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ILLINOIS ZONING: ON THE VERGE OF A NEW ERA

Stephen A. Siegel*

Zoning law, originating in the conservative Lochner era of constitutional jurisprudence, has long been noted for its conservatism in Illinois and the majority of state courts. Professor Siegel suggests that zoning law should be freed from its Lochner era bounds by state adoption of modern constitutional standards. These standards include the expansion of the scope of the police power and the concomitant limitations on it when individual liberties are curtailed. The author argues that Illinois zoning has begun this transformation, citing and analyzing two 1974 zoning cases as primary evidence of this change.

Illinois zoning, long noted for its conservatism, has begun a period of fundamental transformation and modernization. At present, the primary evidence of this transformation consists of two recent cases. In one, *La Salle National Bank v. City of Evanston*,¹ the state supreme court changed the law on zoning for aesthetic purposes. In the other, *Forrestview Homeowner's Association v. County of Cook*,² a state appellate court took a new position on the relation between planning and zoning. Two cases, viewed as isolated departures from existing precedent, might seem to be slight evidence of major change, especially when the opinions themselves say nothing to expressly indicate that more is involved. However, when these cases are analyzed in the context of the history of constitutional jurisprudence as it relates to the state's police power, a new direction in zoning law emerges. As the fundamental assumptions of constitutional law change, so do specific constitutional doctrines which effectuate these assumptions. This has been the history of "equal protection" or "interstate commerce,"³ likewise, the "police power," another

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1. 57 Ill.2d 415, 312 N.E.2d 625 (1974). See text accompanying notes 97-130 *infra*.

2. 18 Ill. App.3d 230, 309 N.E.2d 763 (1st Dist. 1974). See text accompanying notes 131-50 *infra*.

3. On equal protection compare *Fraser v. People*, 141 Ill. 171, 31 N.E. 395 (1892) and *Plessy v. Ferguson*, 163 U.S. 537 (1896), with *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) and *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See generally

basic concept of constitutional jurisprudence, has been affected.

The zoning power is a subcategory of the government's police power.⁴ Not only is zoning sanctioned by the police power, but every exercise of zoning must be within the limits of that power.⁵ However, the concept of police power has not been static, and throughout the twentieth century its applications have steadily expanded. Hence, zoning, as a dependent concept, has been influenced by important variations in the dimensions of the police power. It is this process which explains the "new" law found in the aforementioned cases. These cases are harbingers of things to come not only for Illinois zoning but for all Illinois land-use controls.⁶ Therefore, prior to the discussion of the characteristics and development of Illinois' new zoning era, the recent history of constitutional jurisprudence and the police power will be analyzed.

I. THE IMPACT OF CONSTITUTIONAL JURISPRUDENCE AND THE POLICE POWER UPON ZONING

A. *The Eras of Constitutional Jurisprudence*

Arising in the early twentieth century,⁷ zoning has existed

Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949), reprinted in *SELECTED ESSAYS ON CONSTITUTIONAL LAW, 1938-1962*, at 789 (AALS ed. 1963). On interstate commerce compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918), with *Wickard v. Filburn*, 317 U.S. 111 (1942). See generally Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946), reprinted in *SELECTED ESSAYS ON CONSTITUTIONAL LAW, 1938-1962*, at 218 (AALS ed. 1963).

4. See 1 N. WILLIAMS, *AMERICAN PLANNING LAW* §§7.01-.05 (1974) [hereinafter cited as WILLIAMS]. See also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925).

5. Cases demonstrating this proposition are numerous. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975). For a general discussion of the constitutional limitations on zoning, see 1 R. ANDERSON, *AMERICAN LAW OF ZONING* §§2.01-.30 (1968) [hereinafter cited as ANDERSON].

6. The impact of this transition in Illinois is not limited to zoning. This same trend can be seen in the area of taxation and expenditure, as evidenced by the decision of the Illinois Supreme Court in *People ex rel. City of Salem v. McMackin*, 53 Ill.2d 347, 291 N.E.2d 807 (1972). See notes 49 & 151 *infra* for a full discussion of this development.

7. The first comprehensive zoning ordinance was adopted by New York City in 1916. For studies of the movement which lead to this measure, see M. SCOTT, *AMERICAN CITY PLANNING SINCE 1890*, 1-183 (1969); S. TOLL, *ZONED AMERICAN* (1969) [hereinafter cited as TOLL]. The validity of zoning was reviewed by the judiciary in the 1920's. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925).

throughout two, and perhaps three, eras of constitutional law: the *Lochner*, *Williamson-Brown* and *Reed* eras.⁸ The *Lochner* era bloomed in the decisions of the United States Supreme Court during the 1890's and dominated its jurisprudence until the Depression crisis of the 1930's.⁹ Concepts marking the period originated in state courts a bit earlier and, in some respects, have continued to influence their decisions.¹⁰ During the *Lochner* period the political, economic and social philosophy of laissez-faire was elevated to constitutional assumption and command.¹¹ Mr. Justice Holmes' famous assertion that "[t]he Fourteenth Amendment [did] not enact Herbert Spencer's Social Statics"¹² was then merely a minority position. As between the individual

8. The substance and duration of each era are discussed generally in the text which immediately follows. With reference to the police power, see text accompanying notes 21-49 *infra*. Each era is styled after leading cases which typify that era's distinctive manner of constitutional review. The *Lochner* era is named for *Lochner v. New York*, 198 U.S. 45 (1905), in which the Supreme Court voided maximum working hours legislation as violative of the due process clause of the fourteenth amendment. See notes 34-43 and accompanying text *infra*. The *Williamson-Brown* era derives its name from *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), in which legislation prohibiting opticians from duplicating lenses without a prescription was sustained against due process and equal protection attack, see note 48 and accompanying text *infra*, and *Brown v. Board of Educ.*, 347 U.S. 483 (1954), in which legislation creating racially separate school systems fell before the equal protection clause, see note 44 and accompanying text *infra*. The *Reed* era is styled for *Reed v. Reed*, 404 U.S. 71 (1971), in which a statute favoring males as decedent estate administrators was struck down using a new equal protection analysis. See Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33-37 (1972).

9. On the origins and demise of the *Lochner* era, see E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 116-69 (1948) [hereinafter cited as CORWIN]; B. TWISS, *LAWYERS AND CONSTITUTION* 110-253 (1942) [hereinafter cited as TWISS].

10. For the origins, see, e.g., *In re Jacobs*, 98 N.Y. 98 (1885). See also TWISS, *supra* note 9, at 18-109. For the demise, see, e.g., *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal.2d 436, 254 P.2d 29 (1953). See also Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 226 (1958).

11. TWISS, *supra* note 9, at 1-9; Friedman, *Freedom of Contract and Occupational Licensing, 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487 (1965); Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1909).

12. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). See H. SPENCER, *SOCIAL STATICS* (1883). Spencer's massive work maintained that a true system of morality cannot adopt government as one of its premises. "Government . . . is an institution originating in man's imperfection . . . 'whereas' [a] system of moral philosophy professes to be a code of correct rules for the control of human beings." *Id.* at 27. Accordingly, government could be dispensed with if the world were peopled with the unselfish and the conscientious. In short, government is only a necessary evil.

and society, individual "freedom [was] the general rule and restraint the exception."¹³ State infringement could be justified "only by the existence of exceptional circumstances."¹⁴ Accordingly, much regulatory legislation frequently was not given the presumption of validity and had to seek specific constitutional authorization or be struck down as a denial of that vague concept, "due process."¹⁵

The *Lochner* era was ended abruptly by the United States Supreme Court in 1937 and was succeeded by the *Williamson-Brown* era, which stood *Lochnerism* on its head.¹⁶ State power became the rule; individual freedom became the exception. Accordingly, the Court largely abandoned substantive due process review and proceeded to evolve a "two-tier" test under the equal protection clause. This approach reviews legislation under two distinct standards. In one standard, "minimal rationality" is applied: legislation is upheld if it has any tendency to promote a permissible governmental purpose. However, certain areas, carved out for second tier analysis, are subjected to "strict scrutiny," and regulation of these areas is struck down unless a compelling state interest can be shown. While most legislation, including all economic regulation, is reviewed and sanctioned under the "minimal scrutiny" of the first tier, second tier analysis is reserved for those laws which infringe upon individual liberties or affect certain minorities.¹⁷ As a consequence, the *Williamson-*

13. *Adkins v. Children's Hosp.*, 261 U.S. 525, 546 (1923).

14. *Id.*

15. See CORWIN, *supra* note 9, at 151-53; TWISS, *supra* note 9, at 28-29.

16. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which overruled *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), by upholding the validity of a state's minimum wage law, and which signified the beginning of the *Williamson-Brown* era. After this case the Supreme Court became merely a "rubber-stamp" for the legislature; substantive due process review for economic legislation was rarely used again. However, in the early 1950's non-economic legislation was challenged under the equal protection clause as violative of certain important rights. See also note 8 *supra*; Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L. Q. 153 (1975).

17. For a description of the two-tier analysis, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969). See also Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385 (1975); note 8 *supra*. One of the most influential justifications for a "double standard"—strict scrutiny in some situations, hands-off in others, particularly economic regulation—is Justice Stone's footnote in

Brown era, in sharp contrast to the *Lochner* era, represents a period of pervasive, yet not omnipotent, state power.

Perhaps destroyed by its rigidity, the two-tier analysis of the *Williamson-Brown* era may well be over. To provide flexibility for judicial review, the present Supreme Court appears to be moving toward a new approach and into a new era, the *Reed* era.¹⁸ The *Reed* era introduces a third tier of review. Under the new tier, the Court reviews the exercise of governmental powers which affect important interests not covered, either expressly or by implication, by the Bill of Rights. Legislation within this tier must have some tendency to promote a sufficiently important governmental purpose or goal; otherwise it is void.¹⁹ The approach differs from *Williamson-Brown* in that legislative power is less pervasive in a few more areas, but the *Reed* era still reflects the judicial acceptance of the regulatory state. The difference between the two is the more flexible analysis and review of the *Reed* era judiciary. Because of the similarity in the underlying philosophy of both eras, it has been suggested that the *Reed* era not be viewed as a separate constitutional period. Its principles for analysis merely underlay the two-tier approach and extend the dichotomies of the *Williamson-Brown* era.²⁰ Thus, for the purpose

United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). This footnote suggests that the greatest scrutiny is justified when legislation conflicts with values expressed in the "specific" prohibitions of the Constitution, or with minority rights and "political processes." Recent cases have expanded Justice Stone's standard to include "suspect" classifications, *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimacy is branded a suspect classification), and "fundamental interests," *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (marriage and procreation are declared basic civil rights); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (the right to travel is raised to a fundamental right under the equal protection clause).

18. The *Reed* era is styled for *Reed v. Reed*, 404 U.S. 71 (1971). See discussion in note 8 *supra*. See also note 19 *infra* for *Reed* era cases.

19. See Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). See also note 8 *supra* and note 126 *infra*. For *Reed* era cases, see, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975) (in context of child support, Utah statute providing that period of minority for males extends to age 21 and for females to age 18 denied equal protection of the laws); *James v. Strange*, 407 U.S. 128 (1972) (statute providing state had right to recover legal defense costs from indigents held to violate equal protection); *Stanley v. Illinois*, 405 U.S. 645 (1972) (presumption that unwed fathers are unfit guardians violates the equal protection clause).

20. See, e.g., *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting). The Marshall balancing test, also referred to as the sliding scale

of this Article the *Reed* era will be viewed as a continuation of its predecessor, and the focus shall be directed toward a comparison of the police power and zoning in two constitutional eras: *Lochner* and *Williamson-Brown*.

B. *The Police Power*

As a principal concept of constitutional doctrine, the police power is the usual justification of governmental action. Therefore, the shift in basic assumptions between the *Lochner* and *Williamson-Brown* eras was bound to, and did, affect the concept of the police power. In the *Lochner* era the police power was severely limited, while in the *Williamson-Brown* era it was greatly extended. Nevertheless, the vast differences between the two eras' interpretation and application of the police power is somewhat masked by the fact that the police power's black letter definition has remained constant: the government may abridge personal rights of liberty and property when doing so reasonably promotes the public health, safety, morals, general welfare or protects other property.²¹

During the *Lochner* period the scope of police power was not understood as a grant of general authority. The maxim "use your own property in such a manner as not to injure that of another,"²² rather than the maxim "the welfare of the people is the supreme law,"²³ underscored the police power and thereby guided its application. The common law concept of nuisance, and not the legislative will, delineated those things which the police power could proscribe.²⁴ Consequently, the litany of police power goals was narrowly construed: health meant protection from disease; safety meant protection from physical danger; morals meant protection from vice and brutality. The vague savings clause "gen-

approach, is criticized in *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 115-19 (1974).

21. See WILLIAMS, *supra* note 4, §§7.01-.05. See also *Berman v. Parker*, 348 U.S. 26, 32 (1954); *City of Aurora v. Burns*, 319 Ill. 84, 92, 149 N.E. 784, 788 (1925).

22. From the latin *sic utere tuo ut alienum non laedas*, BLACK'S LAW DICTIONARY 1551 (Rev. 4th ed. 1968).

23. From the latin *salus populi suprema lex*, *id.* at 1506.

24. TWISS, *supra* note 9, at 29-32, 117-18.

eral welfare" was given little, if any, import.²⁵ In short, the subject matter over which the police power had jurisdiction was considerably restricted.²⁶ Furthermore, the means used to achieve police power goals had to be reasonable. If legislation did not "directly," "really," or "substantially" promote an acceptable police power goal it was deemed to be unreasonable.²⁷ Vigorously reviewing to determine if a regulation attained the standard of reasonableness, the judiciary in some instances would substitute its own judgment for that of the legislature.²⁸ Limitation of the police power also was effectuated by constitutional proscription of partial legislation.²⁹ As Professor E. Freund noted in 1904,

25. See E. FREUND, *THE POLICE POWER*, Second Part, *passim* (1904) [hereinafter cited as FREUND]; TWISS, *supra* note 9, at 29-32.

26. Government could decree closing times for retailers of liquors but not dry goods. *State v. Ray*, 131 N.C. 814, 42 S.E. 960 (1902). See also Annot., 55 A.L.R. 242 (1928). Government could license barbers but not horseshoers or accountants. See *Frazier v. Shelton*, 320 Ill. 253, 150 N.E. 696 (1926); Friedman, *Freedom of Contract and Occupational Licensing, 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 517-20 (1965). While the sale of railroad tickets was highly regulated, government could not prevent the "scalping" of theatre tickets. Compare *Burdick v. People*, 149 Ill. 600, 36 N.E. 948 (1894), with *People v. Steele*, 231 Ill. 340, 83 N.E. 236 (1907). For similar reasons, this truncated police power encompassed neither prohibiting the manufacture of cigars in tenements, *In re Jacobs*, 98 N.Y. 98 (1885), nor compelling government contractors to hire only union workers, *Adams v. Brenan*, 177 Ill. 194, 52 N.E. 314 (1898).

27. CORWIN, *supra* note 9, at 143-44, 146-47; FREUND, *supra* note 25, §63; TWISS, *supra* note 9, at 110-40.

28. Accordingly, in *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), the United States Supreme Court struck down minimum wage legislation claiming that even if there was a connection between minimum wages and the police power goals of health and morals, it was so incapable of standardization as to render any statute "without reasonable basis." *Id.* at 554-57. The New York Court of Appeals, after conceding state power to license embalmers and undertakers, held it unconstitutional to require embalmers to be qualified undertakers and vice versa. *People v. Ringe*, 197 N.Y. 143, 90 N.E. 451 (1910). The Illinois Supreme Court ruled that despite "very broad" power "to protect society from disease or epidemic" the legislature could not prohibit the sale of sterilized second hand bedding. *People v. Weiner*, 271 Ill. 74, 110 N.E. 870 (1915).

29. In the *Lochner* era, legislative classification and discrimination between classes was reviewed under the due process clause. To pass "unequal" or "partial" laws was to deny due process. See, e.g., *Bailey v. People*, 190 Ill. 28, 60 N.E. 98 (1901); *State v. Gravett*, 65 Ohio St. 289, 62 N.E. 325 (1901). See also T. M. COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* 389-97 (1st ed. 1868). It was only with the 1937 demise of substantive due process that courts began reviewing legislative classifications under the equal protection clause and that the locution "denial of equal protection" was born. See notes 16-17 *supra*.

In order to fulfill the "equal protection of the laws" doctrine, all persons similarly situated with respect to the purpose of the law must be included within the classification. The term "partial" legislation as used in this Article refers to legislation which is either

"[partial legislation is] one of the most effectual limitations on the police power."³⁰ Moreover, the view that partial laws violated due process was given a liberal application. Thus, the practical use of the police power was restrained, and only "substantial" distinctions would justify separate classification.³¹ Consequently, both the ends and means of the police power were "cabined, cribbed [and] confined."³² Perception of these limitations is central to understanding the dialectic of Lochnerian judicial review.³³

The limited Lochnerian police power is well illustrated by a celebrated string of United States Supreme Court cases concerning maximum hours legislation. In *Holden v. Hardy*³⁴ the Court upheld legislation limiting miners' hours because it agreed there were reasonable grounds for believing that this employment, when long pursued, is detrimental to the health of the employees.³⁵ Eight years later, however, in *Lochner v. New York*,³⁶ the Court struck down a statute limiting bakers' hours, holding that the regulation did not promote any recognized police power goal.³⁷ Significantly, the tendency of the statute to promote the "general

overinclusive or underinclusive. Overinclusive classifications include a wider range of individuals than should be included in the class sought to be controlled; underinclusive classifications do not include all the individuals whom the classification seeks to control.

30. FREUND, *supra* note 25, §682. The 1904 edition devotes 125 pages to equal protection problems, nearly all of which cite state court opinions. Thus, Justice Holmes' admonition in *Buck v. Bell*, 274 U.S. 200, 208 (1927), that equal protection is the "usual last resort of constitutional arguments" must be taken with several grains of salt.

31. TWISS, *supra* note 9, at 28-29. The substantial differences, first mentioned by Thomas McIntyre Cooley, are of the ilk of infancy and insanity. See T. M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (1st ed. 1868). Thus, in *Frorer v. People*, 141 Ill. 171, 31 N.E. 395 (1892), a statute prohibiting "company stores" in mining and manufacturing was voided because it did not also apply to other "branches of industry" such as construction, transportation, agriculture and domestic service.

32. CORWIN, *supra* note 9, at 144.

33. This refers to understanding the scheme of judicial analysis, not the social facts and values of which it was the intellectual superstructure. For the social facts, see CORWIN, *supra* note 9, *passim*; A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1893 (1960); TWISS, *supra* note 9, *passim*; Friedman, *Freedom of Contract and Occupation Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 525-34 (1965).

34. 169 U.S. 366 (1897).

35. *Id.* at 395.

36. 198 U.S. 45 (1905).

37. Other sections of the statute, dealing with washrooms and painting, were of undoubted validity. *Id.* at 61-62.

welfare" was dismissed out of hand.³⁸ The relation of the limitation to the bakers' health, being considered more plausible, was discussed at length and, indeed, persuaded three justices to vote to uphold the measure.³⁹ The majority, however, could not accede to the legislative judgment that the trade of baker is "an unhealthy one to that degree which would authorize the legislature to interfere."⁴⁰

In spite of *Lochner's* ringing denunciation of the maximum hours law, within 12 years the case was overruled without any departure from the matrix of constitutional assumptions and doctrines to which *Lochner* has given its name. Again, the key was the understanding of the scope of police power. Thus, in *Bunting v. Oregon*,⁴¹ the Court sustained a statute limiting hours of all employees in manufacturing work. Felix Frankfurter, arguing for the statute's validity, read *Lochner* as reflecting the then "common understanding" that length of work did not affect health. However, subsequent scientific research, he claimed, had shown this to be untrue; consequently, "judgment by speculation must yield."⁴² Persuaded, the Court accepted the legislature's judgment that regulating hours preserves health, and further, that the particular regulation was reasonable because it was consistent with average industrial working hours around the world.⁴³

As constitutional law entered the *Williamson-Brown* era, the dimensions of the police power were necessarily revamped. Legislation which intruded upon the interests of racial or political minorities or the Bill of Rights became subject to rigorous *Lochnerian* judicial review.⁴⁴ Outside of these areas, however, governmental power was supreme.

38. *Id.* at 57. Safety and morals were also summarily dismissed.

39. Justice Holmes dissented on more general grounds, but eventually tied his approval into the health justification. *Id.* at 76.

40. *Id.* at 59. Without the health justification, this law could not be distinguished from one regulating the hours of doctors, lawyers, athletes, scientists, or bank clerks. Therefore, upholding this law would authorize such regulation. This inverted equal protection argument also helped demonstrate the unsoundness and invalidity of this legislation. *Id.* at 59-61.

41. 243 U.S. 426 (1917).

42. *Id.* at 432.

43. *Id.* at 438-39.

44. Thus, in *Board of Educ. v. Barnette*, 319 U.S. 624 (1943), the Supreme Court invalidated a compulsory flag salute in a public school, writing that:

Several doctrinal changes in the *Williamson-Brown* era accomplished these results. First, the permissible purposes of the police power expanded beyond protection from disease, physical harm, vice and brutality and became a general grant of authority. As Justice Douglas wrote in *Berman v. Parker*:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms *well-nigh conclusive*. . . . Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power Yet they merely illustrate the scope of the power and do not delimit it. (emphasis added)⁴⁵

Second, the traditional standard of reasonableness, defined as a substantial relation to a permissible purpose, was greatly diminished. Once a legislature determined a reasonable relation existed between the ends and the means, a court could not intervene unless that judgment was proven “palpably false.”⁴⁶ Finally, expansion of the police power was accomplished by contraction of the concept of partial legislation. Equal protection became an effective limitation on legislative power only within the “protected” *Williamson-Brown* areas.⁴⁷ Otherwise, partial legislation, once allowed only upon “substantial” distinctions, was usually permitted; the Supreme Court “ha[d] in fact almost abandoned

The right of a State to regulate, for example, a public utility may well include . . . power to impose all of the restrictions which a legislature may have a “rational basis” for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

Id. at 639. See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938); *Developments in the Law—Equal Protection*, *supra* note 17, at 1087-1133 (1969). *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the case for which this constitutional era is partially named, illustrates vigorous judicial review. The Court, faced with legislation impinging on racial minorities, refused to defer to the legislative judgment that separate facilities could be equal. The Court, citing non-legal sources, independently determined that “[s]eparate educational facilities are inherently unequal.” *Id.* at 494-95 n.11.

45. 348 U.S. 26, 32 (1954). (emphasis added)

46. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949).

47. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954), discussed in note 8 *supra* and other cases discussed in note 17 *supra*. See also *Developments in the Law—Equal Protection*, *supra* note 17, at 1076-1132 (1969); notes 8, 16, 29 *supra*.

the task of reviewing [most] questions of equal protection."⁴⁸

In both the *Lochner* and the *Williamson-Brown* eras, therefore, the operation of the police power paralleled the breadth of state power generally.⁴⁹ While in the *Lochner* era state power was

48. *Developments in the Law*, *supra* note 17, at 1087. Thus, in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), the city had attempted to decrease traffic distractions by prohibiting vehicles from carrying advertisements. The prohibition did not include advertising the vehicle owner's business. When the ordinance was attacked as partial, the Court responded:

The local authorities may well have concluded that those who advertise their own wares . . . do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case.

Id. at 110. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), illustrates the style of minimal review. In upholding a statute disadvantaging opticians, the Court emphasized again that for "protection against abuses by legislatures the people must resort to the polls, not to the courts." *Id.* at 488.

49. As is true of the police power, other governmental powers also have been affected by the shifts in constitutional eras. Hence, during the *Lochner* era the sovereign powers of eminent domain, taxation and expenditure were accordingly limited. The limitation on eminent domain was accomplished by a narrow definition of the doctrine of *public use*. See, e.g., *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 A. 633 (1913). See also 2A P. NICHOLS, *EMINENT DOMAIN* §7.2(1) (3d ed. 1975), which defines public use as the right to be used by the public. This *Lochnerian* definition represented a major narrowing of the pre-Civil War definition of public use as *public benefit* or promotion of public welfare. See *Beekman v. Saratoga & S. R.R.*, 3 Paige 45, 73 (N.Y. Ch. 1831); *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694, 729 (1832).

Taxation and expenditure powers were limited by a narrow definition of *public purpose*. The *Lochner* era judiciary equated taxation's *public purpose* with eminent domain's narrow definition of *public use*. For example, in a 1912 Advisory Opinion, the Massachusetts Supreme Judicial Court declared unconstitutional the expenditure of public money to purchase land to develop low-income housing. Opinion of the Justices to the House of Representatives, 211 Mass. 624, 629, 98 N.E. 611, 614 (1912). The expenditure was barred even though the court acknowledged "the measure [was] aimed at mitigating the evils of overcrowded tenements and unhealthy slums." *Id.* at 630, 98 N.E. at 614. One of the most immediate effects of the rise of the *Williamson-Brown* era was to reverse the judgment that slum control was beyond the scope of the eminent domain, taxation and expenditure powers. See, e.g., *Allydonn Realty Corp. v. Holyoke Housing Auth.*, 304 Mass. 288, 23 N.E.2d 665 (1939); *New York City Housing Auth. v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936). As slum control became a recognized *public use*, a variety of governmental activities became acceptable because of their supposed tendency to prevent the occurrence or reoccurrence of slum conditions: public housing, low income housing, urban renewal and conservation. See *People v. City of Chicago*, 3 Ill.2d 539, 121 N.E.2d 791 (1954) (community conservation accepted as a part of a slum prevention program); *People v. City of Chicago*, 414 Ill. 600, 111 N.E.2d 626 (1953) (condemnation of obsoletely platted land accepted as public use because the intended re-use was for housing to help eliminate or prevent slums elsewhere); *Krause v. Peoria Housing Auth.*, 370 Ill. 356, 19 N.E.2d 193 (1939) (public housing accepted as part of slum clearance program).

tightly constrained by active judicial review, in the *Williamson-Brown* era state power became paramount unless it infringed upon certain "protected" areas. The following section will discuss the impact of this variance in the scope of the police power on the concurrent developments in the law of zoning.

C. Zoning

The concept of comprehensive governmental regulation of land-use is now such a common feature of American law that one might forget that when first proposed 60 years ago it was on the fringes of legality.⁵⁰ Prior to the United States Supreme Court's acceptance of zoning in the landmark 1926 case of *Village of Euclid v. Ambler Realty Co.*,⁵¹ 14 jurisdictions had adjudicated its constitutionality, three of them unfavorably.⁵² Moreover, the federal district court which decided the *Euclid* case unhesitatingly ruled against zoning,⁵³ and there is general belief that the Supreme Court was at first ready to affirm that decision.⁵⁴ While the votes shifted after re-argument, still, three of the nine justices voted against reversal.

While the *Lochner* era judiciary, albeit hesitatingly, accepted zoning, the legislative and executive branches followed this acceptance enthusiastically.⁵⁵ By the late 1920's nearly all states had cities with zoning ordinances. However, *Lochner* era zoning had a conservative cast and a limited scope due to the early proponents of zoning carefully tailoring their device to the requirements of the time. The enumerated statutory purposes of zoning enabling acts evidence this.⁵⁶ The influential *Standard State Zoning Enabling Act*,⁵⁷ drafted in Herbert Hoover's Depart-

50. See ANDERSON, *supra* note 5, §2.08, at 46-47. See also note 7 *supra*.

51. 272 U.S. 365 (1926).

52. *Id.* at 369-70; ANDERSON, *supra* note 5, §2.08.

53. *Ambler Realty Co. v. Village of Euclid*, 397 F. 207 (N.D. Ohio 1924).

54. TOLL, *supra* note 7, at 228-53.

55. *Id.* at 202. Zoning was even sponsored by the conservative Harding administration.

56. See, e.g., ILL. REV. STAT. ch. 24, §11-13-1 (1975); IOWA CODE ANN. §414.3 (1976); MASS. GEN. LAWS ANN. ch. 40A, §3 (1975); MO. REV. STAT. §89.040 (1976); N.Y. TOWN LAW §163 (McKinney 1965). Both the Illinois and the Missouri statutes have added the preservation of historic areas. The Illinois statute goes further by also adding sites, buildings and areas of architectural and aesthetic importance.

57. U. S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT §3 (1926).

ment of Commerce and still zoning's organic law in 47 states,⁵⁸ states that the purposes of zoning are:

[T]o lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.⁵⁹

Aside from the then meaningless "general welfare" clause, each purpose was undeniably within the core police power goals of physical safety and health.

Moreover, the judiciary acted to re-enforce zoning's conservative cast, the most frequent technique for limiting the zoning power being the principle embodied in *Nectow v. City of Cambridge*.⁶⁰ According to this principle, not only a zoning ordinance's general concept, but also its *application* to a particular parcel of land, must substantially promote the public health, safety, morals or general welfare.⁶¹ The *Nectow* view was so vigorously pursued that "during [the *Lochner* era] . . . the courts tended in many or most instances to hold the restrictive regulations invalid as applied" and the municipality retained the burden of proof to show why a given restriction should apply to a particular parcel of land.⁶²

With the rise of the *Williamson-Brown* era one would expect widespread changes in zoning law since governmental dominion over most aspects of life, especially economic affairs, became unassailable in this period. However, this did not occur. The vast majority of state jurisdictions are still resolving zoning disputes according to the assumptions of the *Lochner* era⁶³ and are sympathetic to the landowner's claim that his private gain takes precedence over the local legislature's assertion of community goals. On the other hand, the courts of a distinct minority of jurisdictions,

58. WILLIAMS, *supra* note 4, §18.01, at 355.

59. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT §3 (1926).

60. 277 U.S. 183 (1928).

61. *Id.* at 188.

62. WILLIAMS, *supra* note 4, §5.03.

63. *Id.* §§6.02, 6.07-19. See, e.g., *Biske v. City of Troy*, 381 Mich. 611, 166 N.W.2d 453 (1969); *Silver v. Zoning Bd. of Adj.*, 435 Pa. 99, 255 A.2d 506 (1969).

“sympathetic to the idea that communities need some strong legal powers to restrict private rights in land . . . ,”⁶⁴ have liberated zoning from its *Lochnerian* bounds.

Usually, zoning involves economic regulation which permissibly intrudes upon an individual's possible pecuniary gain. However, zoning occasionally intrudes upon interests beyond the reach of even the legislature of the *Williamson-Brown* era. This occurs, for example, when zoning ordinances are designed to exclude racial minorities⁶⁵ or novel family arrangements,⁶⁶ or to infringe on first amendment rights.⁶⁷ The state has at least questionable power over these interests. Nevertheless, zoning has been allowed to regulate freely beyond the limits imposed upon the state during the *Williamson-Brown* era. Thus, the minority of jurisdictions which have liberated zoning from the *Lochner* era are only partially consistent with the assumptions of the *Williamson-Brown* era. While this minority has applied the new era's expanded concept of state police power to zoning, it has not applied simultaneously the era's expanded concern over individual liberties.⁶⁸ Even the United States Supreme Court has refused to discuss, let alone apply, *Williamson-Brown* era limitations to the zoning power.⁶⁹ Further, the Supreme Court has declined to

64. WILLIAMS, *supra* note 4, §6.02, at 115. See, e.g., Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal.2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962).

65. See, e.g., United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), in which the court struck down a municipal zoning ordinance prohibiting the construction of any new multiple family dwellings as racially discriminatory under Title VIII of the Civil Rights Act of 1968.

66. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the Court upheld a zoning ordinance prohibiting three or more people unrelated by blood, marriage or adoption from residing in a single-family district. *But see id.* at 12-20 (Marshall, J., dissenting); O'Grady v. Town of New Castle, 43 U.S.L.W. 2345 (S.D.N.Y. 1975).

67. See, e.g., American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir.), *cert. granted*, 96 S.Ct. 214 (1975), in which an ordinance which prohibited the operation of any “adult” movie theater, bookstore or similar establishment within 1000 feet of any other such establishment was struck down on the basis of infringement of first amendment freedoms under the equal protection clause of the fourteenth amendment.

68. See text accompanying notes 16-17, 43-49 *supra*.

69. To date the United States Supreme Court has heard only three zoning cases: Ambler Realty Co. v. Village of Euclid, 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (*see note 66 supra*). The Court has accepted three more cases for review: Gribbs v. American Mini Theatres, Inc., 518 F.2d 1014 (6th Cir.), *cert. granted*, 96 S.Ct. 214 (1975) (upheld zoning prohibiting

expand the "protected" areas of the era to include housing or wealth.⁷⁰

adult bookstores and movie theaters); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 517 F.2d 409 (7th Cir.), *cert. granted*, 96 S.Ct. 560 (1975) (zoning exclusion of multiple unit housing for low and moderate income families held unconstitutional); *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St.2d 187, 324 N.E.2d 740, *cert. granted*, 96 S.Ct. 185 (1975) (zoning ordinance's referendum provision before granting a rezoning is unconstitutional as an unlawful delegation of legislative powers, thereby depriving appellant of due process of law). Not only have they traditionally not wanted to hear zoning cases, but recent standing to sue decisions imply that the proper forum for zoning litigation will continue to be in the state courts, even for exclusionary zoning litigation. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975) (standing to challenge exclusionary zoning denied to the following groups: persons who wished to move in because they did not show interest in particular land; taxpayers because of conjectural injury because they could not assert claims of third parties; housing council because it could only assert the interest of its members, none of whom had direct injury; builders association because it did not show monetary injury or loss of particular project); *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3467 (U.S. Sup. Ct. Feb. 24, 1976). Builders association and landowners do not have standing to sue on behalf of third parties to challenge a restrictive zoning plan. *Id.* at 904-05. However, builders and landowners do have standing on personal claims. *Id.* at 905. The *Petaluma* court noted:

The court in *Warth v. Seldin* left open the federal court doors for plaintiffs who have some interest in a particular housing project and who, but for the restrictive zoning ordinance, would be able to reside in the community.

Id. at 905. Perhaps the best exposition of the Supreme Court's reluctance to review zoning cases is *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences . . . (footnotes omitted)

Id. at 40. Thus, perhaps zoning, similar to tax law, is a *purely local matter* best left to state courts and legislatures. However, lower federal courts have continued to actively review zoning cases. *See, e.g.*, *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1975) (race); *United Farm Workers Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (race); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (race). *See also* cases cited in note 66 *supra*.

70. *See, e.g.*, *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973) (public school financing system did not discriminate against a definable class of poor); *Lindsay v. Normit*, 405 U.S. 56 (1972) (a divided court held that housing was not a fundamental interest); *James v. Valtierra*, 402 U.S. 137 (1971) (mandatory referendums on low cost housing did not violate equal protection, but rather insured democratic decision-making). The *Valtierra* Court did not deal directly with the issue of wealth as a suspect classification "which demands exacting judicial scrutiny." *But see* state court cases, *e.g.*, *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (*see* discussion in text accompanying notes 81-85 *infra*); *Serrano v. Priest*, 5

State courts need not exactly parallel federal developments. While they must uphold the Supreme Court's pronouncements as constitutional standards, they may *expand* these standards beyond the limits imposed by the Supreme Court. Following the *Williamson-Brown* era's underlying concern with individual liberties and its method of analysis, the evolution of zoning law in New Jersey, the only state that has been *fully* liberated from Lochnerism,⁷¹ illustrates the direction in which state courts may go.

In the 1920's, the New Jersey judiciary demonstrated its adherence to Lochnerism by holding zoning unconstitutional.⁷² After a

Cal. 3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601 (1972) (discrimination in school financing based on *wealth* of the district is invalid).

71. Other state courts appear to be moving in the same direction. See, e.g., *Fasano v. Board of City Comm'rs*, 264 Ore. 574, 507 P.2d 23 (1973). See also note 149 and discussion in text accompanying 149-50 *infra*. In *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1973), the New York Court of Appeals upheld a phased growth control scheme which could delay the use of land for up to 18 years. However, the court also stated that it would not condone such a scheme if there was evidence showing that its purpose was "exclusion." *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152; *id.* at 391-92, 285 N.E.2d at 310, 334 N.Y.S.2d at 163-64 (Breitel, J., dissenting). In *Associated Home Builders v. City of Walnut Creek*, 4 Cal.3d 633, 484 P.2d 606, 94 Cal.Rptr. 630 (1971), the California Supreme Court upheld the validity of subdivision exactions—dedication of land or payment of fees in lieu of land—for parks and recreational purposes. The court stated, however, that evidence showing that the imposition of such exactions prevented the influx of economically depressed persons into the community would render such an ordinance constitutionally deficient. *Id.* at 648, 484 P.2d at 618, 94 Cal.Rptr. at 642. In *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970), the Pennsylvania court struck down a zoning ordinance prohibiting apartment buildings as exclusionary. However, only three judges were *fully* in the *Williamson-Brown* era. Bell, J., concurring, expressed the purely Lochnerian view of "the right to use one's property in any way and manner and for any purpose the owner desires." Three dissenting opinions partially represented the *Williamson-Brown* era in fully accepting the regulatory state, but not recognizing any constitutional limitations.

Even in Illinois, there has been a hesitant *recognition* of *Williamson-Brown* limitations, but these limitations have not been *applied*. See *Lakeland Bluff, Inc. v. County of Will*, 114 Ill.App.2d 267, 252 N.E.2d 765 (3d Dist. 1969). "While we do not predicate our conclusion upon the need for lower cost housing, we believe that this was an element which should be considered in determining the reasonableness of the restrictive zoning ordinance." *Id.* at 279, 252 N.E.2d at 770.

72. See *Ignaciunas v. Risley*, 98 N.J.L. 712, 121 A. 783 (Sup. Ct. 1924), *aff'd on limited grounds sub nom. State v. Nutley*, 99 N.J.L. 389, 125 A. 121 (Ct. Err. & App. 1924). The Supreme Court of New Jersey struck down a municipal zoning ordinance which prohibited petitioner from constructing a combination store and dwelling as an unconstitutional deprivation of petitioner's right to the use of his property under both the state and federal constitutions. On appeal, petitioner's right to construct his building was upheld. However,

state constitutional amendment specifically authorized zoning, the courts of this state tightly held it to its *Lochner*ian bounds. In *Brookdale Homes, Inc. v. Johnson*,⁷³ the state supreme court invalidated a zoning ordinance which prescribed minimum residential building heights. Arguing that smaller buildings were less expensive and paid less property tax, and that they reduced neighboring property values by increasing the total individual tax bill, the city attempted to enforce the measure because it conserved the value of property in the municipality, one of the accepted purposes of zoning. The court, however, rejected the ordinance because it did not meet the *Lochner* era standard of rationality; small houses, after all, could cost as much as taller ones. Furthermore, the court stated that if the city's argument was sound, "a municipality under the cloak of its zoning power, might provide that no house costing less than a certain sum should be erected,"⁷⁴ a result which would be clearly illegal.

A decade later, however, the New Jersey court cut zoning free from its *Lochner* era limitations, specifically overruling *Brookdale Homes, Inc.* and accepting a variety of minimum standards, first in the name of public health, and later in the name of planning.⁷⁵ In the widely noted case of *Vickers v. Township Committee of Gloucester Township*,⁷⁶ a township on the fringe of the Philadelphia metropolitan area had adopted a zoning ordinance based on a plan excluding mobile homes from an underdeveloped 23 square mile rural area. The New Jersey Supreme Court sustained the prohibition, holding such regulation valid for

the court thought decision of the constitutional issues unnecessary. The court held that under the state's enabling act, the power of a municipality to regulate the purposes for which property may be used was limited to regulations "designed to promote the public health, safety, and general welfare." The court held that though construction of a store in a residential neighborhood might be objectionable to other neighboring property owners, this fact was immaterial, "for such property owners have not acquired the right to impose upon owners of other property in the vicinity any restrictions upon the lawful use thereof." Therefore, the municipal ordinance, insofar as not authorized by the state enabling act, was void. 99 N.J.L. at 392, 125 A. at 122.

73. 123 N.J.L. 602, 10 A.2d 477 (Sup. Ct. 1940), *aff'd*, 126 N.J.L. 516, 19 A.2d 868 (Ct. Err. & App. 1941).

74. 123 N.J.L. at 606, 10 A.2d at 478.

75. See *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 89 A.2d 693 (1952); *Fischer v. Township of Bedminster*, 11 N.J. 194, 93 A.2d 378 (1952).

76. 37 N.J. 232, 181 A.2d 129 (1962).

those "rural areas which will remain undeveloped for the reasonably foreseeable future"⁷⁷ because

Zoning must subserve the long-range needs of the future as well as the immediate needs of the present and the reasonably foreseeable future. It is, in short, an implementing tool of sound planning.⁷⁸

Thus, planning was used to validate a perhaps otherwise invalid zoning ordinance by an expansion of the general welfare police power goal, a move beyond the traditionally narrow goals of health, safety, and protection of property values. In response, a dissenting opinion castigated the majority for allowing the desirable goal of planning to permit "developing municipalities to erect exclusionary walls . . . according to local whim or selfish desire"⁷⁹

In freeing zoning from its *Lochner* era bonds, the New Jersey judiciary failed to explore the applicability of the new limitations of the *Williamson-Brown* era. Zoning became a boundless license for structuring a municipality according to its own desires, as if the interests which zoning entrenched upon were *purely* economic. Legal commentators, sensitive to the fact that zoning for minimum standards encroaches upon the vital interests of racial and economic minorities, promptly and persistently criticized these New Jersey developments.⁸⁰

It was not until 1975 that the New Jersey Supreme Court finally brought its zoning law into the full swing of the *Williamson-Brown* era of constitutional jurisprudence. Imposing new limitations on local zoning power in *Southern Burlington County NAACP v. Township of Mt. Laurel*,⁸¹ the court, returning to basic police power doctrine, noted:

[Z]oning regulation, like any police power enactment, must promote public health, safety, morals, or the general welfare

77. *Id.* at 244-45, 181 A.2d at 136.

78. *Id.* at 245, 181 A.2d at 136, citing *Napierowski v. Township of Gloucester*, 29 N.J. 481, 494, 150 A.2d 481, 488 (1959).

79. 37 N.J. at 252, 181 A.2d at 140.

80. For a partial listing of articles, see Williams & Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 Wis. L. Rev. 827, 828 n.2.

81. 67 N.J. 151, 336 A.2d 713 (1975).

. . . . Conversely, a zoning enactment which is *contrary* to the general welfare is invalid (emphasis added).⁸²

Recognizing that shelter is a basic human need⁸³ and that local zoning regulations have an impact on regional housing needs, the court stated that in order for a developing municipality's zoning to promote the general welfare it must

[P]lan and provide, by its land-use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.⁸⁴

Thus, the New Jersey courts have accepted regional housing needs as a *Williamson-Brown* type limitation on the zoning power. This development is not surprising since regional housing involves basic needs of lower income groups and racial minorities. Protecting these groups from legislative oppression is an extension of the fundamental sensitivity of *Williamson-Brown* constitutional philosophy. In accepting a limitation on the state's police power which goes beyond those the United States Supreme Court has been willing to impose,⁸⁵ the case stands as the precursor of further developments in New Jersey and other states.

II. DEVELOPMENTS IN ILLINOIS

In light of the foregoing, Illinois zoning experience can be quickly surveyed. The *Lochner* era came early to Illinois, where the string of due process invalidations began in the 1880's.⁸⁶ When

82. *Id.* at 175, 336 A.2d at 725. (emphasis added)

83. *Id.* at 178, 336 A.2d at 727.

84. *Id.* at 179-80, 336 A.2d at 728.

85. *See, e.g.*, *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *James v. Valtierra*, 402 U.S. 137 (1971), discussed in note 70 *supra*. *But see* right to vote cases where the Supreme Court has been willing to invalidate regulations that discriminate indirectly, *Gomillion v. Lightfoot*, 364 U.S. 338 (1960); *Lane v. Wilson*, 307 U.S. 268 (1939).

86. *See, e.g.*, *Frazier v. Shelton*, 320 Ill. 253, 150 N.E. 696 (1926); *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895); *Millett v. People*, 117 Ill. 294, 7 N.E. 631 (1886). In the *Ritchie* case, the Illinois Supreme Court invalidated legislation which regulated working

the Illinois court reviewed and sustained the constitutionality of zoning in 1925,⁸⁷ it still was committed to a thorough-going Lochnerism. Consequently, during the 1920's, numerous statutes and ordinances fell under due process objections that they were not within the scope of the police power,⁸⁸ were unreasonable methods for achieving proper objectives,⁸⁹ or were denials of the equal protection of the laws.⁹⁰ Throughout this period the Illinois Supreme Court was still speaking the language of natural law.⁹¹ For example, in *Elie v. Adams Express Co.*,⁹² an ordinance requiring full stops and reduced speeds at intersections was struck down as an "unreasonable" means of achieving traffic safety, the court noting that "ordinances of a regulatory nature in contravention of the natural rights of individuals . . . must be reasonable."⁹³

hours for women. Interestingly, when similar legislation was reviewed by the United States Supreme Court 13 years later, the Court, in spite of its Lochnerian philosophy, was able to uphold the regulation. *Mueller v. Oregon*, 208 U.S. 412 (1908).

87. See *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925).

88. See, e.g., *Frazier v. Shelton*, 320 Ill. 253, 150 N.E. 696 (1926) (licensing of accountants); *Village of Westville v. Rainwater*, 294 Ill. 409, 128 N.E. 492 (1920) (licensing of wholesale delivery of soft drinks).

89. See, e.g., *Klever Shampay Karpel Kleaners, Inc. v. City of Chicago*, 323 Ill. 368, 154 N.E. 131 (1926) (requiring structures containing dry cleaning establishments to be 50 feet from neighboring structures was an unreasonable means of fire protection); *Elie v. Adams Express Co.*, 300 Ill. 340, 133 N.E. 243 (1921) (see text accompanying note 92 *infra*).

90. See, e.g., *Lowenthal v. City of Chicago*, 313 Ill. 190, 144 N.E. 829 (1924) (requiring licensing for drugstores which sell merchandise such as stationery, in addition to merchandise already regulated, such as drugs, medicines and liquors, but not other stores selling similar goods, denies equal protection); *McCray v. City of Chicago*, 292 Ill. 60, 126 N.E. 557 (1920) (requiring wood lath and plaster for certain building specifications discriminates against other equally safe materials).

91. See generally C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 143-234 (1930). The natural law jurisprudence of the *Lochner* era was seen as having both constitutional and extra-constitutional roots:

The right to acquire property, to own it, to deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to Constitutions. It existed before them. (citation omitted) It is however, a right guaranteed by our Constitutions.

Ignacinas v. Risley, 98 N.J.L. 712, 715-16, 121 A. 783, 785 (Sup. Ct. 1923), *aff'd on limited grounds sub nom.* *State v. Nutley*, 99 N.J.L. 389, 125 A. 121 (Ct. Err. & App. 1924). Haines' work, however, suggests that the non-constitutional bases would not have surfaced without the impetus of the due process clause of the fourteenth amendment.

92. 300 Ill. 340, 133 N.E. 243 (1921).

93. *Id.* at 344, 133 N.E. at 245. See also *People v. Chicago, M. & St. P. Ry.*, 306 Ill. 486, 138 N.E. 155 (1923), in which a statute requiring employers to give employees two hours off, with pay, on election day fell before the "overrid[ing] demands of natural justice." *Id.* at 494, 138 N.E. at 158.

While the Illinois judiciary accepted the concept of zoning, it reviewed with hostility a zoning ordinance's application to a specific parcel of land,⁹⁴ keeping this area of law within its Lochnerian mold far into the *Williamson-Brown* era. As late as 1972 Professor Norman Williams was to observe:

Illinois zoning law is unique in the United States, since this is the only state in which the courts have remained happily stuck in the [*Lochner*] period of American zoning⁹⁵

By-and-large this judgment still appears to be accurate; nevertheless, since 1972 several cases have been decided which have indicated that Illinois zoning, and perhaps all forms of land-use control,⁹⁶ are emerging from the *Lochner* era.

A. *Zoning for Aesthetic Purposes: La Salle National Bank v. City of Evanston*

In May 1974, the Illinois Supreme Court changed the law with respect to zoning for aesthetic purposes in *La Salle National Bank v. City of Evanston*.⁹⁷ Before this decision aesthetic goals had been irrelevant to a zoning restriction's legal validity.⁹⁸ Although frequently important to the local legislature's adoption or rejection of a zoning ordinance, aesthetic goals could not be used to strike down a restriction nor to uphold it. Altering this situation, the Illinois high court explicitly recognized that aesthetic factors are "a properly cognizable feature" tending to justify a

94. In 1947, one commentator noted:

The Supreme Court of Illinois has not been sympathetic to . . . zoning. . . . [A]ny municipality which defends its zoning ordinance before the Illinois Supreme Court must assume the heavy burden of demonstrating that its regulations differ from the great majority of the zoning ordinances which the Court has scrutinized.

Babcock, *The Illinois Supreme Court and Zoning*, 15 U. CHI. L. REV. 87, 87-89 (1947).

95. WILLIAMS, *supra* note 4, §6.17. While Professor Williams' treatise was published in 1974, his research included developments through 1972. *Id.* at viii.

96. See note 151 *infra*.

97. 57 Ill.2d 415, 312 N.E.2d 625 (1974). The property in this case was situated between the business district of Evanston, a Chicago suburb, and park land which was located on the lake front. The plaintiff sought to change the zoning ordinance from R-1 (single-family residence district prohibiting structures in excess of 35 feet in height) to R-7 (general-residence district allowing structural heights to 85 feet).

98. See *Neef v. City of Springfield*, 380 Ill. 275, 43 N.E.2d 947 (1942), and discussion in text accompanying notes 105-06 *infra*.

zoning ordinance if they are accompanied by other more traditional factors, such as decreased neighboring property values.⁹⁹ Moreover, the court's opinion openly raises the possibility that aesthetic goals alone may validate zoning restrictions.¹⁰⁰

Prior to 1974, Illinois law was a consequence of the *Lochner* era origins of zoning in which aesthetic regulation was considered outside the realm of the state's police power.¹⁰¹ Illinois had adopted this position in *Haller Sign Works v. Physical Culture Training School*,¹⁰² where a statute prohibiting outdoor advertising structures within five hundred feet of any park or boulevard was invalidated. Here the supreme court determined that the law had an *exclusively* aesthetic purpose and was thus "disassociated entirely from any relation to the [Lochnerian conception of the] public health, morals, comfort or general welfare."¹⁰³ As the *Lochner* era progressed, however, there was some undermining of the judicial rejection of aesthetic regulation.¹⁰⁴ Fewer measures were viewed as serving only an aesthetic purpose and many aesthetic measures were validated as health or safety ordinances.

The Illinois Supreme Court ultimately followed this trend in *Neef v. City of Springfield*,¹⁰⁵ in which an aesthetic regulation was allowed because other valid police power goals were present. In this case landowners objected when the city refused to rezone their property to allow a gasoline filling station. The property

99. 57 Ill.2d at 432, 312 N.E.2d at 634.

100. *Id.*

101. *See, e.g., City of Passaic v. Patterson Bill Posting, Adver. & Sign Painting Co.*, 72 N.J.L. 285, 62 A. 267 (Ct. Err. & App. 1905). *See also* WILLIAMS, *supra* note 4, §§11.01-.06.

102. 249 Ill. 436, 94 N.E. 920 (1911).

103. *Id.* at 442, 94 N.E. at 923.

104. *See, e.g., Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917), *aff'g* 267 Ill. 344, 108 N.E. 340 (1914) (upholding ordinance prohibiting erection of billboards in residential city blocks unless consent obtained from owners of majority of frontage property); *State ex rel. Giangrosso v. City of New Orleans*, 159 La. 1016, 106 So. 549 (1925) (prohibition of business construction within designated residential area upheld because the prohibition could have been justified on public safety considerations); *Turner v. New Bern*, 187 N.C. 541, 122 S.E. 469 (1924) (ordinance excluding lumber yards from residential area upheld as valid exercise of police power); *Cochran v. Preston*, 108 Md. 220, 70 A. 113 (1908) (it is within police power of city to place height restrictions upon all but church construction in landmark-laden area upon grounds of fire prevention). *See also* WILLIAMS, *supra* note 4, §§11.01-.09.

105. 380 Ill. 275, 43 N.E.2d 947 (1942).

abuted the avenue leading from the state capital to the cemetery in which Abraham Lincoln is buried and for which substantial public and private funds had been expended. All the public officials who testified at the court hearing stated that a desire to preserve the beauty of the avenue was one of their motivations for refusing to rezone. The supreme court sustained the city's decision, however, because other reasons existed which the evidence amply supported: the traditionally acceptable goals of traffic safety and preservation of neighboring property values. The court stated:

It is no objection . . . to a zoning ordinance that it tends to promote an aesthetic purpose, if its reasonableness may be sustained on other grounds. The question here then is whether or not, *disregarding the evidence relating to the beauty of the neighborhood* and the streets and other aesthetic purposes, the ordinance should be sustained on the grounds of public health, safety, morals or general welfare (emphasis added).¹⁰⁶

While the new law found in *La Salle National Bank*, that aesthetic factors can help to validate a zoning restriction, is a result of the demise of the *Lochner* era in Illinois zoning law, questions still remain. What delayed the change in the law of aesthetic zoning? Why is the Illinois Supreme Court still hesitant to accept aesthetics as a *sole* validating factor? Fueling our interest is the fact that these questions are not unique to Illinois; they are typical of problems facing the majority of jurisdictions. Nationally, no more than eight states allow aesthetics as a sole validating factor,¹⁰⁷ in spite of frequent calls from both scholarly journals¹⁰⁸ and the United States Supreme Court for

106. *Id.* at 280, 43 N.E.2d at 950. (emphasis added)

107. *See, e.g.,* *Sunad, Inc. v. Sarasota*, 122 So.2d 611 (Fla. 1960); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *People v. Berlin*, 62 Misc.2d 272, 307 N.Y.S.2d 96 (1975). *See generally* Annot., 21 A.L.R.3d 1222, 1235-41 (1968). Other states validate zoning ordinances based *partially* on aesthetic considerations. *See, e.g.,* *Desert Outdoor Adver. v. County of San Bernardino*, 255 Cal.App.2d 765, 63 Cal.Rptr. 543 (1967); *State ex rel. Wilkerson v. Murray*, 471 S.W.2d 460 (Mo. 1975). *See generally* Annot., 21 A.L.R.3d 1222, 1238-47.

108. "The subject of aesthetics has perhaps been written about more than any other aspect of land-use controls in recent years." D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 93 (1971). For a partial listing *see id.* at 93 n.44. *See also* Crumplar, *Architectural Controls: Aesthetic Regulation of the Urban-Environment*, 6

aesthetically-based land-use controls. Over 20 years ago, that usually influential Court wrote:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.¹⁰⁹

Yet, why have a majority of jurisdictions been so hesitant to accept aesthetic zoning as part of the police power goal of general welfare?

The conventional answer seems to be that aesthetics is a matter of taste about which there can be no objective, rational decision.¹¹⁰ This implies that a *Lochner*ian concept of rationality is still a limit on the police power and that aesthetics, therefore, is beyond the modern legislature's power. This answer, however, is insufficient for several reasons. First, many legislative decisions, such as election district boundary drawing or aiding the aged more than the blind, or vice versa, are not susceptible to rationality.¹¹¹ Nevertheless, they are permitted, even demanded. Courts require governmental decisions to be rational only when they can be. But, if the nature of a decision is such that it must be non-rational, the lack of rationality ought not to invalidate the decision. Therefore, even if aesthetic decisions must be somewhat subjective, they should be permitted unless distinguishable from other subjective decisions which are allowed.

Second, the *Williamson-Brown* standard of rationality is such a watered down version of its *Lochner* era predecessor, that aesthetics should be able to meet even the rationality test. *Lochner* era judges could doubt that a billboard-less vista improved public

URBAN LAW 622 (1974); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973).

109. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

110. See Note, *supra* note 108, 71 MICH. L. REV. 1438 (1973).

111. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1230-49 (1970). Professor Ely writes "In bounding a . . . voting district . . . the state must select a subclass from the whole of society and in the process exclude a number of persons who cannot be said on any rational ground to be unqualified for inclusion. Certain factors obviously cannot be used as criteria . . . race, religion, ancestry . . ." *Id.* at 1233.

health, safety and morals¹¹² because the standard of reasonableness required a "direct" and "substantial" connection with the police power goal. However, *Williamson-Brown* era judges view the rationality standard to be whether the legislative judgment is "palpably false," a hurdle that aesthetics should be capable of leaping.¹¹³

Finally, if lack of rationality is the key, aesthetics should have remained irrelevant to upholding the validity of an ordinance throughout both the *Lochner* and *Williamson-Brown* eras. Yet, Illinois and most other jurisdictions now allow aesthetics, if accompanied by other factors, to support the validity of an ordinance. The fact that aesthetic goals are accompanied by more traditional police power goals *does not* render the aesthetic factors themselves more rational.

Rather than being a problem of lack of rationality the problem surrounding aesthetic zoning is the judiciary's conception of it as a unitary concept. Aesthetic zoning, however, encompasses various classes of regulation. Many of these, such as highway billboard regulation or business district sign control, are examples of "economic regulation." Others, such as architectural control, *may* infringe on first amendment freedom of expression interests.¹¹⁴

In the *Lochner* era aesthetics was irrelevant in upholding an ordinance whether the ordinance intruded upon economic or first amendment interests.¹¹⁵ Therefore, there was no need to subcate-

112. Nevertheless, early cases upheld billboard regulations on the grounds of morals. See, e.g., *St. Louis Gunning Adver. Co. v. City of St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911), which upheld a ban on billboards on the rationale that immoral acts could be conducted behind them. Later cases expanded the police power goals to include safety, health, and general welfare by implication. See, e.g., *New York State Thruway Auth. v. Ashley Motor Court, Inc.*, 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961) (upheld regulations prohibiting signs along the thruway for the purpose of providing maximum visibility, preventing distraction to drivers and interference with traffic regulation, enhancing scenic beauty and promoting maximum safety and well-being of thruway users); *General Outdoor Adver. Co. v. Dep't of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935) (held that outdoor advertising could be precluded within certain distances from public grounds and even in business districts because they reduced traffic obstructions, promoted traveler safety and avoided offensive sights constituting nuisances).

113. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949).

114. See Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN. L. REV. 179 (1975).

115. See, e.g., *Varney & Green v. Williams*, 155 Cal. 318, 320, 100 P. 867, 868 (1909);

gorize the concept of aesthetics. For example, in *Haller Sign Works v. Physical Culture Training School*,¹¹⁶ a statute prohibiting outdoor advertising near parks and boulevards was invalida-

City of Passaic v. Patterson Bill Posting, Adver. & Sign Painting Co., 72 N.J.L. 285, 287, 62 A. 267, 268 (Ct. Err. & App. 1905). See also cases cited in note 101 *supra*, indicating that aesthetics was outside the police power, and in note 104 *supra*, noting cases where aesthetic regulation was upheld on other valid police power goals.

Using United States Supreme Court "symbolic speech" cases, a case can be made for the proposition that aesthetic regulation may sometimes infringe upon freedom of expression interests, particularly as applicable to the single-family home. As Frank Lloyd Wright has written, "There should be as many types of houses as there are types of people, and as many differentiations of the types as there are different people." F. L. WRIGHT, *TO THE UNIVERSITY GUILD* (1896). However, "[a]n act cannot be classified as symbolic speech merely because the agent says that it is an attempt to communicate some message." Hall, *Legal Toleration of Civil Disobedience*, 81 ETHICS 128, 132 (1971). Thus, in *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court upheld the defendant's conviction for knowingly burning his draft card in spite of O'Brien's allegations that his action was expression and thus protected by the first amendment. *But see Tinker v. Des Moines Ind. Com. School Dist.*, 393 U.S. 503 (1969), in which the Court struck down a school board prohibition of the wearing of armbands in protest against the Vietnam War because the conduct was considered "symbolic speech." The Court in *O'Brien* said that even if speech is present the conduct may be regulated as long as it meets a four-pronged test: one, the regulation must be authorized by the Constitution; two, the regulation must be in furtherance of an important or substantial governmental interest; three, the interest of the government asserted in the second step must not be directed to the suppression of free expression; four, a regulation in furtherance of that governmental interest must not infringe upon first amendment rights more than is necessary.

The first two steps are met by aesthetic regulation. Courts have traditionally held that zoning laws are a valid exercise of the state's police power, and some courts have recognized that aesthetic regulation is a valid police power goal. However, aesthetic regulation infringes on more than "conduct;" indeed, it may be termed "symbolic speech." See *Berman v. Parker*, 348 U.S. 26 (1954), in which the Supreme Court, likening the spiritual with the aesthetic and the physical with the monetary, impliedly recognized that the lifebreath of architecture is its expressive element. See also *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963), in which the denial of a permit to build a flat-roofed, single-story residence in a supposedly multi-story community was upheld. Judge Corrigan, dissenting, stated:

If [plaintiff] wishes to . . . enjoy her trees and garden and other beauties of nature and whatever decoration she introduces within her walls and her home, these should be permitted to her. She feels the plan submitted calls for a residence of beauty and utility and so does her architect.

It should be borne in mind that there is an important principle of *Eclecticism* in architecture which implies *freedom on the part of the architect or client or both to choose among the styles of the past and present that which seems to them most appropriate.*

Id. at 76, 192 N.E.2d at 80-81. (emphasis added)

116. 249 Ill. 436, 94 N.E. 920 (1911) (excluding aesthetics from police power control). See text accompanying notes 101-04 *supra*.

ted by the Illinois Supreme Court primarily because such legislation was disassociated entirely from any relation to the era's narrowly construed police power goals, including the undefined "general welfare."¹¹⁷ Nevertheless, the court went on to mention in dictum that freedom of expression is an additional ground for prohibiting aesthetically based controls:

The citizen has always been supposed to be free to determine the style of architecture of his house, . . . the style and quality of clothes that he and his family will wear, and it has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in these and other like matters¹¹⁸

The *Williamson-Brown* era's expanded concept of general welfare permits the acceptance of aesthetic regulation. As such regulation is allowed, therefore, subcategorization of the concept is necessary to prevent encroachment on the individual liberties which the era seeks to protect. Aesthetic regulation should be questioned if it infringes on first amendment interests or other individual liberties over which the legislature has little power. On the other hand, regulation of "economic" subcategories of aesthetics clearly would be part of the *Williamson-Brown* police power because far less than protection from disease or physical harm would be required to justify governmental interference with the profit potential of an individual's property.

Yet, while broadening the interpretation of the concept of "general welfare" to allow aesthetics as a sole or partial validating factor,¹¹⁹ the courts have failed to impose corresponding limitations and have continued to treat aesthetic zoning as a unitary concept. Consequently, aesthetic regulation has been upheld even when it infringes on freedom of expression-type interests. For example, *State of Missouri ex rel. Stoyanoff v. Berkeley*¹²⁰ upheld legislation controlling the design of detached single-family dwellings, and *People v. Stover*¹²¹ sanctioned a zoning ordi-

117. *Id.* at 442, 94 N.E. at 923.

118. *Id.* at 443, 94 N.E. at 923.

119. See note 107 and accompanying text *supra*.

120. 458 S.W.2d 305 (Mo. 1970).

121. 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).

nance prohibiting clothes lines even though the clothes lines had been set up as a symbolic protest against increasing taxes.¹²² Whether these decisions are disquieting is a matter of opinion over which first amendment jurists may differ. What is disturbing, however, is the courts' reluctance to recognize that first amendment issues were involved.¹²³ Therefore, with aesthetic zoning, as with exclusionary zoning,¹²⁴ the courts have failed to realize that the new constitutional era necessitates a redefinition of limits as well as powers.

Because the concept "aesthetic zoning" is not a useful category, cases which fall within the category of "aesthetic regulation" should be broken into their component parts: those regulations which harm the regulatee's economic interests and those which harm his first amendment interests. Certainly new "aesthetic categories," in addition to first amendment and economic interests, will continue to arise as the common law process of case-by-case decision-making proceeds.¹²⁵ If the aesthetic cases are adjudicated with an awareness of the constitutional limitations of the *Williamson-Brown* era, the resulting debate will at times be difficult, but it will not be confused or strangely disquieting.¹²⁶

122. See generally Note, *Zoning, Aesthetics, and the First Amendment*, 64 CALIF. L. REV. 81 (1964).

123. Although a first amendment issue was raised in *People v. Stover*, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), the New York Court of Appeals pointed out that first amendment rights are not absolute but are subject to reasonable regulation, such as the ordinance at issue. The ordinance was upheld since it was designed to prohibit conduct offensive to the sensibilities and detrimental to property values, and it bore "no necessary relationship" to the dissemination of ideas or opinions. *Id.* at 469-70, 191 N.E.2d at 276-77, 240 N.Y.S.2d at 739-40. However, in *State of Missouri ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970), the court did not raise the first amendment issue and upheld an architectural design ordinance on grounds that aesthetic regulation was a matter of the general welfare. *Id.* at 310.

124. See discussion in text accompanying notes 72-85 *supra*.

125. Other subcategories could be preservation of historic and architectural areas, sites and buildings, preservation of natural scenic beauty, preservation of urban city vistas, and maintaining a particular ethnic, rural or "small town" character of a community.

126. Furthermore, as the *Reed* era progresses courts will have to analyze aesthetic zoning cases beyond determining whether that landowner's interest is economic or first amendment and is to receive minimal or strict protection. In the *Reed* era, the goals of the intrusion are considered as well as the invaded interest. The degree of judicial protection is determined by an amalgam of the invaded interest and the state's purpose for intruding. A comparison of the goals involved in regulating the design of a single-family

La Salle National Bank is an example of the inherent problems of treating aesthetics as a unitary concept. The case presents a conflict between the height of a high rise and the attempt to create a "gradual tapering of building heights toward an open lakefront and park area."¹²⁷ The Illinois Supreme Court could have created a new category for aesthetic regulation, a category of fostering public recreational amenities. However, the court failed to do so. Moreover, the court failed to examine whether the *particular aesthetic goal* of the ordinance was a sufficient, complementary or irrelevant factor in justifying the regulation. Instead, the court limited itself to stating that aesthetic factors in general are a "properly cognizable feature"¹²⁸ with respect to the validity of zoning classification.

The incorporation of aesthetics into the "general welfare" clause of the police power definition is only a faltering and confused first step for the Illinois judiciary. Still unresolved are the limitations that Illinois courts will place upon regulations which affect interests that the *Williamson-Brown* era has sought to protect. By viewing aesthetics as a unitary concept, the court has incorporated *all* its subcategories into the "general welfare" clause. However, probably aware that some aesthetic regulations infringe upon individual liberties,¹²⁹ the court has held that aesthetics may be used as a validating factor *only* when complemented by other police power goals. By looking back to its dicta in *Haller Sign Works v. Physical Culture Training School*,¹³⁰ the Illinois Supreme Court would rediscover that freedom of expression should be protected from "aesthetic regulation." Further-

home, a first amendment-type interest, will illustrate the *Reed* approach. Perhaps a home ought to be immune from design control when the goal is suburban homogeneity and neighboring property values. But the question of single-family dwelling design control could well receive a different answer if the home is within a historic district, such as Chicago's "Gold Coast," or is itself a masterpiece such as a Frank Lloyd Wright prairie house. The goal of starting a tradition by imposing controls may not outweigh the interest of expression found in one's home. However, the goal of protecting an established and recognized part of the national heritage could well be of greater importance. See discussion accompanying note 8 and cases cited in note 19 *supra*.

127. 57 Ill.2d at 432, 312 N.E.2d at 634. (emphasis added)

128. *Id.*

129. See *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 442, 94 N.E. 920, 923 (1911).

130. *Id.* See also quote at text accompanying note 118 *supra*.

more, if the subcategories of aesthetics were recognized, the court might be able to transform its hesitant "partial validation" of aesthetics, expressed in *La Salle National Bank*, into the validation of particular aesthetic goals that do not infringe on the individual liberties which modern constitutional jurisprudence seeks to protect.

B. Zoning and Planning: Forrestview Homeowner's Association v. County of Cook

Aesthetic regulation is not the only area of zoning that has experienced recent change. In March, 1974, the Illinois Appellate Court for the First District adopted a new perspective on the relationship of planning and zoning. While professional planners differ as to the form and scope of a land-use plan, there is general agreement that planning must be based on study, analysis and projection of the local economy, employment and population.¹³¹ Prior to 1974, study, and by definition planning itself was irrelevant to the legal validity of zoning in Illinois. Communities did not have to plan before they regulated. However, in *Forrestview Homeowner's Association v. County of Cook*,¹³² an Illinois court declared, for the first time, that a zoning ordinance's normally strong presumption of validity was "weakened" by the failure of the unit of local government "to plan comprehensively for the use . . . of land . . . and . . . to relate its rezoning decisions to data files and plans or other related . . . agencies."¹³³ Thus, a zoning ordinance's presumption of validity now is affected by planning. Again, the change is hesitant; in the absence of a plan the presumption of validity is not destroyed, but only weakened.¹³⁴

The irrelevance of planning to zoning was a result of the *Lochner* era's limited goals for zoning. In an era when profit making was a highly regarded constitutional right and state power

131. See generally F. CHAPIN, URBAN LAND USE PLANNING (2d ed. 1972).

132. 18 Ill.App.3d 230, 309 N.E.2d 763 (1st Dist. 1974). In this case, plaintiffs sought a declaration that a Cook County ordinance which rezoned a 96-acre parcel of land from single-family to general-residence and a special use granted to permit the construction of a multi-family housing development were void.

133. *Id.* at 243, 309 N.E.2d at 773.

134. This change is not an isolated Illinois phenomenon. The Illinois court relies upon and closely follows *Raabe v. City of Walker*, 383 Mich. 165, 174 N.W.2d 789 (1970).

was tightly contained, zoning's main function, indeed, the reason for its social and legal acceptance, was to protect established property values.¹³⁵ The zoning enabling acts of many states reflect this orientation.¹³⁶ Some states, following the *Department of Commerce's Standard State Zoning Enabling Act*, have required that zoning be "in accordance with a comprehensive plan."¹³⁷ However, courts in these states never demanded that zoning be accomplished in two distinct steps: the adoption of a professional comprehensive plan and the promulgation of the zoning regulations.¹³⁸ Rather, judicial interpretation of the clause reduced it to "meaning nothing more than zoning ordinances . . . be . . . uniform and broad in coverage."¹³⁹ Consequently, the absence of a professional plan did not invalidate a zoning ordinance.¹⁴⁰ Lochnerian zoning was to be in accordance with existing property values, not with a plan. Most segments of society wanted it that way and, in view of the era's narrowly defined police power goals, the judiciary probably believed that due process prevented "planning" from limiting private property rights.¹⁴¹

As zoning emerges from the *Lochner* era, constitutional jurisprudence no longer dictates that planning be irrelevant to zoning. One should expect, therefore, that, in addition to aesthetic factors, planning will now be admitted as evidence to legitimate an otherwise questionable zoning ordinance. Thus, a zoning ordinance which does not promote the traditional Lochnerian police power goals of preservation of property values, or a strict defini-

135. TOLL, *supra* note 7, at 196, 203, 206-07.

136. The Illinois Act, drafted in the early 1920's, is a typical example:

In all ordinances . . . due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire [unit of local government] and the uses to which property is devoted

ILL. REV. STAT. ch. 24, §11-13-1 (1975).

137. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT §3 (1926). The Standard Zoning Enabling Act was adopted at one point in all 50 states. While most states have retained it, three states have adopted different statutes: Kentucky, Vermont and Pennsylvania. Washington has adopted an optional municipal code while retaining the Standard Act. WILLIAMS, *supra* note 4, §18.01.

138. ANDERSON, *supra* note 5, §5.02, at 234.

139. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955); U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT §2 (1926).

140. ANDERSON, *supra* note 5, §5.02, at 236.

141. See text accompanying notes 22-26 *supra*.

tion of public health and safety, may still be validated if supported by planning.¹⁴² Conversely, in those states that statutorily require zoning to be "in accordance with a comprehensive plan," one would expect that the zoning ordinance would now be invalid in the absence of a plan. However, courts are not so holding. Instead, they may hold, as did the Michigan Supreme Court, that lack of planning diminishes the validity of a zoning ordinance.¹⁴³

In *Forrestview* the court held, by implication, that planning may now be admitted as part of the police power goal of "general welfare." This demonstrates that the Illinois judiciary finally may be recognizing, as the planning profession has always claimed, that zoning is only one of many tools of planning.¹⁴⁴ For

The city plan and the zone plan are not two separate things. One is the whole and the other is a part. The zone plan is that part of the city plan which relates to developments on private property. . . . The relationship of the two is so obvious and integral, that there can be but one answer to the question of whether a good zone plan can be made without making it part of a more comprehensive plan. There surely cannot.¹⁴⁵

While the Illinois Appellate Court did not proceed to invalidate the zoning ordinance in the absence of a plan, it held that the absence of planning *weakens* the ordinance's presumption of validity. The reluctance to invalidate the ordinance may be explained by the fact that most Illinois municipalities have not planned, and are not able to afford adequate planning in the immediate future.¹⁴⁶ To invalidate all zoning ordinances on the

142. See, e.g., *Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129 (1962). See also text accompanying notes 76-79; *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 359, 334 N.Y.S.2d 138 (1972); note 71 *supra*.

143. See *Raabe v. City of Walker*, 383 Mich. 165, 174 N.W.2d 789 (1970).

144. See, e.g., 18 Ill.App.3d 230, 240-43, 309 N.E.2d 763, 771-73. Illinois does not require zoning to be "in accordance with a comprehensive plan." ILL. REV. STAT. ch. 24 §11-13-1 (1975).

145. TOLL, *supra* note 7, at 203.

146. There are 1,267 municipalities (cities, towns and villages) and 102 counties in Illinois. DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS, ILLINOIS PROPERTY TAX STATISTICS (1972). Approximately 400 municipalities and 62 counties have prepared plans. ILLINOIS DEPARTMENT OF TRANSPORTATION, SUMMARY OF LOCAL PLANNING DOCUMENTS IN ILLINOIS (1973). Most of these plans are relatively old (pre-1965) and were prepared with the use of federal "701" funds (§701 of the Housing Act of 1954, as amended, 40 U.S.C. §461 (Supp. 1974)). Most likely, municipalities and counties would require federal funds to

grounds of lack of planning would wreak havoc for Illinois municipalities.

Yet, weakening the presumption of validity itself accomplishes an important limitation on the zoning power. The more rigorous judicial hearing which follows from lessening the presumption of validity acts as a check on legislative favoritism which benefits one property owner to the detriment of the general public. In the *Lochner* era one technique for restraining favoritism was the interpretation of "in accordance with a comprehensive plan" as a requirement that zoning ordinances treat land uniformly and have broad coverage.¹⁴⁷ Now that courts are defining "in accordance with a comprehensive plan" as a planning requirement, the professional plan, as a statement of goals and policies intrinsic to a zoning ordinance, can serve as a *Williamson-Brown* era check on legislative favoritism. Hence, in this era, a zoning ordinance which implements a professional plan is accorded a full presumption of validity. On the other hand, in the absence of such a plan, the weakened presumption of validity permits the judicial hearing to act as a substitute check on favoritism. Perhaps in the future a professional plan will be compulsory.¹⁴⁸

When *Forrestview* is viewed as a post-*Lochner* means of checking arbitrariness, the case merges with another recent change in zoning law which has not yet surfaced fully in Illinois. In *Fasano v. Board of City Commissioners of Washington City*,¹⁴⁹ the Oregon

initially prepare and to update their comprehensive plans. Yet, the priority for 701 funding of such "local" plans, as opposed to regional, state or cooperative local plans, has been decreasing over the past few years. See DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS, STATE APPLICATION FOR 701 FUNDS (1972-76). See also McBride & Babcock, *The "Master Plan" - A Statutory Prerequisite to a Zoning Ordinance*, 12 ZONING DIG. 353 (1960), where it is argued that statutes requiring a master plan encourage hasty planning and deny the advantages of zoning to communities which cannot afford a full dress master plan.

147. See note 139 and accompanying text *supra*.

148. California, one of the most progressive land-use states, has adopted a statutory planning requirement. CAL. GOV'T CODE §§65100-1 (West 1966), as amended CAL. GOV'T CODE §65100 (West Supp. 1975).

149. 264 Ore. 574, 507 P.2d 23 (1973). Interestingly, the Oregon Supreme Court cited the concurring opinion in *Ward v. Village of Skokie*, 26 Ill.2d 415, 186 N.E.2d 529 (1962) in reaching its decision:

It is not part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of

Supreme Court ruled that local legislative rezoning of discrete parcels will be reviewed as quasi-judicial acts. Review of a zoning decision as a judicial rather than a legislative act means that it has a weaker presumption of validity. Indeed, the Oregon court places the burden of proving the validity of the zoning change on the governing body. Interestingly, the new standard of review is directly connected with the interest of basing zoning on comprehensive planning. Showing that the zoning change effectuates a comprehensive plan is one way, noted by the court, that the local legislature can meet the burden of proof that its decision was not arbitrary.¹⁵⁰ Thus, as zoning emerges from the *Lochner* era, new techniques to control arbitrariness will arise. One already has surfaced in Illinois, and it is a precursor of things to come.¹⁵¹

legislative bodies, whose acts as such are not judicially reviewable, is to open the door to arbitrary government.

Id. at 424, 186 N.E.2d at 533 (Klingbiel, J., specially concurring), *cited* at 264 Ore. at 580, 507 P.2d at 26.

150. 264 Ore. at 586, 507 P.2d at 29. *See also* Padrow, Sharpe & Sullivan, *The Renaissance of Comprehensive Planning: The Oregon Case*, 27 LAND-USE L. & ZONING DIG. No. 5, at 7 (1975).

151. A collateral development is evidenced by the recent decision in *People ex. rel. City of Salem v. McMackin*, 53 Ill.2d 347, 291 N.E.2d 807 (1972), sustaining the validity of industrial revenue bonding. Industrial revenue bonding is a technique whereby local government units sell bonds and use the proceeds to create or improve industrial sites for lease and eventual sale to private industry. The income and proceeds are used to pay the interest to retire the bonds. Because the municipal funds derived from the bonds are used to undertake projects leased and sold to private parties, the scheme was attacked for violating the Illinois Constitution, which provides that “[p]ublic funds, property or credit shall be used only for public purposes.” Ill. Const. art. 8. §1(a).

In the *Lochner* era, industrial revenue bonding would not have been a public purpose. The judicially wrought constitutional command was limited government and free enterprise, and therefore, *public purpose* was defined as “use by the public.” *See* note 49 *supra*. As Illinois courts started to emerge from the *Lochner* era into the *Williamson-Brown* era, they expanded the goals of *public use* and *public purpose* to include what more correctly could be termed *public benefits* such as the goals of “slum control” and the indirectly related activities of public housing, urban renewal, low and moderate income housing and conservation. *See* Illinois cases cited in note 49 *supra*. Slum control had at least one foot in the *Lochner* era because of its indirect connection with the police power goal of public health. *McMackin* is the first Illinois case to snap this chain. In explaining why industrial revenue bonding is a valid state activity, the supreme court did not speak of slums but of the expanding concept of “public purpose” in the area of economic welfare. In language reminiscent of pre-Civil War concepts, *see* note 49 *supra*, the court wrote:

Legislation intended to alleviate these conditions [unemployment] and their inherent problems certainly is in the public interest The potential impetus to economic development within our State, which otherwise might be lost

III. CONCLUSION

Having arisen in the early twentieth century, zoning was imprinted with the *Lochner* era's constitutional principles and doctrines. Although *Lochnerism* has perished, it has continued, especially in Illinois, to rule zoning "from the grave."¹⁵² Recently, however, the Illinois judiciary has hesitantly begun to align zoning with current constitutional philosophy.¹⁵³ As a result, government will have more power over land-use. Undoubtedly, legislative and administrative bodies, local and statewide, will explore these enlarged powers. They will select and fashion new techniques for land control which will constitute an exciting and exacting endeavor.

However, the new era also brings with it new concepts of the limits of governmental power. Thus, there is the equally exciting and exacting task of exploring, defining and applying modern constitutional limitations in the land use context as well as fashioning new ones. Though this task can be accomplished at least partially by legislatures, it is the courts who bear the ultimate responsibility. To date all branches of government largely have

to other States with financing of this type, likewise serves the public interest.

The private benefit resulting from the Act is incidental to the *public purpose and benefit* to be served (emphasis added)

53 Ill. 2d at 358, 291 N.E. 2d at 814.

152. Obsolete law often has a tendency to do so. See, e.g., F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (A. Clayton & S.W. Whittaker ed. 1968), whose famous aphorism on the subject has been transposed here.

153. The Illinois Supreme Court has recently re-affirmed this hesitancy in *Board of Educ. of School Dist. No. 68 v. Surety Dev. Inc.*, Ill.2d 347 N.E.2d 149 (1976), involving subdivision control law. Currently, Illinois has a *Lochnerian* view of the extent to which the police power authorizes uncompensated mandatory dedication of property to the public as a condition for permission to subdivide. Subdivision exactions must be "specifically and uniquely attributable" to the activity of the subdivision and not related to "the total development of the community." See *Pioneer Trust & Sav. Bank v. Village of Mt. Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961). In *Surety*, the school board requested the Illinois court to re-examine and enlarge its test in light of recent more liberal decisions in other jurisdictions. See *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal.3d 633, 484 P.2d 606, 94 Cal.Rptr.630 (1971); *Billings Property, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1969); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y. 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Jordan v. Village of Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965). The Illinois court refused to undertake the re-examination, pointing out that the exactions involved in the instant case were permissible under the current "narrow" test.

failed to face this responsibility. In this respect, the New Jersey courts have already begun to apply modern constitutional limitations. Perhaps the Illinois courts will follow.