _Id._
283. 174 N.W. 885 (Minn.), _rev’d on reh’g_, 176 N.W. 159 (Minn. 1920).
284. _Id._ at 888.
285. _Id._ at 886.
286. _Id._ The court held:

If such a building affects the public health or safety or well-being of the community within the meaning of the police power, it can be outlawed by ordinance or statute without condemnation and accompanying compensation, and there is no need of condemnation against a nuisance. It is only when something rightfully belonging to another is to be taken from him the exercise of the superior sovereign right for a necessary public use that resort need be had to condemnation._Id._ at 886-87.
impose their preferences upon the community as a whole. The court rejected such reasoning in striking down the municipality's ordinance. On re-argument, the dissenting members of the court clearly understood that apartment houses lay at the center of the controversy. To these justices, the central issue of the case involved "whether a residence district . . . may exclude from its midst apartment buildings, which are thoroughly sanitary and which furnish satisfactory dwelling places to large numbers of our people."

Certain pre-*Euclid* courts, focusing on the nexus between a zoning ordinance and the promotion of the general welfare, also raised the question of who was included in the term "general welfare." Central to this inquiry was a concern that those living in exclusive districts were not the sole consideration in calculating the "general welfare." As a result, ordinances that privileged a district at the expense of other districts did not pass constitutional muster.

For example, the Minnesota Supreme Court, in *Lachman v. Houghton*, prohibited a municipality from using its eminent domain power to exclude a store from an exclusive residence district. The court stated that not only was it unacceptable for those living in such districts to keep out various uses simply because they did not wish to live near them, but any ordinance authorizing such a result misconstrued who was the beneficiary of the law's enforcement. To the court, the benefit went not to particular, wealthier residents, but rather to "common humanity." As the court wrote, "'[t]he law can know no distinction between citizens because of the superior cultivation of the one over the other.'"

Similarly, the Texas Supreme Court in *Spann v. City of Dallas* declared that "'[i]t is with common humanity . . . that police laws must deal" and that uses could not be excluded as "repugnant to the sentiments of a particular class." The New Jersey Supreme Court in *State ex rel.*

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287. *Id.* at 887.
288. *Id.* at 888. The Texas Supreme Court, in *Spann v. City of Dallas*, 235 S.W. 513 (Tex. 1921), reached a similar conclusion when faced with an ordinance that sought to ban stores from an exclusive residence district. The preferences and prejudices of the residents of the district did not support, in the eyes of the court, the use of the municipality's police power to promote the general welfare. *Id.* at 516.
290. 158 N.W. 1017 (Minn. 1916).
291. *Id.* at 1021-22.
292. *Id.* at 1021.
293. *Id.*
294. *Id.* (citing Quintini v. Board of Aldermen, 1 So. 625 (Miss. 1887)).
295. 235 S.W. 513 (Tex. 1921).
296. *Id.* at 516.
Ignaciunas v. Nutley\textsuperscript{297} held that it was the "public at large" who should benefit from a police power enactment.\textsuperscript{298} The "sentiments or desires of a particular class residing in the immediate neighborhood" was insufficient to support an ordinance's constitutionality.\textsuperscript{299}

Finally, given the degree to which these ordinances operated on behalf of a particular class and against other classes and uses, some courts concluded that zoning was a tool to support the status quo.\textsuperscript{300} They found that the privileged class' desire to preserve their privileges and advantages over others motivated these ordinances; ordinances were enacted to prevent the progression that occurred when desirable neighborhoods began to attract more people and commerce.

The district court in \textit{Euclid}, for example, found that the "true object" of Euclid's ordinance was "to place all the property in an undeveloped area . . . in a strait-jacket."\textsuperscript{301} Likewise, the court in \textit{Lachtman} found it unacceptable to exclude stores from a district "simply because there are now no stores there."\textsuperscript{302} Similarly, the dissenting justices in \textit{Twin City} found that "[t]he exclusive district is unwilling to battle with the economic law which changes the character of residence districts as time goes, or the natural instinct which prompts flat-dwellers to seek agreeable surroundings."\textsuperscript{303}

\section*{V. Conclusion}

Courts may weigh precedent as they see fit in deciding cases before them. In the \textit{Euclid} case, Ambler Realty, as a plaintiff looking to build factories on its property, may not have been the ideal party to raise arguments concerning residential segregation or exclusion. Still, the Supreme Court's decision in \textit{Euclid} carved out a particular conception of zoning

\textsuperscript{297} 125 A.121 (N.J. 1924).
\textsuperscript{298}  Id. at 122.
\textsuperscript{299}  Id.
\textsuperscript{300}  Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), rev'd, 272 U.S. 365 (1926); Twin City Bldg. & Inv. Co. v. Houghton, 176 N.W. 159, 163 (Minn. 1920) (Twin City II) (Brown, C.J., dissenting); Lachtman v. Houghton, 158 N.W. 1017, 1021 (Minn. 1916).
\textsuperscript{301}  Ambler Realty, 297 F. at 316.
\textsuperscript{302}  Lachtman, 158 N.W. at 1021 (quoting Stubbs v. Scott, 95 A. 1060 (Md. 1915)).
\textsuperscript{303}  Twin City II, 176 N.W. at 163. Several years later, one of the dissenting justices wrote the majority decision in State \textit{ex rel.} Beery v. Houghton, 204 N.W. 569 (Minn. 1925), \textit{aff'd}, 273 U.S. 671 (1927), that upheld the validity of a zoning ordinance that sought to exclude apartment houses from exclusive residence districts. \textit{Id.} at 570. Justice Dibbell saw sufficient potential benefit to the "small home owner" to uphold the ordinance. \textit{Id.} The justice nevertheless did not wish to "minimiz[e the] force" of his earlier claim that the power to exclude from districts deemed exclusive was unfortunate as "tending to accentuate class distinctions." \textit{Id.}
and privileged it. Alternative conceptualizations of or ideas relating to zoning dropped from legal "view" when the *Euclid* decision was handed down.

It is not the purpose of this Article to argue that the Supreme Court wrongly decided *Euclid*, so much as it is to examine what was lost as a result of *Euclid*. The purpose is to show that, far from being inevitable, *Euclid* resulted from a series of choices made by the Court. The Court seemingly disregarded the history of the laundry ordinances, the history of the racial ordinances, the non-legal writings on zoning, and case law directly addressing the use of the police power. Nor did the decision reflect a critical appraisal of the arguments of zoning's proponents or the opinions of various state supreme courts.

After the *Euclid* decision was handed down, Newton Baker, counsel for Ambler Realty, wrote that the importance of *Euclid* would be diminished over time.\(^3\) For quite some time now, however, the error of Baker's prediction has been apparent. In *Zoning and the American Dream*, a 1989 collection devoted to various reflections on *Euclid*'s impact, one contributor wrote:

Authorities have reached near consensus that *Euclid* is the most significant case in zoning and land use history. It is the "foundations [sic] under" the development of the law of zoning in America. The importance of the case lies not only in its seminal role in the development of land use law in America. The roots and effects of *Euclid*, still relatively obscure, run deep in our society.\(^3\)

When the Court decided *Nectow v. City of Cambridge*\(^3\) in 1928, and struck down a zoning ordinance that sought to place a portion of the petitioner's land, otherwise zoned for unrestricted uses, in a residential district,\(^3\) the decision raised an expectation, ultimately unfulfilled, that the Court would remain actively involved in resolving zoning disputes.\(^3\) Although the case involved an ordinance "of the same general charac-

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305. Randle, *supra* note 172, at 32 (citations omitted).
306. 277 U.S. 183 (1928).
307. Id. at 184-85.
308. See Sager, *supra* note 3, at 783. One year earlier, in *Zahn v. Board of Public Works*, 274 U.S. 325 (1927), the Court upheld the validity of a zoning ordinance in reliance upon its decision in *Euclid*. Id. at 328. The ordinance limited the use of the petitioner's property to residential purposes in a "largely unimproved" neighborhood that was "in [the] course of rapid development." Id.
ter" as the Euclid ordinance, the different factual context relieved the Court from raising the same socially significant issues it had in *Euclid*. Nonetheless, the decision raised an expectation, ultimately unfulfilled, that the Court would remain actively involved in sorting out zoning disputes.310

Given *Euclid*s ultimate hegemony, it was likely that zoning—this "bureaucratic" tool with an essentially obscured "exclusionary" power—would spread across the country. The erection of barriers by one municipality could only lead another municipality with similar concerns about undesirable "others" to "protect" itself with barriers of its own. Those who could scale these barriers were welcome; the "others" had to go elsewhere.

Indeed, this is precisely what has happened.311 Those who could not erect their own barriers or overcome those of others have been increasingly confined to the cities, while at the same time, those able to surmount the barriers have flocked to protected areas. As cities have become less and less the locus of jobs, and people of low-income and color have been increasingly consigned to live in them, the cities' living conditions and ability to house their low-income residents have gone into an arguably irreversible downward spiral.312

That all of this may have begun with a decision sixty-seven years ago still seems remarkable. When looking for causal links between legal decisions and social consequences, however, we should not lose sight of the constitutive role that these decisions play in shaping how we see the world. Court decisions, such as *Euclid*, do not reflect reality so much as they create it. Although it may be impossible to predict which decisions will have major constitutive significance, it is considerably easier to see which ones did. Sometimes, as in the case of *Euclid*, when such cases do come to our attention, it is worthwhile to unearth and reconstruct the buried fragments of a time when the landscape was not quite so fixed and not quite so accepted as simply "the way things are."

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309. *Id.* at 185.
312. *Id.*