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ARTICLES

EUCLID AT THREESCORE YEARS AND TEN: IS THIS THE TWILIGHT OF ENVIRONMENTAL AND LAND-USE REGULATION?

*Michael Allan Wolf**

The days of our years are threescore years and ten; and if by reason of strength they be fourscore years, yet is their strength labor and sorrow; for it is soon cut off; and we fly away.¹

Twilight and evening bell,
And after that the dark!²

To the psalmist the age of seventy marks the end of one's days on earth, the last days so dimly lit in the poet's eyes. The calendar reminds us that 1996 marks the seventieth birthday of one of the most influential and enduring judicial decisions up-

* Professor of Law and History, University of Richmond. The author thanks his Allen Chair colleagues—Judge Loren Smith, Professor Charles Haar, Professor James Krier, and Dean William McDonough—for the example they set by their creativity, energy, and passion about these important issues; and the family and friends of George E. Allen, whose generosity and support for the life of the mind made this special opportunity possible and enjoyable.

1. *Psalms* 90:10 (King James). The Jewish Publication Society translation reads:

The span of our life is seventy years,

or, given the strength, eighty years;

but the best of them are trouble and sorrow.

They pass by speedily, and we are in darkness.

TANAKH: A NEW TRANSLATION OF THE HOLY SCRIPTURES ACCORDING TO THE TRADITIONAL HEBREW TEXT 1217 (1985).

2. Alfred, Lord Tennyson, *Crossing the Bar* (1889), reprinted in *THE NORTON ANTHOLOGY OF POETRY*, at 716-17 (Alexander W. Allison et al. eds., 3d ed. 1970).

holding the rights of communities to determine their demographic, economic, and societal future—*Village of Euclid v. Ambler Realty Co.*³ Case reporters,⁴ code compilations,⁵ and proposed legislation,⁶ along with treatises⁷ and law review articles⁸ warn us that the broad deference to regulators symbolized by the *Euclid* text is under attack. The eighth decade of constitutionally blessed regulation of land use and abuse would seem to be one of “labor and sorrow” for advocates of traditional planning, zoning, and environmental controls, and with good reason.

But ten years ago, when I was asked to look back over the Euclidean landscape from the vantage point of the mid-1980s, my optimism was apparent (though qualified).⁹ After chronicling the central position Justice George Sutherland’s opinion holds in the pantheon of American jurisprudence, I noted that “[s]ixty years after the Court’s approval of zoning, *Euclid* endures as substance and symbol, despite waves of demographic, economic, and political change.”¹⁰ More importantly, the words of *Euclid* uncannily predicted four leading strands of land-use challenges in the succeeding six decades, challenges based on the “exclusion, anticompetitiveness, parochialism, and aestheticism”¹¹ inherent in Euclidean zoning and comprehensive planning.

Despite the potential for destruction contained in these “four seeds,”¹² in 1986 there were signs that each was under control.

3. 272 U.S. 365 (1926).

4. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973).

5. See, e.g., FLA. STAT. ANN. § 70.001 (West 1996) (Bert J. Harris, Jr., Private Property Rights Protection Act).

6. See, e.g., H.R. 925, 104th Cong., 1st Sess. (1995) (Private Property Protection Act of 1995).

7. See, e.g., STEVEN J. EAGLE, *REGULATORY TAKINGS* (1996); DANIEL R. MANDELKER, *LAND USE LAW* (3d ed. 1993).

8. See, e.g., Michael Allan Wolf, *Fruits of the “Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5 (1996).

9. See, e.g., Michael Allan Wolf, *The Prescience and Centrality of Euclid v. Ambler*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 252 (Charles M. Haar & Jerold S. Kayden eds., 1989).

10. *Id.* at 253.

11. *Id.*

12. *Id.*

The New Jersey Supreme Court was leading the way in combating the more shameful side of zoning—devices such as large-lot zones that exclude the poor, aged, and minorities from the nation's suburbs and exurbs.¹³ Federal antitrust law, as broadly interpreted by the Supreme Court, seemed then to have the potential to chill governmental efforts to steer real estate development to favored parties.¹⁴ More and more communities were talking about accepting responsibility for their fair share of affordable housing for the metropolitan region, and even beginning serious discussions about lightening the financial and social services burdens of the central city.¹⁵ Finally, the perceived arbitrariness and unbridled subjectivity of aesthetic regulation was meeting its match in carefully designed, expert-based and -endorsed, historic and architectural preservation schemes.¹⁶

The future looked relatively bright, despite the naysayers from the antiregulatory¹⁷ and metaregulatory¹⁸ extremes, in large part because

three intrinsic elements [of *Euclid*] have withstood the challenges of time, theory, and practice. First, the Court prescribed a flexible approach in the legislative implementation and judicial review of public land use planning devices. Second, the Court endorsed careful, expert-based planning, eschewing the haphazard vagaries of the market. Third, the Court approved the transfer, from individual to collective ownership, of development rights above a level often labeled

13. See *id.* at 259, 269 (discussing *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.) (*Mount Laurel I*), *app. dismissed and cert. denied*, 423 U.S. 808 (1975); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*)).

14. See *id.* at 260, 269-70 (discussing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982)).

15. See, e.g., DAVID RUSK, *CITIES WITHOUT SUBURBS* 85-119 (1993) ("strategies for Stretching Cities"). See also Wolf, *supra* note 9, at 270.

16. See Wolf, *supra* note 9, at 270 (discussing improvements in preservation practices).

17. See *id.* at 267 (discussing the work of Bernard Siegan, "[t]he champion of nonzoning").

18. See *id.* at 268 (discussing FRED BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971)).

“reasonable return.” These three elements have remained inviolate, despite years of experimentation and variation.¹⁹

Ten years ago, I concluded this demi-homage thus: “What one sees, despite some original imperfections and repeated abuses, is a process of synthesis and experimentation that deserves a hard look, a bit of respect, and perhaps some celebration despite the wolves and pallbearers at the door.”²⁰ What then seemed bright today appears dim, what then seemed inviolate today appears vulnerable. This article seeks to explore the changes—affirmative acts, missteps, and omissions—that warrant such a guarded diagnosis. Only when we appreciate the nature and extent of this declension, can we begin to discuss seriously prospects and strategies for repair or replacement.

Part I of this article revisits the jurisprudential landscape of the mid-1980s, when jurists in several settings endorsed a flexible, incentive-based approach to the regulation of land use. Part II addresses more recent developments in *Euclid's* four problem areas—exclusion, anticompetitiveness, parochialism, and aestheticism—and argues that in each case the progress of the 1980s has been stifled or even reversed. Part III argues that the “three intrinsic elements” of *Euclid* are anything but sacrosanct today, given the growing number of legislative and judicial initiatives designed to smother, stifle, or make cost-prohibitive, environmental and land-use regulatory schemes. In the concluding section, Part IV, the article turns to the work of four leading figures in the land-use and environmental arenas—Judge Loren Smith, Professors Charles Haar and James Krier, and Dean William McDonough—for guidance in reconciling ourselves to, learning the most constructive lessons from, and shaping, our post-Euclidean world.

I. A PROMISING START: JUDICIAL SUPPORT FOR FLEXIBLE REGULATION

The 1980s were years of great promise for supporters of enlightened and flexible land-use and environmental controls.

19. *Id.* at 269.

20. *Id.* at 271.

Local, state, and federal officials, spurred on, or assisted by, activist judges, were confronting for the first time some key trouble spots of American planning and zoning practice. Not all of these initiatives were universally acclaimed; nor were they without flaws. Still, it appeared that the new leitmotif of land-use and environmental regulation was responsiveness—to the needs of the greater society and to the realities of the real estate development market.

In the 1970s and 1980s, as-of-right zoning and command-and-control environmental constraints were giving way to incentive schemes designed to stimulate economically efficient and socially responsible private-sector activities.²¹ A number of courts endorsed and abetted these shifts, ignoring or distinguishing away potentially troublesome common- and constitutional-law dicta. Four cases typify this judicial endorsement of regulatory flexibility—*Penn Central Transportation Company v. City of New York*,²² *Chevron, U.S.A., Inc. v. National Resources Defense Council*,²³ *In re Egg Harbor Associates*,²⁴ and *Collard v. Incorporated Village of Flower Hill*.²⁵

A. *Preservation in the Balance*

When the United States Supreme Court, in *Penn Central*, refused to invalidate the designation of Grand Central Terminal as a landmark under New York City's Landmarks Preservation Law, the national preservation movement was in full swing. The holding gave even greater encouragement to efforts to add historic preservation to the legal canon. According to Professor Costonis,

By the time the nation's bicentennial rolled around in 1976, preservation's ranks had ballooned. The movement shed its antiquarian image by building bridges to powerful allies in political, financial, and ethnic circles. And by 1988 more

21. See, e.g., Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV 565 (1992).

22. 438 U.S. 104 (1978).

23. 467 U.S. 837 (1984).

24. 464 A.2d 1115 (N.J. 1983).

25. 421 N.E.2d 818 (N.Y. 1981).

than 1,000 cities had adopted landmark and historic district regulations.²⁶

With relative ease, the *Penn Central* majority hurdled three traditional legal barriers faced by preservationists and their law and planning allies who developed and employed flexible devices such as transferable development rights to mollify owners of landmark structures.²⁷ First, the Court, building on dictum planted in *Berman v. Parker*²⁸ (an unsuccessful challenge to urban renewal), bypassed decades of land-use precedent that had cautioned regulators that aesthetics alone would not suffice as the basis for police power regulation.²⁹ Indeed, the problematic nature of aesthetic-based regulation was not even an issue

26. JOHN J. COSTONIS, *ICONS AND ALIENS* 24 (1989).

27. See, e.g., *Penn Central*, 438 U.S. at 137:

[T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable.

The classic work on TDRs is John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 *YALE L.J.* 75 (1973).

28. 348 U.S. 26 (1954). Speaking for the Court, Justice William O. Douglas noted:

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.

Id. at 33 (emphasis added) (citation omitted).

29. See, e.g., *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 62 A. 267, 268 (N.J. 1905):

It is probable that the enactment of section 1 of the [sign and billboard] ordinance was due rather to aesthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.

See also Jesse J. Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 *LAW & CONTEMP. PROBS.* 218 (1955). *But cf.* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 *HARV. L. REV.* 1252, 1296 (1996) ("colonial legislatures sometimes regulated land use for expressly aesthetic purposes").

in the case, as “appellants do not contest that New York City’s objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.”³⁰

The second potential barrier—the claim that the city’s preservation scheme lacked the essential comprehensiveness of legitimate land-use regulatory devices—was summarily rejected by the *Penn Central* majority. The Court denied that this was a case of “discriminatory, or ‘reverse spot,’ zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.”³¹ Despite claims by landowners that they were being asked to shoulder special burdens for the benefit of the common weal, the Justices were willing to allow New York and other localities to experiment with unorthodox, incentive-driven systems for preserving architecturally, historically, or culturally significant structures and districts.

The third barrier—the allegation that the city had in effect “taken” the appellants’ property by designating it a landmark—proved a bit more challenging for the *Penn Central* Court. After all, for more than five decades the Court, heeding Justice Holmes’s caveat, had understood that regulation that goes “too far . . . will be recognized as a taking.”³² Moreover, the city’s refusal to allow Penn Central’s tenant to use the air rights above Grand Central Terminal seemed inconsistent with the Court’s holding in *United States v. Causby*,³³ involving a takings lawsuit brought for “frequent and regular flights of army and navy aircraft over respondents’ land at low altitudes.”³⁴ The majority in *Causby* deemed it “obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping

30. *Penn Central*, 438 U.S. at 129.

31. *Penn Central*, 438 U.S. at 132. Cf. Osborne M. Reynolds, Jr., “Spot Zoning”—A Spot That Could Be Removed From the Law, 48 WASH. U. J. URB. & CONTEMP. L. 117, 123 (1995) (“this Article argues that courts should abandon the term ‘spot zoning’ in favor of general principles of zoning law”).

32. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

33. 328 U.S. 256 (1946).

34. *Id.* at 258.

atmosphere. Otherwise *buildings could not be erected*, trees could not be planted, and even fences could not be run."³⁵

The *Penn Central* Court was undeterred, distinguishing these and other precedents that suggested the city had exceeded its powers under the Constitution. Most importantly, the majority, engaging in the relativistic balancing that typifies twentieth-century constitutional law decision-making,³⁶ introduced a multi-factor, "ad hoc" test for determining whether specific regulations amount to takings:

[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.³⁷

This was a far cry from the formalistic characterization of governmental activity as an infringement on private property rights in earlier cases such as *Pumpelly v. Green Bay Company*³⁸ and *United States v. Lynah*.³⁹ Indeed, short of a compelled permanent physical occupation of private land by the government or its agents,⁴⁰ or of the unlikely event that government action totally devalued a landowner's entire parcel,⁴¹

35. *Id.* at 264 (emphasis added).

36. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 28-29 (1992); Michael Allan Wolf, *Takings Term II: New Tools for Attacking and Defending Environmental and Land-Use Regulation*, 13 N. ILL. U. L. REV. 469, 513-15 (1993).

37. *Penn Central*, 438 U.S. at 124 (citations omitted).

38. 80 U.S. 166 (1872) (construction of dam, pursuant to state authority, that flooded private property constituted taking).

39. 188 U.S. 445 (1903) (as a result of navigation improvement, rice plantation turned into valueless bog, constituting taking).

40. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

41. The *Penn Central* Court focused "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'" *Penn Central*, 438 U.S. at 130. For a total-taking case, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003

the *Penn Central* test would prove to be a significant shield and impetus for innovative land-use regulators who, during the succeeding ten years, moved beyond Euclidean zoning's "as-of-right" rigidity.

B. *Offsetting the Hard Look*

Eight years after *Penn Central*, the Supreme Court again deferred to regulators—this time officials in the Environmental Protection Agency. In *Chevron*,⁴² the Justices rejected the Natural Resources Defense Council's challenge to EPA's flexible interpretation of the term "stationary source," as that phrase appears in the Clean Air Act Amendments of 1977.⁴³ NRDC and other environmentalists were troubled by the agency's use of the "bubble concept," whereby, in nonattainment areas for criteria pollutants, "an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the [otherwise stringent] permit conditions if the alteration will not increase the total emissions from the plant."⁴⁴

The two potential barriers faced by the governmental and regulated industry litigants were Court precedents suggesting that serious judicial scrutiny was in order⁴⁵ and an inconclusive legislative history.⁴⁶ As in *Penn Central*, however, the Court was unflinching, sending a strong signal to federal judges that deference was the preferred position in case involving flexible regulation.⁴⁷ The bubble concept endorsed by the EPA

(1992).

42. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

43. Pub. L. 95-95, 91 Stat. 685 (codified at 42 U.S.C. § 7411(a)(3)(1996)).

44. *Chevron*, 467 U.S. at 840.

45. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 91-92 (2d ed. 1994) (footnote omitted) ("The 1971 decision in *Citizens to Preserve Overton Park, Inc. v. Volpe* [401 U.S. 402 (1971)] is the most frequently cited decision in the history of environmental law. In that case the Supreme Court made clear that courts reviewing agency actions affecting environmental values must be aggressive overseers.").

46. The *Chevron* Court concluded that, "[b]ased on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating." *Chevron*, 467 U.S. at 862.

47. According to Professor Rodgers, that signal has been received quite clearly: "*Chevron* has proven to be among the most frequently cited decisions in the history of

had something essential in common with the transferable development rights that buttressed New York City's landmark preservation scheme: In each case, the regulators (and the approving Court) refused to narrow the focus of their analysis, considering the "parcel as a whole" (rather than the air rights above Grand Central Terminal) and "all of the pollution-emitting devices within the same industrial grouping"⁴⁸ (rather than "each unit within a plant"⁴⁹).

The *Chevron* Court's judicial review formula has become as familiar to American jurists and commentators as the *Penn Central* balancing test:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁵⁰

The *Chevron* Court, left without sufficient legislative guidance, opted not to "reconcile competing political interests . . . on the basis of the judges' personal policy preferences."⁵¹

administrative law so that it stands as a close rival to *Overton Park*. Empirical studies have shown that the decision has resulted in greater deference in the lower federal courts even while the decision is unevenly applied by the Supreme Court itself." Rodgers, *supra* note 46, at 97-98 (footnotes omitted).

48. *Chevron*, 467 U.S. at 840.

49. *Id.* at 859.

50. *Id.* at 842-43 (footnotes omitted).

51. *Id.* at 865.

C. *Setting Aside Exclusiveness*

In the summer of 1983, as they surveyed the realm of state planning and zoning law, members of the New Jersey Supreme Court could take pride in the leadership role that they and their most recent predecessors had assumed. Eight years before, in *Southern Burlington NAACP v. Township of Mount Laurel (Mount Laurel I)*,⁵² the court responded to the discriminatory and parochial use of land-use controls by local governments in "developing communities" across the Garden State, fastening upon each such locality a legal obligation to provide "its fair share of the regional burden" for low and moderate income housing.⁵³ A single warning, however, was not enough for many recalcitrant communities; so, in January, 1983, the court reiterated and strengthened its position in *Mount Laurel II*.⁵⁴

This Court is more firmly committed to the original *Mount Laurel* doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work. The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals. We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.⁵⁵

The supreme court was not alone, however, in its campaign for increasing the state's supply of affordable housing.

In 1979, Egg Harbor Associates sought a Department of Environmental Protection (DEP) permit for the construction of Bayshore Centre, "a residential community of 1,530 units, a 500-room hotel, a 300-slip marina, a 22-story office building, and 4,200 parking spaces" in Egg Harbor Township, close to Atlantic City.⁵⁶ The extensive project was approved, though sub-

52. 336 A.2d 713 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

53. *Id.* at 733-34.

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

55. *Id.* at 410.

56. *In re Egg Harbor Assoc.*, 464 A.2d 1115, 1117 (N.J. 1983).

ject to the condition that ten percent of the proposed residences be set aside for low-income housing and ten percent for moderate-income housing.⁵⁷ Displeased with the conditional permit, the developer challenged DEP, claiming that the agency's "actions were based on an impermissibly vague delegation of legislative power and that forcing a developer to build low and moderate income housing is an unconstitutional taking of property without compensation."⁵⁸

The state supreme court rejected the first challenge, noting that the goals of the Coastal Area Facility Review Act (CAFRA)⁵⁹ (in accordance with which DEP officials acted in conditioning their approval on the provision of affordable housing) were quite broad: "Although CAFRA is principally an environmental protection statute, the powers delegated to DEP extend well beyond protection of the natural environment. Succinctly stated, the delegated powers require DEP to regulate land use within the coastal zone for the general welfare."⁶⁰ In accordance with those goals, DEP cited in support of its conditional permit the "unquestioned need [that] exists in the Atlantic City regions for housing for low and moderate income households, as a direct result of casino development."⁶¹

Given this and other evidence by the agency of the interconnectedness of economic development, housing, and environmental protection, it was easy for the court to conclude that the term "general welfare" encompassed housing needs as well as environmental protection. The developer's plea for the justices to narrow their focus was, for good reason, denied: "To hold . . . that CAFRA can consider only the environment, but not the needs of the people who live in it, is contrary to the legislative intent. . . . Environmental protection, like good zoning, is not an exercise in abstract analysis, but in the pragmatics of responsible and sensitive land use control."⁶² The *Egg Harbor*

57. See *id.*

58. *Id.*

59. N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1991).

60. *Egg Harbor*, 464 A.2d at 1118.

61. *Id.* at 1120 (quoting DEP, Division of Coastal Resources Opinion #73, at 21 (August, 1980)).

62. *Id.* at 1122.

court rightfully considered the proposed project *in its physical and socioeconomic context*, not as an island unto itself.

The justices resolved the takings challenge with even greater dispatch. The court first noted that the plaintiff shouldered the "burden of demonstrating that a taking has occurred" and that the "[p]roof must be by clear and convincing evidence."⁶³ Because there was no proof offered that, with the conditional permit, Bayshore Centre "will not return a profit or will return a profit so low as to amount to a taking," the court would not assume that an unconstitutional deprivation had taken place.⁶⁴ The justices closed their takings analysis by quoting their recent *Mount Laurel II* opinion: "As for confiscation, the builder who undertakes a project that includes a mandatory set-aside voluntarily assumes the financial burden, if there is any, of that condition."⁶⁵ As did the *Penn Central* and *Chevron* courts, the *Egg Harbor* court widened its focus to include the entire project and refused to heighten its scrutiny in the absence of solid proof of confiscatory or arbitrary regulation.

D. Conditional Approval

The 1960s and 1970s witnessed some considerable tampering with the simple Euclidean scheme of height, area, and use regulation. "Post-Euclidean"⁶⁶ devices abounded, including, but not limited to, incentive,⁶⁷ noncumulative,⁶⁸ and mixed-use zoning;⁶⁹ performance standards;⁷⁰ and planned unit development.⁷¹ These new devices shared two fundamental characteristics: they significantly departed from the as-of-right, uniformi-

63. *Id.* at 1123.

64. *Id.*

65. *Id.* (quoting *Mount Laurel II*, 456 A.2d at 390).

66. See CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING 255-88 (4th ed. 1989) ("Post-Euclidean Modifications of the Zoning Ordinance").

67. See, e.g., *id.* at 256-69.

68. See, e.g., MANDELKER, *supra* note 7, at 178-80.

69. See, e.g., HAAR & WOLF, *supra* note 66, at 283-84.

70. See, e.g., *id.* at 276-79; LANE KENDIG, PERFORMANCE ZONING (1980); Luther L. McDougal, III, *Performance Standards: A Viable Alternative to Euclidean Zoning?*, 47 TUL. L. REV. 255 (1973); Frederick W. Acker, Note, *Performance Zoning*, 67 NOTRE DAME L. REV. 363 (1991).

71. See, e.g., HAAR & WOLF, *supra* note 66, at 279-83; MANDELKER, *supra* note 7, at 425-33.

ty of first-generation zoning, and they were responsive to the landowner who could demonstrate that a development, though technically in violation of one aspect of the Euclidean scheme, was in keeping with the goals and spirit of sound comprehensive planning. The developer who, for example, wished to include single-family detached houses and multi-family dwellings in the same neighborhood—thereby violating the Euclidean tenet of separation of uses—could do so if the local government allowed planned unit development and if density limits were not exceeded.

The post-Euclidean device that perhaps best demonstrates this flexibility and responsiveness is conditional rezoning, whereby a landowner, typically in an effort to secure a change to a more intensive (and more lucrative) use, agrees to impose on the land unilaterally certain limitations that would not be imposed on land rezoned in a more "orthodox" fashion.⁷² *Collard v. Incorporated Village of Flower Hill*,⁷³ a 1981 opinion by the New York Court of Appeals, signaled a growing acceptance of this practice, a practice that departs from the predominant as-of-right nature of Euclidean zoning in which the zoning ordinance typically contains a complete and uniform description of the activities and structures permitted in a discrete zone.

The plaintiffs' predecessors in title had in 1964 secured a zoning change to enable them to build a private sanitarium in a district that had been designated for single-family dwellings.⁷⁴ A declaration of covenants was recorded concurrently with the rezoning, whereby the landowners assured the municipality that, despite the reclassification to General Municipal and Public Purposes District, the parcel would only be used for a sanitarium.⁷⁵ Twelve years later, as the "sanitarium had fallen into disuse,"⁷⁶ the same landowners secured a second rezoning, this time to a Business District classification; a second set of covenants was filed as well, by which the landowners bound

72. See, e.g., MANDELKER, *supra* note 7, at 287-89.

73. 421 N.E.2d 818 (N.Y. 1981).

74. See *id.* at 819 n.1.

75. See *id.* at 819.

76. *Id.* at 819 n.1.

themselves and their successors to restrictions not otherwise applicable to land zoned for business.⁷⁷

Included among the second set of covenants was a promise that “[n]o building or structure situated on the Subject Premises . . . will be altered, extended, rebuilt, renovated or enlarged without the prior consent of the Board of Trustees of the Village.”⁷⁸ That promise spelled trouble for the plaintiffs, who purchased the sanitarium property two years after the second rezoning, because it frustrated their plans “to enlarge and extend the existing structure on the premises.”⁷⁹ They pursued their allegation that the village’s insistence that the plaintiffs adhere to this promise constituted “arbitrary, capricious, unreasonable, and unconstitutional”⁸⁰ behavior all the way to the New York Court of Appeals.

Judge Jones and his colleagues were not sympathetic to the plaintiffs’ plight, despite two long-standing objections to conditional rezoning. To the charge that this post-Euclidean practice constitutes spot zoning, Jones noted that the evil inherent in spot zoning—typically a small-parcel rezoning to a more intensive use, over the objections of neighboring landowners⁸¹—was not present in cases such as the one before the court. Plaintiffs’ grantors had agreed to the “imposition of *greater restrictions* on land use,” thereby “*benefiting* surrounding properties.”⁸² If an unconditional rezoning would have been proper, “then a fortiori conditions imposed by a local legislature to minimize conflicts among districts should not in and of themselves violate any prohibition against spot zoning.”⁸³

The court also overcame the second traditional objection—that conditional rezoning “constitutes an illegal bargaining away of a local government’s police power.”⁸⁴ The judges of

77. *See id.*

78. *Id.* at 820 (alteration in original) (quoting Declaration of Covenants).

79. *Id.*

80. *Id.*

81. Professor Mandelker notes: “A ‘spot zoning’ is a zoning map amendment that rezones a tract of land from a less intensive to a more intensive use district. Spot zoning comes under attack because objectors believe it confers a ‘zoning favor’ on a single landowner without justification.” MANDELKER, *supra* note 7, at 248.

82. *Collard*, 421 N.E.2d at 821 (emphasis added).

83. *Id.*

84. *Id.*

ferred this realistic endorsement of the kind of flexible land-use regulation that is responsive to developers' and surrounding landowners' needs:

While permitting citizens to be governed by the best bargain they can strike with a local legislature would not be consonant with notions of good government, absent proof of a contract purporting to bind the local legislature in advance to exercise its zoning authority in a bargained-for manner, a rule which would have the effect of forbidding a municipality from trying to protect landowners in the vicinity of a zoning change by imposing protective conditions based on the assertion that that body is bargaining away its discretion, would not be in the best interests of the public.⁸⁵

In *Collard*, as in *Penn Central*, *Chevron*, *Egg Harbor*, and numerous other challenges in the 1970s and early 1980s to innovative land-use and environmental regulations, the judiciary, assured that adequate protections against arbitrary and confiscatory governmental behavior remained in place, assumed a solicitous posture. Just a few years later, however, in cases in which the regulatory tools at issue furthered the negative legacy of Euclidean zoning, that posture unfortunately proved lacking.

II. THE PROBLEM WITH DEFERENCE: SOWING THE SEEDS OF *EUCLID*

Ten years ago, it struck me that, in the *Euclid* opinion, "the Court's words and phrases anticipate four principal 'modern' objections to Euclidean zoning and comprehensive governmental land use regulation."⁸⁶ I labeled those objections—exclusion, anticompetitiveness, parochialism, and aestheticism—the "four seeds" planted in *Euclid*, and traced the development of each negative aspect as planning and zoning burgeoned and matured.⁸⁷

85. *Id.* at 821-22.

86. Wolf, *supra* note 9, at 253.

87. *See id.* at 253-64.

Still, in keeping with the optimism that permeates my earlier work, I highlighted the ways in which courts and legislatures were addressing the underside of land-use regulation. In 1975, after decades of ignoring or even abetting exclusionary zoning practices, the members of the New Jersey Supreme Court in *Mount Laurel I* “recognized and attacked the link between land use restrictions and socioeconomic segregation.”⁸⁸ “During the subsequent decade,” I noted with admiration, “the legacy of *Mount Laurel* has been impressive: some corrective legislation, replication in a handful of state courts, oceans of ink in planning and law journals, and stubborn resistance leading to a second (more restrictive and demanding) supreme court decision in New Jersey.”⁸⁹

A decade ago the battle against the anticompetitive aspects of zoning was proceeding apace as well. Despite the shield Congress provided in the Local Government Antitrust Act of 1984,⁹⁰ it appeared then that, “with injunctive relief and attorneys fees still available, the antitrust count remains an effective component of the litigation package for the late-1980s land use attorney representing disgruntled private interests.”⁹¹ The parochial nature of land-use planning and zoning were under attack in the 1980s, too, and I noted then that, “[b]ecause of zoning’s contribution to the continued isolation of middle-class communities, courts and legislatures in some states have mandated regional responsibility for suburban areas, while in other areas planning and zoning controls have been recaptured by state officials.”⁹²

Finally, the 1970s and 1980s witnessed dramatic experimentation with aesthetic-based controls, ranging from historic⁹³ and open-space⁹⁴ preservation, to subdivision exactions for rec-

88. *Id.* at 259.

89. *Id.* (footnotes omitted).

90. Pub. L. No. 98-544, 98 Stat. 2750 (1984) (codified at 15 U.S.C. §§ 34-36 (1996)).

91. Wolf, *supra* note 9, at 260.

92. *Id.* at 262.

93. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

94. *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

reational purposes,⁹⁵ and schemes for controlling adult uses.⁹⁶ Courts, and this commentator, looked approvingly at these and other efforts to create balanced, well-designed communities, for it appeared that there were protections in place to check the subjectivity that had plagued earlier aesthetic controls.

With the benefit of the perfect vision that hindsight accords, it appears now that such optimism was misplaced. There have been some recent advances in the struggle to make land-use regulation more efficient and equitable.⁹⁷ Nonetheless, the last ten years have produced too many examples of governmental miscues in all four areas—excesses in some instances, shortcomings in others—to warrant a wholly sanguine outlook regarding the future of land-use regulation, unless some adjustments and corrections are instituted.

The struggle against exclusionary zoning has slowed considerably over the past decade, despite the best efforts of judges and legislators in New Jersey and elsewhere. In the Garden State, state legislators responded to the strong mandate of *Mount Laurel II* with a Fair Housing Act⁹⁸ that neutralized some of the judicially imposed remedies and provided a way for suburbs to opt out of their regional obligation. Although it was hard to deny that the legislation was a retrenchment from the steps taken by the court, the justices acceded to state lawmakers' wishes that an administrative agency—the Council on Affordable Housing (COAH)—take the lead in the fight to achieve an adequate supply of affordable housing.⁹⁹

The justices' strong endorsement of inclusionary zoning devices in *Egg Harbor* was also targeted by the New Jersey Legislature. Professor Haar offers this somber appraisal:

[A] majority of the legislature cut down the court's construction of CAFRA by passing a statute expressly preventing the DEP from demanding "the provision of low and moder-

95. See, e.g., MANDELKER, *supra* note 7, at 418-21.

96. See, e.g., *Young v. American Mini-Theatres*, 427 U.S. 50 (1976).

97. See, e.g., A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555 (1993).

98. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986).

99. See *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986) (*Mount Laurel III*).

ate income housing as a condition" for a permit. More than one-third of the state once again became exempt from meeting any obligation to the poor. Although border disputes among the branches of government raise few eyebrows today, the mind reels at the speed with which the legislature repudiated the supreme court ruling in *Egg Harbor*.¹⁰⁰

In the past decade, only one additional state supreme court—New Hampshire's—has endorsed the *Mount Laurel* notion of regional general welfare.¹⁰¹ Other courts, most notably the New York Court of Appeals in *Asian Americans for Equality v. Koch*,¹⁰² have refused to interpret the notion of general welfare to be as capacious and demanding as did their counterparts in New Jersey. While a few states have addressed the acute shortages of affordable housing, particularly in suburbs outside of the nation's urban centers, through legislation authorizing devices such as set-asides and density bonuses,¹⁰³ inclusionary schemes have realized only marginal success.¹⁰⁴ Moreover, the various efforts to link affordable housing production to new office and commercial development raise serious takings concerns in the light of the "rough proportionality" standard used by the Supreme Court in *Dolan*.¹⁰⁵

On the anticompetitive front, since the mid-1980s the Supreme Court has made it more difficult for property owners to prevail in antitrust actions against local governments and their officials. In *Town of Hallie v. City of Eau Claire*,¹⁰⁶ the Court refused to reverse the dismissal of a Sherman Act claim brought against a city that conditioned the provision of sewage treatment on an agreement by private property owners to allow the city to annex their homes.¹⁰⁷ The Justices concluded that Eau Claire's actions "were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage

100. CHARLES HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 92 (1996) (footnote omitted) (quoting N.J. STAT. ANN. § 13:19-11.1 (West 1991)).

101. See *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991).

102. 527 N.E.2d 265 (N.Y. 1988).

103. See, e.g., CAL. GOV'T CODE § 65915 (1983) (providing density bonuses to developers building minimum number of affordable housing units).

104. See HAAR, *supra* note 100, at 189-92.

105. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

106. 471 U.S. 34 (1985).

107. See *id.* at 37.

services with regulation,"¹⁰⁸ although the state legislature did not "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects."¹⁰⁹ Moreover, the Court held "that active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party."¹¹⁰

The next year, 1986, brought further solace for local governments who faced antitrust challenges to their alleged market tampering. In *Fisher v. City of Berkeley*,¹¹¹ the Court rejected a challenge to the city's stringent rent control ordinance that imposed rent ceilings administered by a Rent Stabilization Board.¹¹² Justice Marshall deemed the program "a restraint imposed unilaterally by government," not an illegal conspiracy or concerted action, and noted that "[t]he owners of residential property in Berkeley have no more freedom to resist the city's rent controls than they do to violate any other local ordinance enforced by substantial sanctions."¹¹³ Justice Brennan, whose opinion for the Court in *Community Communications Co. v. City of Boulder*¹¹⁴ invigorated municipal antitrust law, was frustrated by what he perceived to be the majority's retreat.¹¹⁵

In its most recent offering in the area, the Court distanced itself even further from the activism of the early 1980s. In *City of Columbia v. Omni Outdoor Advertising, Inc.*,¹¹⁶ the Court declined to recognize a conspiracy exception to state (and state-authorized municipal) immunity from federal antitrust sanctions. Omni, a Georgia corporation, alleged that the city had

108. *Id.* at 47.

109. *Id.* at 43.

110. *Id.* at 47.

111. 475 U.S. 260 (1986).

112. *See id.* at 262-63.

113. *Id.* at 267.

114. 455 U.S. 40 (1981).

115. *See Fisher*, 475 U.S. at 278 (Brennan, J., dissenting):

Ultimately, the Court is holding that a municipality's authority to protect the public welfare should not be constrained by the Sherman Act. That holding excludes a broad range of local government anticompetitive activities from the reach of the antitrust laws. This flies in the face of the fact that Congress has not enacted such a broad antitrust exemption for municipalities.

116. 499 U.S. 365 (1991).

improperly colluded with a local competitor that controlled a ninety-five percent market share and that the result was tight restrictions on billboard construction.¹¹⁷ The Court was unsympathetic: "The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners."¹¹⁸ Combined with *Town of Hallie's* expansive version of state authorization and *Fisher's* refusal to tamper with unilateral controls, *Omni* sent a strong signal that local land-use regulators who engaged in arguably anticompetitive activities were no longer pursuing a high-risk activity.

In the 1980s, there was great hope that, with the growing popularity of regional and statewide planning,¹¹⁹ parochialism was at last on the wane. The *Euclid* opinion itself had established the principle of self-determination for local governments, at least in the area of land-use regulation, when it declared that the Village of Euclid, "though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the state and federal Constitutions."¹²⁰ Yet, often ignored is Justice Sutherland's caveat concerning the limits of localism: "It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."¹²¹ In fact, a search of computer law databases reveals only one reported appellate opinion over the last decade in which a court quoted the *Euclid* caveat. Not surprisingly, the quotation appears in the only state supreme court

117. *See id.* at 367-68.

118. *Id.* at 377.

119. *See, e.g.,* JOHN M. DEGROVE, THE NEW FRONTIER FOR LAND POLICY: PLANNING AND GROWTH MANAGEMENT IN THE STATES (1992); David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197 (1994); James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994); Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127 (1995) (hereinafter *State-Sponsored Growth Management*).

120. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926).

121. *Id.* at 390.

decision that adopts the expansive view of regional obligation found in *Mount Laurel II—Britton v. Town of Chester*.¹²²

There are other telling signs that parochialism is alive and thriving in the area of land-use regulation. First, growth control ordinances continue to attract the attention of local government officials because, depending on one's outlook, they either provide "communities time to develop comprehensive growth plans, for relieving pollution and smog, and for helping to preserve the 'quality of life,'"¹²³ or serve as "as a self-interested, elitist effort to increase property values and fence out newcomers."¹²⁴ The likelihood that the second motivation is a significant factor increases when the no- or slow-growth scheme is effected through "ballot-box zoning," referenda and initiatives that "provide[] local citizens with a means of addressing the growth and development-related problems they feel their local planning officials are either unable or unwilling to remedy."¹²⁵

Second, despite the growing number of critics who decry suburban sprawl and the increasing isolation and impoverish-

122. See *Britton v. Town of Chester*, 595 A.2d 492, 495 (N.H. 1991).

123. Keith R. Denny, Note, *That Old Due Process Magic: Growth Control and the Federal Constitution*, 88 MICH. L. REV. 1245, 1245 (1990).

124. *Id.* For a more optimistic view of the potential of growth management to redress exclusionary zoning, see *State-Sponsored Growth Management*, *supra* note 119, at 1137 (footnotes omitted):

Growth management has not received unanimous support from commentators. Some commentators argue that any regulations imposed to meet environmental and infrastructure needs will increase the cost of housing construction. Other commentators are wary because the conceptual framework for growth management originated in local "growth control" or "slow growth" ordinances, through which localities attempted to limit development. Although local growth controls sometimes reflect genuine concern for the natural environment, they often serve as pretexts for the exclusion of low-income residents. Unlike local growth control ordinances, however, state-sponsored growth management responds to state rather than local interests and thus avoids NIMBYism and attempted cost shifting among localities.

125. David G. Andersen, *Urban Blight Meets Municipal Manifest Destiny: Zoning at the Ballot Box, the Regional Welfare, and Transferable Development Rights*, Comment, 85 NW. U. L. REV. 519, 520 (1991). See also *id.* at 547-48 (use of ballot-box zoning to advance parochial interests); Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); David L. Callies et al., *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U. J. URB. & CONTEMP. L. 53, 94-95 (1991) (noting discriminatory potential of referendum and initiative).

ment of the inner city,¹²⁶ new, self-governed, Edge Cities are proliferating throughout the country:

Our new city centers are tied together not by locomotives and subways, but by jetways, freeways, and rooftop satellite dishes thirty feet across. Their characteristic monument is not a horse-mounted hero, but the atria reaching for the sun and shielding trees perpetually in leaf at the cores of corporate headquarters, fitness centers, and shopping plazas. These new urban areas are marked not by the penthouses of the old urban rich or the tenements of the old urban poor. Instead, their landmark structure is the celebrated single-family detached dwelling, the suburban home with grass all around that made America the best-housed civilization the world has ever known.¹²⁷

There are no significant disincentives—legal, economic, or social—to the increased popularity of these beltway behemoths that grow *at the expense of*, not in concert with, the older urban centers in the region. Indeed, as Professor Eisen notes, “[f]or better or worse, Edge Cities are precursors to the postmodern urban future.”¹²⁸

Third, as noted previously,¹²⁹ the New Jersey mandate that individual localities have regional obligations has spawned too few imitations. Moreover, even in the Garden State, the Fair Housing Act allows suburban communities to opt out of up to half of their regional fair share of affordable housing through regional cooperation agreements.¹³⁰ In providing this avenue of

126. See, e.g., PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM* 9 (1993): “[B]oth the city and suburb are now locked in a mutually negating evolution toward loss of community, human scale, and nature. In practical terms, these patterns of growth have created on one side congestion, pollution, and isolation, and on the other urban disinvestment and economic hardship.”

127. JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 4 (1988).

128. Joel B. Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U. J. URB. & CONTEMP. L. 1, 31 (1995).

129. See *supra* notes 101-04 and accompanying text.

130. According to Professor Payne,

Under these Agreements, “sending” municipalities, invariably in the suburbs, can contract with “receiving” municipalities, invariably poorer and more urbanized, for the former to fund up to half of its fair share obligation through construction or rehabilitation of housing in the latter. The most recent COAH summary shows a total of thirty-nine Regional Contri-

“cooperation,” state lawmakers enable the continuation of the notion that cities and their suburbs are “separate kingdoms” whose destinies are distinct, if not *de facto*, then at least *de jure*.

Finally, over the last decade, despite a great deal of rhetoric and numerous supporting studies,¹³¹ there have been no significant steps taken toward effective and widespread regional planning and governance. The most prominent advocate for reconceptualizing the American city, David Rusk, notes that “[r]eversing the fragmentation of urban areas is an essential step in ending severe racial and economic segregation.”¹³² The solution—“The ‘city’ must be refined to reunify city and suburb.”¹³³—though easy to say, has proved quite difficult to implement. This reality is in no small way attributable to popular

bution Agreements, designed to produce 4,172 units of housing at a total subsidy cost of \$80,982,795 (additional subsidies may have come from other sources) and an average subsidy of \$19,411 per unit. Five municipalities accounted for 21 of the 39 contracts and 1,855 of the 4,172 housing units: Newark (6 contracts/732 units); Jersey City (5/194); New Brunswick (4/406); Phillipsburg (3/373); and, Perth Amboy (3/150).

John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 672-73 (1996).

131. See, e.g., INTERWOVEN DESTINIES: CITIES AND THE NATION (Henry G. Cisneros ed. 1993); NEIL R. PEIRCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD (1993); Rusk, *supra* note 15; John Kincaid, *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence*, 13 PACE L. REV. 449, 473 (1993):

Although the federal government mounted significant efforts from the 1950s to the 1980s to promote regional and metropolitan governance, primarily through financial incentives, those efforts were curtailed during the 1980s not only because of opposition from President Reagan but also because of the substantial shift of federal aid from places to persons and because of rising budget deficits.

132. Rusk, *supra* note 15, at 85. Rusk is not without his critics. See, e.g., John P. Blair et al., *The Central City Elasticity Hypothesis: A Critical Appraisal of Rusk's Theory of Urban Development*, 62 J. AM. PLAN. ASS'N 345, 345 (1996) (“Rusk’s recommendations for restructuring metropolitan areas with more unified governance forms such as consolidation, unified metropolitan government, limits on new incorporations, or expanded annexation powers for central cities do not have strong empirical support and should not be considered panaceas for central city decline.”)

133. Rusk, *supra* note 15, at 85.

resistance to metropolitan-wide solutions¹³⁴ and to some very real legal barriers, not the least of which is the Euclidean legacy of local control of planning and zoning decision-making.

Finally, the last ten years have also witnessed a growing unease with aesthetic-based regulation. While during the early decades of this century, planners and urban designers wisely abjured an overtly aesthetic strategy in the struggle for zoning's legitimacy,¹³⁵ we have of late become much more familiar and comfortable with a wide range of regulatory efforts to preserve our built and unbuilt environment. Today, even advocates of legal aesthetics concede that some excesses and missteps have plagued this area. Professor Costonis observes that many judges

have embraced beauty as legal aesthetics' justification in opinions that seldom acknowledge, let alone dispel, the concerns advanced by their more cynical predecessors. Law-makers, administrators, and citizen groups have been quick to seize upon the modern judiciary's indiscriminate stance. Countless aesthetics initiatives have streamed through the floodgates the judges have unlocked. Many of these initiatives are superb, both in concept and administration. Others have been neither, rendering legal aesthetics vulnerable to the Dump Aesthetics critique.¹³⁶

Particularly troubling are the developments in the areas of historic preservation and adult use that imperil fundamental First Amendment rights.

Emboldened by their victory in *Penn Central*, preservationists have tightened the restrictions placed on places deemed architecturally, historically, or culturally significant. While in the great majority of cases, public officials have proceeded in a matter respectful of vested property and other rights, there are

134. See Kincaid, *supra* note 131, at 478-79:

[T]wentieth-century history clearly indicates that voters value local control and resist regulatory metropolitan regionalism. Supporters of state-wide and regional land-use regulation and growth management, therefore, will need to assure voters that they will have a voice in policymaking and that decisionmaking institutions will be ultimately accountable to local voters, not to a state bureaucracy established by the legislature and/or a federal bureaucracy established by Congress.

135. See HAAR & WOLF, *supra* note 66, at 519-30.

136. Costonis, *supra* note 26, at 20.

some discomfiting exceptions. The politically and culturally charged struggle over the plans of St. Bartholomew's Episcopal Church to replace its community building with a massive office tower dragged out over a decade, ending with the Supreme Court's refusal to overturn the Second Circuit's decision that neither a taking nor a violation of free exercise protections had occurred.¹³⁷ The First Covenant Church of Seattle was more successful in its challenge to landmark designation, although it took more than a dozen years, two trips to the Washington Supreme Court and a detour to the United States Supreme Court to prevail on its free exercise claim.¹³⁸

In *United Artists' Theater Circuit, Inc. v. City of Philadelphia*,¹³⁹ the Pennsylvania Supreme Court held that the Philadelphia Historical Commission, in designating the interior of the historic Boyd Theater as historically and architecturally significant, had overstepped its bounds:

The plain meaning of [the city] ordinance is that the interior must be maintained physically (and not aesthetically) for the express purpose of supporting the exterior of the building. However, the Commission exceeded that authority by designating the interior of the Boyd Theater. There is no "clear and unmistakable" authority to designate the interior of a building; therefore, the Commission possesses no such power. By designating the interior of the Boyd Theater, the Commission committed an error of law.¹⁴⁰

What makes this holding especially interesting is that it appears in the court's reconsideration (and reversal) of its earlier "ruling that the designation of a building as historic is a 'taking' under our Constitution and requires just compensation."¹⁴¹

137. See *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), cert. denied, 499 U.S. 905 (1991); Louis S. Hansen, *St. Bart's Alliance Pleases All; Conservancy Group Will Aid Restoration*, *Newsday*, Jan. 20, 1995, at B15, available in WESTLAW, NWSDAY database.

138. See *First Covenant Church of Seattle v. City of Seattle*, 787 P.2d 1352 (Wash. 1990), cert. granted and judgment vacated, 499 U.S. 901 (1991), holding reinstated en banc, 840 P.2d 174 (Wash. 1993); see also *First United Methodist Church of Seattle v. Hearing Examiner*, 916 P.2d 374 (Wash. 1996) (designation of church as landmark violated free exercise rights).

139. 635 A.2d 612 (Pa. 1993).

140. *Id.* at 622.

141. *Id.* at 614. See *United Artists Theater Circuit, Inc. v. City of Philadelphia*,

The City of Boerne, Texas compounded the problem faced by the *United Artists* court when it forbade the Saint Peter Catholic Church, a nonlandmark located in the newly designated Historic District, to enlarge its church building.¹⁴² This landowner cited the Religious Freedom Restoration Act (RFRA),¹⁴³ which requires governments to justify substantial burdens on free exercise of religion with a demonstration that the challenged regulation "is the least restrictive means of furthering [a] compelling governmental interest."¹⁴⁴ The Fifth Circuit reversed a trial court holding that RFRA was unconstitutional,¹⁴⁵ and the case is currently on the docket of the United States Supreme Court.¹⁴⁶ Similarly, in *Keeler v. Mayor and City Council of Cumberland*,¹⁴⁷ the district court, in granting summary judgment, held "that the City's refusal to grant the Church [located in the Washington Street Historic District] a Certificate of Appropriateness for the demolition of its monastery impermissibly violates the Church's right to the free exercise of religion protected by the First Amendment."¹⁴⁸

Aesthetics-based regulations have recently raised concerns in other First Amendment contexts. When, for example, officials in Renton, Washington, sought to concentrate adult theaters rather than disperse them throughout the city, the Supreme Court held that the First Amendment's free speech protections did not obligate the city to tailor its regulatory scheme to the city's specific circumstances:

We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult

595 A.2d 6 (Pa. 1991).

142. See *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir.), cert. granted, 117 S. Ct. 293 (1996).

143. See 42 U.S.C. § 2000bb (1994).

144. *Id.* at § 2000bb-1(b)(2).

145. See *Flores v. City of Boerne*, 877 F. Supp. 355, 357-58 (W.D. Tex. 1995).

146. See *City of Boerne v. Flores*, 117 S. Ct. 293 (1996) (petition for writ of certiorari granted).

147. 940 F. Supp. 879 (D. Md. 1996). See also *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996) (district court agreed with city that RFRA violated separation of powers doctrine).

148. *Keeler*, 940 F. Supp. at 886-87.

theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.¹⁴⁹

This deference resembles that found in the typical Euclidean case, one that involves no serious allegation that the landowner's fundamental rights have been violated.¹⁵⁰

More recently, the Supreme Court, troubled by a Missouri city's widespread regulation of residential signs, reacted with a finding protective of a landowner's free speech rights. In *City of Ladue v. Gilleo*,¹⁵¹ the city's aesthetic goals were apparent in the sign ordinance's "Declaration of Findings, Policies, Interests, and Purposes," in which regulators complained that the

proliferation of an unlimited number of signs in private, residential, commercial, industrial, and public areas of the City of Ladue would create *ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children.*¹⁵²

Margaret P. Gilleo violated the sign ordinance by posting a sign in a second-story window of her house; the offending dis-

149. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). *See also* *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (licensing scheme for "sexually oriented businesses" constituted unconstitutional prior restraint lacking adequate procedural safeguards).

150. *See* Wolf, *supra* note 8, at 12.

151. 114 S. Ct. 2038 (1994).

152. *Id.* at 2041 (quoting declaration) (alteration in original) (emphasis added).

play—measuring eight-and-one-half inches by eleven inches—read, “For Peace in the Gulf.”¹⁵³

The *Ladue* Court, treading carefully on already unsteady jurisprudential terrain,¹⁵⁴ declared that the city had overstepped the bounds set by the First Amendment. While the Justices conceded the validity of Ladue’s “interest in minimizing visual clutter,”¹⁵⁵ they were seriously troubled that the city “almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages.”¹⁵⁶ The Court could not have been surprised that cities such as Ladue have would embarked on such zealous campaigns in the name of beauty, given the imprimatur the Justices have placed on a wide range of aesthetic-based regulation.¹⁵⁷

The eighth decade of Euclidean zoning poses considerable challenges for advocates of locally based planning and zoning. The bright promise of ten short years ago—when post-Euclidean devices and inclusionary zoning, like the incentive-based, flexible environmental regulations with which they had so much in common, earned the acceptance of a cautious, yet respectful, judiciary—has dimmed significantly, to such an extent that legislators, judges, and commentators have called for some fundamental restructuring of the foundations underlying the *Euclid* text and, in turn, our attitudes toward regulation of the use and enjoyment of land.

III. TO THE HEART OF *EUCLID*: ELEMENTAL CHALLENGES

In 1986, even after decades of modification, innovation, and judicial gloss, three “intrinsic elements . . . withstood the chal-

153. *Id.* at 2040.

154. *See, e.g., City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977).

155. *Ladue*, 114 S. Ct. at 2044-45.

156. *Id.* at 2045.

157. *See, e.g. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26 (1954).

lenges of time, theory, and practice." "First," I observed a decade ago,

the Court prescribed a flexible approach in the legislative implementation and judicial review of public land use planning devices. Second, the Court endorsed careful, expert-based planning, eschewing the haphazard vagaries of the market. Third, the Court approved the transfer, from individual to collective ownership, of development rights above a level often labeled "reasonable return."¹⁵⁸

Today, all three of these elements are under attack, in the courthouse, on the floor of the legislature, and in the pages of legal and popular journals. If any one of these at-risk elements falls, then we will know that the twilight noted in the title is upon us.

A. *Flexibility?*

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. . . . [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.¹⁵⁹

With these words, Justice Sutherland, on behalf of the *Euclid* majority, signaled that the validity of governmental regulations affecting the use of land would not be determined in a detached manner or through a categorical method, but in a context that

158. Wolf, *supra* note 9, at 269.

159. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926).

considered and balanced competing public and private demands. Three recent jurisprudential developments challenge directly this Euclidean approach.

First, the use of the unconstitutional conditions doctrine¹⁶⁰ in *Nollan* and *Dolan* threatens the very flexible, post-Euclidean, planning and zoning devices—such as conditional rezoning, transferable development rights, inclusionary zoning discussed previously¹⁶¹—that employ incentives to stimulate positive private-sector activities. Sadly, because government officials at all levels must now be extremely cautious when allowing development subject to conditions, the wisest route for regulators might be to “just say no” to private sector actors.

Second, the categorical approach introduced by Justice Scalia in *Lucas*,¹⁶² unlike the ad hoc, balancing approach of *Penn Central*,¹⁶³ is an attempt to decide regulatory takings challenges with little regard for “circumstances and the locality.”¹⁶⁴ If it can be demonstrated that a total deprivation of value has been occasioned by governmental activity, only nuisance-like circumstances are relevant to the holding.¹⁶⁵

While some may console themselves with the fact that, for now, the set of cases in which total takings occur is quite minuscule, a third development—conceptual severance¹⁶⁶—

160. According to the *Dolan* Court, under the doctrine “the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.” *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)). See also Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1 (1988); Wolf, *supra* note 8, at 15, 19-20.

161. See *supra* Part I.

162. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-19 (1992); Wolf, *supra* note 36, at 479-80.

163. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

164. *Euclid*, 272 U.S. at 388.

165. See *Lucas*, 505 U.S. at 1027-31; Wolf, *supra* note 36, at 479-80.

166. See Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (defining conceptual severance as “delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken.”).

threatens to increase its size considerably. To this point, the idea that the denominator in the regulatory takings equipment should be reduced to reflect the specific reach of the regulation at issue, rather than the "parcel as a whole,"¹⁶⁷ has been confined to dissents and dicta by the Justices.¹⁶⁸ Other federal jurists have been more daring, however,¹⁶⁹ and it appears likely that sometime soon that the Supreme Court will have another opportunity to decide whether to increase considerably the universe of total deprivation cases.¹⁷⁰

B. *Deference to Experts?*

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. . . .

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us

167. See *Penn Central*, 438 U.S. at 130-31.

168. See *Lucas*, 505 U.S. at 1016 n.7; (Rehnquist, J., dissenting); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 518-20 (1987) (Rehnquist, J., dissenting); *Penn Central*, 438 U.S. at 143. See also *Wolf*, *supra* note 8, at 63-64.

169. See, e.g., *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (landowner denied permit to fill wetlands entitled to compensation for taking), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

170. There are two cases currently on the Supreme Court's docket that raise takings questions. See *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir.), *cert. granted*, 117 S. Ct. 293 (1996) (involving ripeness determination for landowner's challenge of restrictions placed on parcel located in "stream environment zone"); *Youpee v. Babbitt*, 67 F.3d 194 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1874 (1996) (involving federal law limiting descent and devise of minor fractional interests in Native American lands).

from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.¹⁷¹

Thus did the Court establish a pattern of deference to experts in the area of land use regulation; over the past few decades, support for that pattern has eroded significantly. For example, President Ronald Reagan's Commission on Housing, of which antizoning advocate Bernard Siegan was an influential member, suggested the following substitute for the "fairly debatable"¹⁷² test:

To protect property rights and to increase the production of housing and lower its cost, all State and local legislatures should enact legislation providing that no zoning regulations denying or limiting the development of housing should be deemed valid unless their existence or adoption is necessary to achieve a vital and pressing governmental interest. In litigation, the governmental body seeking to maintain or impose the regulation should bear the burden for proving it complies with the foregoing standard.¹⁷³

Recent critics of the *Euclid* Court's indulgent standard are not confined to those commentators of libertarian ilk who object to a wide range of land-use regulation.¹⁷⁴ Professors Mandelker and Tarlock, outspoken advocates of responsible

171. *Village of Euclid v. Ambler Real Estate Co.*, 272 U.S. 365, 394-95 (1926).

172. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Euclid*, 272 U.S. at 388.

173. PRESIDENT'S COMM'N ON HOUS., THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 200 (1982). The Commission directly challenged the Court's 1926 holding:

[T]he Commission believes the *Euclid* doctrine should be reexamined. The Commission recommends that the Attorney General seek an appropriate case in which to request review of the *Euclid* doctrine in the context of modern land-use issues and the due process protections afforded other property rights in the 50 years since *Euclid* was decided.

Id. at 202.

174. See, e.g., Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 ARK. L. REV. 65 (1991); Robert B. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute For Analysis, a Source of Significant Confusion,* 23 B.C. ENVTL. AFF. L. REV. 301 (1996); Douglas W. Kmiec, *Protecting Vital and Pressing Governmental Interests—A Proposal for a New Zoning Enabling Act,* 30 WASH. U. J. URB. & CONTEMP. L. 19 (1986); Bernard Siegan, *Non-Zoning is the Best Zoning,* 31 CAL. W. L. REV. 127 (1994).

land-use and environmental controls,¹⁷⁵ have identified the hard choices faced by courts in zoning cases:

A deferential standard satisfies separation of power concerns by ensuring that elected bodies discharge their constitutional and legislative functions. But, deferential review, usually the substitution of a more coherent and elegant rationale for the decision, leaves too many persons at risk from arbitrariness. Intrusive review puts courts on the shoals of value substitution. There are no transcendent zoning values that could form the basis for a rights-based approach to judicial control of zoning.¹⁷⁶

Mandelker and Tarlock summarize four "types of cases in which presumption-shifting has become common"¹⁷⁷: "Constitutional Rights and Suspect Classification Cases,"¹⁷⁸ and cases involving "Zoning Barriers to Affordable Housing,"¹⁷⁹ "Zoning Barriers to Nontraditional Families and Dwellings,"¹⁸⁰ and "Malfunction in the Zoning Process."¹⁸¹ While, in these situations, it is not uncommon to find courts questioning the motives and methods of land-use regulators, we have not yet reached the stage at which the right to own and use private property is viewed as fundamental under the Constitution, meaning that *all* controls of the use and enjoyment of land would be, under

175. See, e.g., Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can it Be Done?*, 65 CHI.-KENT L. REV. 479, 480 (1989) ("The hope is that this program will encourage state and local government experimentation with land use controls that are necessary to resolve the nonpoint pollution problem."); Tarlock, *supra* note 97, at 560 ("Biodiversity protection is not a Romantic effort to create the illusion of a prior Eden, but is a highly rational effort to apply modern science to prevent further harmful reductions in high quality habitats and the species that they support.").

176. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 10 (1992).

177. *Id.* at 11.

178. *Id.* See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (live entertainment ban violated First Amendment free speech protections).

179. Mandelker & Tarlock, *supra* note 176, at 14. See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

180. Mandelker & Tarlock, *supra* note 176, at 15. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Euclidean deference inappropriate for zoning provision defining families too narrowly).

181. Mandelker & Tarlock, *supra* note 176, at 16. See, e.g., *Fritts v. City of Ashland*, 348 S.W.2d 712 (Ky. 1961) (city failed to carry its burden to justify change in rezoning case).

due process and equal protection analysis, subject to elevated judicial scrutiny.¹⁸²

There are, of course, signs that some Supreme Court Justices are moving in the direction of fundamentality. The initial stirrings took place in Justice Scalia's opinion for the Court in *Nollan*, particularly in its insistence that the standards applied in regulatory takings challenges were different from those used when other claims were brought against the government:

[O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective." . . . [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.¹⁸³

The Court's use of the word "substantial" is anachronistic, for it derives from a case, *Euclid*,¹⁸⁴ that was decided decades before

182. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 606 (4th ed. 1991).

183. *Nollan v. California Coastal Comm'n.*, 483 U.S. at 836 n.3 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

184. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1927):

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Justice Powell, in his opinion for the Court in *Agins*, 447 U.S. at 260, actually cites *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), for the proposition that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." In the *Nectow* opinion, 277 U.S. 187-88, however, Justice Sutherland cites *Euclid*, 272 U.S. at 395,

the current usage for cases involving heightened scrutiny.¹⁸⁵ Still, this part of Justice Scalia's opinion was dictum, as the condition imposed by the California Coastal Commission on the beachfront landowners did not meet "even the most untailed standards."¹⁸⁶

Of much greater import than this subtle rhetorical shift is the Court's decision in *Dolan* to "plac[e] the burden on the city to justify the required dedication" of property for a public greenway and pedestrian/bicycle pathway.¹⁸⁷ By transferring to the public actor the responsibility of justifying its actions, the Justices have sent the clearest signal yet of their willingness to abandon the Euclidean notion that, except in cases involving specially protected rights or vulnerable populations, private property owners carry the burden of demonstrating arbitrary, capricious, or unreasonable conduct by public regulators.

Regretfully, there are indications that these changes are related to a growing judicial skepticism regarding the motives and abilities of government officials. In *Nollan*, the Court equates the Coastal Commission's conditional permitting system with "an out-and-out plan of extortion."¹⁸⁸ Then, during the oral argument in *Dolan*, Justice Scalia offered the following

for the "substantial relation" language. In *Euclid* itself, 272 U.S. at 396, Sutherland had identified *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530-31 (1917), and *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905) as sources for the test. The *Jacobson* Court in turn, 197 U.S. at 31, includes as its oldest authority *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) ("If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . ."). See generally NOWAK & ROTUNDA, *supra* note 183, at 573-91 (discussing the evolution of the Supreme Court's standards of review).

185. NOWAK & ROTUNDA, *supra* note 184, at 579 ("The intermediate standard of review has been formally adopted for gender and illegitimacy cases Under the intermediate standard of review, the classification must have a substantial relationship to an important interest of government.").

186. *Nollan*, 483 U.S. at 838. The Commission claimed that the condition was "reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes." *Id.* This would not be the first time that the Court would fault a land-use regulator for failing to have a reasonable basis for its actions. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (equal protection violation for city's requirement that group home for mentally retarded secure special use permit).

187. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994).

188. *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (1981)).

hypothetical set of facts: “[S]uppose the City is worried about urban congestion and pollution and someone who has a factory wants to . . . expand it infinitesimally, just a very little bit. Can the State require, as a condition of that permit, a million-dollar contribution to the City, which would go to . . . pollution reduction?”¹⁸⁹ These are not the words of a jurist who, in the context of environmental and land-use regulation, feels comfortable with the findings and actions of government experts. As the next session indicates, that skepticism is shared by federal and state legislators as well.

C. *Reasonable Return*

The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially adapted, being immediately in the path or progressive industrial development; that for such uses it has a market value of about \$10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of \$2,500 per acre; that the first 200 feet of the parcel back from Euclid avenue, if unrestricted in respect of use, has a value of \$150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of \$50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee’s land, so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial, and residential uses in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial, and

189. Official Transcript of Proceedings Before the Supreme Court of the United States at 45, *Dolan* (No. 93-518).

residential development thereof to other and less favorable locations.¹⁹⁰

Perhaps the most significant legacy of *Euclid* is the notion that government regulation that significantly reduces the value of real property is not necessarily invalid. Though *Euclid* technically is not a regulatory takings case,¹⁹¹ courts in takings cases have consistently followed Justice Sutherland's lead in allowing significant deprivations in the name of the public interest,¹⁹² even when, as in *Ambler Realty's* challenge, the landowner asserts that the regulation "attempts to restrict and control the lawful uses of appellee's land, so as to confiscate and destroy a great part of its value."¹⁹³ These subsequent cases have established that, so long as the regulation allows the landowner to maintain a "reasonable beneficial use,"¹⁹⁴ an "economically viable use,"¹⁹⁵ or a "reasonable rate of return,"¹⁹⁶ even a significant reduction in value will survive judicial review.

The same cannot be said for legislative review, at least according to the growing number of lawmakers, state and federal, who over the past decade have responded to the growing property rights movement by promoting takings statutes designed to trigger procedural and substantive relief for landowners whose property is somewhat, though not totally, reduced in value.¹⁹⁷ Consider, for example, this provision from S. 605, the

190. *Euclid*, 272 U.S. 384-85.

191. *See id.* at 384 ("The ordinance is assailed on the grounds that it is in derogation of section 1 of the Fourteenth Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law . . .").

192. *See Wolf*, *supra* note 8, at 63 n.305 (citing cases involving significant deprivations).

193. *Euclid*, 272 U.S. at 384.

194. *See, e.g.*, *Penn Cent. Transp. Co. v. United States*, 438 U.S. 104, 138 (1978).

195. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

196. *See, e.g.*, *Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (1975), *cert. denied*, 426 U.S. 905 (1976).

197. *See, e.g.*, FLA. STAT. ANN. § 70.001(2) (West 1996):

When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

"Omnibus Property Rights Act of Act of 1995,"¹⁹⁸ a proposal that garnered strong support from leading Republicans in the 104th Congress:¹⁹⁹

No agency or State agency, shall take private property except for public use and with just compensation to the property owner. A property owner shall receive just compensation if—

(1) As a consequence of an action of any agency, or State agency, private property (whether all or in part) has been physically invaded or taken for public use without the consent of the owner; and . . .

(D) such action diminishes the fair market value of the affected portion of the property which is the subject of the action by 33 percent or more with respect to the value immediately prior to the governmental action; . . .²⁰⁰

There is certainly no guarantee that, should a proposal of this sort emerge from Congress with the approval (or over the objections of) the President, lawmakers and regulators would have an easier time than the courts in drawing the line between compensable and "free" regulations.²⁰¹ Notwithstanding these

See also John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327 (1994); Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 FORDHAM ENVTL. L.J. 409 (1995); Richard Minter, *You Just Can't Take it Anymore: America's Property Rights Movement*, HERITAGE FOUNDATION POL'Y REV., Fall 1994, at 40; Joseph L. Sax, *Takings Legislation: Where It Stands and What Is Next*, 23 ECOLOGY L.Q. 509 (1996); Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON REG. 501 (1996); Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 FORDHAM ENVTL. L.J. 637 (1995).

198. S. 605, 104th Cong., 1st Sess. (1995).

199. The lead sponsor was Senator Bob Dole (R.-Ks.). Joining the Republican presidential nominee were Senators Hatch, Lott, Gramm, and Thurmond, among several others.

200. S. 605, § 204(a). See also H.R. 925, 104th Cong., 1st Sess. § 3(a) (1995):

The Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the owner, the Federal Government shall buy that portion of the property for its fair market value.

201. See Sax, *supra* note 197, at 515:

real practical difficulties, the very promulgation of a new takings threshold would signal a departure from the Euclidean “reasonableness” standard that allowed for, and even encouraged, decades of creative and responsive land-use and environmental regulation.

IV. *EUCLID* AT TWILIGHT: FOLLOWING FOUR LODESTARS

Given these significant challenges to *Euclid*'s central elements, we should prepare now for the time that land-use and environmental regulation are cut loose from their jurisprudential moorings. Each of the four guest contributors to this Allen Chair Symposium offers an important lesson for this critical twilight period. Defenders and opponents of traditional command-and-control and incentive-based regulatory systems would benefit greatly from their instruction.

A. *Lesson One: Rekindle the Common-Law Light*

For years, Professor James Krier has pursued the gremlin that threatens to enervate and disable all expert-based, administrative, environmental regulation—risk assessment.²⁰² In one of his more recent ruminations on the subject, *The End of the World News*, Professor Krier, with the deft humor that often accompanies and complements his keenest insights, offers little hope for a quick fix:

Why do proponents of these bills believe that Congress is likely to do a better job in articulating the standard for fairness to property owners in these bills than the courts have done in nearly 150 years of struggling with the question? This is, I think, the central dilemma on which they are caught. They are unprepared to say that they think the Supreme Court is all mixed up and does not know what it's doing. And so they say, “we want to avoid the problems of litigation,” but once pressed on that point they don't seem to be able to show a way to avoid the problems of litigation. They face the same problems of definition with which the Supreme Court has struggled, and they are caught up in the same inability to come up with a simple one-dimensional answer.

202. See, e.g., Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990); James E. Krier, *The End of the World News*, 27 LOY. L.A. L. REV. 851 (1994) (hereinafter *End of the World*); James E. Krier, *Round Table Discussion: Science, Environment, and the Law*, 21 ECOLOGY L.Q. 356 (1994); James E. Krier & Clayton P. Gillette, *The Uneasy Case for Technological Optimism*, 84 MICH. L. REV. 405 (1985).

We could proceed to make policy by the equivalent of a coin flip, on the principle of insufficient reason, but it seems bizarre to let random luck decide our destiny (which of itself provides a sufficient reason to do otherwise). We could turn to mystery and ritual, as did our distant ancestors—could if we had not already. The primitives had shamans, which we call risk assessors; they had totems, and we have science, progress, and technological wonders; they had taboos, but so do we; and despite all of these we still have our modern predicament.²⁰³

Professor Krier's current offering shares little of the pessimism evident in this excerpt.

Indeed, Professor Krier's current exploration of self-help, of which *Capture and Counteraction: Self-Help by Environmental Zealots*²⁰⁴ is part, is invigorating because it reminds us that even in the age of internet access to gigabytes of statutes and regulations, there is much in the encrustations of judge-made law that is worth our careful and respectful study. It is easy to admire the way in which Professor Krier makes that bugaboo of first-year property courses—*Pierson v. Post*²⁰⁵—relevant to a Greenpeace, post-Coasean world: "In a state of abundance—whether abundant wildlife, groundwater, oil, gas, or any other fugitive resource—the balance of costs and benefits makes exploitation sensible, and the rule of capture as fashioned by the courts promoted exactly that."²⁰⁶

The example set by Krier's article is especially apt today, when our struggle to make environmental and land-use regulation meet competing public and private demands is increasingly focused on the latest scientifically informed regulatory scheme. The language of environmental lawyers is peppered with acronyms—NEPA,²⁰⁷ RCRA,²⁰⁸ FIFRA,²⁰⁹ BAT,²¹⁰ PRP,²¹¹ FONSI,²¹² and so many others—that sym-

203. Krier, *End of the World*, *supra* note 203, at 865 (footnote omitted).

204. 30 U. RICH. L. REV. 1039 (1996).

205. 3 Cai. Re. 175 (N.Y. Sup. Ct. 1805).

206. Krier, *supra* note 203, at 1051 (citation omitted).

207. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994).

208. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6986 (1994).

209. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994).

210. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 360-61 (2d ed., 1994) (dis-

bolize our fixation with regulations that are piled upon layers of other regulations, all balancing precariously on their statutory foundations. We are too far removed from the common-sense, experience-based principles that inform the best of our common-law system. After all, for hundreds of years judges have been called upon to reconcile discordant land-uses and to protect the community from serious harm.²¹³

In anticipation of the shift away from Euclidean deference to regulators, we should be searching now for jurisprudential alternatives to reliance on a haphazard and unforgiving market. Justice Scalia's environmentally unfriendly opinion in *Lucas* has already engendered a spate of legal research devoted to the exploration of the nuisance origins of modern environmental and planning schemes.²¹⁴ We need to strengthen that database, not as a substitute, but as a complement to, and, yes, correction for, modern regulation.

B. *Lesson Two: Remember the Power of Private Property Rights*

Rhetoric is easily translated into power in a society devoted to the rule of law. Over the past few years, property rights activists have cast supporters of regulation as anti-property, even anti-American. For example, congressional supporters of the Private Property Owners Bill of Rights,²¹⁵ are responsible for the following collection of aspersions:

cussing Best Available Technology in Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994).

211. *Id.* at 767-83 (discussing Potentially Responsible Parties in context of Superfund liability, 42 U.S.C. § 9607(a) (1994)).

212. *Id.* at 870 (discussing Finding of No Significant Impact which eliminates need to file Environmental Impact Statement under National Environmental Policy Act, 42 U.S.C. § 4332(c) (1994)).

213. *See, e.g.,* HAAR & WOLF, *supra* note 66, at 89-135. For a provocative argument in favor of common-law resolution of environmental issues, see J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 851 (1996).

214. *See, e.g.,* Patricia A. Hageman, *Fifth Amendment Takings Issues Raised by Section 9 of the Endangered Species Act*, 9 J. LAND USE & ENVTL. L. 375 (1994); Hart, *supra* note 29; Wolf, *supra* note 8.

215. H.R. 3875, 103d Cong., 2d Sess. (1994).

Just as the Former Soviet Union and Eastern Bloc are discovering the critical need for private property, there are those in this country who in the name of environmental protection would seek to destroy the right to use your own land.²¹⁶

Radical environmentalists disagree with the Founding Fathers who wrote and ratified the Constitution, arguing that the Endangered Species Act (ESA), federal wetlands regulations and other environmental protection measures should supersede the Constitution.²¹⁷

We have new tyrants depriving us of our inalienable rights of life, liberty, and property—King George has been replaced by bureaucrats and kangaroo rats.²¹⁸

It should not be surprising, given the current jurisprudential rules of the game, that the targets of these attacks have spent an inordinate amount of time and energy trying to deflate and devalue the notion of fundamental private property rights. Still, if we are to move toward meaningful resolution of the problems plaguing modern environmental and land-use regulation, we must move beyond the kind of damaging discourse represented by the quotations above.

There is probably no more energetic, enthusiastic, and diligent voice in defense of private property rights than Judge Loren Smith, whose contribution to this collection is titled *Life, Liberty & Whose Property?*²¹⁹ Unlike his more intemperate counterparts in the legislative branch, Judge Smith speaks of a “legal system [that has become] insensitive to the rights associated with property or economic liberty,”²²⁰ and ascribes that “insensitivity” not to unpatriotism or extremism, but to “[t]he American progressive movement, one of the first political expressions of . . . awe of science and rational central planning,

216. 140 Cong. Rec. E233 (Feb. 23, 1994) (Statement of Rep. Don Young) (quoted in Wolf, *supra* note 195, at 651).

217. 140 Cong. Rec. S2639 (Feb. 22, 1994) (Statement of Sen. Richard Shelby) (quoted in Wolf, *supra* note 197, at 653).

218. 140 Cong. Rec. E224 (Feb. 23, 1994) (Statement of Rep. Jack Fields) (quoted in Wolf, *supra* note 197, at 653).

219. 30 U. RICH. L. REV. 1055 (1996).

220. *Id.* at 1056.

[that] saw individual rights and the Constitution as a barrier to needed progressive and scientific social reform."²²¹

From his bench at the United States Court of Federal Claims, Judge Smith has sent a clear message to federal law-makers and regulators that they must be mindful of vested property rights when instituting new programs. Indeed, Judge Smith's opinions in *Loveladies Harbor, Inc. v. United States*²²² and *Whitney Benefits, Inc. v. United States*,²²³ rescued private property owners from new regulatory regimes that did not include the kind of nonconforming use provisions routinely included in local zoning codes.²²⁴

Judge Smith's writings, within and outside the case reporters, remind us of the power of the notion of vested rights, and of the difficulties our legal system encounters in the attempt to determine just exactly when and how vesting occurs.²²⁵ Unfortunately, because of the way in which federal takings law has

221. *Id.* at 1058.

222. 21 Cl. Ct. 153 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) (landowner denied permit to fill wetlands entitled to compensation for taking).

223. 18 Cl. Ct. 394 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991) (taking of property owners' coal interests effected through enactment of Surface Mining Control and Reclamation Act, Pub. L. No. 95-87, 91 Stat. 445 (codified as amended in scattered sections of 30 U.S.C.)).

224. *See, e.g.*, HAAR & WOLF, *supra* note 66, at 290-308 (materials on nonconforming uses).

In *Loveladies Harbor*, the land at issue was purchased in 1956. By May 5, 1982, 199 acres had been improved by landfill, where necessary, and by the construction of homes. Most of these acres had been sold to the general public. Development of the remaining 51 acres was prevented by the enactment of certain state and federal statutes regulating wetlands.

21 Cl. Ct. at 153.

In *Whitney Benefits*, Judge Smith noted:

SMCRA's proposed grandfather clause specifically would have let plaintiffs mine Whitney coal because their property was enumerated in the list of properties the clause was intended to cover. Unfortunately for plaintiffs, the grandfather clause was removed before the statute was enacted to prevent the mining of the enumerated properties. Since the grandfather clause was intended to cover Whitney, and since it was removed in order to prevent the mining of Whitney, this court logically must find that SMCRA was intended to affect Whitney coal.

18 Cl. Ct. at 407.

225. For a particularly puzzling example, see *Hage v. United States*, 35 Fed. Cl. 147 (1996), and the fine student note included in this symposium, Danielle Stager, Note, *Takings in the Court of Federal Claims: Does the Court Make Takings Policy in Hage?*, 30 U. RICH. L. REV. 1183 (1996).

evolved, vesting has quite negative connotations for defenders of land-use and environmental regulation. We should recall Willard Hurst's notion that in the nineteenth-century American polity, contrary to laissez-faire myth-making, "two working principles" operated:

(1) The legal order should protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression. In pursuit of this end, law might be used both (a) to secure a man a chance to be let alone, free of arbitrary public or private interference, while he showed what he could do, and (b) to provide instruments or procedures to lend the support of the organized community to the effecting of man's creative talents, even where this involved using the law's compulsion to enforce individual arrangements. (2) The legal order should mobilize the resources of the community to help shape an environment which would give men more liberty by increasing the practical range of choices open to them and minimizing the limiting force of circumstances.²²⁶

In other words, property rights and government regulation are not natural enemies. The challenge for the coming decades is to construct a new paradigm that somehow accommodates the individual need "to be let alone" with the environmentalists' mantra that "everything is connected to everything else."²²⁷ Judge Smith's careful, moderate tone contrasts with the harsh, alarmist rhetoric, from either corner, that only serves to distract us from tackling the difficult task of finding that paradigm.

226. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 6 (1956).

227. BARRY COMMONER, *THE CLOSING CIRCLE: NATURE, MAN, AND TECHNOLOGY* 33 (1971) (labeling this "the first law of ecology").

See also Joseph L. Sax, *The Constitutional Dimensions of Property: A Debate*, 26 *LOY. L.A. L. REV.* 23 (1992). Professor Sax writes:

The ecological truism that everything is connected to everything else may be the most profound challenge ever presented to established notions of property. The reason is that every traditional theory of property assumes rights within a bounded domain, where one can use, enjoy, profit and exclude, but not adversely affect others within their separate domains.

Id. at 32.

C. Lesson Three: Respect the Promise of Planning

Beginning with his work in the nascent Department of Housing and Urban Development, Professor Charles Haar has explored the potential of the modern public-private partnership, seeking to enlist the creative drive and energy of the market in the cause of economic development and community revitalization.²²⁸ Though he has never been hesitant to point out the negative potential of local land-use controls,²²⁹ in his contribution to this collection, *The Twilight of Land-Use Controls: A Paradigm Shift?*,²³⁰ Professor Haar assures us that there is synthesis and progress in the history of zoning and planning. We can share his optimism that public and private can be creative partners—"My guess is that, though far short of a revolutionary break such as repeal, society is ready to move the equilibrium further than in the past, most particularly against the prevailing legal constraint of a separation between the public and private worlds"²³¹—and that our system is flexible enough to accommodate technological, economic, and ideological shifts—"Essentially, . . . the stability of land-use controls is the striking factor—the system's ability to adapt to startlingly new transportation technologies, changes in financing and the flow of capital, even transformations of family values."²³²

Professor Haar, who in large part shaped the contours of land-use planning as a legal discipline, has been an active witness to the cycles of public and private ascendancy in post-World War II America. His latest offering convinces us that comprehensive land-use planning resonates with the American ethos:

228. See Lance M. Liebman & Michael Allan Wolf, *Essays Honoring Charles M. Haar: Introduction*, 50 WASH. U.J. URB. & CONTEMP. L. 1 (1996).

229. See Haar, *supra* note 100, and the insightful student-authored review included in this symposium, Abigail T. Baker, Book Note, 30 U. RICH. L. REV. 1093 (1996) (reviewing CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES* (1996)).

230. 30 U. RICH. L. REV. 1011 (1996).

231. *Id.* at 1031.

232. *Id.* at 1014-15.

Like American society, zoning is profoundly middle-class and liberal in basic orientation toward rights and deeply Lockean in character. On the other hand, it seeks to absorb contending viewpoints of the existence of a public interest without shaking the core belief system. Consequently, land-use controls embody on a local scale, and in a physical sense, the national ambivalence and ambiguity. In adoption, by not bringing conflicts out in the open, but seemingly adopting all views at one and the same time, the ordinances are again typically American in the desire not to highlight conflict or probe the darker side.²³³

It is undeniable that centralized, uniform regulation offers significant benefits in the environmental arena. Nonetheless, Professor Haar's article prompts the nagging thought that federal environmental law—removed as it is from the local community in the drafting, promulgation, and enforcement stages—suffers from the absence of this kind of compatibility.

D. *Lesson Four: Reconsider the Development/Conservation Dichotomy*

Dean William McDonough is a leading environmentalist thinker and actor whose livelihood and artistic expression are intimately tied to private-sector, real property development. His career demonstrates that "sustainable development" and "environmental design" are neither oxymoronic nor unattainable concepts.²³⁴ Those of us who make our living by cautioning others can admire his willingness to dare, "to play at the edge of progress."²³⁵

233. *Id.* at 1020.

234. For example, Dean McDonough has recently designed healthful and environmentally friendly offices for the Heinz family in Pittsburgh, see William A. McDonough, *Dialogue on Design*, 30 U. RICH. L. REV. 1071, 1071-72 n.4, and an energy efficient Wal-Mart with an on-site recycling center in Lawrence, Kansas. See *id.* at 1072 n.5. See also WILLIAM MCDONOUGH + PARTNERS, *THE HANNOVER PRINCIPLES—DESIGN FOR SUSTAINABILITY* (1995) (on file with the *University of Richmond Law Review*); William McDonough, *Design, Ecology, Ethics, and the Making of Things*, Sermon at the Cathedral of St. John Divine (Feb. 7, 1993), in WILLIAM MCDONOUGH + PARTNERS—*SELECTED ARTICLES* (on file with the *University of Richmond Law Review*).

235. *Id.* at 1072.

Dean McDonough offers us a peek over the horizon into the next century, where, perhaps, the goal of the ensuing generation of regulation will be to create a regime that accentuates not the negative—the prevention of harmful spillovers and externalities—but the positive—the fostering of sustainable solutions. “[B]ecause design is the first signal of human intention,” he tells us, “it is a highly positive activity, not a reaction based on guilt. For attorneys, especially, it is an exciting notion that we could be designing a regulatory matrix that enhances creativity in a positive direction”²³⁶

The most important lesson we can glean from Dean McDonough’s life and words may well be the irrelevance of law in the overall struggle to, with all due respect to nature, *build* a more liveable world. From his perspective outside the confines of the law, he imagines that

[r]egulation is the first signal of the failure of design It says that we haven’t figured out how to do something safely, so now we have to figure out to regulate it. I’m much more interested in a design agenda that says, “Don’t create the problem, don’t need the regulation.” Eliminate regulations for all time, not just for this generation, and not just so that this generation can pollute and kill, but so that all generations can be free of that kind of what Jefferson would probably characterize as remote tyranny.²³⁷

Such a strategy may lead to the removal of some valuable professional turf from attorneys and law schools. Still, with our knowledge, and in some cases mastery, of the often frustrating and puzzling current legal regime, lawyers would be valuable partners in McDonough-inspired undertakings to obviate the context for more regulation.

V. CONCLUSION

Ten years ago, I noted that “[a] 60-year anniversary is an appropriate time to take an accounting of *Euclid* and its lega-

236. *Id.* at 1074.

237. *Id.* at 1079.

cy."²³⁸ The case's seventieth birthday seems a more somber occasion. We should not waste what is perhaps our last opportunity for reflection now that legislative, judicial, and theoretical evidence abounds that twilight has indeed fallen upon the Euclidean plain. The four lessons—to rekindle the common-law light, remember the power of private property rights, respect the promise of planning, and reconsider the development/conservation dichotomy—presented in greater detail in the contributions that follow, comprise lodestars to light the way during this murky period in the evolution of American land-use and environmental regulation. With their guidance, in forms and forums about which we can now only speculate, we will be better equipped for the coming struggles at last to achieve (or at least to approach) that elusive balance of private right and public need.

238. Wolf, *supra* note 9, at 271.

