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EUCLID'S HISTORICAL IMAGERY

Richard H. Chused[†]

The standard image of *Village of Euclid v. Ambler Realty Co.*¹ places it in the pantheon of constitutional cases signaling the demise of unbridled, *laissez-faire* based, substantive due process theory in land use jurisprudence.² Despite the present Supreme Court's partial regression to pre-New Deal theories in recent takings cases, many land use planners, developers, local officials, and law teachers still look at *Euclid* as the baseline for constructing the contours of contemporary land use law. They also view those early twentieth century reformers responsible for the development of the land use and urban planning professions as mentors who helped the Supreme Court understand the need to rationally plan and develop our resources.

Such a rosy image of *Euclid* can be challenged in a number of ways. Conservatives cast about for theories ennobling private initiative, debunking government controls, or proving that the world with zoning is not very different from what the world would be without zoning. Others, claiming a liberal mantle, argue that the potential of zoning has never been met because of our love affair with automobiles and single-family homes and the political power and wealth of real estate developers.

I have a different, historically based, bone to pick with *Euclid*. Though convinced of the need for wise land use planning, appalled at our studied refusal to control sprawl, amazed at our indifference to ecological degradation, and dismayed by the conservative drift of the present Supreme Court, I view *Euclid* as an enabler of the very problems I decry. Its place in the history of land use planning is not nearly as attractive as its boosters suggest. Indeed the history is pretty ugly. That ugliness—derived from and embedded with the racism of the era in which the case was decided—helps explain why a group of very conservative Supreme Court Justices approved zoning despite

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¹ 272 U.S. 365 (1926).

² For example, according to Laurence Gerckens, Alfred Bettman's *amicus curiae* brief in support of zoning was "a brilliant defense of the zoning power" that "changed the course of American urban history." Laurence C. Gerckens, *Bettman of Cincinnati*, in *THE AMERICAN PLANNER: BIOGRAPHIES AND RECOLLECTIONS* 120, 135 (Donald A. Krueckeberg ed., 1983).

their well-known objections to many forms of government economic regulation. This essay recasts Euclidean imagery in the hope that history can teach lessons to the contemporary world.

I. ROSY IMAGERY

Herbert Hoover, known most widely for escorting the Great Depression into existence, served as Secretary of Commerce under Presidents Harding and Coolidge from 1921 until his accession to the presidency in 1928. Among the first things he did after taking over the department was to create the Division of Building and Housing in the Bureau of Standards and to appoint John M. Gries to run it.³ Gries helped organize a number of initiatives, all designed to encourage local authorities to alter the ways they dealt with real estate planning, development and construction. The Better Homes Organization, for example, was formed to encourage local initiatives for housing construction.

A panel was established to develop a model building code to reduce domination by “contractors and labor organizations who greatly and unnecessarily increased costs.”⁴ In July of 1921, Gries, over the signature of his boss Herbert Hoover, began to invite a number of prominent real estate development and planning professionals to form a small “committee to consider the question of zones.”⁵ The group that emerged was a “who’s who” of the real estate development and planning worlds—Edward Bassett,⁶ Irving B. Hiatt,⁷ John Ihlder,⁸ Morris Knowles,⁹ Nelson Lewis,¹⁰ J. Horace McFarland,¹¹ Frederick

³ Hoover himself brags about this a bit in HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920-1933, at 92 (1952).

⁴ *Id.* at 94 (noting that a standard building code was promulgated by the Commerce Department, which successfully encouraged its adoption by local authorities all over the country).

⁵ I took this intriguing little phrase from the form letter drafted by Gries and sent out by Hoover asking a number of people to join the committee. See Letters from President Herbert Hoover to individuals invited to participate in zoning committee (July 28, 1921) (on file with the Herbert Hoover Presidential Library, Commerce Papers Collection, Building and Housing Folder, Box No. 68) [hereinafter Hoover Building and Housing Papers].

⁶ Edward Bassett graduated Columbia Law School in 1886, served in Congress in the early twentieth century, and ended up practicing real estate and mass transit law in New York. He was instrumental in drafting the 1916 zoning ordinance, helping to turn it from a potentially reformist document designed to help raise the quality of life for the urban poor into a system easily capable of protecting the interests of the real estate development industry. He became known as a zoning expert, traveled widely giving speeches, and published a number of books and articles. For more information on Bassett, see William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in Euclid v. Ambler*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 31, 37-38 (Charles M. Haar et al. eds., 1989); Garrett Power, *The Advent of Zoning*, 4 PLAN. PERSP. 1, 2-4 (1989).

⁷ Irving B. Hiatt was a realtor and past president of the National Association of Real Estate Boards.

⁸ John Ihlder was a housing consultant servicing developers and a manager of the Civic Development Department of the Chamber of Commerce of the United States.

⁹ Morris Knowles was a civil engineer who represented the Chamber of Commerce of the United States.

Law Olmsted,¹² and Lawrence Veiller.¹³ The committee devoted itself to gathering information about zoning. They published tens of thousands of copies of a widely read tract called the *Zoning Primer*,¹⁴ and crafted a Standard Zoning Enabling Act,¹⁵ a model statute that was quickly used by states all across the country to authorize local government zoning.

No one should be surprised that land use and urban planning emerged and flowered in the 1920s. Chaos in America's developing urban centers, unprecedented levels of immigration from Europe and migration from the southern United States, burgeoning sales of automobiles, and development of new building construction techniques generated enormous controversy during the end of the nineteenth and beginning of the twentieth centuries. As American cities grew like wildfire, cries of distress became common. Muckraking authors produced "hit" books reflecting upon widespread concern about the state of urban America.¹⁶ From holding only about twenty-five percent of

¹⁰ Nelson Lewis was an engineer and a past-president of the American City Planning Institute. He represented the National Conference on City Planning and the National Municipal League, both progressive planning organizations, on the Commerce Department committee on zones.

¹¹ During the committee's work, J. Horace McFarland was president of the American Civic Association. Among his earliest accomplishments was the construction of a water filtration plant and a flood control system for Harrisburg, Pennsylvania. The "Harrisburg Plan" became a model for cities all over the country. He also worked hard to establish the National Park Service, was among the first to seek protection of the lands now in Yosemite National Park and the Everglades, lobbied across the nation for zoning, and was a master gardener. For more information on McFarland, see ERNEST MORRISON, *J. HORACE MCFARLAND—A THORN FOR BEAUTY* (1995).

¹² Frederick Law Olmsted may well be the most famous landscape architect in the history of the United States. He designed major parks in many major cities, including the Capitol Grounds in Washington, D.C., Central Park in Manhattan, Prospect Park in Brooklyn, Forest Park in St. Louis, The Fenway in Boston, Central Park in Louisville, Belle Isle Park in Detroit, Mount Royal Park in Montreal, and Roger Williams Park in Providence. His work also had significant impacts on other cities such as Seattle, Baltimore, Atlanta, Buffalo, and Rochester.

¹³ As Secretary and Director of the National Housing Association in New York City, Lawrence Veiller was among the leaders in the movement to zone America's largest city. Much of what he proposed was adopted in 1916 when New York became the first city to adopt comprehensive land use and building bulk restrictions.

¹⁴ The pamphlet was published by the Department of Commerce in 1922 and distributed in large numbers all over the country. Within a few days of its release in July, requests for over 50,000 copies had arrived at the desk of John Gries. Gries predicted that up to 100,000 copies would be requested by September. See Memorandum from John Gries to Herbert Hoover, Secretary of Commerce (July 6, 1922) (on file with Hoover Building and Housing Papers).

¹⁵ STANDARD ZONING ENABLING ACT (Dep't of Commerce 1924). See also HOOVER, *supra* note 3, at 94 (1952) (noting that the Department of Commerce initiated nation-wide zoning through the promulgation of sample municipal zoning codes drafted by a national conference of experts).

¹⁶ See, e.g., JACOB A. RIIS, *HOW THE OTHER HALF LIVES* (1890) (discussing the squalid conditions of New York tenements in the late-nineteenth century, and arguing that for-profit managing of such housing caused the poor conditions); UPTON SINCLAIR, *THE JUNGLE* (1906) (describing inhumane working conditions in the Chicago stockyards' meat-packing plants at the turn of the century); LINCOLN STEFFENS, *THE SHAME OF THE CITIES* 1-24 (1904) (discussing

the nation's population in 1870, urban areas held just over half only fifty years later.¹⁷ Between just 1905 and 1915, immigration increased the nation's population by more than ten percent.¹⁸ With most of those arrivals settling in highly populated areas along the coasts and industrial cities in the heartland, responding to immigration was a major concern in urban America. The blare of urban life became a cacophony as the number of registered automobiles passed the ten million mark in 1921.¹⁹

Led by the Chicago School, architectural and engineering developments changed the physical face of American cities. Renowned designers and engineers like Daniel Burnham, John Root, Louis Sullivan, William Jenney, William Holabird, and Martin Roche²⁰ rebuilt Chicago after the disastrous fire of 1871. Their work began to appear in other cities by the end of the century. Sullivan's Wainwright Building in St. Louis, when finished in 1891, was the tallest building west of the Mississippi River. The construction of Burnham's famous Flatiron Building at the corner of 23rd Street, Broadway, and Fifth Avenue in Manhattan in 1902 caused both a sensation and a storm of protest from those working and living in the area south of the structure.²¹

The widespread adoption of zoning enabling statutes in the 1920s was only one of numerous responses to the quickly changing face of America. A variety of movements urging reforms in housing and planning policy emerged during the early decades of the twentieth century. Tenement house regulations, for example, were first adopted by the state of New York in 1894. Other changes followed, as scandals erupted over the lack of tenement maintenance by famous persons and religious organizations,²² the fires that killed people in their apartments²³ and in sweatshops buried in the tenement dis-

political corruption and models of good governance in Chicago, St. Louis, Minneapolis, Philadelphia, and New York).

¹⁷ See BEN J. WATTENBERG, U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *THE STATISTICAL HISTORY OF THE UNITED STATES: FROM COLONIAL TIMES TO PRESENT* 11-12 (1976).

¹⁸ See *id.* at 105-106.

¹⁹ See *id.* at 716.

²⁰ For information on these and other famous architects in Chicago, examine the landmarks area of the city's web site. See *Chicago Landmarks* (visited Mar. 16, 2001) <<http://www.ci.chi.il.us/Landmarks/index.html>>.

²¹ The tale, along with its consequences for zoning in New York City, is best told in SEYMOUR I. TOLL, *ZONED AMERICAN* (1969).

²² In 1894, a scandal broke when it was revealed that the Trinity Church Corporation owned a number of rental buildings that were in deplorable condition. See *Old Trinity Shanties*, N.Y. TIMES, Dec. 15, 1894, at 9.

²³ The Tenement House Commission issued a report on fires in 1900, noting, among other things, that 41 people died in fires just between the beginning of 1898 and the middle of 1900. See *Tenement House Fires*, N.Y. TIMES, Dec. 21, 1900, at 6.

tricts,²⁴ and the rent strikes that popped up in the slums.²⁵ Jacob Riis published his famous muckraking book *How the Other Half Lives* in 1890. The General Assembly's Tenement House Committee produced a massive report during the 1895 session of the state legislature describing in detail the conditions in tenement houses and exploring the ownership of large numbers of tenement houses by the Trinity Church.²⁶ New York's Tenement House Act of 1901²⁷ was the culmination of a major, long-term effort by Progressive reformers to ban the construction of poor quality apartment buildings.²⁸ New York followed up by adopting significant building code changes and tenement house reforms in 1901. By the 1920s, many other urban areas around the country had followed suit.

Transformation of tenement house standards was an example of the "positive environmentalism"²⁹ movement that dominated a significant segment of the Progressive reform community in the decades surrounding the turn of the twentieth century. They believed that changing surroundings would change behavior. Advances in public health, sanitation, and social science allowed positive environmentalists to theorize about designing urban environments that would lead people to make better moral decisions about the structure of their lives. This movement was especially influential in the housing and architectural worlds. Many tenement house reformers strongly be-

²⁴ The famous Triangle Shirt Waist Factory fire that killed 147 New York City garment workers occurred on March 25, 1911. See *141 Men and Girls Die in Waist Factory Fire*, N.Y. TIMES, Mar. 26, 1911, at 1; *Locked in Factory, The Survivors Say, When Fire Started that Cost 141 Lives*, N.Y. TIMES, Mar. 27, 1911, at 1; *Blame Shifted on all Sides for Fire Horror*, N.Y. TIMES, Mar. 28, 1911, at 1; *Many Now Tell of Fire Traps*, N.Y. TIMES, Mar. 29, 1911, at 3; *Faint in a Frenzy over Tales of Fire*, N.Y. TIMES, Mar. 30, 1911, at 1.

²⁵ There was a significant surge of rent strikes in 1904 in response to widespread rent increases. See, e.g., Archibald A. Hill, *The Rental Agitation on the East Side*, 12 CHARITIES 396, 396-98 (1904) (describing the 1904 rent increases on the lower east side of New York, where monthly rents increased as much as 60%).

²⁶ See Report of the Tenement House Committee of 1894, New York State Assembly, 18th Legis. Sess., No. 37 (1895) (noting that, as of 1893, over one-half of New York residents lived in overcrowded and unhygienic tenement housing and describing methods for identifying tenements in the city).

²⁷ 1901 N.Y. Laws ch. 334.

²⁸ A review of the some of the Tenement House Act history may be found in Lawrence M. Friedman & Michael J. Spector, *Tenement House Legislation in Wisconsin: Reform and Reaction*, 9 AM. J. LEGAL HIST. 41, 41-63 (1965). The classic histories of the tenement reforms include two works authored by Lawrence Veiller, one of the participants in Hoover's advisory committee on zones. See LAWRENCE VEILLER, *THE TENEMENT HOUSE PROBLEM* (Robert W. DeForest et al. eds., 1903); Lawrence Veiller, *The Housing Problem in American Cities*, 25 ANNALS AM. ACAD. POL. & SOC. SCI. 248, 248-72 (1905). More recent classics include Steven E. Andrachek, *Housing in the United States: 1890-1929*, in *THE STORY OF HOUSING* 123, 123-76 (Gertrude Sipperly Fish ed., 1979), and ROY LUBOVE, *THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY 1890-1917* (1962).

²⁹ This label is taken from Chapter 15 of an important book on the history of urban reform movements in America. See PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920*, at 221-23 (1978) (describing positive environmentalism as a strategy to discourage urban vice by the provision of healthy social substitutes).

lieved that improving access to parks, air, and light would enhance both the physical and moral health of the occupants. Their reports, including those issued by the New York state legislature prior to its adoption of tenement house reforms in 1901, were filled with data on disease and death rates in various sorts of housing environments. In 1878, for example, the journal *Plumber and Sanitary Engineer* announced a competition for a model tenement design. The contest drew wide publicity and a number of entries. Many of the ideas suggested in this contest were later codified in Tenement House Acts.³⁰ Some years later, reformers held a Tenement House Exhibition at 404 Fifth Avenue as part of the efforts to develop backing for reform legislation then pending in the state legislature. At the exhibition's opening ceremony, New York's governor, Theodore Roosevelt, gave a speech laced with positive environmentalism. He opened his remarks by saying:

I have come from Albany to be here this evening because it seems to me, literally, that on the whole no movement is so vital to the well-being of our people as that into a part of which you are looking now. If we succeed in upbuilding the material and therefore moral side of what is the foundation of the real life of the Greater New York we shall have taken a longer stride than is possible in any other way toward a solution of the great civic problems with which we are confronted.³¹

The City Beautiful Movement in the architectural world grew out of a similar belief structure.³² Based in significant ways on the work of Frederick Law Olmsted, who designed Central Park in the 1850s, architects began to see housing complexes as part of a larger urban environment. In a somewhat romantic effort to recapture the bucolic and putatively more virtuous past of rural America, site planning and landscape architecture became important parts of urban planning. And, of course, the zoning movement was heavily influenced by the positive environmental movement of the early twentieth century. In sum, the concern of the positive environmentalists for physical and moral improvements led to major public and legislative initiatives, including public health campaigns, water and sewer construction programs, revisions in basic architectural assumptions,

³⁰ See LUBOVE, *supra* note 28, at 28-32 (noting that the amendment to the Tenement Housing Law allowed the Board of Health to adopt the prize-winning dumb-bell tenement design).

³¹ *Gov. Roosevelt on Tenement Reform*, N.Y. TIMES, Feb. 11, 1900, at 6.

³² See WILLIAM H. WILSON, *THE CITY BEAUTIFUL MOVEMENT* (1989) (discussing the principles, conflicts, and achievements of the City Beautiful Movement's efforts to reshape American cities into beautiful, functional entities).

adoption of health, building, and fire codes, and enactment of zoning schemes.

The largely undeveloped Village of Euclid, just east of Cleveland, was caught up in this wave of planning reforms. The Village of Euclid actually adopted its first zoning ordinance in 1922, two years before the Commerce Department published its final draft of the Standard Zoning Enabling Act.³³ Euclid followed in the footsteps of New York City, which adopted its first zoning ordinance in 1916, two years after the New York state legislature adopted the nation's first zoning enabling statute.³⁴ Some of those who actively labored to gain passage of zoning enabling legislation in Ohio and zoning ordinances in towns and cities around the state ended up playing important roles in the litigation that became *Village of Euclid v. Ambler Realty Co.* Two are of special note—James Metzenbaum and Alfred Bettman.

The Euclid zoning ordinance was drafted by James Metzenbaum. He lived on the town's main street, Euclid Avenue, and was its village counsel. The zoning scheme adopted by the town was modeled on the earlier New York ordinance. Euclid simply took the various building type, height, and density classifications of the New York plan and pasted them over Euclid to solidify extant land use patterns. Euclid Avenue itself, known by some as Millionaire's Row, was lined with mansions as it headed west toward Cleveland. One of the reasons Metzenbaum encouraged Euclid to adopt a zoning plan was to preserve the avenue, which by 1920 had begun to fall upon hard times. Some of its mansions had given way to gas stations or other uses, and a few had been turned into apartments.³⁵ Like the Fifth Avenue Merchants Association in Manhattan, those on Euclid Avenue saw zoning as a way to protect existing land use patterns and property values. Metzenbaum, of course, ended up representing Euclid before the Supreme Court.

Metzenbaum's efforts to write a zoning ordinance for Euclid also were spurred by the similar efforts of several nearby suburban towns—Lakewood, East Cleveland, and Cleveland Heights³⁶—and by

³³ Euclid may have been ahead of the general trend because Alfred Bettman, who drafted the Standard Act for President Hoover, was from Ohio and deeply involved in development of land use legislation in the state.

³⁴ The most prominent entity seeking adoption of zoning enabling legislation in New York was the Fifth Avenue Commission, established in 1913 by the Manhattan Borough President. The Commission was concerned about the growth of tall buildings in lower Manhattan and the negative effects of the garment industry. See TOLL, *supra* note 21, at 143-71 (describing the Fifth Avenue Commission and its activities).

³⁵ For more on this era, see TOLL, *supra* note 21, at 214-17; Power, *supra* note 6, at 4.

³⁶ East Cleveland and Cleveland Heights are southeast of Cleveland and southwest of Euclid. Lakewood is just west of Cleveland. Their ordinances were drafted by Robert Whitten, a nationally known municipal reformer. He worked in city planning in New York between 1914 and 1917, and then moved to Cleveland. In addition to his zoning work, he developed a plan to

the long-time labors of Alfred Bettman, a Cincinnati reformer deeply involved in both the local and national zoning movement. Bettman was part of the early Reform German Jewish Community in Southern Ohio. Led by Rabbi Stephen Wise, founder of New York's Free Synagogue, the movement's headquarters and seminary eventually located in Cincinnati. Wise's efforts to integrate social reform into religious concepts of charity and justice were very closely related to the early twentieth century Social Gospel movement among Christians led by the likes of Walter Rauschenbusch.³⁷ Bettman took his social obligations seriously, working for decades, often as a volunteer, on urban planning and land use issues.³⁸ He worked tirelessly on developing planning agencies for Cincinnati, often without much success. He wrote Ohio's first act enabling the establishment of city planning agencies and saw it adopted in 1915, and he also drafted much of Ohio's later land use legislation and joined Hoover's committee on zones in 1924, just in time to draft the Standard Zoning Enabling Act.

II. UGLY IMAGERY

Race, ethnicity, and poverty were never far below the surface of American culture between the end of the Civil War and the resolution of *Euclid* in 1926. Indeed, images about race, immigration and poverty were central parts of the *Euclid* litigation itself. The district court opinion issued by Judge David Westenhaver³⁹ invalidating the *Euclid* zoning plan was laced with a distinctly pre-New Deal form of judicial racism. President Wilson appointed Westenhaver to the federal bench in 1917, in significant part because of the influence of Ambler Realty's attorney, Newton Baker. Baker served as Wilson's secretary of war and was a close friend and sometime law partner of Westenhaver's.⁴⁰ Though Judge Westenhaver had close ties to Baker, it is virtually impossible to contend that his district court opinion in *Euclid* distorted prior Supreme Court jurisprudence on race, regulation of property, and the Constitution in Ambler Realty's favor. During the

purchase thousands of acres of parklands in and around Cleveland in the tradition of positive environmentalism. For more on Whitten, see Randle, *supra* note 6, at 38-40.

³⁷ See, e.g., ROBERT T. HANDY, *THE SOCIAL GOSPEL IN AMERICA, 1870-1920* (1966).

³⁸ Bettman was a corporate lawyer in private practice for much of his professional life. He also served as a special assistant to A. Mitchell Palmer, attorney general of the United States, between 1917 and 1919 prosecuting espionage cases, including a case against socialist Eugene Debs. After this service, he recommended that many of those prosecuted, not including Debs, be pardoned. He left the Justice Department before the infamous Palmer raids began, but his reforming reputation has been historically tainted by his work on the Debs case. Some think his interest in zoning was actually based on a desire to solidify the investment opportunities of real estate developers. For more on Bettman's career, see Gerckens, *supra* note 2, at 120.

³⁹ See *Ambler Realty Co. v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

⁴⁰ See Randle, *supra* note 6, at 33-35, 40-42.

two-year period before Judge Westenhaver rendered his January 1924 decision against Euclid's zoning plan, the Supreme Court had decided three cases, which as a group cast great doubt on the ability of states to regulate land use or the economy, while affirming the vitality of a distinct form of Jim Crow racism.⁴¹

In his opinion, Judge Westenhaver noted that many of the older cases affirming state land use regulation involved statutes designed to bar placement of activities commonly viewed as nuisances, such as livery stables and brick manufacturing plants, near residences. It was easy for him to view the sorts of land use restrictions imposed by Euclid's ordinance as quite different from the typical regulatory fare that had previously come before the Supreme Court. Though there were certainly some examples that were hard for Westenhaver to deal with,⁴² most of the cases gave significant support for his general thesis that unlawful restraint of freedom of contract, rather than legitimate use of the police power, was the primary, and unacceptable, objective of Euclid's zoning plan.

He relied heavily, for example, on *Buchanan v. Warley*,⁴³ decided in 1918. Judge Westenhaver argued that if, as *Buchanan* held, ordinances requiring the establishment of segregated residential zones were invalid, then certainly Euclid's zoning plan had to fall. It was so obvious to Judge Westenhaver that "colored" people and certain groups of immigrants were nuisances that the Supreme Court's refusal to approve racial zoning made it impossible to validate zoning for other purposes. Comparing the *Buchanan* and *Euclid* ordinances, he wrote:

It seems to me that no candid mind can deny that more and stronger reasons exist, having a real and substantial relation to the public peace, supporting [the *Buchanan*] ordinance than can be urged under any aspect of the police power to support the present ordinance as applied to plaintiff's property. And no gift of second sight is required to foresee that if this Kentucky statute had been sustained, its provisions would have spread from city to city throughout the length

⁴¹ See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating a Washington, D.C. minimum wage statute); *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923) (striking down a Kansas compulsory labor arbitration statute); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding that a Pennsylvania regulation of underground mining constituted a regulatory taking).

⁴² See, e.g., *Welch v. Swasey*, 214 U.S. 91 (1909) (involving limitations on building height). Even recognizing that tall buildings and the light they block were a major concern of the New York legislature when they first adopted zoning statutes, Judge Westenhaver could say little more than that the case involved "merely a reasonable regulation of the height of buildings." *Amber Realty Co.*, 297 F. at 315.

⁴³ 245 U.S. 60 (1917) (holding that a city ordinance prohibiting "colored" people from occupying certain houses was unconstitutional).

and breadth of the land. And it is equally apparent that the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of the population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.⁴⁴

Judge Westenhaver's reliance on *Buchanan* was part of a distinctly pre-New Deal legal construct about race and freedom of contract that is strange to present-day sensibilities. The factual structure of *Buchanan* helps understand how this worked. Warley, who was the black head of the recently established Louisville chapter of the NAACP, agreed to buy a house from a white man in violation of the Louisville racial zoning ordinance. The parties to the deal, who both wished to test the validity of the ordinance, inserted a clause in the contract allowing Warley to decline to perform the deal if the Louisville ordinance barred him from taking possession. To set up the litigation, Warley then refused to settle the deal and Buchanan sued for specific performance. Buchanan, the white seller, claimed that Warley was obligated to perform because the ordinance was unconstitutional, and Warley, the black buyer, resisted by claiming the apartheid zoning statute was valid. This odd reversal of roles was a clever strategic move, for it placed the white seller at the forefront of the case and presented the courts with a "simple" claim by a white man that he was entitled to seek specific performance of a standard contract for the sale of real estate. The Supreme Court took the bait, finding the racial zoning scheme invalid on the ground that it infringed upon the substantive due process right of a white man to be free from unlawful constraints on the enforcement of a contract for the sale of real estate voluntarily agreed to by the parties.

What went unsaid in both Justice Day's opinion in *Buchanan* and Judge Westenhaver's opinion in *Euclid* was that racially restrictive covenant schemes were completely acceptable. Such covenants came into widespread use early in the twentieth century⁴⁵ and were explicitly approved by the Supreme Court in *Corrigan v. Buckley*,⁴⁶ decided just one year before Judge Westenhaver rendered his opinion

⁴⁴ *Amber Realty Co.*, 297 F. at 312-13.

⁴⁵ The covenants at issue in *Shelley v. Kraemer*, 334 U.S. 1, 4-5 (1948), which barred enforcement of the racial restrictions, were first generated by the Marcus Avenue Improvement Association in 1911. The restrictions in *Corrigan v. Buckley*, 299 F. 899, 900 (D.C. Cir. 1924), *aff'd*, 271 U.S. 323 (1924), set up in 1921, were uncharacteristically late in arriving.

⁴⁶ 271 U.S. 323 (1924). The Circuit Court of Appeals rendered the most complete opinion in the case. *See Corrigan*, 299 F. at 899.

in *Euclid*.⁴⁷ Both the *Corrigan* and *Buchanan* courts opined that the Constitution required only that “political” or “legal” equality—the rights of each person to vote and to avail themselves of the “freedom” to contract about their labor and assets—be granted to both whites and blacks. “Social” equality was beyond the capacity of the law to bestow. But the right of whites and blacks to contract about property, Justice Day wrote in *Buchanan*,

did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. . . . The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.⁴⁸

So when all was said and done, Judge Westenhaver’s opinion was an expression of shock at the outcome of *Buchanan*. It was difficult for him to fathom the idea that segregation by zoning was anything other than a vitally important method of limiting the amalgamation of the races and the spread of pernicious ideas like social equality. Claims of social equality, Judge Westenhaver believed, could best be constrained by allowing each race to “freely” contract only within its segregated residential zone.⁴⁹ The Supreme Court having concluded, however, that racial zoning was better characterized as an unlawful limitation on freedom of contract rather than a legitimate attempt to bar social equality, Westenhaver felt compelled to invalidate a general zoning scheme based on a legislative claim of police power authority even more tenuous to him than the one deployed in *Buchanan* to support Louisville’s residential segregation ordinance.

It should surprise no one that race, ethnicity, and poverty were on the minds of those handling the dispute over *Euclid*’s zoning scheme. The solidification of the Jim Crow system from the end of Reconstruction through the 1920s is a well-known story. Other startling events also brought racial and ethnic issues to public attention on a regular basis. Race riots occurred in numerous cities in the late nineteenth and early twentieth centuries. These were not like the ur-

⁴⁷ *Amber Realty Co.*, 297 F. at 307.

⁴⁸ *Buchanan*, 245 U.S. at 79, 81.

⁴⁹ Judge Westenhaver also relied on Justice Holmes’s recent opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and a series of freedom of contract cases decided just before *Euclid* came before him. Two important contract cases used by Westenhaver appeared in 1923. See *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (invalidating a Washington, D.C. minimum wage statute); *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923) (striking down a Kansas compulsory labor arbitration statute).

ban disturbances that began in Watts in 1965 and appeared repeatedly until after the assassination of Reverend Martin Luther King, Jr. in 1968. In 1919 alone, for example, over twenty-five cities were faced with mobs of white people destroying African-American neighborhoods and killing residents.⁵⁰ In recent years, some communities have begun to retell the stories of these riots, apologize to their African-American communities, and even consider payment of reparations.⁵¹ Though lynching of individuals or small groups of people peaked near the end of the nineteenth century, urban mob killings more than made up for the decline in the numbers of people strung up on trees individually or in small groups.⁵² The Ku Klux Klan was a major political force at the time. Its members held elected offices in a number of states during the first few decades of the twentieth century. Indeed, the power of the Klan was the subject of debate in Congress just before *Euclid* came before Judge Westenhaver. A movement favoring anti-lynching legislation reached its peak in 1922, when a bill passed in the House of Representatives, only to die in a Senate filibuster.⁵³

In addition, opposition to immigration was fierce by the time Judge Westenhaver decided *Euclid*. Acts restricting immigration were enacted in 1885, 1891, 1903, 1907, and 1917. The quota system, favoring those seeking admission from northern Europe and severely limiting entry from other parts of Europe and the rest of the

⁵⁰ See JOANNE GRANT, *BLACK PROTEST: HISTORY, DOCUMENTS AND ANALYSES 175-79* (1968) (containing a collection of representative documents recording the history of the African American protest).

⁵¹ The best-known example of this phenomenon is probably occurring in Tulsa, Oklahoma. The city has established the 1921 Race Riot Commission. Access to commission materials, including its report, a list of those who died, minutes of their meetings, and a list of other riots in the United States can be found at *1921 Tulsa Race Riot Commission* (visited Apr. 3, 2001) <<http://www.ok-history.mus.ok.us/trrc/trrc.htm>>.

⁵² My elderly father has vividly described to me scenes from the 1917 riot in East St. Louis, Illinois, where he was then living as a nine-year-old child. The most chilling was his description of a mob of angry whites dragging a black barber out of his shop across the street from my grandfather's store, tying him up to the back of a truck, dragging him to the Eads Bridge, and throwing him in the Mississippi River. The trigger for what was in essence the lynching of a community was the hiring of blacks to work in an aluminum-smelting factory while whites were fighting in World War I. The last time I visited St. Louis, the story of this riot was told in great detail in an exhibit of the Missouri Historical Society in the Jefferson Memorial in Forest Park. For more on this particular episode of mob violence, see ELLIOTT M. RUDWICK, *RACE RIOT AT EAST ST. LOUIS JULY 2, 1917* (1964).

⁵³ For more on this movement, spearheaded by Ida B. Wells-Barnett, Mary Church Terrell, Jessie Daniel Ames, the NAACP, and others, see DONALD L. GRANT, *THE ANTI-LYNCHING MOVEMENT 1883-1932* (1975) (focusing on the involvement and struggle of African-Americans in the anti-lynching movement); JACQUELYN DOWD HALL, *REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING* (1979) (studying female involvement in the anti-lynching movement); NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918* (1919) (discussing the NAACP's struggle to have anti-lynching legislation enacted).

world, was imposed by legislation passed in 1921 and 1924. Immigration dropped dramatically after the last of these enactments was signed into law. Fueled by racism and anti-semitism, and given intellectual cover by Social Darwinism, many native-born whites saw themselves as the saviors of culture and civilization. The willingness of the Supreme Court in *Buchanan* and of Judge Westenhaver in *Euclid* to focus on the meanings of legal and social equality mirrored the widespread cultural understanding that apartheid was not merely acceptable but wholly necessary for the well-being of the republic.

When viewed in light of such a setting, the debate in *Euclid* takes on new meanings. It was not just a case about the ability of legislative bodies to regulate property and contracts, but a debate about the sorts of social forces—good, bad, and indifferent—that could legitimately be taken into account by those elected to state legislatures. Judge Westenhaver simply made the overtly racist side of this debate explicit in his *Euclid* opinion. Another side of this debate explored the rosy images described in the prior part of this essay, and a third group explored the “nuisance rationale”—a more “polite” form of legal discourse that still allowed for use of ugly images in land use planning.

Metzenbaum, representing *Euclid*, adopted a straightforward strategy of rosy imagery before Judge Westenhaver and repeated that strategy in the 142-page brief he filed with the Supreme Court. He catalogued the problems of urban America in great detail, listed all the zoning acts then extant, and argued that the courts must give legislative bodies wide latitude, under their police power, to regulate in the public interest by presuming their enactments valid. He called upon all the theories of positive environmentalism, pleading that the complexities of modern life necessitated careful planning, well thought-out land use controls, “scientific” rules about building styles and construction methods, and sophisticated management of resources.

Metzenbaum’s strategy was very risky. As noted earlier,⁵⁴ the Supreme Court had relied heavily on freedom of contract theory in three cases decided shortly before *Euclid* to limit the authority of state legislatures to control the economy. In the famous case of *Pennsylvania Coal Co. v. Mahon*,⁵⁵ the most important of these three cases for our purposes, a land use control scheme to control subsidence from underground mining was invalidated on the ground that its impact on mineral rights was too severe to pass muster under the state’s police power. Zoning was clearly at constitutional risk. Newton Baker, Ambler Realty’s attorney, saw the opening and ran through it.

⁵⁴ See *supra* notes 41–49 and accompanying text.

⁵⁵ 260 U.S. 393 (1922).

He confronted Metzenbaum's strategy directly, arguing that the police power could not be used to destroy property rights and inhibit the ability of owners to develop their land to its highest and best use.

It was in this context that Alfred Bettman, leader of the National Conference on City Planning, emerged as a crucial strategic and theoretical player. He did not directly participate in either the trial or the first hearing before the Supreme Court. In one of history's most bizarre twists of fate, Bettman drafted a brief to file for use when the Supreme Court first heard the case, but missed the deadline by waiting until after the oral argument before seeking permission to file.⁵⁶ On February 13, 1926, about two-and-one-half weeks after the *Euclid* oral argument, Bettman wrote to his old friend and fellow Cincinnati, Chief Justice William Howard Taft, noting how important the case was and asking if he could belatedly file an amicus brief. Taft wrote back to Bettman later that month telling him that his request had been brought up in conference and granted. Shortly thereafter, the Court ordered that the case be reargued the following term. The absence of Justice Sutherland at the first argument, Bettman's request to file a brief, and, perhaps, judicial disarray on the merits among the eight Justices who heard the oral argument persuaded the Court to go over the issues one more time.⁵⁷

Bettman's "Brandeis Brief"⁵⁸ took a tack dramatically different from those of Metzenbaum and Baker. While focusing the Court's attention on the social need for urban planning, he restructured the arguments supporting zoning in a decisive way. Confronted with an unrefuted claim by Ambler Realty that the value of their land was significantly reduced by *Euclid's* zoning plan, Bettman feared that the Court would be reluctant to reverse. Metzenbaum dealt with this issue by arguing only that the police power allowed for zoning despite the potential costs it imposed on landowners. Bettman declined to use such broad and unlimited arguments, preferring instead to contend that specific claims of unfairness could be dealt with individually without barring zoning altogether. He argued that legislative author-

⁵⁶ See Gerckens, *supra* note 2, at 135 (noting that Bettman's *amicus curiae* brief in support of zoning was "a brilliant defense of the zoning power" that "changed the course of American urban history"); Power, *supra* note 6, at 6 (describing Bettman's failure to file a brief with the Supreme Court on time and noting that such tardiness by Bettman was atypical).

⁵⁷ The story surrounding the re-argument of *Euclid* is best told by Timothy Alan Fluck, *Euclid v. Ambler: A Retrospective*, 52 J. AM. PLAN. ASS'N 326, 331-32 (1986).

⁵⁸ The appellation comes from the brief signed by Louis Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908), a case that validated an Oregon law mandating maximum working hours for women. The document, which referred to dozens of "scientific" studies about the need to treat women with special care because of their reproductive obligations, was actually pulled together by Josephine Goldmark, Brandeis's sister-in-law, and Florence Kelley for the National Consumers League. For more on the *Muller* story see ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 186-87* (1982). Bettman's brief ran for 137 pages and contained excerpts from the works of many well-known planners, including many who served on Hoover's committee on zones in the Commerce Department.

ity extended to the prevention of nuisances, and that creating single use zones was an appropriate method for avoiding future conflicts in land uses.

The shift in tone was decisive not only because of the subtle ways in which it undermined Ambler Realty's claims of economic harm, but also because of the contours of the arguments about single use zones. By using a "nuisance analogy"—the idea that single use zones were likely to prevent land use conflicts—as the central feature of his argument, Bettman sidestepped the intractable and circular debates in the Metzenbaum and Baker briefs about the dichotomy between the police power, on the one hand, and takings or freedom of contract, on the other.⁵⁹ While the briefs of the parties seemed to walk past each other in the night, Bettman found a way to concretize the debate by bringing it back into legally familiar terrain. In a section of his brief cleverly entitled "Analogies with Other Types of Regulation of Property," Bettman argued, "[z]oning is simply a modern mode or application to modern urban conditions of recognized and sanctioned methods of regulating property."⁶⁰ Then, in perhaps the most crucial paragraph of his argument, he presented nuisance law as the most appropriate analogy to use in thinking about the constitutionality of zoning:

What, for example, is the relationship of zoning to the law of nuisances? The term "nuisance" is usually applied to those developments which are offensive in the most crude and obvious way, in which cause and effect are not only quite obvious to the naked ear or nose, but are also not far apart in either space or time. A slaughterhouse or foundry next door to a residence, throwing its odors or clanging noises into that residence over an intervening space of a few feet, is a nuisance. The law of nuisance, however, has precepts and a philosophy, as well as illustrations. The philosophy underlying the above illustration is nothing more or less than the old adage that a man shall not so use his property as to injure another; and the precept, that a man may not send noise or odor or other disturbing substances or vibration into or onto his neighbor's property. The law of nuisance operates by

⁵⁹ Bettman's amicus brief does refer to these issues, but only in an attempt to demonstrate their irrelevancy. His argument about police power, for example, suggests that the attorneys of record for both sides only confused matters by taking seriously the idea that zoning disputes involve a conflict between regulation and police power. The argument that reduction in value of property automatically invalidates the regulation is circular, Bettman argued, for it assumes the conclusion it is designed to reach. See Brief on Behalf of the National Conference on City Planning, the Ohio State Conference on City Planning, the National Housing Association, and the Massachusetts Federation of Town Planning Boards, at 9, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665) [hereinafter Bettman Brief].

⁶⁰ *Id.* at 23.

way of prevention as well as by suppression. The zoning ordinance, by segregating the industrial districts from the residential districts, aims to produce, by a process of prevention applied over the whole territory of the city throughout an extensive period of time, the segregation of the noises and odors and turmoils necessarily incident to the operation of industry from those sections of the city in which the homes of the people are or may be appropriately located. The mode of regulation may be new; but the purpose and the fundamental justification are the same. If, as is the case, one of the aims of zoning be to segregate industrial and commercial street traffic from the lighter and quieter forms of street traffic, by means of segregation of the districts in which these different types of traffic normally develop, then zoning becomes obviously a mode of prevention of noise and dangers. Experience demonstrates that unregulated city growth tends to subject the home districts to offensive environment; and not much imagination is needed to realize that zoning can counteract this tendency.⁶¹

The stage was set by the remark that “home districts” were subject to “offensive treatment.” Bettman then used that idea to attack the most difficult issue in the case—the separation of apartment and house zones. As Bettman himself noted in a paper he wrote while *Euclid* was pending,⁶² barring apartment buildings from residential zones was thought by many to be the most troublesome feature of the typical planning ordinances. Responding to claims that such zoning tactics were merely aesthetic controls and therefore outside the police power, Bettman called upon telling imagery of middle and upper class men protecting their children from moral risk to justify single family residential zones:

[T]he man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. This assumption is indubitably correct. The researches of physicians and public health students have demonstrated the importance of our physical environment as a factor in our physical health,

⁶¹ *Id.* at 23-24.

⁶² See Alfred Bettman, *The Present State of Court Decisions on Zoning*, 2 CITY PLAN. 24, 25 (1926) (noting the “anxiety” caused by excluding apartment buildings from residential zones).

mental sanity and moral strength; and the records of hospitals and criminal courts amply support these conclusions. The comparative health statistics of the planned and unplanned communities, so far as same have been gathered, tend to show more favorable results in the former than in the latter. Disorderliness in the environment has as detrimental an effect upon health and character as disorderliness within the house itself.⁶³

In this passage, it becomes clear that use of the nuisance analogy also permitted one other crucial step—the introduction of “politely” ugly discourse. By putting the home/apartment dichotomy into the nuisance analogy, Bettman could call forth a host of phrases well suited to convince the conservative instincts of Supreme Court Justices that zoning was a positive good. The moral strength of upper-class children was at risk, Bettman warned. Keeping the kids away from a “disorderly, noisy, slovenly, blighted and slum-like district” was the only protection.

This was not the first time that children became the linchpin of efforts to reform society. Such a focus had deep historical roots. Much of conservative America’s agenda from after the Civil War through the 1920s revolved around creating “positive” environments for children. Juvenile courts, adoption law, and a variety of other “child saving” reforms proliferated during this period.⁶⁴ The middle and upper classes went to great lengths to protect their children from harm. Prep schools bloomed in the countryside, vagrancy rules were created and used to sweep risky people off the streets, prostitution codes were strengthened and red-light districts raided, and obscenity codes were expanded to include bans on discussion of birth control and abortion to reduce sexual temptations among the children of the rich.⁶⁵ Zoning rules, like many of the other moral reforms of the late nineteenth and early twentieth centuries, were designed to significantly reduce the likelihood that middle- and upper-class children would come into contact with poor, immigrant, or black culture.

Justice Sutherland ran with Bettman’s imagery in his majority opinion for the Court in *Euclid*. He gave us a picture of an “apartment” that “politely”—that is, without the overt use of racial and ethnic slurs—called forth the most negative, stereotypical imagery of New York tenement house districts. In a very revealing passage, with many haunting similarities to Bettman’s prose, Justice Sutherland’s

⁶³ Bettman Brief, *supra* note 59, at 29-30.

⁶⁴ See, e.g., ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 46 (1969) (discussing how reformers hoped to convert “juvenile delinquents” into productive members of society).

⁶⁵ The best book I know of on this subject is NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* (1997).

appreciation for what the nuisance analogy could do for the upper class was palpable:

[T]he development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.⁶⁶

It was therefore possible, without ever mentioning race, immigration, or tenement houses, to call upon other code words that had the same impact. Justice Sutherland, with a little help from Bettman, crafted a result that allowed legislatures to protect upper-class residential and commercial areas. In one fell swoop, Fifth Avenue merchants, Euclid Avenue mansions, single-family zones, and the children of the rich were freed from the threat of “other” people and poverty. In the context of its time, the final result was stunning. In just a two-year span, the Supreme Court had validated both racial covenants⁶⁷ and isolated residential zones for the rich. Nothing could have been more in tune with the times.

EPILOGUE

When the racial and ethnic context of *Euclid* is taken into account, its Vietnam era fate is hardly surprising. At the same time that

⁶⁶ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926).

⁶⁷ See *Corrigan v. Buckley*, 271 U.S. 323, 324 (1924) (upholding a twenty-one-year mutual covenant, made between private landowners, not to sell lots to “any person of Negro race or blood”).

a variety of movements began to attack racial segregation in housing during the 1960s and 1970s, many reform-minded folks also began to take another look at Euclidean zoning and its overt licensing of segregation by class. The leadership of major civil rights groups, including the NAACP, the Urban League, and the National Committee Against Discrimination in Housing,⁶⁸ began to investigate the possibility of attacking national housing policies and many of the basic suppositions of *Euclid* itself. In addition to bringing litigation that altered the contours of federal housing discrimination law⁶⁹ and sought the adoption of new federal legislation,⁷⁰ cases were brought under various state constitutional and statutory provisions challenging a variety of zoning and building code practices. The Mt. Laurel litigation—named after the famous and massive series of cases brought in New Jersey⁷¹—forced the reconstruction of Euclidean zoning in a number of states. Regional and state planning agencies now exercise more control over housing policy in a few areas. A variety of schemes are in place that force communities to accept more middle and lower class housing construction.

But most zoning decisions are still made locally. Planning still largely depends on the boundary lines of artificially small towns and counties. For the most part, central cities still are left to watch in frustration as suburban and ex-urban areas lure wealth to their areas. The oft-discussed “comeback” of many old downtowns may be tenuous. Most old and largely abandoned residential areas have not changed much in the last decade. And the contemporary reinvestment in urban areas may be driven in significant part by temporary demographic trends—recent increases in immigration, the return of the empty-nester-baby-boomers to neighborhoods closer to cities, and the entry of the baby-boom generation’s children into the housing market.

In short, balkanization still dominates our land use planning world. That system allows for governments to compete with each other on a large scale for good tax rates and “clean” land uses.

⁶⁸ See, e.g., NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, *HOW THE FEDERAL GOVERNMENT BUILDS GHETTOS* (1967).

⁶⁹ For example, *Jones v. Mayer Co.*, 392 U.S. 409 (1968), was brought by an attorney named Sam Liberman, a volunteer for the St. Louis, Missouri branch of the National Committee Against Discrimination in Housing. The case established that Congress had the authority to adopt race discrimination statutes under § 2 of the 13th Amendment as well as § 5 of the 14th Amendment. That meant that private action, rather than just state action, could be reached by federal legislation.

⁷⁰ Title VIII of the Civil Rights Act of 1968 was the first federal enactment to deal with housing discrimination since the Reconstruction Era. It was passed very shortly after the assassination of Reverend Martin Luther King, Jr.

⁷¹ See, e.g., *Southern Burlington County NAACP v. Mt. Laurel*, 456 A.2d 390 (N.J. 1983) (holding that an absolute ban on mobile homes based solely on the grounds that they negatively affect real estate values was impermissible); *Southern Burlington County NAACP v. Mt. Laurel*, 336 A.2d 713 (N.J. 1975) (holding municipalities may not use land use regulations to make it impossible to provide low and moderate income housing to those who need it).

Those cities and towns without much economic clout cannot successfully compete in such a world. There are lessons to be drawn from this history. Only a complete restructuring of jurisdictional boundary lines and land use standards will alter this picture. Euclidean zoning must be discarded and replaced by a system of regional land use authorities with explicit instructions to sharply curtail sprawl and force reinvestment in under-utilized urban centers. Are we, like the generation that decided *Euclid*, still too afraid of the ugly imagery of urban America to let it happen?