

Fordham Law Review

Volume 73 | Issue 2

Article 16

2004

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Recommended Citation

Charles M. Haar and Michael Allan Wolf, *Yes, Thankfully, Euclid Lives*, 73 Fordham L. Rev. 771 (2004).
Available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss2/16>

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Cover Page Footnote

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YES, THANKFULLY, *EUCLID* LIVES

Charles M. Haar*
Michael Allan Wolf**

INTRODUCTION

We are grateful to the editors of the *Fordham Law Review* for the invitation to respond to Eric R. Claeys's essay, *Euclid Lives?: The Uneasy Legacy of Progressivism in Zoning*,¹ particularly because we are provided with the opportunity to correct any misimpressions that some readers of the essay might have regarding the intent and content of our commentary, *Euclid Lives: The Survival of Progressive Jurisprudence*.² We are also pleased to have the chance to reiterate our call for a serious reconsideration of the nation's courts' misguided reliance on the Takings Clause to resolve a wide range of disputes regarding the validity of land-use and environmental regulation.

Our commentary seeks to clarify how courts can more effectively wrestle with their essential review of the validity of land-use regulations and to identify the points to which the contending lawyers should direct their energies. Rather than relying on regulatory takings-related phrases such as "going too far," "economically viable use," or "right to exclude," courts and counsel should consider the following five inquiries when evaluating the validity of land-use and environmental regulation:

- (1) Does the challenged regulation reflect the elasticity and adaptability of traditional common law methodology?
- (2) Was the challenged regulation crafted with important input by experts from nonlegal fields, thus leaving the property owner with the heavy burden of demonstrating unreasonableness?
- (3) Does the challenged regulation hold the capacity to reduce and, at the same time, enhance individual wealth and personal rights?

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1. Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 *Fordham L. Rev.* 731 (2004).

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

(4) Is the Court being asked to affirm judicial and popular acceptance in the “laboratory” of the states?

(5) Is the regulatory scheme fundamentally flexible, in that it furthers a wide range of public interests and features exemption provisions for property owners who would otherwise be asked to shoulder heavy burdens?³

We believe it is important for judges to maintain a measured deference toward innovative, expert-based and flexible, regulation, in the spirit of cases such as *Village of Euclid v. Ambler Realty Co.*⁴ and *Nectow v. City of Cambridge*.⁵ Emulating this judicial posture will allow the continuing development of responsive regulation, drawing its inspiration in large part from the evolving common law during the nineteenth century, to continue for the good of society—including landowners.

Professor Claey's is among those who would seek to repeal roughly a century of police power regulation of the use and abuse of land. There is perhaps no more revealing evidence of the wide gap between Professor Claey's and our worldviews regarding the role of public regulation of land use than in his discussion of an essential component of what he identifies as “Progressive political theory”—the four “ways” Progressives developed “to institute the strong local communities of which they were so enamored.”⁶ “First, cities needed to control overcrowding.”⁷ “Second, cities and suburbs alike were expected to zone to make themselves more presentable and more beautiful.”⁸ “Third, cities and especially suburbs were expected to use regulatory powers to stabilize the price of home values.”⁹ “Finally, and above all else, municipalities were expected to plan. The Progressives loathed the absence of a comprehensive plan.”¹⁰ While Professor Claey's believes that the mere assertion of these goals demonstrates their fallaciousness, and the supposed dangers they pose to individual private property rights, we gladly endorse them, not only for the time in which they were formulated but for our time as well.

A point-by-point challenge to Professor Claey's assertions would take up too much of the reader's time. Instead, we opt to highlight two problem areas with *Euclid Lives?*: (1) Professor Claey's inaccurate portrayal of zoning in practice and (2) his employment of flawed history to further his ideological message. Despite Professor Claey's passionate nostalgia for a natural law approach to resolve

3. *Id.* at 2174-75.

4. 272 U.S. 365 (1926).

5. 277 U.S. 183 (1928).

6. Claey's, *supra* note 1, at 748.

7. *Id.*

8. *Id.* at 749.

9. *Id.*

10. *Id.* at 750.

difficult questions in land-use law, because of these two shortcomings and others, we remain unconvinced by his attempt to set the record straight regarding the political origins of Progressive jurisprudence. The fact that we have serious differences with Professor Claeys does not preclude appreciating the seriousness of his effort to grapple with the historical context for the fundamental principles that have shaped contemporary laws of planning and the environment.

I. OUT OF THE ZONE

Constitutionally approved zoning has made many enemies during its nearly eighty years of existence and nearly universal acceptance by American localities. Some of the attacks on zoning, it should be noted, are well-deserved. Like all ambitious instruments of public policy, zoning and land-use controls, in the hands of the wrong officials, can result in unfair treatment of landowners, developers, neighbors, potential residents, and adjoining localities. Negative externalities of misdirected zoning and planning decisions include racial and socioeconomic exclusion, environmental degradation, restraint of trade, and aesthetic snobbery. Contrary to the impression a reader might get from Professor Claeys's essay, we did not just awaken to the reality that these and other problems exist. Professor Claeys, for example, asserts that our statements such as "judges who practice the sort of Progressive jurisprudence typified by the Court's opinion in *Euclid* endorse the view that legislative and administrative efforts often result in social and economic progress for the commonweal,"¹¹ "make zoning sound as if it is all upside and no downside."¹²

Not satisfied with just one attempt to label us and other "conventional land-use scholars" as unabashed cheerleaders for zoning, Professor Claeys writes, "[i]f they prefer to embrace the more political commitments of Progressivism, they had better be prepared to accept the bitter with the sweet."¹³ However, our commentary itself belies this point. Two examples should suffice. First, in our discussion of the experts' role in land-use regulation, we note that courts have rightfully checked local government abuse in planning and

11. Haar & Wolf, *supra* note 2, at 2197.

12. Claeys, *supra* note 1, at 733. Perhaps Professor Claeys's conclusion might have been true if, in our quoted passage, we had used the following instead of the word "often": "always," "ever," "without exception," "with certainty," "universally," or even "more often than not."

13. *Id.* at 736.

zoning.¹⁴ And we illustrated our awareness of Progressivism's less appealing side in its attitude toward "New Immigrants."¹⁵

Even if we had not included such points in the commentary, we would have thought that our body of scholarship to date demonstrates familiarity and, more importantly, a concern with the bitter side of zoning and Progressivism. For example, Professor Peter Byrne, in his review of Professor Haar's 1996 exploration of the *Mount Laurel* litigation,¹⁶ "note[s] with admiration that among the promptest academic critics [of exclusionary zoning] was Professor Haar himself, in a perceptive comment published nearly 45 years ago."¹⁷ Fifteen years ago, Professor Wolf discussed Judge Westenhaver's concern, articulated in *Ambler Realty Co. v. Village of Euclid*,¹⁸ about zoning's use of socioeconomic exclusion.¹⁹ While Professor Claey's does cite one example of our cautionary writings,²⁰ it is merely the tip of the iceberg.²¹

Professor Claey's discomfort with the employment of the police power as a regulatory tool is reflected by the words and phrases he

14. "While expert-based planning generally receives judicial approval, *Nectow* and many state and lower federal cases following *Euclid's* guidance have protected landowners from arbitrary and confiscatory land-use regulations, thus demonstrating that to employ the approach of Progressive jurisprudence is not necessarily to rubber stamp legislation." Haar & Wolf, *supra* note 2, at 2185 n.107.

15. "[S]ome Progressives campaigned for the restriction of 'new' immigration from southern and eastern Europe, while others championed the nation's ability to absorb and assimilate these newcomers." *Id.* at 2197 n.164 (citing Barbara Miller Solomon, *Ancestors and Immigrants: A Changing New England Tradition* 122-51, 176-94 (1956)).

16. Charles M. Haar, *Suburbs Under Siege: Race, Space, and Audacious Judges* (1996).

17. J. Peter Byrne, Book Review, *Are Suburbs Unconstitutional?*, 85 *Geo. L.J.* 2265, 2275 n.62 (1997) (citing Charles M. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 *Harv. L. Rev.* 1051 (1953)).

18. 297 F. 307 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

19. Michael Allan Wolf, *The Prescience and Centrality of Euclid v. Ambler, in Zoning and the American Dream: Promises Still to Keep* 252, 258-59 (Charles M. Haar & Jerold S. Kayden eds., 1989); see also Michael Allan Wolf, Charles Warren: Progressive, Historian (1991) (unpublished Ph.D. dissertation, Harvard University) (on file with authors) (discussing life and work of a leading legal and constitutional historian who was active in Progressive politics, including the founding of the Immigration Restriction League).

20. Claey's, *supra* note 1, at 767 n.172 (citing Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 *U. Rich. L. Rev.* 1011 (1996)).

21. See, e.g., Charles M. Haar, *supra* note 16; Charles M. Haar & Michael Allan Wolf, *Land-Use Planning* 372 (4th ed. 1989) (noting that "to study Euclidean and post-Euclidean zoning absent some appreciation of the 'four seeds' planted in Sutherland's opinion—exclusion, anticompetitiveness, urban design, and parochialism—is a shallow exercise for the modern land-use attorney . . ."); Charles M. Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 *Harv. L. Rev.* 986 (1954); Michael Allan Wolf, "Compelled by Conscientious Duty": *Village of Euclid v. Ambler Realty Co. as Romance*, 2 *J. Sup. Ct. Hist.* 88 (1997); Michael Allan Wolf, *Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?*, 30 *U. Rich. L. Rev.* 961 (1996).

uses to describe zoning, the nation's most widely-accepted land-use regulatory program, such as "social control,"²² "command-and-control style of land-use,"²³ and "centralized pre-approval licensing process."²⁴ We also would be frightened to live in the "twilight zoning" world that Professor Claeys presents.

In this *twilight zoning world*, he argues, "zoning expects that local majorities should be given free rein to express their own communal visions of community, security, and aesthetics."²⁵ Yet, in the *real zoning world*, the majority and the officials they elect often have relatively little to say about aesthetics and security, which are more often the domain of servitudes effected by private contract. There are many checks on the tyranny of the majority in the real zoning world: variances, special exceptions, and, of course, resort to the courts to correct unfair treatment and ultra vires government activity.

In the *twilight zoning world*, he continues, "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."²⁶ Yet, in the *real zoning world*, while it is true that experts—typically planning professionals employed by the locality or outside consultants—do propose use districts (as well as height and area controls, landmark districts, open spaces, and other areas), it is the locally elected officials who finalize them as part of their legislative duties, often after significant public comment and revision. These experts are usually not involved with enforcement of zoning codes or with the granting of exceptions. The membership of the board of adjustment or zoning appeals, who grant and deny dispensations, is typically made up of duly selected ordinary citizens, not professional planners.

In the *twilight zoning world*, he asserts, once zoning went into effect, "most land uses were presumed illegitimate unless they conformed to the master plan's specifications for the local use district."²⁷ Yet, in the *real zoning world*, the master plan is a future-looking vision giving broad and general guiding principles for the locality. The master plan typically includes zoning as one of many components, but certainly not at the level of specificity of the zoning ordinance.²⁸

22. Claeys, *supra* note 1, at 734.

23. *Id.* at 739.

24. *Id.* at 758.

25. *Id.* at 735.

26. *Id.*

27. *Id.* at 741.

28. While there are a few states, such as Florida, that have imbued the master plan with legal bite in the area of zoning amendments, these jurisdictions remain a distinct minority. See, e.g., 12 Powell on Real Property § 79B.04 (Michael Allan Wolf ed., 1999).

In the *twilight zoning world*, he claims, “[e]ach 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.”²⁹ Yet, in the *real zoning world*, localities and their residents must adhere to two Supreme Court decisions from 1912³⁰ and 1928,³¹ making clear that a veto by neighbors of a landowner’s proposed land use is unconstitutional. Like *Euclid*, neither of these wise decisions has been reversed. It is true that referendum zoning caught on in some jurisdictions near the end of the twentieth century, but this device typically involves giving voters the opportunity to vote on whether the legislative decision by local officials to *permit* a zoning change *favoring* a landowner-developer should be overturned.³² Despite the growing popularity of these plebiscites, and their acceptance by the United States Supreme Court,³³ the vast majority of zoning and rezoning decisions are made by elected officials, not by direct democracy.

In the *twilight zoning world*, he holds, “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”³⁴ Yet, in the *real zoning world*, majorities as voters have neither a direct or indirect relationship with the planning professionals who advise their elected and appointed officials. While in some jurisdictions zoning commissioners may be characterized as “administrative delegates,” they are appointed, or sometimes elected, members who are *advised* by local land-use planners. Building inspectors, concerned citizens, and, in some localities, a zoning administrator, are the ones who make sure that owners comply with zoning codes.

How can the reader who now appreciates Professor Claeys’s problematic depictions of the law and practice of zoning share his alarmism about majority control, governance by unaccountable experts, and rigid restraints on property use? The zoning described in Part II of his essay is not the system of land-use regulation that was

29. Claeys, *supra* note 1, at 741.

30. *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (holding unconstitutional a city ordinance allowing two-thirds of the property owners on a street to request that a street committee determine the street’s building line).

31. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (finding unconstitutional an ordinance requiring consent of neighboring landowners to enable a trustee to replace a philanthropic home in a residence district).

32. *See, e.g., City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668 (1976).

33. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) (finding that there was no constitutional violation in city’s subjection of a site-plan approval to a referendum); *Eastlake*, 426 U.S. at 668 (holding that a requirement that changes in existing land uses by the city council be submitted to a referendum was not unconstitutional).

34. Claeys, *supra* note 1, at 741.

endorsed by the early zoning advocates whose words are selectively presented in Part III of his essay.

Too many anti-planning and anti-zoning attacks by staunch defenders of private property rights paint a bleak world in which American property owners are placed in a regulatory straitjacket at the mercy of anti-development local government officials and their planning staffs. Observers from other countries would scoff at this misrepresentation of our relatively burden-free system of land-use regulation. Even the most Locke-loving legal authorities from the early national period would be impressed with the rapid pace of real estate development and concomitant real property-based wealth in every region of the nation. With all of the serious ills that plague our abundantly wealthy nation today—persistent poverty and underemployment, lingering racial and gender discrimination, and the health care conundrum, to mention only a prominent few—we confess that we continue to be taken aback by those who find the American property owner the citizen most in need of heightened constitutional protection.

II. MATTERS OF HISTORY

At one point in his essay, when considering zoning as an example of Professor Henry Smith's notion of a "governance'-based regime," Professor Claeys states, "[t]he legal history matters here. . . ."³⁵ We would expand that statement to read, "the history matters always." Unfortunately, in too many places in his essay, the history misses the mark.

We will limit our comments to four examples of the troublesome use of history by Professor Claeys: (1) selective reading and presentation of early planning materials; (2) tenuous and anachronistic assertions about the ideas that influenced early planning and zoning advocates; (3) unrealistic presentation of the natural law and natural rights hegemony in the pre-Progressive period; and (4) misreading of the landmark *Mount Laurel* case.

Professor Claeys's exploration of the writing of early zoning and planning advocates is found in the heart of his essay: "Part II: The Progressives' Case for Zoning." According to Professor Claeys, "[t]his Progressive-political account of zoning deserves to be taken seriously. . . . As a matter of history, it fills an important gap in our understanding about zoning's origins."³⁶ "Most important," he continues, "this *political* account of zoning exposes significant gaps in the standard legal account of zoning—Haar and Wolf's account of

35. *Id.* at 736 (discussing Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 Va. L. Rev. 965 (2004)).

36. *Id.* at 757.

'Progressive jurisprudence.'"³⁷ Unfortunately, there are too many gaps in the essay's own historical presentation.

Lawyers devoted to natural law and natural rights, according to Professor Claeys, knew that "land-use law needed to change with the times."³⁸ Apparently, they differed from their Progressive counterparts in three chief ways: early zoning and planning advocates (1) "concluded that new times required not only new laws but also new principles";³⁹ (2) viewed "individualistic property rights . . . as reactionary";⁴⁰ and (3) believed that the notion of progress "replaced rule under law with administration by experts."⁴¹ In his attempt to prove these important and controversial assertions regarding the radical political thought informing Progressive land-use reformers, Professor Claeys gleans a diverse set of books, essays, speeches, and presentations⁴² by a group of advocates that was much less homogeneous than Professor Claeys would have us believe.⁴³

Professor Claeys's assertions regarding the extreme political beliefs of the zoning advocates are simply not supported by the quotations he has excerpted from these wide-ranging sources. For example, although Frederick Law Olmsted, Jr. is quoted as saying that "old buildings, old streets, [and] old institutions must give way,"⁴⁴ neither Olmsted nor anyone else quoted in this part of the essay says anything

37. *Id.*

38. *Id.* at 744.

39. *Id.*

40. *Id.* at 753.

41. *Id.* at 754.

42. In the two decades before the Court's opinion in *Euclid*, for example, the National Conference of City Planning published an annual set of proceedings that included, among other contributions, descriptions of new and proposed city zoning schemes and discussions of specific topics such as industrial zoning, regional planning, and war housing. More significantly, the proceedings recorded often heated exchanges between many of the leading figures in the field. See, e.g., *Discussion, in Proceedings of the Eleventh National Conference on City Planning 185-94 (1920); Discussion, in Proceedings of the Tenth National Conference on City Planning 43-45 (1918).*

43. Professor Claeys does note that "Progressive views varied more about property than about other features of land-use regulation," but that does not stop him from criticizing the ideas of a group he calls "Mainline Progressives." Claeys, *supra* note 1, at 751. In reality, these advocates differed sharply on some essential points. At the tenth national conference, for example, following Robert H. Whitten's presentation on *The Zoning of Residence Sections*, there were several exchanges regarding the wisdom and legality of using zoning to separate native-born from foreign-born residents. *Discussion, in Proceedings of the Tenth National Conference on City Planning 43-45 (1918).* The following year, Harland Bartholomew, Lawson Purdy, and E.M. Bassett offered sharply differing views regarding the wisdom and legality of segregating houses from other residential uses. *Discussion, in Proceedings of the Eleventh National Conference on City Planning 185-94 (1920).*

44. Claeys, *supra* note 1, at 744 (quoting Frederick Law Olmsted, Jr., *Reply in Behalf of the City Planning Conference, in Proceedings of the Third National Conference on City Planning 10 (1911).*)

about getting rid of permanent legal or constitutional principles.⁴⁵ Similarly, none of the statements Professor Claeys quotes in support of his claim that the Progressives characterized individualistic property rights as reactionary even includes a specific reference to “property rights.” And while Professor Claeys asserts that these Progressives “deprecated judges,”⁴⁶ we would ask the reader to find one quotation that indicates anything more than respectful questioning of the judiciary. In Holmesian terms, given the meager evidence he presents in his essay, Professor Claeys just goes “too far” in his characterization of Progressives’ political beliefs.

Professor Claeys’s second problem with the use of history surfaces in his attempt to explain the origins of the ideas that influenced major planning and zoning figures during the Progressive Era. For example, he locates the philosophical roots of the “communitarian spirit”⁴⁷ permeating the ideas and work of these advocates: “Moody, Metzenbaum, and Wilson were voicing themes that trace back to Jean-Jacques Rousseau.”⁴⁸ The origins of this communitarianism sound ominous in Professor Claeys’s formulation: “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.”⁴⁹ He goes on to note that the Progressives’ Rousseau-inspired “communitarian ideals exerted tremendous pressure on earlier conceptions of the police power,”⁵⁰ and that the result was a contraction of private property rights.⁵¹

The road from Rousseau to the Standard State Zoning Enabling Act,⁵² as charted by Professor Claeys, is certainly long and winding, if not tortuous.⁵³ It starts with *The Social Contract*⁵⁴ in 1762, which “influenced” the work of Hegel in the early nineteenth century, which then “influenced” the German universities in which many American Progressives received part of their education. Presumably, even if they did not attend German universities themselves, Moody, Metzenbaum, Wilson, and others came under the influence of Progressive thinkers whose continental training contained a dose of Hegelian and, in turn, Rousseauian thought. The result was a

45. *Id.* at 744-46.

46. *Id.* at 754.

47. *Id.* at 748.

48. *Id.*

49. *Id.*

50. *Id.* at 750.

51. *Id.* at 751-54.

52. Dep’t of Commerce Advisory Comm. On Zoning, A Standard State Zoning Enabling Act: Under Which Municipalities May Adopt Zoning Regulations (1926).

53. See Claeys, *supra* note 1, at 742-51.

54. Jean Jacques Rousseau, *On the Social Contract* (Maurice Cranston trans., Penguin Classics 1972) (1762).

critique of "the more individually-centered conception of use rights."⁵⁵ This is a speculative and tenuous chain of causation that minimizes competing theories influencing European and American institutions of higher learning during this period (for example, the ideas of Locke, Montesquieu, and Hobbes) and maximizes the influence that the abstract Hegelian ideas had on the highly practical, pragmatic, even mundane work of the participants in the National Conference on City Planning. However, while the champions of comprehensive planning and of the segregation of uses into locally legislated districts may have indulged on occasion in the rhetoric of community in order to sway their fellow advocates, there was no concerted effort to tear down the notion of private property or to weaken the judiciary. We agree with Professor Dan Mandelker that Alfred Bettman's brief, in which he showed important connections between zoning and traditional common law principles, is "a more accurate representation of the intentions of Progressive land-use lawyers" than the selected quotations found in Part II of Professor Claeys's essay.⁵⁶ We also believe that Bettman's position and the position of other defenders of zoning should not be dismissed as disingenuous statements designed to pull one over on the Court.

In his zeal to discredit the theoretical underpinnings of American planning and zoning and of Progressive jurisprudence, Professor Claeys confuses chronology as well. He claims that the "broader trends" of political Progressivism and legal realism "left their mark on the first wave of land-use reformers," a group that "critiqued individualistic property rights along the lines laid down by Progressive political theory, utilitarian interest balancing, and legal realism."⁵⁷ It is true that some of the ideas offered by some legal realists were shared by some early planning and zoning advocates. However, it is highly unlikely, if not impossible, that these advocates, writing before 1920,⁵⁸ were influenced by legal realism, a movement that did not gain currency until the 1920s and 1930s.⁵⁹ More importantly, as noted previously, the positions of these early advocates do not really correspond with the extreme anti-property notions that typify Professor Claeys's version of political Progressivism.

Professor Claeys's third major shortfall in the use of history is the manner in which he portrays the dominance of traditional natural law and natural rights principles on the eve of Progressivism. Where Professor Claeys sees a revolutionary overthrow of the legal *ancien*

55. Claeys, *supra* note 1, at 751.

56. *Id.* at 763 n.159.

57. *Id.* at 753.

58. *Id.*

59. See generally G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 Va. L. Rev. 999 (1972).

régime, we see evolutionary change tied closely and directly to the common-law tradition and to the deep respect for property rights that has always been a hallmark of the American legal system. When describing the constitutional protection of property rights on the eve of the Supreme Court's opinion in *Euclid*, Professor Claeys observes:

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 own lots.⁶⁰

If this portrait of the nineteenth century American legal landscape as a wonderland of individualistic private property rights were accurate, how is it possible that commentators such as John F. Hart have found—even during the formative, Lockean period of the American legal ethos—significant environmental and aesthetic regulation of land use by local ordinance and state statute? In an article with which Professor Claeys is quite familiar,⁶¹ Hart notes,

Contrary to the conventional image of minimal land use regulation, government in the colonial period often exerted extensive authority over private land for purposes unrelated to avoiding nuisance. Colonial lawmakers often regulated private landowners' usage of their land in order to secure public benefits, not merely to prevent harm to health and safety. Indeed, the public benefits pursued by such legislative action included some that consisted essentially of benefits for other private landowners. Legislatures often attempted to influence or control the development of land for particular productive purposes thought to be in the public good. . . . In towns and cities, landowners were constrained by measures intended to channel the spatial pattern of development, to optimize the density of habitation, to promote development of certain kinds of land, and to implement aesthetic goals.⁶²

60. Claeys, *supra* note 1, at 738.

61. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1562-65 (2003) [hereinafter Claeys, *Takings, Regulations*]; see also Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 Nw. U. L. Rev. (forthcoming 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=560387#PaperDownload.

62. John F. Hart, *Colonial Land Use and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1257 (1996) (citations omitted); see also 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). Hart writes:

The same variety of public welfare objectives is observable for these years as for the colonial period. Aesthetic regulation of town buildings was common.

Professor Claeys's response to the findings of Hart and other respectable scholars who have made similar findings is that "the original sources they cite [must be] studied with closer care."⁶³ However, we, like many other legal commentators,⁶⁴ are not as skeptical of Hart's comprehensive and variegated view of the legal landscape during this important formative period. Professor Claeys attempts to portray Euclidean zoning as a radical departure from existing regulatory practices, but the historical reality was that the shift from pre-zoning to zoning (and nineteenth century constitutional law to the deference of the *Euclid* Court) was not as sudden as this and other passages would lead the reader to believe.

Professor Claeys contrasts the Court's opinion in *Buchanan v. Warley*⁶⁵ and Judge Westenhaver's trial court opinion in *Euclid* as representative of the constitutional law treatment of land-use regulation before a marked shift that occurred when the Justices decided in favor of the Village of Euclid.⁶⁶ This account of an abrupt shift away from constitutional law protections of private property is not consistent with the record of the Court's decisions for the two decades preceding *Euclid*, however. In his careful study of land-use opinions during this key period, when Progressives by no means dominated the Court, Professor Gordon Hylton reveals:

Almost forgotten is the fact that during the preceding two decades the Supreme Court heard numerous challenges to state and municipal land use regulations. In these cases, which required the Court to define the meaning of the Fourteenth Amendment's guarantee that one could not be deprived of property without due process of law, the supposedly property-rights oriented Fuller and White Courts sided with the state in almost every instance. Time after time, and with only one dissenting vote in two decades, the Court found that the police power was sufficiently broad to warrant

Riparian land was subordinated to the policy of promoting economic development that would benefit the public. Farmers who owned wetlands were obliged by local majorities of their neighbors to have their lands drained and to contribute to the costs of drainage. Other farmers were obliged to participate in coercive fencing projects. The public interest in the development of mines and metal production was given precedence over the wishes of affected landowners. Some landowners were prohibited from selling their interests in land. And legislatures sometimes enacted statutes declaring that owners of unimproved land must improve or occupy such lands or forfeit their title.

Id. at 1102 (citations omitted).

63. Claeys, *Takings, Regulations*, *supra* note 61, at 1563.

64. Hart's excellent work is widely cited in the legal literature. See, e.g., Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 Duke L.J. 75, 90 n.66 (1998); Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 Ecology L.Q. 631, 640-41 nn.31-34 (1996); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. Rev. 713, 736 & n.104 (2002).

65. 245 U.S. 60 (1917).

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

restrictions on the use of land, even when they eliminated existing uses and imposed severe economic loss on landowners. These cases provided a strong pro-regulation backdrop against which the cases of the 1920s were decided.⁶⁷

When the full set of cases is studied in this fashion, we see that the private property owner's victory in *Buchanan* was decidedly atypical,⁶⁸ and that Judge Westenhaver's judgment as to the illegitimacy of zoning was much less representative of the status quo than the many opinions approving zoning that were cited by Justice Sutherland in *Euclid*.⁶⁹

Professor Claeys's fourth problem with history arises during his extensive discussion of the *Mount Laurel*⁷⁰ litigation in Part IV of his essay. He calls *Mount Laurel*, the landmark decision of the New Jersey Supreme Court nearly thirty years ago that declared exclusionary zoning invalid, "a poster child for many of the deepest problems in zoning,"⁷¹ and states that the case "powerfully illustrates how zoning's idealism falls short in practice."⁷² While we might agree that the zoning *practices* of the township are most troublesome (and have written such for the record)⁷³, we differ dramatically with his account of, and conclusions regarding, the court's decision. To borrow Professor Claeys's metaphor, we believe that, by enunciating the "*Mount Laurel* doctrine" in the fight against exclusionary zoning, the court was engaged in a noble effort to make the bitter sweet.

Professor Claeys asserts: "The trial court had concluded that the proper remedy was to declare Mount Laurel's zoning system

67. Joseph Gordon Hylton, *Prelude to Euclid: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900-1920*, 3 Wash. U. J.L. & Pol'y 1, 2 (2000).

68. Professor Hylton writes:

Although the Court in this era viewed the determination of the reasonableness of a police power regulation as one of its responsibilities, it routinely upheld the legitimacy of local land use controls. . . . Only in *Buchanan v. Warley* was an ordinance found to be an unreasonable exercise of the police power and that case involved a blatant effort to use the police power to shield an unconstitutional act of racial discrimination. In spite of the "pro-property" reputation of the Supreme Court under Fuller and to a lesser extent White, the Court proved repeatedly that it was indifferent to pecuniary losses suffered by the landowners. Ordinarily the benefit of the doubt went to the state, and so long as the evidence did not show that the action was undertaken in bad faith or for a purpose that went beyond the contemporary understanding of the police power or violated a separate constitutional right (like the right to buy and sell property free from state-imposed racial restrictions), the statute was presumed legitimate.

Id. at 34-35 (citation omitted).

69. 272 U.S. at 390-93.

70. *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

71. Claeys, *supra* note 1, at 767.

72. *Id.* at 768.

73. See *supra* notes 16-21 and accompanying text.

unconstitutional. The New Jersey Supreme Court was not prepared to go so far.⁷⁴ Yes, the court did not find it necessary to hold that the township had violated the *Federal* Constitution, as urged by the plaintiffs.⁷⁵ However, the New Jersey Supreme Court did find that the township had violated the *state* constitution, and it is important to review the specific language used by the court:

It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Art. I, par. 1 of our Constitution, the requirements of which may be more demanding than those of the federal Constitution. It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. (The last term seems broad enough to encompass the others.) Conversely, a zoning enactment which is contrary to the general welfare is invalid.⁷⁶

In other words, the idea of “general welfare” is the portal through which the court enters to attack exclusionary zoning practices.

In his account of the *Mount Laurel* decision, Professor Claey's makes nary a mention of “general welfare.”⁷⁷ Instead, to him the case is an example of what happens when “Progressive ideals overestimate how far community, order, and security can suppress people’s selfish and rivalrous tendencies[.]”⁷⁸ We can understand why Professor Claey's would not want to celebrate the court’s use of general welfare to address the abuse of zoning power by some New Jersey suburban local governments. In Professor Claey's’s mind, in a zero-sum game general welfare expands at the expense of something much more important: “the scope of owners’ ‘private property’ in the rights to control the use of their land.”⁷⁹ In sharp contrast, the New Jersey Supreme Court, which sees the rights to own and use private property as an essential *part of* the general welfare, is attempting to correct an imbalance in the exercise of localities’ planning and zoning powers. Despite Professor Claey's’s wishes, there is no need to resort to Judge Westenhaver’s anti-zoning approach, a move that would have been unnecessarily disruptive given all of the expectations on the private

74. Claey's, *supra* note 1, at 769 (citation omitted).

75. See *Mount Laurel*, 336 A.2d at 725 (“We reach this conclusion under state law and so do not find it necessary to consider federal constitutional grounds urged by plaintiffs.”). While the lower court did refer to federal constitutional cases, the judge never articulated the specific provision of federal or state constitutional law upon which he based his conclusion of invalidity. See *S. Burlington County NAACP v. Township of Mount Laurel*, 290 A.2d 466-74 (N.J. Super. Ct. Law Div. 1972).

76. *Id.* at 725-26 (citations omitted).

77. This is despite the fact that the phrase “general welfare” appears in the majority opinion in *Mount Laurel* more than a dozen times. See *id.*

78. Claey's, *supra* note 1, at 769.

79. *Id.* at 751.

and public side that have arisen in the decades since the *Euclid* Court allowed the zoning experiment to continue.

Professor Claeys's legal history of exclusionary zoning also fails because he ends the tale much too soon. He states: "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."⁸⁰ The real saga continues with the New Jersey Supreme Court's monumental and highly controversial opinion in *Mount Laurel II*,⁸¹ the state legislature's passage of the Fair Housing Act,⁸² and subsequent cases in which the New Jersey Supreme Court has considered the legacy of the *Mount Laurel* doctrine in the light of statutory and regulatory additions. The true story of the struggle against exclusionary zoning in New Jersey involves a judiciary that has created procedures (such as special courts to hear *Mount Laurel* challenges), substantive rules (such as the affirmative obligation to provide affordable housing), and remedies (such as the builder's remedy) in their efforts to enlist all branches of state and local government to find a creative way of allowing landowners and developers throughout the Garden State to build least-cost housing for the state's neediest residents.

The *Mount Laurel* opinion, like its successors, is an important demonstration that *Euclid* and Progressive jurisprudence work.⁸³ While Professor Claeys would have preferred that the New Jersey Supreme Court turn back the clock fifty years, we commend the court for choosing the Progressive jurisprudential path represented by *Euclid* and *Nectow*. For, contrary to Professor Claeys's version, the true story is that in the *Mount Laurel* litigation and in other decisions, the New Jersey Supreme Court used an evolving and adaptive notion of the "general welfare" to fine tune and readjust zoning and planning for the state's metropolitan regions.

III. LAST THINGS: THE POSITIVE LEGACY OF PROGRESSIVE JURISPRUDENCE

Even after taking Professor Claeys's excursion through Progressive political thought, and despite his warning regarding the "uneasy

80. *Id.* at 770.

81. *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

82. N.J. Stat. Ann. § 52:27 D301-329 (West 2004).

83. In fact, the state supreme court cites the *Euclid* opinion itself to bolster the notion that one locality cannot stand in the way of regional needs: "[W]hen regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served." *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 728 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926)).

legacy of ‘Progressive jurisprudence,’”⁸⁴ we remain quite comfortable in endorsing our five-point strategy for judges and lawyers seeking guidance through the morass of caselaw and commentary involving allegedly confiscatory regulation of land use. We close by revisiting a key passage from Justice Sutherland’s opinion for the *Euclid* Court, and two modern evocations of Progressive jurisprudence that suggest strongly that *Euclid* does and should maintain its lodestar status.

Justice Sutherland, who was far from an anti-property rights radical, perceived the potential of enlightened and sensitive regulatory responses to the needs of a swiftly changing society within the confines of constitutional law:

[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.⁸⁵

In language such as this, Professor Claeys sees an organic, relativistic notion of law and morals.⁸⁶ We see a direct connection to the adaptive view of common law that typified the best of nineteenth century American jurisprudence.⁸⁷

Concurring opinions found in two of the Supreme Court’s most recent land-use decisions give special force to the cogency and lasting import of the Euclidean approach. Each opinion comes from a Justice identified with the center of the Rehnquist Court on the issue of private property rights, and each typifies an organic view of law that, much like the majority opinion in *Euclid*, seeks to strike the right balance between public and private interests, while respecting the most essential principles that continue to inform our Constitution.

84. Claeys, *supra* note 1.

85. *Euclid*, 272 U.S. 365, 387 (1926).

86. Early Progressives “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.” Claeys, *supra* note 1, at 759.

87. Perhaps the soundest evocation of that philosophy is found in a Massachusetts Supreme Judicial Court opinion written by Chief Justice Lemuel Shaw, who observed that:

[W]hen a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances.

Haar & Wolf, *supra* note 2, at 2178 (quoting *Norway Plains Co. v. Boston & Me. R.R.*, 67 Mass. (1 Gray) 263, 268 (1854)).

In his concurring opinion in *Lucas v. South Carolina Coastal Council*,⁸⁸ Justice Anthony Kennedy offers this word of caution to all of his colleagues:

In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. . . . I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions.⁸⁹

In 2001, nine years after *Lucas*, in *Palazzolo v. Rhode Island*,⁹⁰ Justice Sandra Day O'Connor, also concurring with the majority, provides this caveat:

As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula."⁹¹

This fact-centered, flexible, responsive judicial posture, so close in tone and substance to the early American notion of an adaptive common law, has been honed for a legal world of statutes, ordinances, and regulations. This eminently usable and experience-based judicial posture has survived decades of social, economic, and technological change, and has accommodated even profound transformations in political theory. This is the most important and enduring legacy of *Euclid* and of Progressive jurisprudence, as all of the participants in our legal system struggle to meet the needs and aspirations of the contemporary American metropolis.

88. 505 U.S. 1003 (1992).

89. *Id.* at 1035 (Kennedy, J., concurring).

90. 533 U.S. 606 (2001).

91. *Id.* at 635-36 (O'Connor, J., concurring) (citation omitted).

Notes & Observations