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**EUCLID LIVES: THE SURVIVAL OF PROGRESSIVE JURISPRUDENCE**

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The Supreme Court's expanded use of regulatory takings is making a highly controversial and confusing concept more difficult to apply and defend. The Court and commentators are invited to explore a different approach - Progressive jurisprudence, as represented by the Court's enduring opinion in *Village of Euclid v. Ambler Realty Co.* This Commentary examines the reinvigoration of the Takings Clause and, in historical and ideological terms, discusses the Progressiveness of Euclid and of the regulatory scheme the Euclid Court approved. Professors Haar and Wolf identify and explore five inquiries concerning the character of regulations affecting the use, ownership, and value of private property. The answers to these questions remain relevant (and often outcome-determinative) in cases involving allegedly confiscatory regulations. In the discussion of each inquiry, the authors consider how the Court's current regulatory takings approach suffers by comparison. The authors note that it is becoming increasingly difficult for the current Justices to shape consistent majority opinions out of their diverse views regarding the nature and applicability of regulatory takings. The authors urge American jurists to take a second look at Euclid and the Euclidean inquiries as an alternative to regulatory takings law and its unfortunate legacy of unnecessary confusion and judicial overreaching.

**[\*2158] I. Introduction: Continuing Down the Wrong Path**

For seventy-five years, the United States Supreme Court has consistently maintained the proposition that there is no fundamental constitutional right to the speculative value of a piece of property. Officials representing even the most modest local government may promulgate and enforce regulations that dramatically and demonstrably reduce the value of real estate and personalty, so

long as those regulations promote the laudatory and adaptable goals of public health, safety, morals, and general welfare. n1 This admittedly controversial [\*2159] proposition has weathered profound political and ideological shifts in the composition of the Court and in American legal thought from the 1920s through the turn of a new century. Moreover, the Justices have imposed a significant burden on those private litigants who seek vindication for the deprivation of their property "rights." This burden involves the obligation to demonstrate that the targeted regulation or its application is "clearly arbitrary and unreasonable." n2 Village of Euclid v. Ambler Realty Co. n3 is the case most closely identified with the denial of a constitutional right to speculative value. n4 Many Court observers may be surprised to learn that this strong endorsement of government regulatory activity occurred in the mid-1920s, during the era of constitutional jurisprudence most closely associated with laissez-faire and conservative judicial activism. Merely three years earlier, Justice George Sutherland, the author of the majority opinion in Euclid, had presented the Court's opinion in a [\*2160] case that invalidated a congressional minimum wage law for women privately employed in the District of Columbia, because the statute constituted a violation of the constitutional principle of "liberty of contract." n5 Indeed, Justice Sutherland was one of the legendary "Four Horsemen" who often stood as bulwarks against government violations of property and contract rights. n6

We present the language and legacy of Euclid as an example of Progressive jurisprudence. Imbued with the spirit of late nineteenth-century pragmatism and grounded in early twentieth-century political and ideological realities, Progressive jurisprudence is a novel and characteristically American approach that views with great skepticism bald assertions of abstract rights.

Recent schools of thought and ideological movements, such as critical legal studies, law and economics, and public choice, have captured the imagination and attention of courts and commentators over the past few decades. n7 Unfortunately, we have lost sight of a strong element of American legal thought that has long existed and that should be rediscovered and modified for deployment in the current debate over the nature and extent of private property rights. In the early decades of the twentieth century, the Court began to develop an incremental, experience-and-fact-centered approach to evaluating the legitimacy of comprehensive legislative attempts to regulate the use and ownership of real property. n8 An America whose intellectual conversation [\*2161] was dominated by the likes of William James, John Dewey, and Oliver Wendell Holmes, Jr., n9 had little tolerance for the absolutist belief embodied in Blackstone's notion of a property owner's exclusive dominion. n10 Rather, those Justices who were interested in deferential oversight

of their co-equal branches employed certain criteria to determine which provisions would receive the judicial blessing, so that the nation's regulatory experiment could continue.

The rough contours of Progressive jurisprudence have been the subject of speculation by legal historians. n11 This Commentary, invoking as its primary focus the Court's opinion in *Euclid*, pulls together several relatively unexplored strands of the Progressive legal tradition, with an emphasis on a specific context - the use and ownership of land.

**[\*2162]** Through the lens of Progressive jurisprudence, we present a fresh critique of current efforts to push the Fifth Amendment's Takings Clause n12 to and beyond its logical and sound public policy limitations. In expanding the reach of the regulatory takings doctrine - that is, the notion that statutes, ordinances, and regulations that do not involve a physical invasion or appropriation can effect a violation of the Takings Clause requiring just compensation, injunctive relief, or both - the majority of the current Court (and the state and federal judges inspired by their renewed activism) are not only straying from the most relevant precedent, but also moving out of step with widely shared values about public and private realms. n13 In the area of environmental regulation especially (but certainly not solely), lawmakers and judges are seeking guidance as they craft measures and engage in analysis designed to reach a fruitful balance that respects private decisionmaking regarding current use and consumption and that supports public trustees acting on behalf of the future. Similarly, individuals and entities in the private sector making investment, lending, sale, and enhancement decisions regarding land and improvements on real property need guidance and leadership from the Court, not a series of decisions that only further muddles the line separating valid police power regulation from illegal confiscation.

This Commentary will explore why *Euclid* survives, why it ought to remain an important component of American law, and why it offers powerful, yet unrecognized, guidance in the regulatory takings arena. It will examine why the principles at the heart of this 1926 decision have not, to employ a now-familiar metaphor, been "voted off the island" **[\*2163]** by the enemies of environmental and conservationist regulations who challenge these measures as confiscatory and violative of cherished private property "rights." n14 The lessons gleaned from studying *Euclid* and the Progressive ideas that informed the Court's opinion can increase our understanding of the ways in which courts and legislatures can maintain the precarious balance between public good and private right. In this way, *Euclid* - with its strong and consistent record of acceptance over the succeeding

seven and one-half decades, n15 during periods of right then left hegemony on the Court - serves as a new lodestar. The elements of Progressive jurisprudence we distill from the Court's language provide crucial guidance for judges and commentators who are struggling to break out of the regulatory takings morass yet maintain proper respect for the rights of property owners.

The approach outlined in this Commentary holds several advantages over the failed doctrine of regulatory takings. Not only is the manageable and intelligible set of Euclidean inquiries more logical, [\*2164] straightforward, and internally consistent than the ever-expanding list of questions posed by the current Justices, it is also more easily and more fruitfully applied. More than seven decades of judicial application of Euclid and its principles have yielded a moderate body of law that stands in sharp contrast to the threat of potentially boundless activism typified by malleable and subjective concepts such as "conceptual severance," "rough proportionality," "important sticks in the bundle," and "investment-backed expectations." Yet perhaps the most significant advantage the Progressive jurisprudence of Euclid and its progeny holds is its connection to history - not merely to the text and original intent of the Fifth Amendment, but also to the common law whose antecedents helped shape the development of early judicial review and whose methods and meaning continue to inform the substance and scope of constitutional lawmaking.

Beginning with its holding in *Penn Central Transportation Co. v. New York City* n16 in 1978, the Supreme Court has allowed, then encouraged, many owners to base their challenges to regulations affecting land and other forms of private property on the following words included in the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." n17 A literal reading of this Takings Clause does not reveal authority either for invalidating a regulation or for providing compensation in the absence of an affirmative exercise of the government's (or its agent's) power of eminent domain to "take" or "condemn" property. n18 Nor does the history of the framing and adoption of the Fifth Amendment reveal such authority. n19 Instead, the notion of regulatory taking derives most directly from dictum found in the somewhat quaint opinion of Associate Justice Oliver Wendell Holmes, Jr., in 1922's *Pennsylvania Coal Co. v. Mahon*: n20 "The general rule at least is, that while property may be regulated to a [\*2165] certain extent, if regulation goes too far it will be recognized as a taking." n21

We say "quaint" for two reasons. First, this opinion, which opened the door to judicial second-guessing of legislative schemes, was penned by the Justice who

had dissented so eloquently from his conservative colleagues' overreaching in *Lochner v. New York*,<sup>n22</sup> the case that, to this day, is most closely associated with the dark side of judicial review.<sup>n23</sup> There, Holmes wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty ... . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.<sup>n24</sup>

The author of this defense of judicial deference should not have been surprised that his Progressive colleague, Louis D. Brandeis, not only dissented from Holmes's apparent about-face in *Pennsylvania Coal*,<sup>n25</sup> but also voiced *ex parte* concern with the latter opinion, telling Felix Frankfurter that "heightened respect for property has been part of Holmes' growing old."<sup>n26</sup>

The second reason why the adjective "quaint" fits is that the majority opinion in *Pennsylvania Coal* apparently had little impact on how the Court analyzed the legitimacy of regulations affecting the use and development of land in the years immediately following the issuance of [\*2166] the opinion. *Pennsylvania Coal* did not earn even a mention in the four cases decided between 1926 and 1928 in which landowners claimed that government officials were passing and enforcing arbitrary and confiscatory regulations.<sup>n27</sup> In contrast, in the 1920s and early 1930s, Justice Holmes's opinion was cited with approval by his conservative brethren in several opinions (majority and dissenting) unrelated to land use - opinions that we associate today with the apex of conservative judicial activism.<sup>n28</sup>

So much has already been written about what Holmes did and did not intend when he opened a jurisprudential can of worms in *Pennsylvania Coal* with his "too far" test.<sup>n29</sup> Even so, many more questions are raised by this oracular assertion: From where did Holmes derive this "general rule"? How "general" is the rule? How can a "rule" be so indeterminate? How far is "too far"? By "taking," does Holmes mean a violation of the Takings Clause that requires compensation (if requested by the property owner), or instead a deprivation that violates the Due Process Clause? In

1922, ample precedent supported a finding in favor of the Pennsylvania Coal Company without having to invoke (even indirectly or metaphorically) the protections of the Takings Clause. n30

[\*2167] Four years later, in *Euclid*, Justice Holmes joined in Justice Sutherland's majority opinion upholding zoning, despite the challenger's allegation that this new form of land-use regulation significantly reduced the value of its real estate. n31 Surprisingly (but thankfully), the words and spirit of *Pennsylvania Coal* were not echoed in the Court's opinion, even though the lower court relied heavily on Justice Holmes's opinion. n32 It is telling that District Judge Westenhaver grouped *Pennsylvania Coal* with *Adkins v. Children's Hospital* n33 and *Charles Wolff Packing Co. v. Court of Industrial Relations*, n34 two cases invalidating reform legislation that cited *Pennsylvania Coal* and closely identified with conservative imprudence during the 1920s. n35

Despite Judge Westenhaver's opinion and considerable then-recent precedent indicating strong judicial prejudice against regulations that burdened contract and property rights, the *Euclid* majority upheld an ambitious set of land-use controls devised by a "mere" suburb of Cleveland. n36 Today, a badly divided Court is being presented with a multifront assault on regulations affecting property. While many of the battles concern environmental and other controls placed on land and buildings, n37 the modern campaign to resanctify property rights also involves challenges to any number of statutory and regulatory programs that have a negative economic effect on the private sector, such as coal miner benefits, pension plans, and attorneys' trust funds. n38 Today's Court has struck down regulatory programs and [\*2168] practices because of a generalized notion that an unconstitutional "taking" has occurred - even in the absence of formal condemnation proceedings or the destruction of private property, and even in cases in which regulators offered a scenario by which the value of the property would be enhanced. n39 Should this pattern continue, observers may one day view opinions in cases such as *Lucas v. South Carolina Coastal Council*, n40 *Nollan v. California Coastal Commission*, n41 *Dolan v. City of Tigard*, n42 *Eastern Enterprises v. Apfel*, n43 and *Palazzolo v. Rhode Island* n44 with the same general opprobrium as we now view *Lochner* and *Adkins* - as opinions written and endorsed by judges who, though certainly not as callous and regressive as they are sometimes portrayed, were responsible for provoking a backlash of judicial restraint. n45 Rather than having their judicial creations suffer such historical ignominy, the current Justices should shift their focus away from the bumpy and murky path of regulatory takings and toward the Progressive jurisprudence embodied in *Euclid*, a much more suitable guidepost for

judicial consideration of allegedly confiscatory government regulations.  
n46[\*2169]

## II. Two Divided Courts

Over the past few years, as part of a larger pattern or project that can no longer avoid the label "activist," the Rehnquist Court has demonstrated an increasing willingness to determine the fairness and legitimacy of regulations and statutes that negatively affect the value and use of real and personal property or that interfere with private property rights. The Court has reconceptualized the Takings Clause, deploying it as a powerful new tool to neutralize a wide range of environmental and land-use regulation and to uphold a personal liberty - the right to own and use private property - that some Justices feel has been severely devalued. In much the same way, the current Court has attempted to rein in government programs that it perceives to be intrusive, if not dangerous, and to increase the protection afforded other personal rights. In the process, the Court has challenged decades-old understandings regarding the Commerce Clause, the Free Exercise Clause, the Establishment Clause, state sovereignty, privacy, criminal justice, and equal protection. n47

The cacophony of opinions in *Palazzolo* and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, n48 the Court's most recent efforts to amplify and apply the regulatory takings approach, comprises a cry for help by a badly divided Court. n49 The Takings Clause has proved to be an unwieldy and potentially devastating tool [\*2170] for balancing private rights and public needs. More than two decades (and several unsuccessful Supreme Court attempts) ago, one of the authors of this Commentary observed, in language quoted in two Court opinions, that "the attempt to distinguish 'regulation' from 'taking' is the most haunting jurisprudential problem in the field of contemporary land-use law ... one that may be the lawyer's equivalent of the physicist's hunt for the quark." n50 In the interim, our colleagues in the physical sciences have been much more successful in their quest. n51 All that lawyers and judges have to show for their efforts is a body of law that nearly all observers acknowledge is hopelessly confused, with no immediate resolution in sight. n52

In literature, indefiniteness and obscurity may - in skilled, inspired hands - yield immeasurable gains to the patient and indulgent reader. Would Joyce and Faulkner, for example, be embraced and studied by readers and critics to this day had these authors crafted narratives that were more chronological, straightforward, and, yes, obvious? Would the impact and import of *Ulysses* n53 and *The Sound and the*

Fury n54 be as overwhelming had their designers not engaged in purposeful obscurity?

Our most skillful jurists also, on occasion, are capable of reaching creative and analytical heights by means of intentional ambiguity. Much more often, however, ambiguity and inconsistency result not from a conscious (or subconscious) decision of one judicial "artist," but from the tough compromises needed to forge a majority in a specific case before the court. Current takings jurisprudence epitomizes this process, as judges on federal and state appellate courts struggle to reach fragile accords regarding the meaning and implication of a text that is itself the product of significant compromise.

[\*2171] We should not be surprised that the vehicle that has served to re-elevate private property rights is not the Due Process Clause, given the disdain with which Justices who employed that strategy have been viewed since the late 1930s. Unfortunately, the portion of the Fifth Amendment upon which property rights advocates are now focusing their energies - "nor shall private property be taken for public use, without just compensation" - is proving as effective as its predecessor in invalidating statutes and regulations that further the common good but negatively affect the use and ownership of the private property of a few. The substitution of the Takings Clause for the Due Process Clause has not in any significant way enhanced our appreciation of when regulation is invalid or confiscatory. n55

The use of this strategy has not been easy going for the Rehnquist Court, as evidenced by the shakily cobbled, five-member majority opinions that are often followed by bitter, sniping concurrences and dissents. The five Justices who have most consistently joined together to move the Court rightward - Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas, all Republican appointees - are far from unanimous in their views concerning the role government should play in regulating business, private property, and personal behavior. n56 Certainly, a different Court that included a bloc of five or even six Justices unwaveringly committed to one brand of conservatism would have produced fewer compromises and pulled fewer punches, not only in [\*2172] hot-button areas such as abortion and criminal justice, but also in the realm of private property regulation. The two Clinton selections - Justices Ruth Bader Ginsburg and Stephen Breyer - along with two colleagues nominated by Republican Presidents - Justices John Paul Stevens and David Souter - often dissent from their colleagues' attempts to readjust constitutional law understandings that date back to the years of liberal hegemony



on the Warren Court. n57 Because the foreseeable political future holds no promise of clear sailing for committed partisans on either the right or left, the importance of the votes and attitudes of the Court's moderates is dramatically increased.

Luckily, history provides important guidance for today's Supreme Court. The Court of the 1920s featured a contentious ideological lineup. By 1922, the Taft Court contained a core of four conservative Justices - Willis VanDevanter, James McReynolds, George Sutherland, and Pierce Butler - who soon earned reputations for being decidedly unfriendly to the regulation of business. n58 On the other end of the political spectrum sat Louis D. Brandeis, a Progressive lawyer who, though by no means an enemy of the private sector, consistently favored statutory reforms of big business in the name of the greater good. n59 Justice Oliver Wendell Holmes, Jr. also generally indulged the whims of legislative majorities that passed reforms, very few of which he personally supported. For his judicial (if not his personal) opinions, the independent-minded Brahmin remained the hero of many Progressive activists and theorists. n60

[\*2173] William Howard Taft, himself the victim of Progressive politics in the Presidential campaign of 1912, had criticized his successor, Woodrow Wilson, for his "latitudinarian construction of the Constitution," which threatened "to weaken the protection it should afford against socialistic raids upon property rights." n61 Not surprisingly, as Chief Justice, Taft hoped that the conservative bloc, along with moderate Justices Joseph McKenna, Edward Sanford, and Harlan Fiske Stone (who replaced McKenna in 1925), would enable him to shape a unified Court that would not be plagued by pesky dissents. n62 That hope was frustrated, however, as Stone, the former Wall Street lawyer, joined Holmes and Brandeis. As Stone's biographer, Alpheus Thomas Mason, notes, "together the Three Musketeers fought an unceasing battle against formalistic jurisprudence." n63

Mason also identifies *Euclid* as a case in which the Taft Court majority shifted from right to left. n64 While Mason's account of Stone's supposedly decisive role in effecting that shift is almost certainly exaggerated, n65 the fact that Sutherland broke from the conservative bloc, in a case alleging a serious violation of private property protections, makes *Euclid* worthy of special attention. It is our belief that the emergence of Progressive jurisprudence, at a time when the Court was sharply divided by ideology and temperament, has special meaning for the modern Court, especially in the wake of the fiery October 2000 Term. n66

[\*2174] What was it about the challenged regulatory scheme in *Euclid* that, despite its potentially negative impact on property rights and values, made possible

its acceptance by a cross-section of the Taft Court? What was it about the way the opinion was crafted that allowed the unusual alliance in the majority? By studying this opinion and the legal and societal issues underlying the dispute, we gain some important insights into the kinds of government controls on the use and enjoyment of private property that are worthy of respect and deference by our current Court - a Court as divided as the Taft Court over the legitimacy and wisdom of government tampering with private property and business activities.

### III. Five Questions the Court Should Still Ask

Euclid, imbued as it is with Progressive jurisprudence, still serves as a useful paradigm of the judicial craft, for today the Court is once again sharply divided in its efforts to articulate a meaningful distinction between valid regulations and illegal confiscations. For more than three-quarters of a century, Euclid's logic and text, and the approach to judicial decisionmaking the majority opinion represents, have weathered profound societal, political, and ideological shifts on the Court and in the American polity. Euclid's strength over the years, however, should not be taken to mean that our courts have mined all of its value. Regardless of how well-known Euclid is to certain courts and scholars, it has much more to offer in the basic principles it expounds.

The attributes of Progressive jurisprudence to which we can attribute Euclid's "staying power" are represented by the five questions that appear within and between the lines of Sutherland's opinion for the Court:

(1) Does the challenged regulation reflect the elasticity and adaptability of traditional common law methodology?

(2) Was the challenged regulation crafted with important input by experts from nonlegal fields, thus leaving the property owner with the heavy burden of demonstrating unreasonableness?

[\*2175] (3) Does the challenged regulation hold the capacity to reduce and, at the same time, enhance individual wealth and personal rights?

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

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

These questions, and some of the aspects of Progressiveness they reflect, are not expressly articulated by the Court. These inquiries must be distilled from the text, as read in its historical and ideological context. In the pages that follow, we reset,

rearrange, and reinterpret discourse that, in the opinion, is at times expansive and at other times obfuscated by mundane details or distracting rhetoric.

The ensuing discussion of each question will demonstrate that this set of Euclidean inquiries is much more appropriate, useful, and prudent than the confusing and problematic questions spawned by *Pennsylvania Coal* and its numerous progeny. Progressive jurisprudence presents to the current Court: (1) a respectful understanding of the contextual nature of modern regulatory law, which is tied to a notion of the common law that meaningfully responds and adapts even to profound societal changes; (2) a model of temperate judicial lawmaking that, when appropriate, translates into deference to the findings of qualified experts; (3) an accurate perspective of the nature and impact of regulations affecting private property; (4) a prudential approach that awaits and, barring serious error, endorses the work product of state judges; and (5) a consideration of the devices that are included in regulatory schemes to provide relief to those property owners suffering special hardships.

#### A. Does the Challenged Regulation Reflect the Elasticity and Adaptability of Traditional Common Law Methodology?

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. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the [\*2176] purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. n67

These words appeared during a crucial transition period in American legal and constitutional history, as statutory and administrative law began to supplant the common law as the primary source of law governing business and private property relationships. n68 The Progressive reform impulse and the new, activist notion that rights and liberties were incorporated through the Due Process Clause of the Fourteenth Amendment n69 (and thus protected from intrusion by states and localities) brought a large number of state and local statutory and regulatory schemes before the Court for the first time. n70 From the late 1890s through the mid-1930s, the Justices heard hundreds of due process and related challenges. n71

Progressive jurisprudence evolved in the hands of judges who brought to the bench a worldview anchored in the strong belief in the inevitability of the common law. Not surprisingly, the Justices were eager to draw lessons and insights from the common law in their search for a mode of evaluating the constitutional legitimacy of the flood of new laws crafted by elected lawmakers and by administrative officials, while taking into consideration reliance interests and settled expectations regarding property.

The members of the Taft Court were specially qualified to oversee this transition in the law. The backgrounds of these Justices revealed strong links to the common law, as well as a special agility with new, superseding sources of legal authority originating in the legislative chamber. Like their predecessors, these Justices were attorneys educated and engaged in practice during a period of common law hegemony. Several Justices, including Joseph McKenna, Holmes, William Day, Willis Van Devanter, Mahlon Pitney, John Clarke, Taft, and Edward [\*2177] Sanford, had helped to shape and adapt the common law from the bench before their elevation to the Supreme Court. n72

Moreover, during this crucial transition period, several future Justices played key roles in the new administrative state; they brought to their work on the Court valuable experiences as elected and appointed officials with first-hand knowledge of the growth of the regulatory state generally, and of reform legislation and its implementation specifically. For example, the author of the Court's opinion in *Euclid*, George Sutherland, had served in the United States House of Representatives and Senate from 1901 to 1917, following four years of service in the newly formed Utah State Senate. n73 Though he was identified with the non-Progressive wing of the Republican Party, Sutherland at times supported reform legislation in state and federal legislatures, including the maximum hours legislation for miners that was upheld in *Holden v. Hardy*. n74 Pitney also served as a state and federal legislator. Louis Brandeis's biography before his appointment included, of course, skillful and innovative advocacy on behalf of reform efforts such as maximum hours legislation for women. James McReynolds and Harlan Fiske Stone had each directed the growing bureaucracy of the Department of Justice before their elevation to the Court. Day served for a few months as Secretary of State during the Spanish-American War, while Taft was Secretary of War before his election as President. n75

With feet firmly planted in the common law tradition, yet with important practical experience in the emerging regulatory state, the members of the Taft Court did a masterful job of mining Anglo-American law's usable past in cases such as *Euclid*.

By the mid-nineteenth century, American judges had already demonstrated their confidence in the elasticity and adaptability of many centuries-old, judge-made concepts. n76 That is, these judges believed deeply in the crucial role that judicial interpretation from the past plays in solving the problems of the present, and in the ability of the common law to respond to profound technological, economic, and demographic [\*2178] changes. Perhaps the soundest evocation of that philosophy is found in a Massachusetts Supreme Judicial Court opinion written by Chief Justice Lemuel Shaw, who observed that "when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances." n77 There may be new inventions, such as steamboats and railroads, Shaw continued, "yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial." n78 Before the dawn of the "age of statutes," n79 common law judges such as Chief Justice Shaw were unabashedly confident that common law rules could be molded to govern modern conditions without violating "the general considerations of reason, justice and policy, which underlie" those very rules.

More than fifty years later, in defense of a federal postal savings-bank bill, a Republican senator articulated Shaw-like optimism concerning the adaptability of federal constitutional law to rapidly changing societal and legal conditions: "While it is true that the Constitution continues to speak with its original words and meaning, their scope and application continually broaden so as to include new conditions, instrumentalities, and activities." n80 That senator was George Sutherland, who, as a Supreme Court Justice, was not daunted by the spate of land-use regulation that preceded and foreshadowed the litigation in *Euclid*. Sixteen years later, that opinion would echo the Senator's ideas and actual phrases:

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive ... . While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of

constitutional principles, statutes and ordinances, which, after giving due weight to the [\*2179] new conditions, are found clearly not to conform to the Constitution, of course, must fall. n81

Sutherland and several other members of the Taft Court brought a new perspective to the work of the Court, indeed to American jurisprudence. It was only natural that they should look to the common law for guidance and support - for "a fairly helpful clew" and "the helpful aid of its analogies" - as they exercised their role as the ultimate interpreters of the Constitution.

In the specific context faced by the Euclid Court, private and public nuisance law at the time did not mandate the separation of uses that planners deemed incompatible, such as apartment houses and single-family, detached dwellings. n82 If, therefore, the Justices had relied on common law precedent "for the purpose of controlling ... the [police] power," they would have declared zoning invalid. n83 Instead, what Sutherland drew from nuisance law - the "helpful clew" - was its contextual nature, its rejection of absolutism and abstraction:

The 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. n84

Five members of the Rehnquist Court crossed over Sutherland's line in *Lucas v. South Carolina Coastal Council*: n85 they employed the common law of nuisance not merely to ascertain, but to control the scope of the police power. That is, the Court used nuisance law not only for informative purposes, but for determinative purposes as well. After finding that the passage of the Beachfront Management Act effected a total taking of Lucas's two parcels, the Court held:

A law or decree with such an effect must ... do no more than duplicate the result that could have been achieved in the courts - by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. n86

In other words, under the regulatory takings approach, today the Court asks, "Is the landowner conducting or planning to conduct a nuisance?" If the answer to this question is "no," and the regulation [\*2180] deprives the landowner of "all

economically viable use," n87 the Court concludes that a violation of the Takings Clause has occurred.

We can understand how using age-old common law doctrines to measure the validity of legislative and administrative abuse would appeal to several of the Justices on today's Court. First, in the seven decades that separated *Euclid* from *Lucas*, there was a profound change in the prevailing political milieu. In the 1920s, Progressive judges remained enthusiastic about reform legislation, and even conservative jurists such as Sutherland and Taft could see significant public benefits in some social and economic regulation. n88 Today, there is widespread skepticism concerning the ability of government to solve society's ills. This skepticism, unlike the laissez-faire musings of a hundred years ago, grows out of decades of dissatisfaction and frustration with federal and state bureaucracies whose expanse and influence were unimagined before the New Deal and World War II. Four members of the Rehnquist Court were appointed or elevated by Ronald Reagan - a President who stated in his First Inaugural Address that "government is not the solution to our problem; government is the problem," n89 and who later that same day ordered "a strict freeze on the hiring of Federal civilian employees to be applied across the board in the executive branch." n90 Likewise, Reagan's Republican and Democratic successors, responsible for all but one of the other appointments to the Court, took pride in their successful efforts to shrink the federal government and reduce regulation. n91 Their appointees, like those of [\*2181] Reagan, are struggling with the difficult task of establishing a restrained yet responsive version of judicial review.

The second reason today's Justices are more likely than their predecessors to utilize traditional common law rules in defining the boundaries of police (and regulatory) power relates to a perception that these rules - when compared with modern statutes, regulations, and ordinances - are relatively fixed and are closer to timeless principles of law than are the more ephemeral products of political vagaries. Thus, it is not Chief Justice Shaw's notion of a flexible, responsive, and adaptable common law that the Justices who made up the *Lucas* majority find so appealing. No, the tone and content of Shaw's words too closely resemble the rhetoric of jurists who speak of an "evolutionary" Constitution, a notion that textualists such as Scalia find highly objectionable. n92

The members of the *Euclid* majority recognized that the world was moving very fast - socially, technologically, and economically - and that they could therefore not predict what factual and legal situations might lead to unfairness and injustice in the future. These legal arbiters were poised on the banks of a torrent of new facts

and realities: profound demographic shifts occasioned by millions of new immigrants from southern and eastern Europe; newly configured political and ideological relationships marked by the growing acceptance of third parties; scientific inventions that accelerated dramatically the flow of people, culture, and information; and the repercussions of the nation's recent mobilization for and involvement in a world war. n93 Owing in large part to the inappropriateness of, and their impatience with, certitude in such a world, the Euclid Court accorded elected officials a presumption of correctness. For underlying this feeling of uncertainty was a fundamental recognition that this was a democracy, as [\*2182] expressed most noticeably by the will of the popularly elected legislature. The judiciary's place was at the boundaries of public policy debates, not at the center, and its role was to check the occasional abuses of the other branches.

B. Was the Challenged Regulation Crafted with Important Input by Experts from Nonlegal Fields, thus Leaving the Property Owner with the Heavy Burden of Demonstrating Unreasonableness?

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 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. n94

The Progressive Era witnessed the triumph of American professionalism, a movement that, beginning in the 1870s, had recast the nation's educational and economic landscape. n95 Urban planners - like lawyers, physicians, architects, university professors, social workers, and other professionals - focused their



attention on establishing a national organization, developing specialized curricula, producing a code of ethics, and, of course, practicing their skills for what they believed was the betterment of society. The professional, according to a leading historian on the subject, "excavated nature for its principles, its theoretical rules, thus transcending mechanical procedures, individual cases, miscellaneous facts, technical information, and instrumental applications." n96 Notables such as Frederick Jackson Turner (history), [\*2183] Oliver Wendell Holmes, Jr. (law), and Jane Addams (social work), "attempted to define a total coherent system of necessary knowledge within a precise territory, to control the intrinsic relationships of their subject by making it a scholarly as well as an applied science, to root social existence in the inner needs and possibilities of documentable worldly processes." n97 One aspect of Progressive jurisprudence, as represented by Euclid, was appropriate, though certainly not total, deference to the expertise and special knowledge of this new breed of professionals.

Zoning was the product of two key professional groups: planners and lawyers. Combining their efforts, these groups drafted and implemented zoning ordinances in communities throughout the nation. n98 Officials in the Republican administrations of Warren Harding and Calvin Coolidge played important facilitative roles in the American zoning story, as Secretary Herbert Hoover's Department of Commerce developed and circulated the very popular Standard State Zoning Enabling Act, along with more moderately influential model planning and subdivision acts. n99

On the national level, the principal conveyor of expert views on zoning was the reformer Alfred Bettman, a prominent lawyer who contacted Chief Justice Taft (his fellow Cincinnati), seeking permission to submit an amicus brief in Euclid on behalf of the National Conferences on City Planning and other professional organizations. n100 That document not only contained key legal arguments concerning the relationship between zoning and nuisance law and the positive reception zoning had received in other states, but also, in "Brandeis Brief" fashion, conveyed extralegal arguments from planners regarding the various ways in which comprehensive zoning contributed to the general welfare. n101

The Court by no means yielded its review function to nonlawyers without qualification. Instead, the Justices staked out a workable middle ground between total deference to professional findings and de novo review. For example, although the Euclid Court did not seek a demonstration of "wisdom or sound policy in all respects," Justice [\*2184] Sutherland noted that the reports of commissions and experts in support of zoning were "comprehensive," "bearing every evidence of

painstaking consideration." n102 Ambler Realty failed to carry the heavy burden of proving that village officials, who acted on the advice of these careful experts, were conducting themselves in a "clearly arbitrary and unreasonable" manner. n103

We must keep in mind the dramatic economic and political ramifications of Euclid, the first Court decision that approved the significant height, area, and use restrictions comprising a comprehensive zoning ordinance. As the real estate values recorded in the Euclid opinion indicate, zoning inevitably involved serious negative fiscal impacts on certain landowners, frustrating potentially lucrative development and devouring speculative investments. Any notion that American constitutional law, even as interpreted by a Court closely identified with an expansive interpretation of the reach of the Due Process Clause, would protect the realization of the highest return on a real property investment died with the Court's announcement of the decision favoring the Village of Euclid. It is undeniable that part of the rationale for the rejection of this position lay in the research and opinions of planners and other social scientists.

In contrast with the attitude of the Taft Court, majority opinions in recent regulatory takings cases have revealed a deep skepticism regarding the motives and abilities of planning and environmental experts. We are in the midst of a strident rhetorical battle over the nature and extent of harms that human and nonhuman life face on this planet, particularly in highly industrialized and developing regions. Experts advising the government and nongovernmental organizations warn of global warming; decry the loss of naturally "productive" wetlands, dunes, beach vegetation, and endangered species of plants and animals; and seek to reduce microscopic particles in the air and water. Quite often, politicians and right wing activists attack these experts as "radicals" who rely on "junk science" and employ scare tactics to achieve their extremist goals, with no concern about private property values or rights or, for that matter, the Constitution. n104

Perhaps the best examples of an anti-environmental bias can be found in Nollan and Dolan. In the former case, Justice Scalia suggested [\*2185] that coastal regulators, who attempted to exact a public-beach access easement in exchange for permission to build a larger (and more valuable) structure that was otherwise not allowed under the prevailing land-use scheme, might have been engaging in "extortion." n105 In Dolan, Chief Justice Rehnquist second-guessed the wisdom and efficacy of a decision by town officials to condition the grant of permission for a landowner to expand an existing structure upon the grant of two easements to the public - one for a bicycle path, the other for floodplain protection. n106 In the

1920s, even at the height of conservative judicial activism in the name of economic liberty and property rights, the Court relied on the expert advice of nonlegal professionals and gave government regulators the benefit of the doubt. n107 Today, in asking a different question - "Does the challenged regulation substantially advance legitimate governmental interests?" - several Justices do not hesitate to reject expert-based findings.

The Rehnquist Court, in *Nollan* and *Dolan*, has lowered the bar in two significant ways for private property owners challenging government regulation of land. First, the majority in *Nollan* asserted that governments challenged in regulatory takings cases had traditionally been afforded less protection than those challenged in the Equal Protection and Due Process contexts. n108 Whereas in the latter situations, the state need only show a rational or reasonable connection to legitimate governmental interests, the Takings Clause supposedly demands [\*2186] a demonstration of a substantial relation to those interests. n109 Although the phrase "substantial relation" appeared in *Euclid*, n110 the meaning of those two words had changed considerably in the interim between *Euclid* and *Nollan*. The Taft Court used "substantial" and "rational" interchangeably when referring to the relationship between ends (public interests) and means (regulatory tools). For example, in the *Euclid* opinion itself, while Justice Sutherland employed the phrase "substantial relation" in one section, he also referred approvingly to state court decisions holding "that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community." n111 In the 1920s, decades before the Warren Court adopted the levels-of-scrutiny approach still in use today, a "substantial" relation suggested reasonableness - nothing more and nothing less. n112 Beginning in the 1970s, however, use of the word "substantial" in Supreme Court constitutional scrutiny parlance suggested a step up from the most minimal form of review. n113

The second way in which property owners today are advantaged over their 1920s counterparts is that, in certain cases alleging regulatory takings, owner-plaintiffs no longer carry the Euclidean burden of going forward with proof of a constitutional violation. n114 In the proper context, the Justices in *Dolan* held, the government must demonstrate "rough proportionality" between the impact of the challenger's proposed development and any conditions (typically dedications of real property interests) placed on the grant of permission: "No precise [\*2187] mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." n115 Thus, the next non-Euclidean, regulatory takings inquiry asks, "Has the government seeking exactions proved that

it has made the necessary individualized determination?" By requiring more closely fitting ends-means relationships and by placing extra burdens on elected government officials to prove that their determinations are more than reasonable in individual cases, the five majority members of the Rehnquist Court are once again behaving in a decidedly non-Progressive fashion.

### C. Does the Challenged Regulation Hold the Capacity To Reduce and, at the Same Time, Enhance Individual Wealth and Personal Rights?

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract. Approximately one-sixth of the area of the entire village is included in U-5 and U-6 use districts... .

... 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 of 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. n116

The second paragraph quoted above illustrates the confiscatory potential of zoning and other land-use controls, which was the primary concern of Ambler Realty and remains the chief focus of property rights advocates seventy-five years later. Had the Court considered the fiscal impact of zoning on only that discrete portion of Ambler's holdings, we have little doubt that Sutherland and Taft, and perhaps even Holmes, would have joined the three dissenters and declared this form of regulation unconstitutional. Indeed, the Court, following the lead of Holmes in *Pennsylvania Coal*, might well have dismissed the [\*2188] zoning ordinance as another example of well-intentioned regulations that crossed the line between a proper exercise of police power and an invalid, uncompensated taking.

It is telling that, despite Euclid's closeness in time (1922) and in theme (confiscatory regulation) to the successful challenge brought by the *Pennsylvania Coal Company*, not once did Sutherland quote or cite that earlier decision or

invoke the notion of a regulatory taking. This was also true of three other local land-use regulation cases from the same era: *Zahn v. Board of Public Works* n117 (a 1927 decision rejecting a landowner's challenge to the Los Angeles zoning ordinance), *Gorieb v. Fox* n118 (a 1927 decision upholding a building setback ordinance), and *Nectow v. City of Cambridge* n119 (a 1928 zoning decision finding a constitutional violation). The *Euclid* majority's failure to cite *Pennsylvania Coal* seems not to be an accidental oversight, as Judge Westenhaver relied on Holmes's decision in the trial court opinions, and counsel for Ambler, the Village, and amici in their briefs spent considerable time discussing *Pennsylvania Coal* and its implications. n120

The clue concerning why Sutherland chose a different tack from *Pennsylvania Coal*, and ultimately reached a markedly different conclusion, lies in the first paragraph quoted above. Most of Ambler's tract was classified for the most intensive, and therefore least restrictive, uses. This meant that Ambler or its successors in interest would be able to operate factories and other potentially lucrative facilities on some of their properties as of right. n121 Moreover, as the Court noted, only one-sixth of the land in the entire village received these highly beneficial zoning classifications. By limiting the supply of industrial parcels in a suburb of a heavily industrialized city, the village had shifted valuable development rights to Ambler and other owners of those parcels. Unlike *Pennsylvania Coal*, this was not a regulatory scheme designed to single out one owner or class of owners for negative, confiscatory treatment. Because of the zoning plan's facial evenhandedness and, as noted previously, its expert-based nature, even some conservative and moderate Justices on the Taft Court refused to pigeonhole comprehensive zoning with other arbitrary or confiscatory regulatory schemes.

**[\*2189]** Progressive jurisprudence, as illustrated by *Euclid*, as well as by *Zahn*, *Gorieb*, and *Nectow*, evaluates regulations affecting private property from a multidimensional perspective. In contrast, several members of the current Court, relying on a memorable bit of dictum from Holmes's *Pennsylvania Coal* opinion, have reduced their analysis to one basic question: "Has the regulation gone 'too far' in terms of reducing productive value, so that the regulation amounts to an uncompensated taking?" The Justices comprising the majority in *Lucas*, for example, eager to consider a fact pattern involving total deprivation, overlooked strong indications that the affected land retained value even after the regulation went into effect. n122 More importantly, Justice Scalia's majority opinion in *Lucas* took a very non-Euclidean view of "benefit-conferring" regulations, by focusing almost exclusively on the benefits that accrue only to the general public or to

owners of land adjacent to that directly affected by the regulation. n123 There was no sense that the affected landowner herself may benefit, even in a financial way, from a comprehensive regulatory scheme that, for example, requires subdivision developers to set aside a pond or woodlands or wetlands or sand dunes - unspoiled places that potential home purchasers in an otherwise overbuilt community would consider a valuable amenity.

Furthermore, in *Lucas*, Justice Scalia included an aside suggesting that, contrary to the holding in *Penn Central*, "it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." n124 While Justice Kennedy again raised [\*2190] this prospect in dictum in *Palazzolo*, n125 the majority in *Tahoe-Sierra* restated its commitment to the *Penn Central* Court's focus on the "parcel as a whole." n126 Still, Justice Thomas's terse and adamant dissent demonstrated that this debate is far from over. n127 Other regulatory takings cases have carried this notion of narrowing the focus to the regulation's effect on the "burdened portion" to an extreme that endangers a wide range of regulatory activity. Endowing with legal consequence a metaphor apparently derived from Wesley Hohfeld and Justice Benjamin Cardozo, n128 the Court sometimes asks, "Has the [\*2191] property owner been deprived of an essential stick in the bundle of property rights?" n129 In other words, if the government deprives an owner of a right deemed essential, even in the absence of a physical occupation or a reduction in value, the Takings Clause will mandate just compensation, invalidation of the offending regulation, or both. There is a marked difference between this elevation of abstract, disembodied rights and the holistic and interdependent approach of *Euclid* and its Progressive progeny.

#### D. Is the Court Being Asked To Affirm Judicial and Popular Acceptance in the "Laboratory" of the States?

This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question, this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. n130

By the time Euclid reached the Supreme Court, zoning already was popular among state and local government officials throughout the nation, had received the active support of a federal agency, was endorsed by planners and social scientists, and was familiar to hundreds of thousands of urban and suburban residents. n131 The Euclid majority in effect allowed this national experiment to continue, assuring itself that, because "the validity of the legislative classification for zoning purposes [was] fairly debatable, the legislative judgment must be allowed to control." n132

[\*2192] In its review of state court activity, the Euclid opinion cited more than twenty decisions (from a dozen jurisdictions) concerning the creation of residential zoning districts; in all but a few of these cases, the courts permitted this relatively novel land-use tool. n133 The opinion quoted significant passages from Illinois and Louisiana high court decisions that relate several rationales for upholding these private property restrictions: increased urban density and congestion, traffic control, and fire and crime prevention. n134 Following these excerpts, Justice Sutherland included several of these grounds among the "sufficiently cogent" reasons for rejecting Ambler's facial challenge. n135

The Euclid Court's respectful invocation of state decisional law is an important aspect of Progressive jurisprudence. Although the outcome of the Civil War and the passage of the Reconstruction Amendments certainly had erased any doubt concerning the hegemony of federal law, the national government's dominance of the American polity is a development more accurately associated with the opening decades of the twentieth century. Federal regulation of commerce, transportation, banking and finance, and consumer goods mushroomed during this era, and inevitably the Court's work entailed sorting out the nature and limitations of this brave new legal world. n136

The relationship between state and federal courts was altered significantly as a result of congressional changes in 1914, 1916, and 1925. n137 For the first time, Congress authorized Supreme Court review of state court decisions denying federal claims or defenses. At the urging of Chief Justice Taft and his colleagues, Congress also created the modern system of certiorari review, which is characterized by a high degree of discretion and a severely reduced case load for the Justices. n138 In fact, Justice Sutherland noted in testimony before the House Judiciary Committee in December, 1924, that "the Court is burdened by "a large number of trifling cases,' which he illustrated by pointing to a day in which the Court heard several cases "where it was perfectly apparent upon a mere statement of the case that there was [\*2193] nothing to do but affirm it." n139 This was not a Court eager to split hairs with state judges.

What a difference seven decades can make. In his opinion for a five-Justice majority in 1994's *Dolan*, Chief Justice Rehnquist ostensibly relied on insights from sibling jurisdictions concerning the most difficult inquiry facing the Court: "The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit." n140 One of the authors of this Commentary has compared the Chief Justice's mode of analysis to that employed by Goldilocks, the famous fairy-tale protagonist. Rehnquist "rejects the two extremes: those state courts that take a "too soft" approach and are satisfied with regulators who provide merely "very generalized statements as to the necessary connection between the required dedication and the proposed development," and those "too hard" jurisdictions that "require a very exacting correspondence, described as the "specific and uniquely attributable" test." n141 "Just right" are those jurisdictions "occupying the "intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development." n142

Chief Justice Rehnquist and his colleagues appeared, as did the majority in *Euclid*, to side with the majority of state courts that have spoken to the issue: "We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed." n143 However, the *Dolan* majority then took a decidedly non-Progressive turn, refusing to adopt the majority test "as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." n144 In its stead, the Court substituted its own phrase: "rough proportionality." n145

Does the *Dolan* majority believe that today's state courts employ phrases such as "reasonable relationship" in an uninformed or sloppy [\*2194] manner? For decades, local government officials, often with the encouragement and support of state lawmakers and administrators, have successfully conditioned development approval upon the owner's dedication of land and money for public amenities that often provide environmental and conservation benefits to the community. n146 Is it not more logical to assume that the state judges evaluating the validity of these programs are fully aware that they are employing "minimal scrutiny" language and are thus signaling a highly deferential attitude toward innovative land-use planning and environmental regulation?



As we have seen, state courts used "rational relation" and "substantial relation" interchangeably in evaluating the earliest comprehensive zoning schemes. n147 In contrast, the Rehnquist Court, first in *Nollan* and then in *Dolan*, has attempted to replace due process and equal protection analysis of social and economic regulation (both highly deferential to government) with more demanding tests under the Takings Clause. In other words, today the Court asks, "In passing and enforcing regulations affecting private property, have government officials met the more exacting requirements of the Takings Clause?" Motivated by skepticism regarding the wisdom and fairness of regulations affecting the use of land, the current Court, in abandoning the "fairly debatable" standard, has sent a strong signal of its displeasure with the process of state and local experimentation. This signal is inconsistent with the Rehnquist Court's strong federalist streak, manifested in cases involving the Commerce Clause, Section 5 of the Fourteenth Amendment, and the Eleventh Amendment. n148 Nevertheless, given the popularity of state takings statutes and the ability of state judges to interpret their own state constitutions' eminent domain clauses broadly, the current Court faces no real need to expand the reach of the Takings Clause.

E. Is the Regulatory Scheme Fundamentally Flexible, in that It Furthers a Wide Range of Public Interests and Features Exemption Provisions for Property Owners Who Would Otherwise Be Asked To Shoulder Heavy Burdens?

The enforcement of the ordinance is entrusted to the inspector of buildings, under rules and regulations of the board of zoning appeals. Meetings of the board are public, and minutes of its proceedings are kept. It is authorized to adopt rules and regulations to carry into effect provisions [\*2195] of the ordinance. Decisions of the inspector of buildings may be appealed to the board by any person claiming to be adversely affected by any such decision. The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done. n149

The zoning scheme approved in *Euclid* was comprehensive in its health, safety, and welfare goals; in its geographic reach; and in the number of uses it authorized. The scheme, however, was not categorical. The experts and public officials who crafted the state enabling act and the local ordinance anticipated that, despite the best intentions of regulators, "cases of practical difficulty or unnecessary hardship" would nonetheless occur. Thus, Euclidean zoning ordinances typically include safety valves such as variances and special exceptions that, if employed properly and with pragmatic common sense, prevent confiscatory and arbitrary treatment.

n150 In Justice Sutherland's terms, achieving this balance between protecting the general public and providing relief to burdened private property owners would yield "substantial justice."

The social-reform flavor of this type of land-use regulation is undeniable. Like many other urban reforms during the opening decades of the twentieth century, planning and zoning were largely local affairs. n151 Efforts to address the problems of crime, corruption, and poverty in the nation's urban centers bubbled up from the community, often after local muckrakers published alarming exposes. n152 Although technically the power to zone resides in the state, the overwhelming pattern was and remains for state legislatures to transfer zoning authority to local governments by means of enabling acts. n153 Local elected officials then adopt ordinances based on those acts, adjusting for community needs and aspirations. By taking a decidedly deferential stand in *Euclid*, the Court encouraged this bottom-up process.

This deference, though significant, was not unlimited. First, the Court noted that, while "the village, 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," there were limits to parochial control - "cases where the general public [\*2196] interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." n154

The second limit to governmental control of land use and development lay in the deep and abiding respect that all members of the Taft Court held for the American system of private property ownership. This respect, too, is a significant part of Progressive jurisprudence, for Progressive politicians were by no means enemies of capitalism and private sector profit, as Gabriel Kolko revealed in his influential study regarding the pro-business nature of many Progressive reforms and the capture of administrative agencies by regulated concerns. n155 Justice Sutherland quoted favorably *Ambler Realty's* formulation of the federal and state constitutional question before the Court: "Is the ordinance invalid in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?" n156 The variance and exception provisions noted above usually guarantee that the answer to this question in a typical zoning case will be "no."

Today's Court overlooks the safety valves that are designed to provide relief outside the courtroom for landowners who would otherwise allege confiscation. In

Lucas, for example, the majority proceeded to decide the case despite the fact that (as noted in one concurring and two dissenting opinions) the offending state Beachfront Management Act had been amended to provide a "special permit" that probably would have provided relief to the landowner. n157 In addition, the Court has replaced Ambler Realty's straightforward inquiry with perplexing questions. These questions feature key phrases that require unpacking, and contain nuances that take the Court down peripheral lines of inquiry: Is the government interfering with reasonable investment-backed expectations? n158 Is this a compelled, permanent, physical occupation? n159 [\*2197] Is this a categorical taking? n160 Has the property owner been deprived of all economically viable use? n161 Incredibly, the Court, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, n162 authorized trial courts to submit these kinds of impermeable questions - questions that have been debated and attacked for decades by legal academics and practitioners - to jurors. n163

#### IV. Progressive Meanings

The adjective "Progressive" fits *Euclid* and the village's regulatory scheme for several reasons. First, judges who practice the sort of Progressive jurisprudence typified by the Court's opinion in *Euclid* endorse the view that legislative and administrative efforts often result in social and economic progress for the commonweal. This belief in the positive potential of government contrasts starkly with the less deferential posture taken by the most conservative Justices from the late nineteenth century to this day. These judges often invoke laissez-faire or free market notions to bolster a brand of judicial activism grounded in serious skepticism regarding the abilities and motives of public officials who regulate economic activities and the use of private property.

Second, government initiatives such as zoning are easily identified with the Progressive era in American history. As the twentieth century opened, Progressive lawmakers - Republicans, Democrats, and members of third parties alike - offered a wide panoply of programs designed to reform the nation's political processes, to improve working conditions for American laborers and living conditions for urban denizens, to check the unbridled expansion of monopolies and trusts, and to outlaw unfair trade practices and excessive rates. Although there were certainly divisions within the various groups whose members identified themselves as "Progressive," n164 one theme that permeated their reform efforts was a strong belief that the talents of experts [\*2198] drawn from the newly professionalized ranks - chiefly economists, political scientists, social workers, lawyers, and teachers - should be

harnessed by governments at all levels to help individual Americans reach their full potential. n165

Third, the word "Progressive" comprehends an approach to governance and to judicial decisionmaking that is as separate and distinct from the New Deal politics and jurisprudence that gained prominence in the late 1930s as it is from the formalism that typified the judicial craft for much of the nineteenth century. n166 While it is easy to lump together Progressives and New Dealers as American liberals (some might throw in Populists, too, to round out the leftist troika), it is important to understand the distinctiveness of the Court's approach during the opening decades of the twentieth century. During the crucial transition between a legal system dominated by the common law and one characterized by the growth of the administrative state, judges at all levels were challenged to calibrate their analytical tools. The principal fount of the American rule of law did not shift abruptly or perceptibly from the courtroom to the legislative chamber. n167

Finally, the term "Progressive" relates to the influence certain philosophical approaches brought to bear on much legislative and judicial lawmaking during the early twentieth century. It is certainly easy to overemphasize the ties between Progressivism and pragmatism. Still, it is true that certain representative examples of Progressive jurisprudence reflect the pragmatism explored and popularized by William James, Charles Peirce, and John Dewey much more than the certitude of the Court's formalist predecessors or the broad-stroked egalitarianism of their successors. n168 Perhaps the best indication of this connection to general philosophical thought can be found in cases, such as [\*2199] *Euclid*, in which the Justices endorsed experimentation with legal linedrawing by state and local officials throughout the nation; refused to measure the validity of a legislative or regulatory innovation by holding it up to some eternal, inerrant standard; or viewed the Constitution as an organic body of principles that, not unlike the common law, could be adapted to changing social, economic, and technological conditions, while maintaining consistency and respect for precedent.

## V. Kernel and Husk

The lesson Holmes took from the [Civil War] can be put in a sentence. It is that certitude leads to violence. n169

The current reinvigoration of the Takings Clause is an awkward, internally inconsistent effort to elevate private property rights at the expense of an expansive range of regulations affecting the environment and the use and ownership of

property. The Court's "rediscovery" of Pennsylvania Coal in the 1970s, after decades of relative and well-deserved oblivion, was an unfortunate (but not irreversible) move. By asking the wrong and sometimes unanswerable questions - inquiries inspired by Holmes's "too far" dictum n170 - the Justices have created a disorderly and highly divisive body of law that provides no palpable benefit to practitioners, judges, academics, students, developers, planners, or elected officials. The Euclid legacy and the Progressive jurisprudential questions identified in this Commentary are much more inherently consistent, logical, and conducive to temperate and pro-ductive debate.

The end of the October 2000 Term brought two items of bad news to Supreme Court observers who had hopes that the Justices would extricate themselves from the regulatory takings entanglement. To the dismay of supporters of environmental laws and other land-use controls, it appeared that a majority of the Rehnquist Court would be willing to use the Takings Clause to sacrifice many kinds of regulations for a potentially boundless notion of abstract, private property rights.

First, the Justices, on June 28, 2001, announced their split decision in *Palazzolo v. Rhode Island*. n171 The five-member majority overlooked serious ripeness problems, n172 and dismissed the "notice rule," which [\*2200] until that point had been a significant barrier to realizing success in regulatory takings challenges. n173

Second, that same day, the Justices made clear that *Palazzolo* was by no means the last word on the subject. The Court agreed to hear *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, n174 a case that raised yet another question regarding the evasive nature of regulatory takings: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?" n175 This was the wrong kind of question to ask because there was no need to use the Takings Clause to resolve the problem faced by the landowners. For too long now the Justices have relied on unstable precedent and an inappropriate constitutional clause when evaluating the legitimacy and wisdom of regulations affecting all kinds of property (not just land and buildings).

The issue facing the Justices in *Tahoe-Sierra* - the validity of a temporary planning moratorium - could have comfortably fit into the Progressive jurisprudential framework. Even a cursory review of the three Supreme Court opinions written in *Tahoe-Sierra* reveals not only how confusing regulatory takings law remains, but

also how that body of law still fails to address the key issues regarding regulations [\*2201] affecting the use and value of private property. n176 The pendulum continued to swing with the Court's announcement of April 23, 2002. Justice Stevens, writing for a six-member majority, rejected the petitioners' contention that the two challenged moratoria (lasting a total of thirty-two months) triggered a per se regulatory taking under Lucas. n177 The Tahoe-Sierra Court thus frustrated the landowners' "desire for a categorical rule," n178 over the strong objections of the three dissenters who deemed "tenuous" the majority's distinction between "'temporary' and 'permanent' prohibitions." n179 Rather than plodding through the morass of regulatory takings, the Court could have more constructively [\*2202] and pragmatically addressed the five Euclidean inquiries presented in this Commentary. n180

In similar cases that will inevitably arise in the near future, the Justices, by considering these appropriate inquiries, can more directly and intelligibly strive to "do substantial justice" without abandoning their due respect for private property rights and for the work product of the other governmental branches.

We close by insisting that we are not asking the Justices to choose between Holmes and Sutherland, or between private right and public good. Judges, lawyers, and litigants who for the past few decades have focused their considerable energies and resources on the "too far" test are drawn to the mere husk of Holmes's opinion, his rhetorical flair. Inside that husk is a kernel that has much in common with the Progressive jurisprudence of Euclid.

Holmes's surprise at the criticisms of Brandeis and other allies is understandable when we remember that the sage "Yankee from Olympus" n181 reluctantly and begrudgingly granted the Pennsylvania Coal Company's request for injunctive relief (not "just compensation" in the form of damages). Of the many qualifications of private property rights that suffuse the Court's opinion, the most famous reads: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." n182 The immoderate tone of the private property paeans included in the majority opinions in Lucas, Nollan, Dolan, and Palazzolo leave little room for such thoughtful reservations.

It is long past time that the Justices abandon the husk of Pennsylvania Coal and return to the kernel, to the essential ideas that government may on occasion deprive landowners of speculative value without effecting a taking, that public officials

may sometimes find themselves outside the generous shelter provided by the Constitution, [\*2203] and that judges can protect the interests of private property owners and the commonweal without rewriting the Constitution. The Euclidean path of Progressive jurisprudence remains their and our guide to these ideas.

#### FOOTNOTES:

n1. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 395, 397 (1926) (upholding a zoning scheme despite the landowner's allegation that regulation reduced the market value of its property by at least seventy-five percent). For a confirmation of this essential aspect of Euclid, see *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993), which declared that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." For a recent state court opinion citing Euclid for this proposition, see *Ventures Northwest L.P. v. State*, 914 P.2d 1180 (Wash. Ct. App. 1996). The Ventures Northwest court explained: "The mere denial of a permit for one particular use does not establish the absence of any economically viable use; a regulation that may impact the property's highest and best use is not a taking." *Id.* at 1188 (citing *Euclid*, 272 U.S. at 384).

n2. *Euclid*, 272 U.S. at 395.

n3. 272 U.S. 365 (1926).

n4. In *Euclid*, the The Ambler Realty Company challenged the Village of Euclid's zoning ordinance, which classified lands in the Cleveland suburb by height, area, and use. While factories and other industrial structures were permitted on part of Ambler's parcel, other portions were restricted to residential and institutional uses. *Euclid*, 272 U.S. at 380-82. When Federal District Court Judge D.C. Westenhaver agreed with Ambler that the ordinance was unconstitutional in *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *Euclid* appealed to the Supreme Court, which, by a 6-3 vote, reversed. *Euclid*, 272 U.S. at 397. Ambler was represented by Newton D. Baker, the former Cleveland mayor who served in the Wilson Administration as Secretary of War and who helped found the firm known today as Baker & Hostetler. Baker was a longtime friend and supporter of Westenhaver who, in 1917, had replaced John H. Clarke on the district court bench after Clarke was elevated to the United States Supreme Court. When Justice Clarke resigned, he was replaced by George Sutherland, who was to write the majority opinion in *Euclid*. See William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in Euclid v. Ambler*, in *Zoning and the American Dream: Promises Still To Keep* 31 33-35 (Charles M. Haar & Jerold S. Kayden eds., 1989) [hereinafter *Zoning and the*

American Dream]. Euclid's zealous counsel, James Metzenbaum, had helped draft the village's ordinance and would later gain a national reputation as a zoning expert. See Michael Allan Wolf, "Compelled by Conscientious Duty": Village of Euclid v. Ambler Realty Co. as Romance, 2 J. Sup. Ct. Hist. 1997, at 88, 90; see also James Metzenbaum, *The Law of Zoning* (1930). For the historical background of the Euclid litigation and discussion of its continuing importance, see the collection of essays in *Zoning and the American Dream*, supra. Professor Korngold recently observed that the "milestone Supreme Court decision" in Euclid "has had a profound effect on American life and jurisprudence. The decision provided the constitutional foundation for an explosive growth in modern zoning, subdivision controls, and other governmental land-use regulation that has transformed the organization and development of land and communities." Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 *Case W. Res. L. Rev.* 617, 617 (2001).

n5. *Adkins v. Children's Hosp.*, 261 U.S. 525, 553 (1923) (Sutherland, J.) ("We cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.").

n6. The other three members of this conservative bloc were Justices Pierce Butler, James McReynolds, and Willis Van Devanter. See e.g., Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 *Yale L.J.* 613, 679 n.303 (1996) ("Intended to evoke the Four Horsemen of the Apocalypse, the allusion was hardly complimentary."). Professor White has questioned placing Sutherland among the other stalwarts. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 *Va. L. Rev.* 1, 5-6 (1999). There are indications of ideological vacillation by Sutherland and his colleagues in Professor Cushman's clever "expose" of the Horsemen's hidden liberalism. See generally Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 *Va. L. Rev.* 559, 561 (1997) ("Theirs, then, is not a simple story of handmaidens of the industrial and financial elite.").

n7. For representative works in these areas, see *Critical Legal Studies: Articles, Notes, and Book Reviews Selected from the Pages of the Harvard Law Review* (1986); Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991); Richard A. Posner, *Economic Analysis of Law* (5th ed. 1998); *Critical Legal Studies Symposium*, 36 *Stan. L. Rev.* 1 (1984); *Symposium on Law and Economics*, 85 *Colum. L. Rev.* 899 (1985); and *Symposium on the Theory of Public Choice*, 74 *Va. L. Rev.* 167 (1988).



n8. In surveying the Court's review of land-use regulation during the first two decades of the twentieth century, Professor Hylton discovered a decidedly pro-regulation pattern:

Almost forgotten is the fact that during the preceding two decades the Supreme Court heard numerous challenges to state and municipal land use regulations. In these cases, which required the Court to define the meaning of the Fourteenth Amendment's guarantee that one could not be deprived of property without due process of law, the supposedly property-rights oriented Fuller and White Courts sided with the state in almost every instance. Time after time, and with only one dissenting vote in two decades, the Court found that the police power was sufficiently broad to warrant restrictions on the use of land, even when they eliminated existing uses and imposed severe economic loss on landowners. These cases provided a strong pro-regulation backdrop against which the cases of the 1920s were decided.

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

n9. For a stimulating exploration of the intellectual culture that spawned the pragmatism of these three key figures (and of the enigmatic Charles Peirce), see Louis Menand, *The Metaphysical Club* (2001).

n10. See 2 William Blackstone, *Commentaries on the Laws of England* 2 (photo. reprint, Univ. of Chi. Press 1979) (1766):

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Professor Rose assures us that even the author of this oft-cited passage "was thoroughly aware of ... pervasive and serious qualifications on exclusive dominion." Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 *Yale L.J.* 601, 603 (1998).

n11. Professor Grey places "The Progressives" between "The Classicists" and "The Legal Realists." See Thomas C. Grey, *Modern American Legal Thought*, 106 *Yale L.J.* 493, 495-502 (1996) (reviewing Neil Duxbury, *Patterns of American Jurisprudence* (1995)). Taking its "philosophical inspiration from American pragmatism," Progressive jurisprudence rejected the idea of law "as an abstract and

autonomous system of norms." *Id.* at 497-98. To jurists such as Holmes, Cardozo, and Pound, "judicial resistance to democratic reforms was retrograde." *Id.* at 498.

For a discussion of Cardozo's articulation of "the working premises of Progressive jurisprudence," see Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 190 (1992). See also Morton Horwitz, *In What Sense Was the Warren Court Progressive?*, 4 *Widener L. Symp. J.* 95, 96 (1999) ("Progressives both before and after the constitutional revolution of 1937 elevated democracy to constitutional fundamentality.").

n12. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation").

n13. "Plethoric" best describes the legal literature on regulatory takings. Commentary roughly falls into five categories. The "classics" explore the tension between public need and private right that continues to remain influential even in the new century. See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *Harv. L. Rev.* 1165 (1967); Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36 (1964) [hereinafter Sax, *Police Power*]; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *Yale L.J.* 149 (1971). The "expansionists" envision a Takings Clause that would preclude a wide range of police power regulation. See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). The "reactions" are typically found in symposia on the heels of the latest Court offering on the topic. One of the best is Symposium, *Lucas v. South Carolina Coastal Council*, 45 *Stan. L. Rev.* 1369 (1993) (featuring articles by Professors Epstein, Fisher, Lazarus, and Sax). The "outside-the-boxes" are attempts to reconceptualize the notion of a taking by regulation. See, e.g., Jed Rubenfeld, *Usings*, 102 *Yale L.J.* 1077 (1993). Finally, there are "muddlers" that explain to the reader why this area of the law remains hopelessly confused. The best is Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 *S. Cal. L. Rev.* 561 (1984). Our Commentary, drawing insights and caveats from all five categories, redirects the discussion toward a competing constitutional vision that is more solidly grounded in the American ethos - in generally understood notions of sound legislative, administrative, and judicial lawmaking.

n14. The "property rights movement" has been active in promoting takings legislation and in supporting court challenges to allegedly confiscatory land-use and environmental regulations:

The Pacific Legal Foundation (PLF) and a dozen other "public interest" legal foundations located around the country represent developers free-of-charge in takings cases. PLF and others recruit and train an army of private practitioners to assist them in shepherding cases through the legal system. Large and powerful

lobbies such as the National Association of Home Builders similarly devote significant resources both to litigating takings cases and promoting "procedural reform legislation" in Congress that would grease the wheels of takings litigation.

Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 *B.C. Envtl. Aff. L. Rev.* 509, 511 (1998). The movement has been inspired by the expansive regulatory takings notions of Richard Epstein. See *id.* at 526 ("Epstein's call has also inspired the constitutional litigation strategy of the current property rights movement, which increasingly has turned its attention to the federal judiciary as the means by which it will accomplish its agenda."). The blueprint for that litigation strategy can be found in Epstein, *supra* note 13. Professor Epstein's campaign to push the regulatory takings envelope suffered a setback in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, No. 00-1167, slip op. (U.S. Apr. 23, 2002). See *id.* at 29 & n.28 (dismissing arguments, presented in the Institute for Justice amicus brief written by Professor Epstein, that advocated compensation for moratoria lasting longer than one year and that urged the Court to overrule *Penn Central*).

For discussions of attempts to enact state and federal takings legislation, see Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *Ecology L.Q.* 187 (1997); Julian Conrad Juergensmeyer, *Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 *Fla. L. Rev.* 695 (1996); and Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 *Wash. & Lee L. Rev.* 265 (1996).

n15. There are recent instances of judges favorably invoking *Euclid*. See, e.g., *Jim Sowell Constr. Co. v. City of Coppell*, No. 3:96-CV-0666-D, 2000 *U.S. Dist. LEXIS* 9869, at 17 (N.D. Tex. July 12, 2000) (placing the burden of proof on the landowner plaintiffs and applying *Euclid*'s deferential test in rejecting their challenge to a local zoning decision); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1009-12 (Cal. 1999) (Kennard, J., concurring) (concurring for three justices in a rejection of the plaintiff's challenge to a rent control law, on grounds including *Euclid*'s "arbitrary and unreasonable" standard).

n16. 438 *U.S.* 104 (1978).

n17. U.S. Const. amend. V.

n18. The Court has scrutinized and approved unambiguous condemnation. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 *U.S.* 229, 231-32 (1984) (upholding a Hawaii act that allowed taking of title in real property from lessors and transferring it to lessees in order to reduce the concentration of land ownership); *Berman v.*

*Parker*, 348 U.S. 26, 33-35 (1954) (holding that under the public use requirement of the Fifth Amendment, condemned property can be resold or leased to private interests so long as the development plan accomplishes a public purpose).

n19. "The original understanding of the Takings Clause," Professor Treanor demonstrates convincingly, "required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used." William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 782 (1995). Moreover, regulations restricting the use of land were far from unusual during the colonial and early national periods. See generally John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 *Harv. L. Rev.* 1252 (1996); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 *Nw. U. L. Rev.* 1099 (2000).

n20. 260 U.S. 393 (1922).

n21. *Id.* at 415.

n22. 198 U.S. 45 (1905).

n23. In surveying a recent array of historical and legal offerings on this infamous case, one reviewer noted:

Although simply the name of the 1905 case in which the United States Supreme Court ruled unconstitutional a New York statute limiting bakers to a 10 hour work day and a 60 hour work week, the word *Lochner* has for some three generations of lawyers, jurists, and historians taken on an additional resonance, summing up in two syllables everything wrong with a constitutional jurisprudence that could do no right.

Gary D. Rowe, *Lochner Revisionism Revisited*, 24 *Law & Soc. Inquiry* 221, 222 (1999). For a balanced treatment of the relationship between *Lochner* and regulatory takings activism, see Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 *B.U. L. Rev.* 605 (1996).

n24. *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

n25. *Pa. Coal*, 260 U.S. at 416-22 (Brandeis, J., dissenting).

n26. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 *Sup. Ct. Rev.* 299, 321 (quoting Frankfurter's written recollections of conversations with Brandeis, *The Louis Brandeis Papers* (on file with the Harvard Law School library)) (internal quotation marks omitted).

n27. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325 (1927); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

n28. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 552 (1934) (McReynolds, J., dissenting) (disagreeing with the majority's refusal to invalidate price controls for milk under the Equal Protection Clause); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 478-79 (1934) (Sutherland, J., dissenting) (objecting to the majority's holding that Minnesota's Mortgage Moratorium Law did not violate the Contracts Clause); *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 544 (1923) (holding that a Kansas act that vested in an Industrial Court the power to decide disputes arising in certain industries deprived a packing house of property and liberty of contract without due process of law); *Adkins v. Children's Hosp.*, 261 U.S. 525, 554-59 (1923) (holding that a minimum wage law for women violated freedom of contract).

n29. Professor Brauneis's work is the best of several attempts to "unveil the mystery" of Holmes's intent. Brauneis, *supra* note 6, at 618. Professor Brauneis observes that, contrary to popular belief:

Mahon was not the "first regulatory takings case." It was not decided under the Takings Clause. It was not the first case to hold that the Constitution protected nonphysical property or property as value. And it was not the first case to hold that a use restriction might be constitutional if and only if accompanied by just compensation. Its supposed status as the progenitor of all regulatory takings cases is the result of erroneous genealogy.

*Id.* at 701.

Less convincing are those efforts to dismiss Holmes's use of the term "taking" as mere metaphor. See, e.g., *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385 (N.Y. 1976) ("The metaphor should not be confused with the reality.").

n30. Indeed, Professor Brauneis notes that "Holmes and the 1922 Court understood [Pennsylvania Coal] to be a Due Process and Contract Clause case, not a Takings Clause case." Brauneis, *supra* note 6, at 666.

n31. *Euclid*, 272 U.S. at 384-85.

n32. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 311-12 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

n33. 261 U.S. 525 (1923) (declaring a minimum wage statute for women employees unconstitutional), cited in *Ambler Realty Co.*, 297 F. at 312.

n34. 262 U.S. 522, 544 (1923) (concluding in a unanimous decision that "the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law"), cited in *Ambler Realty Co.*, 297 F. at 312.

n35. For a sustained, though ultimately unconvincing, effort to overcome the "conventional wisdom" concerning these and other "Lochner era" cases, see Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (2001).

n36. *Euclid*, 272 U.S. at 389.

n37. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, No. 00-1167, slip op. (U.S. Apr. 23, 2002) (development moratoria in Lake Tahoe basin); *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001) (wetlands controls); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (development permission for oceanfront property); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (dedication of land for flood plain and creation of a pedestrian/bicycle path); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (state Beachfront Management Act).

n38. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (invalidating a program that expanded health benefits for coal mine employees and their dependents); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (allowing a takings challenge to a Texas program that required attorneys to place client funds in a separate account whose interest income financed legal services for low-income persons); *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993) (holding that the Multiemployer Pension Plan Amendments Act of 1980 did not effect a taking).

n39. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Commission granted conditional approval for the Nollans to build a newer and larger beach house to replace the 504-square-foot bungalow on their property. See *id.* at 827-28. In *Dolan*, the City Planning Commission conditionally granted the landowner's permit application to increase the size of her plumbing supply store from 9,700 to 17,600 square feet. See *Dolan*, 512 U.S. at 379. There was no evidence that the "cost" of the conditions (that is, the exactions) in any way approached the increased value attributable to the newly granted permission to make more intensive use of the property.

n40. 505 U.S. 1003 (1992).

n41. 483 U.S. 825 (1987).

n42. 512 U.S. 374 (1994).

n43. 524 U.S. 498 (1998).

n44. 121 S. Ct. 2448 (2001).

n45. Justice Stevens has already issued a similar warning. See *Dolan*, 512 U.S. at 406-07 (Stevens, J., dissenting) ("The so-called 'regulatory takings' doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state

economic regulations that Members of this Court view as unwise or unfair." (footnote omitted)).

n46. *Euclid* is not even cited in the majority opinions of several post-Penn Central cases in which the Court refused to dismiss a regulatory taking challenge. See Palazzolo; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998); *Babbitt v. Youpee*, 519 U.S. 234 (1997); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Not surprisingly, majority opinions that rejected such challenges cited *Euclid*. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, No. 00-1167, slip op. at 18 (U.S. Apr. 23, 2002); *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 275 n.17 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 261-62 (1980). We believe that the decision to bypass *Euclid* in the first group of opinions not only contributes to the muddled state of takings law, but also moves the Court farther away from the core values of fairness, deference, and "substantial justice" embodied in the original and current understandings of the Takings Clause.

n47. See, e.g., *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2103-07 (2001) (finding that permitting a religious club to use school premises does not violate the Establishment Clause); *Texas v. Cobb*, 121 S. Ct. 1335, 1339 (2001) (holding that the Sixth Amendment right to counsel is "offense specific"); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (affirming the dismissal of a state defendant for violation of the Fair Labor Standards Act because the state did not waive immunity); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (finding the Gun-Free School Zones Act of 1990 unconstitutional because it exceeded Congress's powers under the Commerce Clause); *Rust v. Sullivan*, 500 U.S. 173, 201-03 (1991) (upholding regulations forbidding the use of federal funds for abortion counseling); *Employment Div. v. Smith*, 494 U.S. 872, 882, 885-89 (1990) (holding that a state controlled-substance law did not violate the Free Exercise Clause and rejecting the compelling governmental interest test for generally applicable laws); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (finding that the city's Minority Business Utilization Plan violated the Equal Protection Clause).

n48. No. 00-1167, slip op. (U.S. Apr. 23, 2002).

n49. In Palazzolo, the Justices were divided on the questions of ripeness, the nature and applicability of the "reasonable investment-backed expectations" factor, and the impact that a transfer of the "burdened" property would have on a takings claim. For a decisional roadmap, the reader should consult The Supreme Court, 2000 Term - Leading Cases, *115 Harv. L. Rev.* 306, 449-53 (2001). In *Tahoe-Sierra*, the Justices split sharply over the denominator question, the appropriateness of per se rules, and the distinctions between temporary and permanent prohibitions and between value and use.

n50. Charles M. Haar, *Land-Use Planning: A Casebook on the Use, Misuse, and Re-use of Urban Land* 766 (3d ed. 1976), quoted in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 n.17 (1985) and *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 649 n.15 (1981) (Brennan, J., dissenting).

n51. Indeed, in early 1995, the sixth and final quark - known as the "top quark" - was discovered, eighteen years after the discovery of the fifth (known as "bottom" or "beauty"). See Antonio Regalado, *With Quark Discovery, Truth Comes Out on Top - Twice*, 267 *Science* 1423 (1995).

n52. "Those who have theories of judicial takings to offer deplore the 'muddled,' 'ad hoc,' or 'chaotic' state of takings jurisprudence." Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 *Wm. & Mary L. Rev.* 825, 876 (1997); see also John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 *Rutgers L. Rev.* 243, 244 (1982) (calling police power takings a "farrago of fumbings"); Rose, *supra* note 13, at 562. There is nothing new about this complaint. See Sax, *Police Power*, *supra* note 13, at 37 ("The predominant characteristic of this area of law is a welter of confusing and apparently incompatible results.").

n53. James Joyce, *Ulysses* (1922).

n54. William Faulkner, *The Sound and the Fury* (1929).

n55. The intermingling of the Takings and Due Process Clauses has a long heritage. One year before *Pennsylvania Coal*, Justice Holmes suggested the possibility of a "taking without due process of law." *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (rejecting a constitutional challenge to a rent control statute). More recently, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), four Justices found a violation of the Takings Clause and Justice Kennedy argued that "the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting in part). Some commentators urge the Court to move to a substantive due process approach to replace a regulatory takings theory that they believe is too indulgent of the public sector. See, e.g., Steven J. Eagle, *Substantive*



Due Process and Regulatory Takings: A Reappraisal, *51 Ala. L. Rev.* 977, 1045 (2000) ("While the Supreme Court has been reluctant to more fully employ the Due Process Clause in dealing with property rights issues, it cannot provide for coherent judicial review otherwise."). Courts' and commentators' difficulty with clarifying and applying the "substantial relation" component of current regulatory takings law - a component some identify with the Takings Clause's core value of "fairness" - does not bode well for a switch between Fifth Amendment clauses. The Court would provide greater guidance and fairness by adopting the more moderate and less subjective factors derived from Euclid that are explored in Part III, below.

n56. For examples of atypical alliances on the Rehnquist Court, see *Rust v. Sullivan*, 500 U.S. 173 (1991) (an abortion case in which Justice Souter joined Chief Justice Rehnquist and Justices Scalia, White, and Kennedy in the majority, while Justice O'Connor dissented); and *Texas v. Johnson*, 491 U.S. 397 (1989) (a flag-burning case in which Justices Scalia and Kennedy joined Justices Brennan, Marshall, and Blackmun in the majority, while Justice Stevens dissented). For an account of the squabbling on the current Court, see Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* 40-46 (2000).

n57. Professor Powe closes his history of the Warren Court by noting, "Some, but hardly all, of the Warren Court's advances stuck." Lucas A. Powe, Jr., *The Warren Court and American Politics* 497 (2000). While the "anti-discrimination principle of *Brown* is sacrosanct," the Warren Court's liberal views of criminal procedure, separation of church and state, and federalism have fared less well. *Id.*; cf. Morton J. Horowitz, *The Warren Court and the Pursuit of Justice* xii (1998) (observing that "ultimately, the test of the historical significance of the Warren Court is whether it managed to leave a lasting legacy of progressive interpretations of the Constitution").

n58. For a brief discussion of the Four Horsemen and their reputations, see *supra* note 6 and accompanying text.

n59. Brandeis "focused his attention on the growing conflicts between large corporate interests on the one side and various groups of economic outsiders, including small business, on the other. He regarded concentrated power as overbearing and began to criticize "bigness" in all its forms." Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* 116 (2000).

n60. Professor White painstakingly traces the growth of Holmes's reputation as a celebrated "progressive" jurist in G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 354-411 (1993). Holmes's personal opinions, however, often conflicted with those of his liberal devotees:

Holmes thought that socialism was a silly doctrine. He believed that most measures on behalf of labor were futile ... . And he regarded the ideas whose expression he was celebrated for protecting in his judicial opinions as fatuous and immature. His personal sympathies were entirely with the capitalists. He not only considered them virtuous engines of social wealth; he had a kind of schoolboy's respect for their energy and willpower.

Menand, *supra* note 9, at 65.

n61. William Howard Taft, Mr. Wilson and the Campaign, *Yale Rev.*, Oct. 1920, at 19-20, quoted in Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law 210 (1956).

n62. See *Mason, supra* note 61, at 251-52; see also Robert Post, The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court, *85 Minn. L. Rev.* 1267, 1310 (2001) (noting that "high rates of unanimity during Taft's tenure" were "typical of the pre-New Deal Court").

n63. *Mason, supra* note 61, at 254.

n64. *Id.* at 252 (discussing the Euclid shift).

n65. See *id.* ("Under Stone's persistent hammering, however, [Justice] Sutherland began to doubt the correctness of his conclusion and asked for reargument."). Alfred McCormack, A Law Clerk's Recollections, *46 Colum. L. Rev.* 710, 712 (1946), the source used by *Mason, supra* note 61, at 834 n.5, is suspect. See Robert C. Post, Defending the Lifeworld: Substantive Due Process in the Taft Court Era, *78 B.U. L. Rev.* 1489, 1542 n.259 (1998) (noting that Sutherland had, in a 1925 memorandum to Chief Justice Taft, expressed support for zoning laws); Garrett Power, Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court, *2 J. Sup Ct. Hist.* 79, 87 n.39 (1997) (noting that, because Justice Sutherland was not present at the first oral argument, it was "unlikely" he would have written the Court's opinion before reargument).

n66. Historians, politicians, and lawyers will debate the import of the October 2000 term for as long as judicial review and presidential elections remain key elements of the American polity. For early forays, see Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (2001); Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (2001); *The Vote: Bush, Gore, and the Supreme Court* (Cass R. Sunstein & Richard A. Epstein eds., 2001); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, *110 Yale L.J.* 1407 (2001); Laurence H. Tribe, *eroG v. hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, *115 Harv. L. Rev.* 170 (2001); Symposium, *Bush v. Gore*, *68 U. Chi. L. Rev.* 613 (2001); Note, *Non sub Homine? A Survey and Analysis of the Legal Resolution of*

Election 2000, *114 Harv. L. Rev.* 2170 (2001). Undoubtedly the volume of literature on this topic will eventually approach that directed toward solving the regulatory takings puzzle.

n67. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926).

n68. See, e.g., Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*, at 249-50 (1982) (discussing the early twentieth-century movement for "clarification of the relationship between judicial authority and administrative authority that would facilitate the exercise of the latter"); cf. Robert L. Rabin, *Federal Regulation in Historical Perspective*, *38 Stan. L. Rev.* 1189, 1216-29 (1986) (discussing the new statutory and administrative regime).

n69. The Due Process Clause of the Fourteenth Amendment requires that no person be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, 1.

n70. With his notion of "refined incorporation," Professor Amar has reset the tone and substance of the debate in this area. See generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998). For a provocative set of responses, AND a rejoinder by Amar, see Symposium, *Commentaries on Akhil Reed Amar's The Bill of Rights: Creation and Reconstruction*, *33 U. Rich. L. Rev.* 289 (1999).

n71. The count of substantive due process cases during this period varies. For an analysis of various lists, see *Phillips*, *supra* note 35, at 32-36.

n72. A helpful set of biographical essays can be found in *The Supreme Court Justices: A Biographical Dictionary* (Melvin I. Urofsky ed., 1994). See also Northwestern University, *The Oyez Project*, at <http://oyez.northwestern.edu> (last visited May. 5, 2002).

n73. Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* 48 (1994); Joel Francis Paschal, *Mr. Justice Sutherland: A Man Against the State* 36-100 (1951).

n74. *169 U.S.* 366 (1898); see also Paschal, *supra* note 73, at 36 (describing Senator Sutherland's support of the legislation at issue in *Holden*).

n75. For biographical resources on the Justices, see sources cited *supra* note 72.

n76. See, e.g., Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* 24 (1957) (discussing Lemuel Shaw's constant search "for ways to adapt the old to the new, reconcile conflicting doctrines, and so restate the law as to make it practical and plastic" as Chief Justice of the Supreme Judicial Court of Massachusetts from 1830 to 1860).

n77. *Norway Plains Co. v. Boston & Me. R.R.*, 67 Mass. (1 Gray) 263, 268 (1854).

n78. *Id.*

n79. See generally Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

n80. 45 Cong. Rec. 2616 (1910), quoted in Paschal, *supra* note 73, at 65.

n81. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (first emphasis added).

n82. See *id.* at 390 ("This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.").

n83. *Id.* at 388.

n84. *Id.*

n85. 505 U.S. 1003 (1992).

n86. *Id.* at 1029.

n87. For the Justices' first use of the puzzling phrase "economically viable use," see *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In *Lucas*, Justice Scalia equated this deprivation with the denial of "all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. Apparently, this does not mean the absence of all value, however, for as the Palazzolo Court cautioned, "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2464 (2001).

n88. For example, Chief Justice Taft joined Justice Sutherland's majority opinions in three cases upholding zoning. See *Gorieb v. Fox*, 274 U.S. 603 (1927); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325 (1927); *Euclid*, 272 U.S. 365.

n89. Inaugural Address of President Ronald Reagan, Pub. Papers 1 (Jan. 20, 1981).

n90. Memorandum Directing a Federal Employee Hiring Freeze, Pub. Papers 5 (Jan. 20, 1981).

n91. For example, in his 1991 State of the Union Address, President Bush stated:

The Federal Government too often treats government programs as if they are of Washington, by Washington, and for Washington. Once established, Federal programs seem to become immortal. It's time for a more dynamic program life cycle. Some programs should increase. Some should decrease. Some should be terminated. And some should be consolidated and turned over to the States.

George Herbert Walker Bush, Address Before a Joint Session of the Congress on the State of the Union, 1 Pub. Papers 74, 77 (Jan. 29, 1991).

President Clinton expressed similar sentiments three years later:

Led by the Vice President, we launched a campaign to reinvent Government. We cut staff, cut perks, even trimmed the fleet of Federal limousines. After years of leaders whose rhetoric attacked bureaucracy but whose action expanded it, we will actually reduce it by 252,000 people over the next 5 years. By the time we have finished, the Federal bureaucracy will be at its lowest point in 30 years.

William Jefferson Clinton, Address Before a Joint Session of the Congress on the State of the Union, 1994 Pub. Papers 126, 127 (Jan. 25, 1994).

n92. Justice Scalia has certainly not been shy in his criticism of an organic view of the Constitution:

It does seem to me that a constitution whose meaning changes as our notions of what it ought to mean change is not worth a whole lot. To keep government up-to-date with modern notions of what good government ought to be, we do not need a constitution but only a ballot-box and a legislature.

Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 *Case W. Res. L. Rev.* 581, 594-95 (1989-90); see also Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 138-40 (1997). But cf. *Lucas*, 505 *U.S. at 1069* (Stevens, J., dissenting) ("Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution - both moral and practical.").

n93. The best historical treatment of the Progressive Era remains Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (1955).

n94. *Vill. of Euclid v. Ambler Realty Co.*, 272 *U.S.* 365, 394-95 (1926).

n95. See Hofstadter, *supra* note 93, at 148-64.

n96. Burton J. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* 88 (1976).

n97. *Id.*

n98. For details on attorney James Metzenbaum's crucial involvement in drafting, implementing, and defending the Village of Euclid's zoning scheme, see Wolf, *supra* note 4, at 90-97.

n99. See Richard H. Chused, *Euclid's Historical Imagery*, 51 *Case W. Res. L. Rev.* 597, 598-99 (2001) (discussing Hoover's activities).

n100. For Bettman's role in Euclid and in advocacy for zoning and planning, see Randle, *supra* note 4, at 47-49.

n101. *Motion for Leave To File Brief, Amici Curiae and Brief on Behalf of the National Conferences on City Planning, the National Housing Association and the*

*Massachusetts Federation of Town Planning Boards at 32-46, Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 31).

n102. *Euclid*, 272 U.S. at 394-95 (1926) (emphasis added).

n103. *Id.* at 395.

n104. See, e.g., Earth Report 2000: Revisiting the True State of the Planet (Ronald Bailey ed., 2000) (challenging environmentalists' findings, assumptions, and policies regarding such topics as global warming, alternative energy sources, and biological diversity); Peter Huber, *Hard Green: Saving the Environment from the Environmentalists: A Conservative Manifesto* (1999).

n105. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (internal quotation marks omitted).

n106. See *Dolan v. City of Tigard*, 512 U.S. 374, 395-96 (1994) ("The city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.").

n107. In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court, relying on *Euclid*, found that the zoning ordinance at issue effected a deprivation of the landowner's property without due process of law. The state court had enlisted the assistance of a special master, who concluded that "no practical use can be made of the land in question for residential purposes." *Id.* at 187 (internal quotation marks omitted). Justice Sutherland, writing for a unanimous Court, adopted the master's findings, reversing the state high court ruling. *Id.* at 188-89. While expert-based planning generally receives judicial approval, *Nectow* and many state and lower federal cases following *Euclid*'s guidance have protected landowners from arbitrary and confiscatory land-use regulations, thus demonstrating that to employ the approach of Progressive jurisprudence is not necessarily to rubber stamp legislation.

n108. Justice Scalia tried to assure his dissenting colleagues that "our verbal formulations in the takings field have generally been quite different." *Nollan*, 483 U.S. at 834 n.3. He continued, "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved ... ." *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Justice Brennan sharply disagreed: "The Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century." *Id.* at 842 (Brennan, J., dissenting). "It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State 'could rationally have decided' that the measure adopted might achieve the State's objective." *Id.* at 843 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

n109. See *Nollan*, 483 U.S. at 834 (quoting *Agins*, 447 U.S. at 260) ("We have long recognized that land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land.") (internal quotation marks omitted).

n110. See *Vill. of Euclid v. Ambler Realty, Co.* 272 U.S. 365, 395 (1926).

n111. *Id.* at 391 (emphasis added).

n112. In the interim between *Euclid* and *Nollan*, it was not unusual for state courts deciding zoning disputes to use the words "reasonable," "rational," and "substantial" interchangeably. See, e.g., *First Nat'l Bank of Lake Forest v. County of Lake*, 130 N.E.2d 267, 277 (Ill. 1955) ("These considerations ... all point to a reasonable and substantial relationship between the present residential classification and the legitimate objects of the exercise of the police power ..."); *Plaza Recreational Ctr. v. Sioux City*, 111 N.W.2d 758, 765 (Iowa 1961) ("substantial or rational relation between the prohibition and basic interests of the community"); *Bonan Realty Corp. v. Young*, 182 N.Y.S.2d 132, 134 (N.Y. Sup. Ct. 1958) ("bears a substantial and rational relation to the general welfare and safety").

n113. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court recognized that "to withstand constitutional challenge, previous cases established that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. For a more recent Court opinion discussing "substantial" in relation to a government interest, see *United States v. Virginia*, 518 U.S. 515 (1996), which held that gender discrimination in a state military school violated the Equal Protection Clause.

n114. Cf. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 *Urb. Law. J.* 1 (1992) (advocating the transfer of the burden to the government in some instances).

n115. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (emphasis added).

n116. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 383-84 (1926).

n117. 274 U.S. 325 (1927).

n118. 274 U.S. 603 (1927).

n119. 277 U.S. 183 (1928).

n120. See *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 311-12 (N.D. Ohio 1924), rev'd, 272 U.S. 365 (1926); Brief on Behalf of the Appellants at 77-78, 129, *Euclid* (No. 31); Brief and Argument for Appellee at 53-54, *Euclid* (No. 31); Motion for Leave to File Brief, Amici Curiae and Brief on Behalf of the National Conference on City Planning, the National Housing Association and the Massachusetts Federation of Town Planning Boards at 11-13, *Euclid* (No. 31).

n121. See, e.g., Daniel R. Mandelker, *Land Use Law* 4.15 (4th ed. 1997).

n122. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1043-44 (1992) (Blackmun, J., dissenting) (noting that, even after passage of restrictive legislation, a landowner could still "picnic, swim, camp in a tent, or live on the property in a movable trailer").

n123. See *Lucas*, 505 U.S. at 1024-25. Professor Sax offers an alternative to the Lucas majority's "conventional perspective of private property":

An ecological view of property, the economy of nature, is fundamentally different. Land is not a passive entity waiting to be transformed by its landowner. Nor is the world comprised of distinct tracts of land, separate pieces independent of each other. Rather, an ecological perspective views land as consisting of systems defined by their function, not by man-made boundaries. Land is already at work, performing important services in its unaltered state. For example, forests regulate the global climate, marshes sustain marine fisheries, and prairie grass holds the soil in place. Transformation diminishes the functioning of this economy and, in fact, is at odds with it.

Joseph L. Sax, Property Rights and the Economy of Nature: Understanding *Lucas v. South Carolina Coastal Council*, 45 *Stan. L. Rev.* 1433, 1442 (1993).

n124. *Lucas*, 505 U.S. at 1016-17 n.7. Professor Michelman raised the "denominator" problem twenty-five years before *Lucas*:

Is the supposedly critical factor the size of the private loss absolutely, or rather the size of that loss compared with some other quantity? And if, as seems clear, a comparison of magnitudes is intended - a comparison in which, were it fractionally expressed, the loss in value of the affected property would compose the numerator - what value supplies the denominator? Is it the preexisting value of the affected property, or is it the whole preexisting wealth or income of the complainant?

Michelman, *supra* note 13, at 1192. This issue is an example of what Professor Radin dubs "conceptual severance." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum. L. Rev.* 1667, 1674-78 (1988).

The Federal Circuit has probably been most ambitious in whittling down the denominator. See, e.g., *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380-81 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000); *Loveladies Harbor v. United States*, 28 F.3d 1171, 1179-82 (Fed. Cir. 1994). If the Court were to move away from Pennsylvania Coal's emphasis on a diminution of value, it could prevent the narrowing of the constitutional inquiry to the smallest discrete "piece" of property. See *Tahoe-Sierra Pres. Council, Inc. v.*



*Tahoe Reg'l Planning Agency*, 228 F.2d 998 (9th Cir. 2000) (Kozinski, J., dissenting from denial of petition for rehearing en banc).

n125. In his brief to the Court, Palazzolo for the first time asserted that he had suffered a total deprivation of value in a discrete part of his parcel (the "wetlands portions"). *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2465 (2001). Justice Kennedy raised, then avoided deciding, this nagging issue:

This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole; but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel [the "upland parcel" and the "wetlands portion"] serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.

Id. (citations omitted).

n126. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, No. 00-1167, slip op. at 27 (U.S. Apr. 23, 2002). Justice Stevens wrote for the majority: "Petitioners' 'conceptual severance' argument is unavailing because it ignores Penn Central's admonition that in regulatory takings cases we must focus on 'the parcel as a whole.' We have consistently rejected such an approach to the 'denominator' question." Id. (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31 (1978)).

n127. See *Tahoe-Sierra*, No. 00-1167, slip op. at 1 (Thomas, J., dissenting). Joined by Justice Scalia, Justice Thomas dubbed the Penn Central formulation a "questionable rule" and observed, "the majority's decision to embrace the 'parcel as a whole' doctrine as settled is puzzling." Id. at 1 & n..

n128. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937) (Cardozo, J.) ("The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership."); Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 *B.C. Envtl. Aff. L. Rev.* 347, 367 n.122 (1998) ("'Legal interest' or 'property' relating to the tangible object that we call land consists of a complex aggregate of rights (or claims), privileges, powers, and immunities." (quoting Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 96 (Walter Wheeler Cook ed., 1923)) (internal quotation marks omitted)); see also Michael A. Heller, *The Tragedy of the*

Anticommons: Property in the Transition from Marx to Markets, *111 Harv. L. Rev.* 621, 663 (1998) ("A.M. Honore proposed a list of eleven 'standard incidents' that he claims make up private property, including the rights to exclusive possession, personal use, and alienation.") (citing A.M. Honore, Ownership, in *Oxford Essays in Jurisprudence* 107, 112-28 (A.G. Guest ed., 1961)).

n129. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (finding that requiring public access to private land "would deprive petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

n130. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).

n131. For the early history of zoning, see Charles M. Haar & Michael Allan Wolf, *Land-Use Planning: A Casebook on the Use, Misuse, and Re-use of Urban Land* 188-90 (4th ed. 1989); Seymour I. Toll, *Zoned American* (1969); *Developments in the Law - Zoning*, *91 Harv. L. Rev.* 1427, 1433-35 (1978).

n132. *Euclid*, 272 U.S. at 388.

n133. *Id.* at 390-93 (reviewing state court decisions on the validity of zoning).

n134. See *id.* at 392-93 (quoting *City of Aurora v. Burns*, 149 N.E. 784 (Ill. 1925), and *State ex rel. Civello v. City of New Orleans*, 97 So. 440 (La. 1923)).

n135. *Id.* at 395.

n136. See Rabin, *supra* note 68, at 1216-29.

n137. Professor Hartnett admirably maneuvers through the various legislative and judicial modifications of the Court's review powers. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, *100 Colum. L. Rev.* 1643 (2000).

n138. See *id.* at 1660-62.

n139. *Id.* at 1689 (quoting *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the House Comm. on the Judiciary*, 68th Cong. 25 (1924) (testimony of Justice Sutherland)).

n140. *Dolan v. City of Tigard*, 512 U.S. 374, 389 (1994).

n141. 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, 16 (1996) (alteration in original) (footnotes omitted) (quoting *Dolan*, 512 U.S. at 389-90 (quoting *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 789, 802 (Ill. 1961))).

n142. *Id.* at 16 (quoting *Dolan*, 512 U.S. at 390).

n143. *Dolan*, 512 U.S. at 391.

n144. *Id.*

n145. *Id.*

n146. See generally Judith Welch Wegner, Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals, *65 N.C. L. Rev.* 957 (1987).

n147. See supra p. 2186.

n148. See William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, *54 Stan. L. Rev.* 87, 109-19 (2001).

n149. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 383 (1926).

n150. See generally Haar & Wolf, supra note 131, at 343-62 (discussing variances and special exceptions).

n151. For a discussion of Progressive urban reform generally, see Hofstadter, supra note 93, at 174-86.

n152. The classic example is Lincoln Steffens, *The Shame of the Cities* (1904).

n153. See, e.g., Mandelker, supra note 121, 4.15-.16.

n154. *Euclid*, 272 U.S. at 389-90.

n155. Gabriel Kolko, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916*, at 1-10 (1963).

n156. *Euclid*, 272 U.S. at 386.

n157. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1010-11 (1992); *id.* at 1032 (Kennedy, J., concurring in the judgment); *id.* at 1041 (Blackmun, J., dissenting); *id.* at 1061 (Stevens, J., dissenting). The current Court's eagerness to resolve regulatory takings questions in the face of serious questions concerning ripeness, residual value, and the availability of variances and exceptions stands in stark contrast to the Justices' cautionary approach in the years preceding *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

n158. See, e.g., *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457 (2001).

n159. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 530-31 (1992) (finding no "compelled physical occupation"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that even a minor "permanent physical occupation" effects a taking).

n160. See *Lucas*, 505 U.S. at 1015-16 (noting two categorical takings: physical invasions and denials of economically beneficial use).

n161. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

n162. *526 U.S.* 687 (1999).

n163. The Del Monte Dunes jurors were asked to determine the presence (or absence) of economically viable use and of the substantial advancement of legitimate public interests. *Id.* at 700-01.

n164. For example, some Progressives campaigned for the restriction of "new" immigration from southern and eastern Europe, while others championed the

nation's ability to absorb and assimilate these newcomers. Professor Solomon contrasts the exclusionary activities of the Immigration Restriction League with the resistance of a Brahmin minority who still clung to a belief in the benefits of absorbing newcomers. See Barbara Miller Solomon, *Ancestors and Immigrants: A Changing New England Tradition* 122-51, 176-94 (1956).

n165. See, e.g., John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 *U. Colo. L. Rev.* 1071, 1088 (2000) ("By the Progressive era, faith in expert commissions was endemic ..."); Michael Allan Wolf, *The Prescience and Centrality of Euclid v. Ambler*, in *Zoning and the American Dream*, supra note 4, at 252, 255.

n166. See Grey, supra note 11, at 497-500.

n167. Therefore, individual judges confronted several difficult questions concerning the judicial craft: What common law principles undergirded new statutory schemes and on what bases could the court conclude that those principles had been preempted? Were state and local lawmakers entitled to the same deference as their counterparts in Congress? Did an administrative regulation have the same import as a statute or ordinance passed by a legislative body?

n168. According to Menand:

The political system their philosophy was designed to support was democracy. And democracy, as they understood it, isn't just about letting the right people have their say; it's also about letting the wrong people have their say... . Democracy means that everyone is equally in the game, but it also means that no one can opt out.

Menand, supra note 9, at 440-41.

n169. *Id.* at 61.

n170. *Pa. Coal Co. v. Mahon*, 260 *U.S.* 393, 415 (1922).

n171. *121 S. Ct.* 2448 (2001).

n172. See *id.* at 2473 (Ginsburg, J. dissenting). Justice Ginsburg, joined by Justices Souter and Breyer, agreed with the Rhode Island Supreme Court that the claim was unripe, noting that "although Palazzolo submitted several applications to develop his property, those applications uniformly sought permission to fill most or all of the wetlands portion of the property. None aimed to develop the uplands." *Id.*

n173. The majority phrased the rule this way: "A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* at 2462. Compare *id.* at 2463 ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to

compensate for what is taken."), with *id. at 2471 n.6* (Stevens, J., concurring in part and dissenting in part) ("In cases such as *Nollan* - in which landowners have notice of a regulation when they purchase a piece of property but the regulatory event constituting the taking does not occur until after they take title to the property - I would treat the owners' notice as relevant to the evaluation of whether the regulation goes 'too far,' but not necessarily dispositive.").

n174. *216 F.3d 764 (9th Cir. 2000)*, rev'd. No. 00-1167, slip op. (U.S. Apr. 23, 2002). Judge Alex Kozinski penned a strident dissent from the en banc refusal to grant a rehearing. Not one to mince words, Judge Kozinski invited the High Court to intercede:

The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles* and adopts Justice Stevens's *First English* dissent. Because we are not free to rewrite Supreme Court precedent, I urged our court to take this case en banc. By voting not to rehear, we have neglected our duty and passed the burden of correcting our mistake on to a higher authority.

*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, *228 F.3d 998, 999 (9th Cir. 2000)* (internal citations omitted) (Kozinski, J., dissenting from denial of petition for rehearing en banc) (internal citations omitted).

n175. *121 S. Ct. at 2589-90*.

n176. The oral arguments before the Justices in *Tahoe-Sierra* further illustrated the need for a more coherent approach and suggested that even comprehensive zoning would be at risk should the Court follow the regulatory takings doctrine to its "logical" conclusion. See Transcript of Oral Argument, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 2002 U.S. TRANS LEXIS 2 (Jan. 7, 2002) (No. 00-1167). Consider, for example, the following exchange between the Justices and counsel for the landowners:

QUESTION: ... Now, what about your basic zoning law? I'm going to, as a city, limit the use of this property to one house per acre. You can't have unlimited apartments or commercial property owner. Now, for the enactment of that, is there a taking immediately?

MR. BERGER: No, Your Honor.

QUESTION: Well, you're permanently deprived of the use of it for commercial purposes.

MR. BERGER: Yes, Your Honor, but you are not totally deprived of the use of it.

QUESTION: But can we get back to the basic question that Justice Scalia asked, and Justice O'Connor asked it as well. I want your answer. Why is it that a

delay for purposes of ordinary zoning, which, let's assume, prohibits you from any use of the property, is not a taking?

MR. BERGER: Because you are there in a process working toward the actual development of the process, of the property, pardon me, in contrast to being in a situation like these people are, where there is no process for development. There is instead the desire -

QUESTION: Let's assume that the Tahoe Regional Planning Agency thought, in good faith, that there would be some development allowed, but they needed a year to think about it... . We know something very valuable is going to be built, but you say it's a taking, and I don't understand the difference between that and the regular zoning procedure.

MR. BERGER: The difference is that in the second situation there is a conscious and total prohibition on use, and that's the purpose of the regulation, is to prohibit the use. In the former situation, where you're applying for a permit, the purpose of the regulation is not to prohibit use but, in fact, to enable use.

Id. at 13-14.

n177. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, No. 00-1167, slip op. at 2, 16 (U.S. Apr. 23, 2002).

n178. Id. at 16.

n179. Id. at 5 (Rehnquist, C.J., dissenting). The Chief Justice, joined by Justices Scalia and Thomas, was also concerned with the majority's apparent conflation of "value" and "use," which he deemed a departure from *Lucas*. Id. at 8-9.

n180. See *supra* pp. 2174-75.

n181. See Catherine Drinker Bowen, *Yankee from Olympus: Justice Holmes and His Family* (1944).

n182. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Several Justices have invoked Holmes's caveat in regulatory takings cases, quoting it verbatim. See, e.g., *Tahoe-Sierra*, No. 00-1167, slip op. at 31; *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2462 (2001); *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992); *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304, 330 (1987) (Stevens, J., dissenting); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473 (1987); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 198-99 (1985); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 650 (1981) (Brennan, J., dissenting); *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).