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Euclid Lives? The Uneasy Legacy of Progressivism in Zoning

Cover Page Footnote

Assistant Professor of Law, St. Louis University. This Essay was supported by a research grant from the Claremont Institute Center for Local Government. It benefited from presentations at the American Political Science Association 2003 Annual Conference, Washington University School of Law, University of Colorado School of Law, and Wake Forest University School of Law. I am grateful to Dan Mandelker, Lee Fennell, Nicole Garnett, Stephanie Stern, and Phil Weiser for their comments and criticisms, and to Matt Jagger for his research assistance.

ESSAYS

EUCLID LIVES? THE UNEASY LEGACY OF PROGRESSIVISM IN ZONING

*Eric R. Claeys**

INTRODUCTION

When land-use law needs to explain how zoning came into being, it tells a well-known tale: Once upon a time, most cities and towns did not use centralized planning. During the eighteenth and nineteenth centuries, most cities regulated land use legislatively for only a few targeted problems, but in general, they relied on decentralized judicial regulation based on the common law of nuisance. Although nuisance-based regulation was incoherent and not particularly effective, easy access to land prevented most conflicts from getting out of hand. By the early 1900s, however, the American frontier had closed. The Industrial Revolution, growing cities, and motor-powered transportation all created intense land-use conflicts. As these pressures mounted, Americans gradually decided that they could not live any longer with judge- and nuisance-based land-use regulation. The heroes in this morality play, of course, are the expert planners and lawyers who introduced modern zoning—and also the U.S. Supreme Court, which surprised most observers and gave zoning a generous endorsement in the 1926 decision *Village of Euclid v. Ambler Realty Co.*¹

* Assistant Professor of Law, St. Louis University. This Essay was supported by a research grant from the Claremont Institute Center for Local Government. It benefited from presentations at the American Political Science Association 2003 Annual Conference, Washington University School of Law, University of Colorado School of Law, and Wake Forest University School of Law. I am grateful to Dan Mandelker, Lee Fennell, Nicole Garnett, Stephanie Stern, and Phil Weiser for their comments and criticisms, and to Matt Jagger for his research assistance.

1. 272 U.S. 365 (1926). The account in the text was synthesized from *Euclid*. See *id.* at 386-97; David L. Callies et al., *Cases and Materials on Land Use* 12-13 (3d ed. 1999); Jesse Dukeminier & James Krier, *Property* 747, 750-53, 951-56 (5th ed. 2002); Morton Gitelman et al., *Cases and Materials on Land Use* 281-82 (6th ed. 1997); Daniel R. Mandelker, *Land Use Law* § 1.04 (5th ed. 2003); Joseph William Singer, *Property Law: Rules, Policies, and Practices* 1048-55 (3d ed. 2002).

Although this tale is familiar, it is difficult to exaggerate how profoundly it has influenced American law. In the words of one leading property casebook, *Euclid* now serves “as a generous endorsement of social engineering in the name of public health, safety, and welfare.”² That endorsement provides zoning with political and legal legitimacy. It also exerts subtle but powerful pressure elsewhere throughout the law of property. Thus, in the 1930s, when the drafters of the *Restatement of Torts* restated nuisance law, they quietly dropped the conception of property rights that had previously informed the law and shifted to a utilitarian interest-balancing formula heavily influenced by legal realism.³ More recently, this metaphorical understanding of *Euclid* has exerted a powerful drag on the law of regulatory takings. The Rehnquist Court briefly flirted with the idea of expanding regulatory takings law,⁴ but the Justices’ attachment to zoning—to *Euclid*—put an end to these flirtations before they ever became serious.⁵

Charles Haar and Michael Allan Wolf celebrate this vision of land-use regulation in a recent essay, *Euclid Lives*.⁶ Haar and Wolf use *Euclid* as a metaphor to describe the principles of property law and land-use regulation most closely associated with zoning: flexibility in the face of changing circumstances, broad conceptions of the public interest, a fluid understanding of the “property” associated with use rights, and a heavy reliance on local expertise.⁷ They use these principles to criticize the regulatory takings cases and scholarship⁸ that have called zoning into question in recent years. The legal principles that make zoning run, they claim, represent a “strong element of

2. See Dukeminier & Krier, *supra* note 1, at 1010.

3. See Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 Alb. L. Rev. 189, 210 (1990).

4. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Dolan v. Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

5. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 Nw. U. L. Rev. (forthcoming 2004).

6. Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 Harv. L. Rev. 2158 (2002).

7. See *id.* at 2174-97. Haar and Wolf also discuss a fifth principle that federal courts ought to promote federalism values by deferring to state and local land-use regulations in takings challenges. See *id.* at 2191-94. Stewart Sterk has made the same argument in a full-length article in Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. (forthcoming 2004). This Essay does not discuss federalism. Federalism issues affect how federal courts should review constitutional challenges to zoning regulations, but not to how zoning ought to be organized in the first instance.

8. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Bernard H. Siegan, *Land Use Without Zoning* (1972); Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* (1997); Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630 (1988).

American legal thought,” which deserves to be “rediscovered and modified for deployment in the current debate over the nature and extent of private property rights.”⁹

Haar and Wolf should be commended for encouraging a scholarly discussion about *Euclid* and land-use regulation. I agree with them that the Rehnquist Court’s forays into regulatory takings law have been indefensible, though I am sure we disagree on the reasons why.¹⁰ Therefore, in this Essay, I focus on what I regard to be the most original and valuable contribution of their essay—their insights about the Progressive roots of zoning.

Zoning and *Euclid* are both products of the Progressive Era. The tenets of land-use regulation that Haar and Wolf praise are all hallmarks of the Progressive ideas that influenced American politics and the realist ideas that influenced American law in the first third of the twentieth century. Haar and Wolf recognize as much by calling these tenets by the general name “Progressive jurisprudence.”¹¹ They enthusiastically praise Progressive jurisprudence: They even go so far as to contend that it deserves to be considered with law and economics, critical legal studies, and the other schools of legal thought that have prevailed in the legal academy over the last several decades.¹²

This last claim is ambitious, and it deserves to be judged by standards as severe as the ambition is high. Haar and Wolf are surely right that Progressive ideas are central to zoning, and that a reexamination of these ideas is long overdue. However, as I will demonstrate in this Essay, I suspect that “Progressive jurisprudence,” to use Haar and Wolf’s term, is more problematic than they assume. This deficiency is understandable, for in zoning as elsewhere it is notoriously difficult to pin down what it means for law or legislation to be “Progressive.” Haar and Wolf confirm as much when they speak of Progressivism as faith in the “positive potential of government,” as a principle that “legislative and administrative efforts often result in social and economic progress for the commonweal.”¹³ Such statements make zoning sound as if it is all upside and no downside, as if zoning can provide all things to all communities without tying itself to any one vision of the common good. As a result, there are good reasons to wonder whether Progressive

9. Haar & Wolf, *supra* note 6, at 2160.

10. See Claeyes, *supra* note 5. Haar and Wolf would probably agree with Stewart Sterk’s response to that article. See Stewart E. Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeyes*, 99 Nw. U. L. Rev. (forthcoming 2004).

11. Haar & Wolf, *supra* note 6, at 2160.

12. See *id.*

13. *Id.* at 2197.

jurisprudence is as versatile as Haar and Wolf assume it is, and whether it is as robust a school of legal thought as they claim it is.

My answers are no, and no. This Essay argues that Progressive jurisprudence is not a self-standing legal theory; rather, it is better understood as a practical application of a more comprehensive Progressive theory of politics. In this Essay, I will continue to use the phrase "Progressive jurisprudence," as Haar and Wolf do, to refer to the general legal principles that unify and guide the law of zoning: changing circumstances, strong and diverse conceptions of the public interest, fluid property rights, and expertise. If one takes these principles at face value, zoning seems relatively apolitical. It seems to apply planning, expertise, and other value-neutral tools of social control to resolve potential land-use conflicts before they happen. But the normative claims that justify Progressive jurisprudence are not very well articulated. They do not explain zoning's basic orientation, and they cannot answer the hard theoretical questions a theory of law and politics must answer if it is going to earn a place at the table with the legal theories that prevail now.

To understand zoning's tendencies, one needs to understand them as an application of what this Essay calls "Progressive political theory." The Essay recovers, studies, and interprets materials long overlooked by the land-use community: the speeches and writing of zoning advocates in the 1910s and 1920s. These materials include books and pamphlets by leading urban and land-use reformers, the first wave of legal treatises written on zoning in the 1920s, and the published speeches and reports from the National Conference on City Planning, an annual conference conducted in the 1910s and 1920s by the leading practitioners, academics, and public officials who made up the first generation of "experts" in land-use planning and regulation.¹⁴ These materials are extremely insightful because they articulate more clearly than contemporary law the "public interest" justifications for contemporary Euclidean zoning. Zoning, like any other system of public-law regulation, depends on a comprehensive opinion explaining why it advances the "public interest." One may call such an opinion an ideology, a set of regime principles,¹⁵ an institutional purpose,¹⁶ or something else, but zoning clearly relies on some set of shared beliefs explaining how people behave in relation to claims about the common good, what specific vision of the common good will make them happy, and how zoning promotes it. This Essay calls that

14. See *infra* Part II.

15. See Bruce Ackerman, *We The People: Foundations* 59 (1991).

16. See Karen Orren & Stephen Skowronek, *Beyond the Iconography of Order: Notes for a "New Institutionalism,"* in *The Dynamics of American Politics: Approaches and Interpretations* 311, 326 (Lawrence C. Dodd & Calvin Jillson eds., 1994).

amalgamated theory of law and politics by the name "Progressive political theory."

As they apply to zoning, the main features of Progressive political theory run as follows. First, in the Progressive understanding, "the general welfare" tends to elevate what the Progressives called "organic" goods and what we would now call collective, communitarian goods. It elevates order, community, homogeneity, financial security, and beauty, and subordinates more self-centered goods like freedom and individual expression in the use of land. Second, and conversely, Progressive theory reshapes how law and regulation conceive of property. Property is directed away from allocating to each owner a zone of noninterference within which to use her own property actively for her own peculiar purposes; instead, owners are transformed into stakeholders in the common civic, aesthetic, and property-value interests that unify everyone in the locality. Third, zoning expects that local majorities should be given free rein to express their own communal visions of community, security, and aesthetics. Last, zoning expects that these majority-driven community visions can be implemented by local planning experts, who bring them to life by promulgating a legislative pattern of use districts, by enforcing the districts, and by granting exceptions to them.

The interpretation of zoning presented here deserves study for a simple reason: It calls into question whether conventional land-use scholars can explain why zoning matters and why it is a good legal institution. By "conventional land-use scholars," I mean to exclude scholars who think of themselves first as specialists in law and economics, critical legal studies, or some other theory for analyzing law and politics, and then apply the lessons of their interdisciplinary specialty to land-use regulation. I mean instead to refer to the scholars, such as Haar and Wolf, who immerse themselves in the administrative law and judicial review of zoning, who write the best practical casebooks and treatises on land-use regulation, and do the synthetic work to restate the law that must be organized and answer the questions that must be settled for any specific field of regulation to function as a self-standing specialty. The work and scholarship of conventional land-use scholars, so defined, depend heavily on the tenets of Haar and Wolf's Progressive jurisprudence, but those tenets are surprisingly questionable.

As will become clear, I have my doubts about zoning, and accordingly I make no claim to speak for the scholars for whom I am raising questions. But the problems with Progressive jurisprudence are serious. At a minimum, those problems dampen Haar and Wolf's hopes. Progressive jurisprudence does not deserve a seat at the table with law and economics and other similarly influential theories of law and politics. In addition, these problems ought to force conventional

land-use scholars to consider an awkward choice. Progressive jurisprudence's tenets do not stand on their own. They do make perfect sense as applications of what was formerly known as Progressive political theory, and what now thrives as communitarian political theory, but most conventional land-use scholars do not understand zoning law in these more political terms. If such scholars prefer not to embrace Progressive political theory, then zoning is bound to remain on uneasy theoretical foundations. If they prefer to embrace the more political commitments of Progressivism, they had better be prepared to accept the bitter with the sweet.

I. THE LEGAL CHARACTER OF EUCLIDEAN ZONING

A. *Exclusion Versus Governance*

To appreciate zoning's character, let us classify it in a taxonomy of different approaches to property regulation. The most revealing taxonomy is Henry Smith's distinction between "exclusion" regimes and "governance" regimes. According to Smith, when the law relies on an "exclusion" regime, it "uses a rough informational variable or signal—such as entry—to define the right, and thus bunches together a range of uses that juries, judges and other officials need never measure directly."¹⁷ Exclusion thus "grants owners a gatekeeper right that protects the owners' interest in a wide and indefinite class of uses without the need ever to delineate—perhaps even to identify—those uses at all."¹⁸ By contrast, at the other conceptual extreme lies a pure "governance" regime, which aims to "implement a list of use rights holding between all potential pairwise combinations of persons with respect to any... conceivable activity that has any impact on anyone."¹⁹

One must appreciate that distinction between exclusion and governance to appreciate the full force of Haar and Wolf's claims about Progressive jurisprudence. The legal history matters here, and as a matter of history, zoning replaced an "exclusion"-based regime of land-use regulation with a "governance"-based regime. Separately, when Haar and Wolf tout zoning's Progressive features, they do so because they like zoning's governance-based features—particularly in contrast to the "exclusion"-based approaches reflected in recent

17. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va. L. Rev. 965, 972 (2004) [hereinafter Smith, *Exclusion and Property Rules*]; see also Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. Legal Stud. 453, 453-87 (2002).

18. Smith, *Exclusion and Property Rules*, *supra* note 17, at 973.

19. *Id.* at 972-73 (discussing governance and governance's definition).

regulatory-takings cases by the Supreme Court, and in regulatory-takings scholarship by Richard Epstein and other similar scholars.²⁰

B. *Nineteenth-Century Land-Use Regulation*

From what we know about nineteenth-century land-use regulation, it tended toward the “exclusion” side of the continuum. We do not know enough about the legislative regulation from this era, but from the evidence available it seems that cities regulated land in ways that were much more narrowly targeted than modern zoning. Municipalities regulated the height and composition of buildings. They abated moral nuisances and gunpowder houses, slaughterhouses, and other sources of serious pollution. When certain neighborhoods “tipped” toward industrial, residential, or other uses, a city might define the boundaries of the ready-made “locality” and exclude non-conforming uses. Otherwise, however, they left land-use decisions to owners.²¹

That pattern of regulation was at least one pattern in land-use legislation, but it was also influential because it broadly tracked ideas about property regulation that prevailed in nineteenth-century constitutional law. In *Buchanan v. Warley*, a 1917 case invalidating a race-based zoning scheme enacted in Louisville, Kentucky, the U.S. Supreme Court described the broad outlines of police power land-use regulation as follows:

Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district, . . . because of the impairment of the health and comfort of the occupants.²²

By modern standards, these outlines made it difficult or impossible to use zoning for many important and routine public purposes. Judge D.C. Westenhaver gave a sense of what was left out when he declared

20. See *supra* notes 5 and 8.

21. The account presented in the text is provisional because we still know comparatively little about some forms of nineteenth-century American land-use regulation, especially municipal police power regulations, and because much of the evidence that we do have has been interpreted in sharply conflicting ways. However, the account presented in the text accords with the sketch of nineteenth-century land-use regulation portrayed in William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* 51-82, 149-90 (1996), and also the sketch of nineteenth-century moral theory portrayed in Mark Warren Bailey, *Guardians of the Moral Order: The Legal Philosophy of the Supreme Court, 1860-1910* (2004). The reader should note, however, that other scholars read the record to suggest that colonial and early American cities regulated land much more closely, along the lines of medieval towns. See, e.g., John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000).

22. *Buchanan v. Warley*, 245 U.S. 60, 74-75 (1917).

unconstitutional the zoning ordinance of Euclid, Ohio in *Ambler Realty Co. v. Village of Euclid*, the trial court prelude to the subject of Haar and Wolf's paean.²³ While zoning might be used to set uniform aesthetic standards throughout a town, such standards did not count as property "regulations" because they extinguished valuable use and development rights. That is not to say that cities could not impose aesthetic requirements. But it did mean they needed to condemn the possessory interests and servitudes they were taking from owners, pay the owners just compensation in an eminent domain proceeding and, most likely, finance the eminent domain by imposing special assessments on the neighbors benefiting the most.²⁴ Zoning could not be used to segregate stand-alone single-family houses from row houses, and it probably could not have been used to segregate any form of housing from apartments absent a showing that the apartments were unusually noisy.²⁵ Zoning could not be used to restrain the course of development of undeveloped property, at least not without making sure that the restraints provided owners a "reciprocity of advantage," by making the development rights they retained more valuable than the development rights they lost.²⁶

The conception of the police powers in *Euclid* was extremely narrow and decentralized in contrast to zoning. Within Henry Smith's dichotomy, the concept of regulation was narrow because it followed from an "exclusion"-based conception of property. Owners were presumed to deserve the greatest range of freedom available to use their properties for their own purposes. The law protected owners from pollution, vibrations, and other discrete and physical invasions of their use rights. That protection secured to owners a right to control the active use and development of their lots for their own purposes. At the same time, it generally refrained from enforcing uniformity requirements or pursuing aesthetic goals. Owners had to give up any right to complain about disuniformity or eyesores as the price for preserving the right to decide for themselves how to use their lots.

Both sides of this tradeoff followed from a conception of freedom that followed from the natural-law/natural-rights ideas evident in the

23. 297 F. 307 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

24. *See id.* at 316; *see also id.* at 316-17 (citing state court decisions).

25. *See id.* at 314 (holding that any "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"); *id.* at 316 (criticizing the ordinance because its "purpose . . . is really to regulate the mode of living of persons who may hereafter inhabit it").

26. *Id.* at 315-16. For more extensive support of this interpretation of Westenhaver's opinion, see Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1628-33 (2003). *See also* Seymour I. Toll, *Zoned American* 213-27 (1969).

Declaration of Independence and other Founding Era public documents. The “exclusion”-based conception of property followed from a conception of freedom centered in the individual. “Property” extended to every owner a presumptive right to decide, free from outside interference, how he should use his own labor and possessions for his own chosen ends. This presumption held unless the state or a neighbor could specifically show that an owner’s land use diminished and therefore injured the equal zone of noninterference to which each neighbor was entitled. *Buchanan v. Warley* described this presumptive zone of freedom as “the free use, enjoyment, and disposal of a person’s acquisitions without control or diminution save by the law of the land.”²⁷ This conception of freedom followed from conceptions of equal and natural rights out of Founding Era social-compact theory. In *Euclid*, Judge Westenhaver cited and applied provisions of the Ohio Constitution, declaring that “[a]ll men . . . have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property,” and that “[p]rivate property shall ever be held inviolate.”²⁸ As it applies to property, the natural law prescribes, and the social compact protects, “property” in a freedom to be left alone, to apply one’s own peculiar passions and talents to use one’s own property for one’s own advancement.²⁹

C. Euclidean Zoning

Euclidean zoning replaced this “exclusion”-based regime with a “governance”-based regime. Euclidean zoning institutes a centralized, command-and-control style of land-use regulation. It operates on the principle, “a place for everything, and everything in its place.” The zoning process enables local majorities to set the “governance” standards—the goals that use districts will promote. To draw up and enforce these districts, Euclidean zoning relies heavily on land-use experts. Taken together, these features work to encourage uniformity and majority rule over the disorder created by diverse individual choices.

One can appreciate the distinctive features of Euclidean zoning simply by comparing the outlines of the nineteenth-century system to the zoning scheme the Supreme Court upheld in its 1926 zoning decision *Village of Euclid v. Ambler Realty Co.*,³⁰ and to the Standard State Zoning Enabling Act (“Standard Enabling Act”), which the U.S. Department of Commerce published in 1926 with substantial

27. *Buchanan*, 245 U.S. at 74.

28. *Euclid*, 297 F. at 310 (quoting Ohio Const. art. I, §§ 1, 19).

29. See Claeys, *supra* note 26, at 1568-69, 1609-12.

30. 272 U.S. 365 (1926).

input from Progressive land-use planners.³¹ Above all else, Euclidean zoning centralizes community land use. The Standard Enabling Act requires development to be coordinated in “accordance with a comprehensive plan.”³² Most municipalities do not draft a “comprehensive plan” before they establish their zoning districts, but they still preapprove major development decisions through a centralized review process.³³ As the Supreme Court described Euclid’s zoning scheme, it was a “comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single-family houses, etc., the lot area to be built upon, the size and height of buildings, etc.”³⁴

The Euclidean zoning plan expanded the range of public interests that could legally justify a local scheme of land-use regulation. Zoning expanded the conception of the “public interest” or “general welfare” protected by the police powers. Some of the factors considered in the comprehensive city plan closely tracked the conceptions of individual rights and general welfare that prevailed in the nineteenth century. These factors included, for instance, how “to lessen congestion in the streets,” and “to secure safety from fire.”³⁵ But the plans were also required to incorporate many other factors that were not part of the normal nineteenth-century conception of the public interest. Comprehensive plans had to consider how “to provide adequate light” and “to avoid undue concentration of population.”³⁶ Most far-reaching, comprehensive plans needed to consider how zoning would affect property values by “conserving the value of buildings,” and whether zoning would promote aesthetic and community-character concerns by “encouraging the most appropriate use of land throughout [the] municipality.”³⁷

Progressive zoning also gave local land-use planners a larger complement of regulatory tools. The Standard Enabling Act recognized some regulatory powers that were unexceptional on the earlier view, like the power to regulate the size and composition of buildings.³⁸ It also vested in municipalities new powers, including the

31. Dep’t of Commerce Advisory Comm. on Zoning, *A Standard State Zoning Enabling Act: Under Which Municipalities May Adopt Zoning Regulations* (1926) [hereinafter *Standard Enabling Act*].

32. *Id.* § 3.

33. Cf. Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 Harv. L. Rev. 1154 (1955) (studying how courts do and should enforce the “in accordance with a comprehensive plan” requirement when a city does not promulgate a plan before promulgating zones).

34. *Euclid*, 272 U.S. at 379-80.

35. *Standard Enabling Act*, *supra* note 31, § 3.

36. *Id.*

37. *Id.*

38. *Id.* § 1.

powers to regulate the percentage of a lot that could be developed, minimum open space requirements, and population-density levels.³⁹ The most powerful new tools, however, were the use districts—the zones.⁴⁰ The Standard Enabling Act took to a new level what *Buchanan* had recognized as the power to confine certain uses of property to neighborhoods “other than the resident district.”⁴¹ Section 2 recognized a power to “divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act.”⁴² In practice under the Standard Enabling Act, use districts were cumulative so that owners could pursue more delicate land uses in districts reserved for more industrial uses; more recently, zoning ordinances have tended to make use districts exclusive, allowing only the uses specified for the zone.⁴³

All of these changes traced a shift from an “exclusion”-based conception of property to a “governance”-based conception. Before zoning, most land uses were presumed legitimate, unless specifically shown to be dangerous or unsuitable to the neighborhood. Afterward, most land uses were presumed illegitimate unless they conformed to the master plan’s specifications for the local use district.

Euclidean zoning thus transformed the orientation of property rights. It transformed what used to be a negative liberty into a positive entitlement. Once Euclidean zoning had taken over, each zoned lot came with a security—a legal guarantee that neighbors would use their lots consistently with tastes, standards and economic goals set by the control group in the local community. In the process, Euclidean zoning also shifted a great deal of control over land-use regulations from individual owners to local majorities and expert land-use planners. Each local owner loses substantial freedom to control the use of his own parcel of land, but gains the opportunity to vote on how his neighbors ought to use *their* properties. In turn, the majorities pass on some of their newfound power to their administrative delegates—local land-use planners—who implement the majorities’ will in two stages. Zoning commissions supervise and enforce the zones; boards of adjustment or similar entities consider requests for special exceptions, variances, and other deviations from the zones.⁴⁴

39. *Id.*

40. *Id.* § 2.

41. *Buchanan v. Warley*, 245 U.S. 60, 75 (1917).

42. Standard Enabling Act, *supra* note 31, § 2.

43. *See* Mandelker, *supra* note 1, § 1.04.

44. *Id.* § 6.

II. THE PROGRESSIVES' CASE FOR ZONING

A. *Progress*

The obvious question to ask is whether zoning's supporters justified this new approach by appealing to any overarching political theory comparable to the natural law ideas that informed nineteenth-century land-use law. As it turns out, they did. These features of zoning are all hallmarks of Progressive political theory: the centralization of land-use planning, the transformation of property rights to accommodate that centralization, and the reliance on majority rule in the broad picture and on experts in the details.⁴⁵ To show the connection, this part studies the books and pamphlets written to persuade cities to adopt zoning, the legal treatises written after zoning codes survived constitutional challenges in the courts, and many speeches, colloquies, and papers by urban planners involved in the annual National Conference on City Planning, the trade guild for professional zoning advocates.

Before proceeding it is important to consider two possible objections to interpreting these materials. One objection, stated by William Fischel, holds that Progressive reformers, planners, and lawyers were not as crucial to the history of zoning as popular majorities and home developers.⁴⁶ My purpose here, however, is not to argue about which political constituency was most influential in campaigning for zoning. Even if majorities and developers exerted the political muscle, Progressive planners and lawyers still wrote the blueprints for zoning laws and stepped in as the first zoning administrators. The latter thus supplied the theory of the "public interest" that put a public face on the homeowners' and developers' private demands. Another obvious objection is that these reformers, lawyers, and planners did not speak with the same voice or subscribe to any one overarching set of political assumptions. It is true that most of these activists did not connect their specific and practical arguments for zoning to any comprehensive and fully-articulated political theory. All the same, that fact does not prove much. Politics would become extremely tendentious if partisans needed to defend every step of their argument by citing the thought of some leading public intellectual. Zoning's advocates did share some political consensus covering the topics mentioned above. They presupposed a

45. To appreciate the similarities, compare the portrait of Progressive administrative theory in Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, Const. Comm. (forthcoming 2005) (manuscript on file with author) with the classic defense of New Deal administrative government, in James M. Landis, *The Administrative Process* (1938).

46. See William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 Urb. Stud. 317, 319 (2004).

common understanding as to how academic and professional sciences could improve real life practice in land use. As a result, it is revealing to interpret the writings of early land-use advocates on the hypothesis that they were applying general principles of a single political theory to land-use practice. Like any other, this interpretation must be judged by whether it plausibly makes sense of the sources and explains important features of zoning.

To restate several of the leading themes of Progressive political theory, this part will rely on the later writings of Woodrow Wilson. Before Wilson was President of the United States, he was a respected professor of political science and a leading public intellectual. The works he wrote while contemplating his candidacy for the President, *The New Freedom*⁴⁷ and *Constitutional Government in the United States*,⁴⁸ are extremely informative because they distill several decades of Progressive academic thought into two manageable books. As Wilson defined progress, it was a faith in the future: “The modern idea is to leave the past and press onward to something new.”⁴⁹ The Progressive future unfolded through a process of adaptation. “The laws of this country have not kept up with the change of economic circumstances in this country,” Wilson asserted, “they have not kept up with the change of political circumstances; and therefore we are not even where we were when we started.”⁵⁰ This adaptation is not something the people enter into voluntarily; it is a fundamental political reality. “I do not say we may or may not,” Wilson stated, “I say we must; there is no choice. If your laws do not fit your facts, the facts are not injured, the law is damaged; because the law . . . is the expression of the facts in legal relationships.”⁵¹

Progressive adaptation in politics thus follows Darwin’s principles of evolution in biology, with one important difference: the unit of study in political science is not the single human, but a human society. Like a Darwinian species, society is in a constant state of evolution—constant “development and accommodation to environment”—and evolution always proceeds onward and forward.⁵² Government, Wilson explained, falls “under the theory of organic life”; it is “modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life.”⁵³ A government, however, cannot adapt effectively unless its citizens constitute a well-formed people. A people is well formed if its leading opinions are rational, if

47. Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (1913).

48. Woodrow Wilson, *Constitutional Government in the United States* (1911).

49. Wilson, *supra* note 47, at 42.

50. *Id.* at 33.

51. *Id.* at 35.

52. *Id.* at 45.

53. Wilson, *supra* note 48, at 56.

they are shaped not in haphazard fashion but with intelligent planning, by “a quick concert of thought, uttered by those who know how to guide both counsel and action.”⁵⁴ Such a people have mastered their selfish tendencies and redirected their energies toward the common good, like the readers of *The New Freedom*, which Wilson dedicated “to every man or woman who may derive from it . . . the impulse of unselfish public service.”⁵⁵

B. *Changed Circumstances*

These concepts of progress, adaptation, and community inspired the Progressives to critique a wide range of American institutions, including the law of land use. That critique started with the notion of changed circumstances. The Progressives held that new times required a new set of land-use laws. American city life and living patterns had changed drastically between the end of the eighteenth century and the beginning of the twentieth. Lawyers who subscribed to the earlier natural-law/natural-rights view would readily agree that land-use law needed to change with the times, but only to regulate new conditions to conform to permanent principles.⁵⁶ Progressive land-use reformers, however, concluded that new times required not only new laws but also new principles.

The new times were ushered in by Frederick Law Olmsted, Jr., an architect, a Harvard professor and the first president of the National Conference on City Planning. Olmsted captured the new point of view when he described the modern city as a “live, productive organism . . . in a constant state of change and growth.”⁵⁷ “Just as new generations replace the old with individuals who differ from their predecessors to some extent in body and in mind,” Olmsted reasoned, “so in such a city old buildings, old streets, old institutions must give way, more slowly but no less certainly, to new and different generations.”⁵⁸

As in many other areas of reform, the most immediate agent of progress in land-use reform was the Industrial Revolution, which caused unforeseen and unprecedented economic problems. Olmsted identified “the need for additional equipment”—buildings and

54. *Id.* at 21.

55. Wilson, *supra* note 47, at v. I have further explicated the themes in this section elsewhere. See Eric R. Claeys, *Zoning and Progressive Political Theory*, in *The Progressive Revolution in Politics and Political Science: Regime Change in America* (Ken Masugi & John Marini eds., forthcoming 2005).

56. See Claeys, *supra* note 26, at 1574-76.

57. Frederick Law Olmsted, Jr., *Reply in Behalf of the City Planning Conference*, in *Proceedings of the Third National Conference on City Planning 5* (1911) [hereinafter *Third Conference Proceedings*].

58. *Id.* at 10.

housing—the production of which was stimulated “indirectly and often so tardily as to cause serious hardship and economic loss.”⁵⁹ For engineer and Planning Conference Vice Chairman Nelson Lewis, the proper response was to identify “[t]he economic considerations which should control city planning . . . namely, adaptation to probable or possible increase in demand and capacity to supply that demand.”⁶⁰

But many Progressives rejected Lewis’s assumption that economic forces were the most powerful agents of progress. These reformers thought that these economic factors merely reflected deeper psychological, social, and political changes. Sharp economic growth, coupled with the closing of the American frontier, worked a profound change in the American collective consciousness. The country embraced a new psychology of scarcity. As historian Christine Boyer explains this change, the demise of the frontier swept in “the concept of limit and the change of sympathies it entailed. When Americans reached the end of westward expansion and were finally forced to turn inward upon themselves, it was with hostility and embarrassment that they observed their disfigured and inhumane cities.”⁶¹

The same historical forces also created demand for a new form of municipality, the “suburb.” Progressive housing reformer Carol Aronovici expected that “Utopia[] [could be] realized in the suburbs.”⁶² Suburbs represented the next wave of progress as soon as the cities declined. Suburbs promised to prevent many of the atomizing tendencies of industrialization. As social reformer Annie Diggs explained, workers were entitled to “a righteous share of the benefits of civilization they help[ed] to create.”⁶³ The way to do so was to give each worker a quarter acre and a lawn to return to at the end of the working day in the city factory. “The demoralizations and deprivations consequent on congested centers of population,” warned Diggs, “have at length taught the Garden City economist the essential sin of divorcing the children of men from their Mother Earth.”⁶⁴ And in return, robust suburbs would also redound to the benefit of the cities. Homeowners habituated to enjoy the benefits of garden living would, in Christine Boyer’s description, “no more tolerate the slum

59. *Id.* at 5-6.

60. Nelson P. Lewis, *The City Plan Defined by a Municipal Engineer*, in Proceedings of the Seventh National Conference on City Planning 3 (1915) [hereinafter Seventh Conference Proceedings].

61. M. Christine Boyer, *Dreaming the Rational City: The Myth of American City Planning* 4 (1983).

62. Carol Aronovici, *Suburban Development*, 51 *Annals Am. Acad. Pol. & Soc. Sci.* 234, 238 (1914).

63. Annie L. Diggs, *The Garden City Movement*, 28 *Arena* 626, 628 (1902).

64. *Id.* at 631-32.

and the tenement than they would the plagues that were prevalent a generation ago.”⁶⁵

The Progressives were both concerned and optimistic about the prospects of reforming land-use planning in their day. They were concerned because they thought United States cities were lagging behind the finest European cities like Paris and especially the best-planned German cities, which had all embraced zoning.⁶⁶ Even so, the Progressives were optimistic because they expected to surpass their French and German role models. European planners needed to reckon with centuries of archaic traditions; the Progressives were in the fortunate position of legislating on what they regarded as a blank slate. As Chicago reformer Walter Moody proclaimed, “We of America, starting in a new country, acting without restraint of custom or ancient law, see our own remarkable opportunities in city building, and, it may be generally stated, are working for harmony and beauty in the building of our cities.”⁶⁷

C. *The Rise of the General Welfare*

Thus, the Progressives needed to ask how best to exploit both the opportunity and the challenge that the forces of progress had thrust upon them. They had a wide range of proposals, including city clean-up, property-value stabilization, beautification, and above all, urban planning. To establish each of these proposals in practice, they needed to redefine what counted as a legally cognizable “general welfare.” American constitutional law recognized that states and localities enjoyed an inherent police power to legislate for the public health, safety, and morals and what Lawrence Veiller, Secretary of the National Housing Association, called “that novel, broad and sweeping ground, ‘the general welfare.’”⁶⁸ Veiller read turn of the century precedents on the meaning of this phrase to “open[] a door a crack,

65. Boyer, *supra* note 61, at 42; see also Frank T. Carlton, *Urban and Rural Life*, *Popular Sci. Monthly*, March 1906, at 255. See generally Boyer, *supra* note 61, at 40-43.

66. See, e.g., Walter D. Moody, *Wacker’s Manual of the Plan of Chicago* 27-38 (3d ed. 1920); Edward M. Bassett, *A Survey of the Legal Status of a Specific City in Relation to City Planning*, in *Proceedings of the Fifth National Conference on City Planning* 46, 58-59 (1918) [hereinafter *Fifth Conference Proceedings*]; Frederick C. Howe, *The Municipal Real Estate Policies of German Cities*, in *Third Conference Proceedings*, *supra* note 57, at 14; Frank B. Williams, *Some Aspects of City Planning Administration in Europe*, in *Seventh Conference Proceedings*, *supra* note 60, at 144, 147-54.

67. Moody, *supra* note 66, at 39. For development of the themes in this section, see Claeys, *supra* note 55.

68. Lawrence Veiller, *Districting by Municipal Regulation*, in *Proceedings of the Eighth National Conference on City Planning* 147, 153 (1916).

which may be opened very wide. How wide it may be opened few of us can tell.”⁶⁹

The Progressives understood the general welfare in strongly communitarian terms. They hoped to instill Americans with a sense of local community as an antidote against the destructive and atomizing tendencies of the Industrial Revolution. The Industrial Revolution upset city life by making cities bigger, dirtier, more unwieldy, and more chaotic than they had ever been before. It upset the life of the working man by subordinating him into a huge industrial organization and by severing the connection that used to exist between his work and home.⁷⁰ The Progressives tried to correct these problems at both the national and the local levels. At the national level, Progressives like Woodrow Wilson and Herbert Croly expected the Constitution, and especially the Commerce Clause, to hasten the formation of a general American will strong enough to give Congress a basis to respond to industrial dislocation.⁷¹ Paradoxically, however, this national project could not succeed without more energetic local government. As Wilson explained:

[M]orals enforced by the judgment and choices of the central authority at Washington, do not and cannot create vital habits or methods of life unless sustained by local opinion and purpose, . . . and only communities capable of taking care of themselves will, taken together, constitute a nation capable of vital action and control.⁷²

The early social reform land-use literature is riddled with Wilson’s idea of formation. Walter Moody claimed that national patriotism was getting “a companion sentiment—devotion,” and “patriotism, an outgrowth of modern conditions of life, [which] takes the form generally of a high and controlling pride in one’s native city, or in the city in which one abides and has adopted as his home.”⁷³ James Metzenbaum regarded the single-family home as “[t]he bulwark and the stamina of this country, . . . one of the important factors in the sustaining of the American people and American ideals.”⁷⁴ Many Progressives were uneasy with the commercialism of modern life and nostalgic for the intense patriotism of antiquity. Moody, for one, hoped that

69. *Id.*

70. See Boyer, *supra* note 61, at 9-56; Richard Hofstadter, *The Age of Reform* 215-27 (1955).

71. See Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 *Wm. & Mary Bill Rts. J.* 403, 416-18 (2002).

72. Wilson, *supra* note 48, at 195.

73. Moody, *supra* note 66, at v.

74. James Metzenbaum, *The Law of Zoning* 127 (1930).

[s]tudents of modern history, seeking to classify or set apart this devotion to the city by its people, and love of a city by its children, will find the feeling not only a new, unique and valuable tendency of the times, but also a revival, under modern conditions, of a patriotism as old as civilization itself.⁷⁵

These conceptions of patriotism and ideals gave Progressive legislation a communitarian spirit. Moody, Metzenbaum and Wilson were voicing themes that trace back to Jean-Jacques Rousseau. Rousseau's social contract promised to solve what he diagnosed as the fundamental problem in the human condition: that man is so free that he knows little better than to enslave himself out of fear of his freedom.⁷⁶ The social contract promised to solve this problem because "the total alienation of each associate, together with all his rights, to the whole community" would free him to partake in the community's "unity, its common identity, its life, and its will."⁷⁷ The Progressives' concept of community is quite similar, because many American Progressives received their educations at German universities influenced by Georg W.F. Hegel's theories of history and the state, which in turn were influenced by Rousseau's thought.⁷⁸ The historical march of progress steered man toward the social contract; Progressive communities and laws finished the job.

The Progressives had at least four ways to institute the strong local communities of which they were so enamored. First, cities needed to control overcrowding. New York reformer Benjamin Marsh saw density controls as a way to prevent high mortality rates and physical deterioration.⁷⁹ Chicago reformer George Hooker worried that housing for "the masses of the people are chiefly characterized by disorder," caused by "the activity of certain great special interests," and "tendencies more or less personal to the people themselves."⁸⁰ In some cases, controlling overcrowding was a polite way of excluding "undesirable" residents like new immigrants and members of different races.⁸¹

75. Moody, *supra* note 66, at vi.

76. See Jean Jacques Rousseau, *The Social Contract*, in *The Social Contract and the Discourses* 179, 181-82 (G.D.H. Cole trans., 1993).

77. *Id.* at 191-92.

78. See Thomas H. Logan, *The Americanization of German Zoning*, *Am. Institution Plan. J.*, Oct. 1976, at 377; Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid, in Zoning and the American Dream: Promises Still to Keep* 101, 103-05 (Charles M. Haar & Jerold S. Kayden eds., 1989).

79. See Benjamin Clarke Marsh, *An Introduction to City Planning: Democracy's Challenge to the American City* 7-10 (1909).

80. George E. Hooker, *Congestion and Its Causes in Chicago*, in *Proceedings of the Second National Conference on City Planning and the Problems of Congestion* 42, 49 (1912).

81. See Bruno Lasker, *The Atlanta Zoning Plan*, 48 *Survey* 114, 114-15 (1922)

Second, cities and suburbs alike were expected to zone to make themselves more presentable and more beautiful. John Nolen disparaged the tendency in nineteenth-century law to keep land-use regulation out of aesthetic disputes. “Nothing can be valid,” he said of most American cities, “that has this degree of sordid and self-satisfied ugliness. We were meant to live in beauty, to cherish it and to create it, and a civilization that functions in the hideous and uncouth is a civilization of the wrong shape.”⁸² Thus, when Daniel Burnham staged the 1893 World’s Fair in Chicago to show off the city’s architecture, he sparked a “City Beautiful” movement seeking to adorn America’s great cities with neoclassical monuments.⁸³ While the cities promised grandeur, the suburbs beckoned with pastoral, idyllic tranquility. Englishman Ebenezer Howard encouraged the move to the suburbs in his 1902 book *Garden Cities of To-morrow*, which promised to remedy London’s overcrowding by providing workers with wholesome homes outside city limits.⁸⁴ Frederick Law Olmsted, Sr., a renowned architect and city designer, embraced the suburban vision for America. “[T]he demands of suburban life” would “advance upon” the refinement “characteristic of town life” because it would secure “the peculiar advantage of the country, such as purity of air, umbrageousness, facilities for quiet out-of-door recreation and distance from the jar, noise, confusion, and bustle of commercial thoroughfares.”⁸⁵

Third, cities and especially suburbs were expected to use regulatory powers to stabilize the price of home values. It might seem strange to call a suburbanite “communitarian” for wanting to exclude new development to prop up the price of his home. Nevertheless, that is how Charles Cheney, a California planner, saw it. Cheney insisted that it is the object of zoning to remove “uncertainty from real estate while, stabilizing property values.”⁸⁶ Robert Whitten, a nationally-known academic influential in New York City and Cleveland zoning

(warning of racial exclusion); cf. Metzenbaum, *supra* note 74, at 128 (arguing that zoning “prevent[s] ‘slums’ and congested living quarters, which develop into blighted territory”). See generally Constance Perin, *Everything in Its Place: Social Order and Land Use in America* (1977); Rabin, *supra* note 78.

82. John Nolen, *The Place of the Beautiful in the City Plan, Some Everyday Examples*, in *Proceedings of the Fourteenth National Conference on City Planning* 133, 134 (1922).

83. Dukeminier & Krier, *supra* note 1, at 954-55.

84. Ebenezer Howard, *Garden Cities of To-morrow* (F.J. Osborn ed., 1965).

85. Frederick Law Olmsted, *Riverside Illinois: A Planned Community Near Chicago*, in *Civilizing American Cities: A Selection of Frederick Law Olmsted’s Writings on City Landscapes* 292, 295 (S.B. Sutton ed., 1971). See generally Carlton, *supra* note 65.

86. Charles H. Cheney, *Zoning in Practice*, in *Proceedings of the Eleventh National Conference on City Planning* 162, 162 (1920).

efforts, insisted that the case for stabilization was not economic but moral. Even though “haphazard development has resulted in enormous waste and destruction of property values,” he argued, the waste “is not nearly as important as the social and civic loss.”

From a social and civic point of view, there is nothing more important than the maintenance of the morale of the neighborhood. 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 dead⁸⁷

Finally, and above all else, municipalities were expected to plan. The Progressives loathed the absence of a comprehensive plan. Recall that Progressives liked to equate the local community to an organism.⁸⁸ The various organs of the body politic needed to act in coordination with the intelligent design of the organic mind. Progressives measured the political health of the city by the extent to which citizens acted with a common purpose; a comprehensive prearranged city plan was proof that they were. Thus, Benjamin Marsh’s book, *An Introduction to City Planning*, begins: “A city without a plan is like a ship without a rudder.”⁸⁹ As leading lawyer Frank Williams warned in an early treatise on zoning, “[f]or good or for ill, as soon as two roads of a given width cross at a given place and angle, and a building starts at the intersection, . . . its life and growth, have been carelessly, perhaps, . . . irrevocably fixed.”⁹⁰

All of these communitarian ideals exerted tremendous pressure on earlier conceptions of the police power. Because Progressives measured a city’s well being by the extent to which it was planned in advance, they saw nineteenth-century regulation as an invitation to anarchy. Newman Baker, a land-use lawyer and author of another prominent land-use treatise, insisted that zoning was a “necessary step to prevent utter chaos in municipal life, coming after years of unregulated city development.”⁹¹ Others argued more subtly for reforming the earlier conception. For instance, in his introductory address to the Second City Planning Conference, Frederick Law Olmsted defined the police power traditionally, in terms of the

87. Robert Harvey Whitten, *Zoning and Living Conditions*, in Proceedings of the Thirteenth Annual Conference on City Planning 22, 25 (1921).

88. See *supra* notes 57-58 and accompanying text.

89. Marsh, *supra* note 79, at 5.

90. Frank Backus Williams, *The Law of City Planning and Zoning* 3 (1922).

91. Newman F. Baker, *The Legal Aspects of Zoning* 35 (1927).

doctrine that “no one may be permitted so to build or otherwise conduct himself upon his own property as to cause unreasonable danger or annoyance to other people.”⁹² He subtly moved, however, to define what is “unreasonable” in Progressive terms—with reference to “gradually shifting public opinion.”⁹³

D. *The Decline of Individual Property Rights*

In order for the “general welfare” to expand, something else needed to contract—the scope of owners’ “private property” in the rights to control the use of their land. Owners could retain many incidents of ownership of land, but the law needed to transform some incidents to guarantee common goods like aesthetics, orderliness, stable neighborhoods and stable property values. To be sure, the Progressives were not the only ones or the last ones to criticize the more individually-centered conception of use rights. Even so, strands of their critique remain influential today.

Before setting this critique forth, it is worth noting that Progressive views varied more about property than about other features of land-use regulation. One can see the extremes in the land-use context as well as in other contexts. Some Progressives respected the institution of private property. For instance, as eager as Benjamin Marsh was to introduce zoning into New York, he conceded that “any effort to restrict the uses of such land to the basis of a lower value or to reduce the earning capacity of the land would be regarded by the Courts as confiscation of property.”⁹⁴ Other Progressives were not so sympathetic. Edward Bassett found it “unthinkable that the city must compensate all of the private owners if reasonable aesthetic restrictions are placed on their use of city land.”⁹⁵ Frederick Howe envied German cities because “[i]n Germany the city is as sovereign over the property within its limits as it is over the people.”⁹⁶ He particularly envied the power German cities enjoyed to finance development by condemning more land than they needed and then selling the excess improved land for a profit.⁹⁷

Even with these extremes, it is still possible to trace out an understanding of property rights that is distinctly “Progressive.” Mainline Progressives still respected property as a source of individual freedom at a high level of generality and for a few key incidents of

92. Frederick Law Olmsted, *Introductory Address on City Planning*, in *Proceedings of the Second National Conference on City Planning* 26 (1910).

93. *Id.* For further development of the themes in this section, see Claeys, *supra* note 55.

94. Marsh, *supra* note 79, at 21-22.

95. Bassett, *supra* note 66, at 59.

96. Howe, *supra* note 66, at 15.

97. *Id.* at 14-15, 21.

ownership. For instance, in his introductory address to the Second Conference on City Planning, Frederick Law Olmsted insisted that zoning rules should “leave open the maximum scope for individual enterprise, initiative, and ingenuity that is compatible with adequate protection of public interests.”⁹⁸ Yet while Progressivism respected private property at a broad level of generality, it treated the institution rather differently at the margins, especially with respect to the questions that made zoning politically controversial. Olmsted’s warning is telling: he respects property as a source of individual initiative, but only to the extent “that is compatible with adequate protection of public interests.”⁹⁹ Free individual initiative over property was no longer inherently a part of the public interest. It might be part of the public interest, but it also might be in derogation of that interest.

Here, Olmsted was echoing broad themes that led to a profound transformation in how lawyers, regulators and judges understood the institution of property. As Part I.B suggested, before 1900 important strands of American property law and constitutional law conceived of property in natural law terms.¹⁰⁰ By the 1920s, leading Progressive jurists reasoned about constitutional property in terms of utilitarian balancing tests, as they did in the Due Process/Takings case *Pennsylvania Coal Co. v. Mahon*.¹⁰¹ Progressive political theory also informed the objects of the legal realists who, in Thomas Merrill and Henry Smith’s description, attacked the natural law tendency to treat property “in rem”—as a legal status which confers on its owner “the right to exclude a large and indefinite class of other persons (‘the world’) from the thing.”¹⁰² As Merrill and Smith describe the realists’ object, if they could show that “property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare.”¹⁰³ Political Progressivism and legal realism combined to attack a natural law tradition of “exclusion”-based property rights. They replaced that tradition with a new program of

98. Olmsted, *supra* note 92, at 27.

99. *Id.*

100. See Claeys, *supra* note 26, at 1566-1604; see also Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 *Ariz. L. Rev.* 371 (2003) (outlining the natural law conception of property in Locke, seventeenth- and eighteenth-century natural law writers, and early American law).

101. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); see Claeys, *supra* note 26, at 1618-26.

102. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *Yale L.J.* 357, 360 (2001).

103. *Id.* at 365.

“governance”-based rights, created by public law legislation and administered by bureaucrats.

These broader trends left their mark on the first wave of land-use reformers. They critiqued individualistic property rights along the lines laid down by Progressive political theory, utilitarian interest balancing, and legal realism. On that critique, James Metzenbaum thought it selfish for homeowners to insist on an individualistic-centered account of property. Zoning was necessary, he argued, to protect the residential owner from “in a single day, being robbed of a very half of the value of the home and property.”¹⁰⁴ Edward Bassett complained that “[p]rivate property and personal rights have been more sedulously guarded than community requirements.”¹⁰⁵ His New York colleague, Benjamin Marsh, demanded for New York City a government energetic to a degree “equal to the effort and the zeal which is now expended in the futile task of trying to make amends for the exploitations by private citizens and the wanton disregard of the rights of the many.”¹⁰⁶

Others thought individualist property rights imprudent. If any owner insisted on those rights, her insistence would drag down her own property values along with everyone else’s. After all, Charles Cheney explained, workers hesitate to buy homes and become solid members of the middle class “for fear some one [sic] later would ruin their investment and home neighborhood by building an apartment, stable, laundry or public garage next door.”¹⁰⁷

Worst of all, individualistic property rights were seen as reactionary, a futile and defiant attachment to a social construct that had passed its time. Edward Bassett illustrated this tendency when he criticized the process of using eminent domain to take use servitudes. Eminent domain would make “the city . . . worse off than it was before. It would be crystallized.”¹⁰⁸ “[A]s every living organism grows and changes,” he explained, “these easements would have to be changed from time to time by successive applications of condemnation.”¹⁰⁹ Newman Baker defended zoning as a necessary response to the realization that “[t]he laissez faire theory of government is no longer tenable.”¹¹⁰

104. Metzenbaum, *supra* note 74, at 6.

105. Bassett, *supra* note 66, at 46.

106. Marsh, *supra* note 79, at 27.

107. Cheney, *supra* note 86, at 164.

108. E.M. Bassett, *The Question Box*, in Proceedings of the Fourteenth National Conference on City Planning 159, 159 (1922).

109. Edward M. Bassett, *Zoning: The Laws, Administration, and Court Decisions During the First Twenty Years* 27 (1940).

110. Baker, *supra* note 91, at 35; *see also* Claeys, *supra* note 55.

E. *The Rise of Experts and the Decline of Judicial Review*

Finally, the Progressives elevated experts and deprecated judges. They did so because the notion of progress transformed how they understood law. Because progress imparted reason to politics, it diminished the role for the rule of law as traditionally understood, as government under specific rules of conduct that applied generally to all citizens. It replaced rule under law with administration by experts.¹¹¹

Walter Moody illustrated this point of view when he stressed that "Chicago must no longer be a creature of chance. There must no longer be planless building."¹¹² Moody assumed that the citizens of Chicago *could* and *must* overcome chance. He assumed that the forces of progress had resolved the really fundamental questions of urban development. Since the *ends* of city life were more or less fixed by progress, the only really important questions in city politics became questions of *means*. The city no longer needed legislators to write regulations reflecting local opinion and judges to enforce them; the city's organic mind, as expressed by its local majority, would express the civic will. Architects, engineers, and land-use planners had the specialized know-how to implement the priorities that a public-spirited and Progressive community would be expected to pursue. Thus, planners could pursue open-ended and rationalistic normative goals like "efficiency" without concern that they were legislating about controversial and politically-charged topics. For instance, as Canadian planner Thomas Adams assumed, "[e]fficiency requires that all planning should have regard to the best economic use to which land can be put, to the provision of the soundest economic basis for industrial development, and to the social organization of life so as to conserve the skill and physique of the workers," all while "trying to secure amenity . . . [and] provide social intercourse, pleasant home surroundings, protection of natural beauty, and creation of structural beauty."¹¹³

The Progressives' writings presuppose such a transformation of politics. The best respected Progressives assumed that the most important problems in land-use planning were not political but scientific and technical. Nelson Lewis looked forward to the day when the city engineer would assume the role once played by the city founder. The engineer's eyes "have been so closely fixed upon the drawing board that he has seldom looked up to catch a vision of the great city that is to come, the complex organism known as the modern

111. See Claeys, *supra* note 45 (manuscript at 7-16).

112. Moody, *supra* note 66, at 53.

113. Thomas Adams, *The Development of the Plan*, in Proceedings of the Ninth National Conference on City Planning Proceedings 141, 148 (1917).

city with . . . its capacity to debase or to elevate its citizens.”¹¹⁴ While planner George Ford acknowledged that “[i]t is practically a physical impossibility for one man, in one lifetime, to acquire an adequate and impartial appreciation of all the points of view” that go into city planning, he was confident one could create a “lastingly satisfactory” plan by “put[ting] the work in charge of *several* experts—one an engineer, one an architect, and one, perhaps, a social expert.”¹¹⁵ For Frederick Law Olmsted, these expectations for planning were not hopes but imperatives. A scientific planner could not possibly leave alone the “free interplay of economic forces and social impulses,” not when she could perceive “the complex interwoven web of cause and effect that binds them all together”¹¹⁶ No one, Olmsted exclaimed, would rest content with an unscientific view of planning “after the imagination ha[d] grasped the larger possibility of control.”¹¹⁷

Progressives also trusted local land-use experts to be non partisan. Since progress had already taken most of the politics out of politics, land-use reformers believed they could vest wide-ranging powers in experts. They did not need, or so they thought, to worry that the experts might offend local community opinions or misuse public power for private ends. Leading administrative law and local government professor Frank Goodnow anticipated that “the trend of American administrative development is in the direction of adopting the continental principle” of “central administrative control,” independent of political oversight.¹¹⁸ Robert Whitten expected that a zoning commission would “devote itself unreservedly to [public] work. It will take a broad view of the scope of city planning. It will realize that it needs the assistance of city plan experts It will have something of the missionary spirit in propagating the gospel of city planning.”¹¹⁹

On the other hand, as social progress and expert planners rationalized land use, they reduced the scope of judicial review. Edward Bassett recognized that “every state has been built on a fundamental law, purposely made hard to change, assuring permanency to government and emphasising [sic] private rights, but omitting even the mention of any rights or powers of urban communities.”¹²⁰ But he distinguished away this fundamental law,

114. Lewis, *supra* note 60, at 11.

115. George B. Ford, *The City Scientific*, in Fifth Conference Proceedings, *supra* note 66, at 32 (emphasis added).

116. Olmsted, *supra* note 92, at 17-18.

117. *Id.*

118. Frank J. Goodnow, *Municipal Home Rule*, 21 Pol. Sci. Q. 77, 90 (1906).

119. Robert H. Whitten, *The Constitution and Powers of a City Planning Authority*, in Seventh Conference Proceedings, *supra* note 60, at 135, 138.

120. Bassett, *supra* note 66, at 47.

namely constitutional law, on the ground that “[g]reat cities had not appeared In later years great cities developed with new and unforeseen needs.”¹²¹ But, “[b]etween the strong guarantees of personal liberty on the one side and the emphasis of the constitution on state government on the other, a municipality constantly struggles for suitable instruments to work out its own salvation.”¹²²

Bassett and other lawyers thus developed legal theories to make the police power, constitutional limitations, and judicial review more organic and adaptable. Bassett insisted that:

[A] written constitution should be construed with a recognition of the changing needs of society and especially the community needs of modern cities, because, unlike a statu[t]e, a constitution should be fundamental, simple and enduring and is framed with an intention to cover the changing relations that progress may develop.¹²³

To resort to Newman Baker’s analogy, since zoning “laws fall in the ‘legal dark continent,’ i.e., in that field bounded by the older idea of the police power on the one side and on the other by the ‘due process clause,’” one could make zoning “perfectly legal” by “expand[ing] the police power and contract[ing] the ‘due process clause.’”¹²⁴ Baker reasoned, “[a]s conditions change, governmental functions change; and our constitution is being expanded constantly to cover our needs.”¹²⁵

Such fundamental changes subordinated the role of the courts. Since social progress was more fundamental than the principles expressed in state constitutions, courts had no principled basis to cite those constitutions as authority to prevent new forms of land-use regulation. Some Progressives thus expressed impatience with state and federal judges. Andrew Wright Crawford and University of Chicago administrative law professor Ernst Freund exemplified the range of the Progressive reformers’ impatience. Crawford complained that American judges “needed education.”¹²⁶ “If we can get over this bogey of the constitution [sic] and if we can fully realize the essentials of what we want,” he complained, “we can probably persuade the judges that acts to provide those essentials should be upheld as constitutional.”¹²⁷ Freund, by contrast, thought all that was needed

121. *Id.*

122. *Id.*

123. *Id.* at 53.

124. Baker, *supra* note 91, at 140-41.

125. *Id.* at 141 (citation omitted).

126. Andrew Wright Crawford, *Discussion, in* Fifth Conference Proceedings, *supra* note 66, at 66; *see also* Claeys, *supra* note 55.

127. Crawford, *supra* note 126, at 66.

was “a liberal interpretation of the constitution [sic] by our courts.”¹²⁸ That interpretation, of course, came when the U.S. Supreme Court handed down *Euclid*.

III. PROGRESSIVE POLITICAL THEORY AND PROGRESSIVE JURISPRUDENCE

This Progressive-political account of zoning deserves to be taken seriously for a few reasons. As a matter of history, it fills an important gap in our understanding about zoning’s origins. As a matter of contemporary policy, it ought to resonate with practitioners and scholars who work in land use. It goes a long way in describing the character of the “public interest” ideas to which local majorities and land-use regulators appeal when they make zoning decisions.

Most important, this *political* account of zoning exposes significant gaps in the standard legal account of zoning—Haar and Wolf’s account of Progressive jurisprudence. Lawyers and scholars who specialize in land-use regulation are not particularly familiar with the themes explored in Part II; they are familiar instead with the story told at the beginning of this Essay.¹²⁹ That story affects their perceptions of zoning. They tend to assume zoning is not particularly ideological, that its main virtues are professional and technical and not political. They understand zoning as a necessary adaptation to the exigencies of administering land-use disputes in a crowded and complex country. Progressive jurisprudence then includes all the claims about land-use rights, regulation, and the institutional advantages of centralized planning that need to be true for this defense of zoning to hang together.

Even so, the tenets of Progressive jurisprudence are surprisingly easy to question. The Progressives’ political case for zoning is more integrated and comprehensive than the tenets of Progressive jurisprudence. The former more clearly identifies and better justifies the claims about law and politics that need to be true for zoning to make sense. Since Progressive political theory seems so coherent, and since Progressive jurisprudence has such gaps, it is strange that, as Haar and Wolf recognize, it is Progressive jurisprudence that has “weathered profound societal, political, and ideological shifts on the Court and in the American polity.”¹³⁰ To appreciate why, consider the key tenets of Progressive jurisprudence. At all the crucial points, these tenets make little sense without some underlying theory of law and politics substantially like the interpretation of Progressive political theory presented in Part II.

128. Ernst Freund, *Discussion*, in Fifth Conference Proceedings, *supra* note 66, at 62-65; see also Claeys, *supra* note 55.

129. See *supra* note 1 and accompanying text.

130. Haar & Wolf, *supra* note 6, at 2174.

First, consider the idea of “changed circumstances.” Progressive jurisprudence makes zoning seem apolitical, innocuous, and even inevitable. Justice George Sutherland restated the conventional legal wisdom in his opinion for the Court in *Euclid*: “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.”¹³¹ Since “[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard,” Sutherland concluded, zoning does no more than lay down a legislative and prospective blueprint to minimize the number of land-use conflicts that might otherwise fester in a system without planned development.¹³² Haar and Wolf draw from these passages one attribute of Progressive jurisprudence—its capacity to change with the times, “the elasticity and adaptability of traditional common law methodology.”¹³³

These appeals to “adaptability” and “changed circumstances,” however, beg all the important questions. It is not enough to show that economic and development patterns changed from 1890 onward. Each of these facts is an “is” that implies no “ought.” One must also explain why the changes discredited some possible responses to that change (like the natural law approach that informed the law around 1900) and required other responses (like the Progressive approach that displaced it). Indeed, if cities were getting more populated and development was getting more complicated, it might be imprudent to make public-law land-use regulation even *more* controlling and particularized, and then even more impractical to funnel all these land-use decisions through a centralized preapproval licensing process. To borrow loosely from contemporary public choice theory, if five times as many people are competing to put land to five times as many uses, centralized licensing should be on the order of twenty-five times more cumbersome and contentious.¹³⁴ No matter: zoning remains deeply committed to licensing.

The first generation of Progressives could explain this commitment to land-use licensing more clearly than most land-use specialists today. Unlike modern land-use specialists, they appreciated that the fundamental questions were not the technical questions about expertise, but the political questions about the right public interest.¹³⁵

131. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

132. *Id.* at 388.

133. Haar & Wolf, *supra* note 6, at 2174.

134. See Mancur Olson, *The Rise and Decline of Nations* 53-58 (1982). See generally Mancur Olson, *The Logic of Collective Action* (1971).

135. See *supra* Part II.E.

They thought that, in their era, social conditions had changed enough to downgrade moral goods like freedom and to upgrade more collective goods, including order, community, and security.¹³⁶ For them, zoning was a manageable process because the forces of progress and the “organic” nature of local life created a potential into which they could tap to organize local politics and land-use management in a systematic way.

Second, land-use lawyers often justify zoning by invoking an ideal of the “general welfare.” Haar and Wolf interpret *Euclid* to say that zoning may promote a “wide range of public interests,”¹³⁷ “comprehensive in [their] health, safety, and welfare goals.”¹³⁸ They describe *Euclid* sympathetically because it vindicated a “bottom-up process” in which “[l]ocal elected officials . . . adjust[] for community needs and aspirations.”¹³⁹ This sentiment is entrenched in modern law as well. In *Penn Central Transportation Co. v. New York City*, the Court recognized zoning laws as the classic example of laws by which “‘the health, safety, morals, or general welfare’ would be promoted.”¹⁴⁰

This rationale is perhaps the most important conventional justification for zoning, but it sounds more content-free than it really is. Phrases like “wide range of public interests” and different “community needs” make it sound as if zoning does not have a built-in tendency to promote any one understanding of the public interest. In reality, these phrases act as something of a code. They encourage communitarian styles of property regulation. One can appreciate the difference between message and meaning by watching how land-use lawyers treat *Euclid*. In some respects, the Supreme Court’s opinion reads rather narrowly, as an attempt to integrate zoning into traditional principles of nuisance regulation without overturning those principles. Nevertheless, as one leading property casebook puts it, *Euclid* was quickly interpreted “as a generous endorsement of social engineering in the name of public health, safety, and welfare. It is beside the point whether zoning authorities actually read the case this way; the point is that they came to act as though they did.”¹⁴¹

By contrast, the early zoning advocates had a firm grasp on the character of the legislative scheme they were proposing. As Walter Moody understood, “[h]e who makes the city makes the world. After all, though men make cities, it is cities which make men.”¹⁴² These

136. See *supra* Part II.C.

137. Haar & Wolf, *supra* note 6, at 2194.

138. *Id.* at 2195.

139. *Id.*

140. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

141. See Dukeminier & Krier, *supra* note 1, at 1010-11.

142. Moody, *supra* note 66, at 2 (quotations omitted).

advocates interpreted their times to suggest that Americans latently desired stronger communities. Pre-approved use districts, homogeneous neighborhoods, stable property values, and common aesthetic requirements were all means to express that desire for community—and then to hardwire that desire into subsequent generations' character and civic life.¹⁴³ No surprise, then, if the “general welfare” refers to policies that downgrade individual tastes and choices and upgrade collective goods like order, homogeneity, community, and security.

Third, zoning law and theory is deeply committed to expertise—administration by expert urban planners. Haar and Wolf celebrate that “[t]he Progressive Era witnessed the triumph of American professionalism”¹⁴⁴ and the shift to “appropriate, though certainly not total, deference [by courts] to the expertise and special knowledge of this new breed of professionals.”¹⁴⁵ The Supreme Court gave land-use expertise respectability in *Euclid*, when it deferred to the findings of expert “commissions” that published “comprehensive reports,” which “b[ore] every evidence of painstaking consideration.”¹⁴⁶ According to Richard Babcock, longtime dean of the land-use law community, zoning originally expected “a bunch of happy, well-informed people with a social I.Q. of 150 [to] sit around making decisions in complete freedom from outside pressure [T]hese people are still making zoning decisions.”¹⁴⁷

Here, as elsewhere, however, the conventional wisdom in land-use law needs better theoretical justification than it can provide on its own. In what matters *should* experts receive deference—technical questions, or political and moral questions, too? The Supreme Court deferred to such expert findings as the following: Zoning makes it easier to provide fire services; it encourages the rearing of children; it reduces nervous disorders; and, most notoriously, it stops apartment houses from leeching off the green and quiet in residential neighborhoods like “mere parasite[s].”¹⁴⁸ Planners may know how to put fire stations near where buildings are most likely to burn, but how does that technical expertise qualify them to make a moral judgment that apartment owners and tenants are social freeloaders? And why must courts defer to such judgments?¹⁴⁹

143. See *supra* Part II.C.

144. Haar & Wolf, *supra* note 6, at 2182.

145. *Id.* at 2183.

146. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

147. Richard F. Babcock, *The Zoning Game: Municipal Practices and Policies* 19 (1966).

148. *Euclid*, 272 U.S. at 394-95.

149. Haar and Wolf describe *Euclid* as the model of a “workable middle ground between total deference to professional findings and *de novo* review.” Haar and Wolf, *supra* note 6, at 2183 (emphasis added). As the example in this paragraph

Land-use law has no obvious answer, but Progressive political theory does: the experts get their legitimacy from the will of the community.¹⁵⁰ Communities have an “organic” sense, which is expressed through the community political process, and also in the preliminary stages of the planning and zoning processes. In the Progressives’ interpretation, the organic nature of political life contributes to shaping its character; local political communities then add detail by expressing their own particular collective goals. Local experts can make politically-sensitive choices on the ground that they are helping the cities whom they represent to express their latent desires for community.

Last, and most important, is the institution of property. Haar and Wolf begin their essay by celebrating the fact that, even near the close of the Rehnquist Court, there is still “no fundamental constitutional right to the speculative value of a piece of property.”¹⁵¹ They interpret the Progressive Era to have abandoned a tradition of property as “abstract, disembodied rights,” and to have embraced instead “the holistic and interdependent approach of *Euclid* and its Progressive progeny.”¹⁵² This new understanding of property (and this implicit derision for other, freedom-centered approaches) remains a powerful Progressive legacy. In dissent in *Lucas v. South Carolina Coastal Council*, Justice Stevens spoke on behalf of land-use planners everywhere when he insisted that “[t]he human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners.”¹⁵³

But as should be clear by now, to defend this conception of property rights, one must embrace political commitments substantially like those held during the Progressive Era. When Haar and Wolf ridicule “abstract, disembodied rights,”¹⁵⁴ they are suggesting that it is difficult or impossible to conceive of “property” as the general right to use and develop property. However, enough scholars have articulated and defended an “exclusion”-based view of property by now that one may not discredit this view simply by lampooning it on doctrinal grounds. Haar, Wolf, and land-use specialists are free to reject general use rights on substantive grounds, but they need to make their

suggests, *Euclid* lies far closer to the “total deference” side of the spectrum than it does toward the “*de novo*” side, and that is how the case has been read. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978) (citing *Euclid* to uphold land-use regulations that destroy or adversely affect property interests if the regulations reasonably relate to the state’s general welfare).

150. See *supra* Part II.E.

151. Haar & Wolf, *supra* note 6, at 2158.

152. *Id.* at 2191; see also *id.* at 2187-91.

153. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting).

154. Haar & Wolf, *supra* note 6, at 2191.

substantive commitments clearer. When Haar and Wolf prefer a “holistic and interdependent approach”¹⁵⁵ to property regulation, they express a preference for a “governance” scheme in which experts and local majorities distribute use rights to individual owners. But they do not explain why this approach is sound. To do so, they would need to explain why the Progressives were right, why regulation should be more communitarian, and why property should be transformed from a source of individual freedom into a source of community and security. They would also need to explain why the realists’ “bundle of rights” approach to property leads to better consequences than the physical-invasion test or other doctrinal proxies for a more comprehensive and individually-centered conception of property. Realism subtly transforms property rights into a series of pairwise relational rights marked off by experts. It is not clear beyond cavil that realism’s conception of property is operationally sounder than one which gives owners simple and absolute rights against the rest of the world, and which leaves most land-use policy decisions in the hands of owners rather than experts. On the question of what is property, perhaps the most important question in land-use regulation, what Haar and Wolf call Progressive jurisprudence assumes the truth of controversial substantive and conceptual claims advanced prominently during the Progressive Era.

I cannot explain here in any comprehensive way why there exists such a discrepancy between the original political and the contemporary legal accounts of zoning. I strongly suspect one contributing factor is the difference between theory and practice. Contemporary land-use lawyers and scholars may assume that the Progressive lawyers and reformers discussed in Part II settled the important questions about zoning, just as those Progressives probably assumed that Woodrow Wilson and academics of his rank had settled the important questions about government on which they relied to develop their theory of zoning. Another factor relates to the difference between politics and lawyering. As Part I.B suggested, pre-zoning land-use regulation—in its common law, legislative, and constitutional dimensions—may have followed in large part from a theory of law and politics radically different from the theory that inspired Euclidean zoning. Even if some areas of nineteenth-century law broke from natural-law/natural-rights prescriptions, the Progressives certainly regarded those prescriptions as an obstacle to be overcome or avoided.¹⁵⁶ To put zoning on solid legal footing, lawyers and judges needed to tone down some of its most novel and Progressive features to make it seem continuous with the natural law themes present in the property and constitutional law of the time.

155. *Id.*

156. See *supra* notes 104-10, 120-28 and accompanying text.

Euclid illustrates as well as any one example could. When James Metzenbaum wrote the opening appellate brief for the Village of Euclid, he laced it with many of the reformist and organic themes of Progressive political theory set forth in Part II.¹⁵⁷ When the case was held over a Term, however, and as zoning advocates grew concerned about the case, Alfred Bettman filed an amicus curiae brief on behalf of the National Conference on City Planning. Bettman's brief went to far greater lengths to make Euclid's zoning plan seem continuous with nineteenth-century conceptions of nuisance-based police power regulation.¹⁵⁸ In many respects, the Supreme Court's opinion follows the more incrementalist approach Bettman charted in his amicus brief for the experts, and endorsed many crucial features of the conventional story just presented above.¹⁵⁹

Nevertheless, if this explanation is correct, it only reinforces the doubts as to whether Progressive jurisprudence can do the heavy lifting needed to defend and justify zoning. Good lawyering has different objects from good legal theory and good political theory. Good lawyering helped make zoning seem continuous with previous forms of land-use regulation, but that appearance of continuity blurred zoning's most distinctive features. Anyone who wants to judge zoning on its merits will probably need to consider Progressive jurisprudence only as shored up by some theory of law and politics substantially like the Progressives' organic political theory.

To be sure, this part has not discredited Progressive jurisprudence. It has only shown that Progressive jurisprudence depends heavily on the Progressive political theory sketched out in Part II, or on some theory of law and politics substantially like it. That connection certainly suffices to make clear that Progressive jurisprudence is not as comprehensive and considered as it would need to be to be regarded as a leading school of legal thought. At the same time,

157. See Brief on Behalf of Appellant at 60-61, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665) (suggesting that the Court take cognizance of the strong preponderant opinion in favor of zoning); *id.* at 64-65 (arguing that, in the absence of zoning, one "selfish shop" can "steal" or "destroy" the property values of neighbors); *id.* at 69-73 (arguing that zoning is essential to preserve the character of American home life); *id.* at 81-82 (insisting that zoning was a response of police power to changing conditions).

158. See Brief on Behalf of Amici Curiae National Conference of City Planning et. al. at 23-30, *Euclid*, 272 U.S. at 365 (justifying zoning under a traditional nuisance-based conception of the police power and disclaiming any intention to zone for aesthetic purposes).

159. I am indebted to Dan Mandelker for this insight and example. Mandelker doubts my interpretation of the sources covered in Part II. He cites Bettman's brief as a more accurate representation of the intentions of Progressive land-use lawyers. To the contrary, I think Bettman's brief simply confirms that lawyers who subscribed to the political critique explained in Part II were willing to downplay their basic legal and political commitments in their briefs to win a case.

zoning is not automatically weak or problematic simply because the principles that inform its practice day to day have been explained better somewhere else. If leading land-use scholars like Haar and Wolf find the Progressives' organic theory of law and politics hospitable, the lessons of this Essay will seem a friendly amendment. If not, the lessons will seem more like a poison pill. The important point is that conventional land-use lawyers and scholars probably cannot defend zoning in theoretically rigorous fashion with the arguments with which they are most familiar unless they are prepared to supplement those arguments with a theory of law and politics substantially like Progressive political theory.

IV. UNEASE ABOUT PROGRESSIVISM IN ZONING

This connection brings us to the last question: Might Progressive political theory serve as the formidable contender that Haar and Wolf hope Progressive jurisprudence is? Although I cannot answer this question in any comprehensive way, it is worth the effort at least to try. The principles of Progressive political theory set forth in this Essay describe many important aspects of the conception of the "public interest" that informs everyday land-use policy. As it turns out, problems in the theory have important parallels in most observers' perceptions about zoning. The parallels suggest that problems observers see in zoning's practice may be inextricably tied to zoning's design and institutional structure.

Separately, this review of Progressive political theory helps clarify the academic scholarship on zoning. Many articles do not treat zoning in terms of political theory. They may stay closer to the phenomena residents and observers see in everyday life, or they may appeal to normative or behavioral theories that are not primarily political. In reality, however, even a cursory comparison suggests that Progressive political theory operates within normative and behavioral horizons that differ drastically from the horizons of more recent theories of law and politics, the ones which Haar and Wolf regard as leading contenders. As a result, the contrasts in politics help describe the lay of the land in zoning scholarship. They help explain why some schools of scholarship tend to be institutionally sympathetic to zoning, while other schools remain more skeptical.

While the following survey is not meant to be comprehensive by any stretch, normative legal scholarship on zoning generally comes in three main types: communitarian, law and economics, and "law and society." The last term refers, somewhat awkwardly, to various scholars who focus on the ways in which law conditions people's values and identities, and particularly on the ways in which people tend to use law to create status groups. It includes, but is certainly not limited to, critical legal studies scholars.

The Progressives' political justification for zoning explains why communitarians tend to be sympathetic to zoning and why the other two camps tend to be skeptical about it. Communitarians tend to be sympathetic to zoning because the Progressives made descriptive assumptions about human nature and normative claims about human happiness that closely resemble contemporary communitarian arguments. Gerald Frug illustrates many of the parallels in his recent book *City Making*, an extended justification of a post-modern/communitarian approach to local government.¹⁶⁰ Like the Progressives, Frug laments the atomization of local civic life. He aims to recover a sense of “[p]opular participation” in civic life by “replac[ing] reliance on the mass media with personally acquired information and to create the sense of a common venture necessary for any meaningful definition of the ‘public interest.’”¹⁶¹

The Progressives' political case for zoning anticipates and spells out the kinds of assumptions that must be true before government can create the senses of “popular participation” and “public interest” to which Frug is appealing. The Progressives held that the social sides of people's beings are fairly plastic and malleable, subject to influence from the communities and the experiences that form them;¹⁶² Frug holds that people have no subjective content until they “forge a coherent self out of an experience of a swarm of objects, fantasies, and sensations . . . to identify with something—like an image in the mirror—other than the self.”¹⁶³ On this account, if people are going to have any chance to avoid atomization and alienation by participating in a meaningful social experience, they need small communities and strong local mores around which to organize their subjective selves. In short, the Progressives more or less sketched out the kind of politics, regulation, and institutions a community needs to respond to the problem Frug lamented when he claimed that “the self is formed only through a relationship with others.”¹⁶⁴

At the same time, law and economics and “law and society” approaches remain more skeptical of zoning—and especially of Progressive or communitarian arguments for it—because they doubt that people are as oriented toward communitarian goals as

160. Gerald E. Frug, *City Making: Building Communities without Building Walls* (1999).

161. *Id.* at 21 (citing John Dewey, *The Public and Its Problems* 143-84 (1972)).

162. *See supra* notes 47-55, 61-67 and accompanying text.

163. Frug, *supra* note 160, at 93.

164. *Id.* at 73. Not all communitarian scholarship favors zoning. In particular, the “New Urbanist” movement is generally skeptical of zoning because it encourages suburbanization and sprawl, which in turn undermine classical conceptions of community. *See, e.g.*, *Charter of the New Urbanism* (Michael Leccese & Kathleen McCormick eds., 2000); Andrés Duany et al., *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (2000). Frug, however, is more representative of the legal literature.

Progressives and communitarians have assumed. The leading skeptics are law and economics scholars. While Progressives and communitarians hold that man can overcome his selfish and passionate attachments through concerted social action, economic scholarship tends to stress that the selfish tendencies are not so easy to escape.

From that perspective, zoning does not enlarge or transform the scope of owners' interests. Far from it. Zoning provides a regulatory structure within which local players can advance their narrow financial interests far more effectively than they could in a more decentralized structure of regulation. Homeowners may use zoning the same way businesses use health, safety, and licensing regulation—to limit the supply of available houses, and thereby to increase the financial value of their homes.¹⁶⁵ Of course, different law and economics scholars draw different conclusions from these common starting assumptions. Some, most notably William Fischel, maintain that zoning can be justified in terms of “efficiency,” on the ground it helps local majorities maximize their collective preferences about land-use regulation. Fischel calls the members of these majorities “homevoters.”¹⁶⁶ By contrast, others, including Robert Ellickson¹⁶⁷ and Richard Epstein,¹⁶⁸ conclude that zoning increases the costs of regulation without increasing social welfare.

In either case, however, law and economics takes over the terms of the debate, shifting it away from Progressive ideas about community and public interest to economic ideas about the efficient maximization of narrow economic interest. That take over should not be a happy prospect for traditional land-use planners and scholars. As a worst-case scenario, consider what the economists did to New Deal utility regulation, a body of law to which zoning is quite similar.¹⁶⁹ In the 1970s and 1980s, economically-trained regulators took over public-utility regulation and abandoned New Deal planning for an ambitious program of deregulation.¹⁷⁰ Even in the best-case scenario, it would still be a significant blow for conventional land-use scholars to lose control of the policy agenda in land-use law to economists.

165. See, e.g., William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001). For one classic restatement of how public choice groups can “capture” public-interested regulation, see George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3 (1971).

166. See, e.g., Fischel, *supra* note 165; Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Government*, 12 *Urb. Stud.* 205 (1975).

167. See Robert C. Ellickson, *Alternative to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 *U. Chi. L. Rev.* 681, 694 (1973).

168. See Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with Euclid*, 5 *N.Y.U. Envtl. L.J.* 277, 283, 290-91 (1996).

169. See *supra* note 45 and accompanying text.

170. See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 *Colum. L. Rev.* 1323 (1998).

By contrast, law and society scholarship is skeptical about zoning for a separate set of reasons. Law and society scholars worry that individuals form perceptions of utility and value around rivalrous goods—goods which bring someone up only if he pushes someone else down. From that perspective, law and society scholars break with communitarians and Progressives because they suspect that strong, public-interested regulations will often be used to elevate some groups and subordinate others.

To illustrate, Lee Anne Fennell has written powerfully about the class implications of zoning. Far from giving homeowners a meaningful sense of life, she argues, zoning encourages a vicious *bourgeois* cycle, in which “[h]omeowners are held in thrall by their homes—tempted by tax breaks, goaded by social pressures, strangled by outsized mortgages, and far too easily spooked by remote or imagined threats to their hard-won and tenuously held ‘way of life.’”¹⁷¹ Richard Thompson Ford has written of the racial implications. He asserted, “[t]he ‘democratic process’ that produces and legitimates exclusionary zoning is . . . very questionable: in many cases, the only significant vote that will be taken on the exclusionary ordinance is the first vote. After it is enacted, exclusionary zoning has a self-perpetuating quality.”¹⁷² These critiques leave many scholars with uneasy suspicions about zoning’s legitimacy and viability.

So which of these various perspectives best captures how zoning works in practice? While I cannot answer that question fully here, let me voice my suspicions about why law and economics and law and society critiques are closer to the mark. One case example is no substitute for thorough, normative, and empirical analysis, but it is still extremely telling that *Southern Burlington County NAACP v. Township of Mount Laurel*¹⁷³ is widely recognized as a poster child for many of the deepest problems in zoning—the distortion of markets for land, its association with racial and class tensions, and above all the NIMBY (“Not In My Backyard!”) phenomenon.¹⁷⁴ Indeed, in their casebook on land use, Haar and Wolf cite *Mount Laurel* as proof “that zoning and socioeconomic exclusion were intertwined.”¹⁷⁵

171. Lee Anne Fennell, *Homes Rule*, 112 Yale L.J. 617, 636 (2002) (reviewing Fischel, *supra* note 165).

172. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv. L. Rev. 1843, 1871 (1994). Professor Haar has identified some of the same problems in separate scholarship. See Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. Rich. L. Rev. 1011 (1996).

173. 336 A.2d 713 (N.J. 1975), *appeal dismissed & cert. denied*, 423 U.S. 808 (1975).

174. See, e.g., Dukeminier & Krier, *supra* note 1, at 1065-91 (excerpting *Mount Laurel* and discussing the case extensively); Keith R. Ihlanfeldt, *Introduction: Exclusionary Land-use Regulations*, 41 Urb. Stud. 255 (2004) (introducing a symposium focused entirely on the problem of exclusionary zoning); Symposium, *Twists in the Path from Mount Laurel*, 30 B.C. Envtl. Aff. L. Rev. 433 (2003).

175. Charles M. Haar & Michael Allan Wolf, *Land-Use Planning: A Casebook on the Use, Misuse, and Re-Use of Urban Land* 376 (4th ed. 1989).

Mount Laurel, a suburb of Camden, New Jersey (and, indirectly, Philadelphia) adopted a series of zoning ordinances that reflect the preferences of a majority of Fischel's homevoters.¹⁷⁶ The town zoned approximately one percent of the township's land for retail, approximately twenty-nine percent for light industry, and the rest for single-family, detached dwellings.¹⁷⁷ The residential zones included lot and floor square-footage requirements that effectively excluded low-income housing.¹⁷⁸ The township then negotiated with developers to build alternate forms of housing for high-income newcomers.¹⁷⁹ It discouraged housing for low-income earners and large families; it limited how many multi-bedroom apartments developers could build in town; and it forced developers to promise to cover tuition and other school expenses if they underestimated how many children new homebuyers would bring to town.¹⁸⁰ Developers also subsidized an increase in the township's public sector by contributing large sums of money for educational facilities, a cultural center, and a library.¹⁸¹ In contrast, when a private nonprofit applied to the Mount Laurel Township Committee for permission to build state-subsidized affordable housing, the Committee required it to build such housing on 20,000 square-foot lots, which made the housing not "affordable" by the standards of affordable-housing advocates or the poor.¹⁸²

Mount Laurel powerfully illustrates how zoning's idealism falls short in practice. Local majorities used zoning to support the prices of their homes and exclude poorer would-be residents, developers applied public-choice pressures to get exemptions, and administrators responded to those pressures to acquire new land and revenue streams to build political power bases. Taken together with similar policies by other suburbs, Mount Laurel's policies helped choke the supply of available housing for low- and middle-income families throughout the state.

Other factors, no doubt, help explain the *Mount Laurel* story. And yet, one piece of the story is the fact that the original zoning laws assumed too Progressive and optimistic an account of human nature. The irony in *Mount Laurel* is especially rich because the New Jersey Supreme Court excoriated the town of Mount Laurel *on Progressive grounds*. The court accused the city of trying "to keep down local taxes on *property* . . . without regard for non-fiscal considerations with respect to *people*."¹⁸³ "Almost every" city, the court complained, "acts

176. See *Mt. Laurel*, 336 A.2d at 719.

177. *Id.*

178. *Id.*

179. *Id.* at 721.

180. *Id.* at 721-22.

181. *Id.* at 722.

182. See *id.*

183. *Id.* at 723.

solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base.”¹⁸⁴ But what if Progressive ideals overestimate how far community, order, and security can suppress people’s selfish and rivalrous tendencies? If so, then the local developers, homeowners, and regulators throughout New Jersey’s suburbs were all doing what common sense would predict they would do.

If this interpretation of *Mount Laurel* is accurate, then “Progressive jurisprudence,” as Haar and Wolf call it, has come with a profound cost: Members of the land-use community may not be able to see the problems in zoning clearly because they do not understand how the problems connect to the basic political orientation of zoning. *Mount Laurel* also illustrates this irony. The trial court had concluded that the proper remedy was to declare Mount Laurel’s zoning system unconstitutional.¹⁸⁵ The New Jersey Supreme Court was not prepared to go so far. While the court was certainly skeptical about local zoning, it followed five decades of legal thought in assuming there was no other practical alternative: “The municipal function,” it assumed, “is initially to provide the opportunity [to build housing] through appropriate land use regulations.”¹⁸⁶

The same problem comes out when one considers how the New Jersey Supreme Court viewed the institution of property. To stop the discrimination it saw, the court declared that Mount Laurel owed an affirmative duty to supply adequate housing.¹⁸⁷ In other words, the court gave poorer residents an entitlement to affordable housing. Ironically, however, the legal basis for this entitlement was the first paragraph of the New Jersey Constitution, which guaranteed the “natural and unalienable rights . . . of acquiring, possessing, and protecting property.”¹⁸⁸ If the Supreme Court had been alert to the character of these natural rights, it might have reconsidered the approach Judge Westenhaver pursued when he applied a similar provision of the Ohio Constitution in *Euclid* more than fifty years earlier.¹⁸⁹ To be sure, such an approach would have threatened some aspects of zoning, especially aesthetic and strict single-family-use regulations. But the flip side is that this approach would have given developers a powerful legal tool to choose to build affordable housing

184. *Id.*

185. *See id.* at 716.

186. *Id.* at 734.

187. *See id.* at 727-28.

188. *See id.* at 725 n.11 (quoting N.J. Const. art. I, ¶ 1 (“All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”)).

189. *See supra* notes 28-29 and accompanying text.

and discriminated-against minorities a powerful tool to buy it. Better to let developers and poorer citizens help each other, than to expect both to convince a state legislature to impose affordable housing duties on local governments and state regulators to enforce those duties effectively.

Moreover, even if the court had not been prepared to make that trade-off, it still would have done well to consider the choices. If the court had remained committed to zoning, the natural law/natural rights sources would have predicted it would have needed to accept a certain amount of local group discrimination as an inevitable and uncontrollable consequence. To enjoy the sweet side of zoning, the court might have learned to swallow the bitter.

CONCLUSION

If the *Mount Laurel* court had understood the lessons of this Essay, it need not have been as resigned to zoning as it was. As this Essay has shown, zoning promotes a conception of the public interest closely tied to Progressive political theory. Like many modern lawyers and scholars, the *Mount Laurel* judges forgot the connection between zoning and the Progressive vision of order, security, beauty, and above all else, community. That is the uneasy legacy of "Progressive jurisprudence." This jurisprudence has helped put zoning on solid political and legal footing because it casts zoning as an institution basically consistent with many different approaches to property regulation. But this jurisprudence has come with a cost. Because it downplays the distinct political features of zoning, it obscures zoning's basic commitments and institutional tendencies. Progressive jurisprudence discourages scholars, judges, and lawyers from considering whether some of the unfortunate consequences of zoning trace back to its basic design in Progressive political theory.