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Background to Village of Euclid v. Ambler Realty Co

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(1971), holding unconstitutional a preference for male executors of estates; *Kirchberg v. Feenstra*, 450 U.S. 455 (1981), invalidating the ability of a husband to unilaterally encumber community property when a wife lacks the same power. *Compare Goes-sart v. Cleary*, 335 U.S. 464 (1946), decided just two years before *Shelley*, and validating a Michigan preference for male bartenders.


The Supreme Court's opinion in *Village of Euclid v. Ambler Realty Company* was eagerly awaited by important federal government officials, Progressive Era reformers, real estate developers and local government officials across the country. It was widely viewed as a crucial test of the validity of the Standard Zoning Enabling Act, adopted by 1925 in just under half of the states and under consideration in many others. The adoption of zoning legislation was part of a much broader effort to reform national housing policies in the early twentieth century. Muckraking books such as Lincoln Steffens' *SHAME OF THE CITIES* (1904) and Upton Sinclair's *THE JUNGLE* (1906) mirrored widespread concern about the state of urban America. Tenement house regulations first appeared in New York City in 1901 and, along with building codes, spread gradually to many urban areas by the 1920's. Shortly after Warren G. Harding assumed the Presidency in 1921, his Secretary of Commerce, Herbert Hoover, appointed an Advisory Committee on Zoning in the Department of Commerce. In 1924, the year following Harding's death and Calvin Coolidge's move to the White House, the Advisory Committee issued the Standard State Zoning Enabling Act and recommended its adoption by the states. By the end of the following year, nineteen states, including Ohio, had followed the Committee's advice. By the end of the decade, some or all localities in every state had been granted the power to zone. The Advisory Committee also reviewed the status of subdivision regulations in the various states. Some control of subdivisions had existed in many places well back into the nineteenth century. They were designed to assure that plat maps were correctly drawn and filed, and that engineering studies were appropriately completed. Other functions were gradually added, such as requiring that new streets tie into old ones and that utility lines be correctly laid. Shortly after *Euclid* was decided the Advisory Committee published a Standard City Planning Enabling Act, making subdivision regulation a tool of comprehensive planning, placing administration of subdivision controls in the hands of local planning boards, and establishing certain guarantees that improvements planned in subdivisions were actually carried out. The Standard Act, or some other similar regulatory

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1 Virtually all persons favoring adoption of zoning argued that each municipality had separate and distinct problems and that actual implementation of zoning had to come at a local level. But most cities were then and are now legal creatures of state legislatures, limited in their authority to the powers granted in state legislation. It was therefore necessary for states to adopt legislation enabling city governments to adopt their own zoning schemes.  

scheme, was eventually adopted by most states. The two Standard Acts drafted by the Commerce Department are still the basic statutory structures used in many jurisdictions.

The Village of Euclid actually adopted its first zoning ordinance in 1922, two years before the Commerce Department published its final draft of the Standard Zoning Enabling Act. Euclid followed in the footsteps of New York City which adopted its first zoning ordinance in 1916, two years after the New York state legislature adopted the nation’s first zoning enabling statute. When Euclid adopted its zoning ordinance, the town’s sixteen square miles of territory contained less than 4,000 people. It was mostly agricultural. While some land speculators, including Ambler Realty, had bought up parcels of land in the town anticipating future industrial development, there were no factories in the Village of Euclid. Indeed, during the decade before Euclid adopted its zoning plan, Ambler sold off some tracts east of the 68 acre site that became the subject of litigation in Euclid and imposed covenants prohibiting commercial and industrial development.

Aply named Euclid Avenue was the major thoroughfare running through the town. Ambler’s 68 acres sat between Euclid Avenue on the southeast and the Nickel Plate Railroad tracks and the Cleveland city limits on the northwest. Under the first version of Euclid’s plan, Ambler’s land was zoned industrial (U-6) for a distance of 500 feet to the southeast of the railroad tracks and two family residential (U-2) over the rest of the site. Ambler’s protests led Euclid to modify the plan so that a two family residential zone covered the area 620 feet to the northwest of Euclid Avenue, apartment use (U-3) was permitted on the next 130 feet, and industrial use on the remainder.

Despite the modifications creating a significantly larger industrial zone, Ambler filed suit seeking to enjoin enforcement of the zoning scheme. The Village sought to have the case dismissed, arguing that Ambler was required to pursue available administrative remedies to its claimed deprivation of property before seeking judicial relief. The motion to dismiss was denied by Judge David Westenhaver, who was appointed to the federal bench by President Wilson in 1917. Westenhaver was appointed in large part because of the influence of Ambler’s attorney, Newton Baker. Baker served as Wilson’s Secretary of War and was a close friend of Westenhaver’s. A short time later, Westenhaver rendered his decision finding Euclid’s ordinance unconstitutional. Even though Westenhaver had close ties to Baker, it is virtually impossible to contend that his decision distorted prior Supreme Court jurisprudence in Ambler’s favor. Within the two years before Westenhaver’s January, 1924, opinion appeared, the Court decided three cases in a manner quite adverse to the notion that states had broad authority to regulate land or the economy. And in prior terms, the Court had made known its general hostility to property regulation in any number of opinions.

In his opinion, Westenhaver noted that many of the older cases involved statutes designed to prevent activities commonly viewed as nuisances, such as livery stables and

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3 Fluck, Euclid v. Ambler: A Retrospective, 52 J. AMER. PLANNING ASSOCIATION 326, 328 (1986). Fluck’s article is a nice history of the case. See also, S. I., TOLL, ZONED AMERICA 213-253 (1969). Euclid may have been ahead of the general trend because Alfred Bettman, who drafted the Standard Act for President Hoover, was from Ohio and deeply involved in development of land use legislation in the state.

4 The most prominent entity seeking adoption of zoning enabling legislation in New York was the Fifth Avenue Commission established in 1913 by the Manhattan Borough President. The Commission was concerned about the growth of tall buildings in lower Manhattan and the negative effects of the garment industry. See TOLL, ZONED AMERICA 143-171 (1969).

5 Fluck, supra, at 327-328.

6 Id.

brick manufacturing plants, near residences. It was easy for him to view the sorts of land use restrictions imposed by Euclid's ordinance as quite different from the typical regulatory fare that had previously come before the Supreme Court. Though there were certainly some examples that were hard for Westenhaver to deal with, most of the cases gave significant support for his general thesis that mediation of nuisance was not the primary objective of Euclid's zoning plan.

He relied heavily, for example, on Buchanan v. Warley, decided in 1918. Westenhaver argued that if, as Buchanan held, racial zoning was invalid, then certainly Euclid's plan had to fall. It was so obvious to Westenhaver that "colored" people and certain groups of immigrants were nuisances, that the Court's refusal to approve racial zoning removed all doubts about the invalidity of zoning for other purposes. Comparing the Buchanan and Euclid ordinances, he wrote:

> It seems to me that no candid mind can deny that more and stronger reasons exist, having a real and substantial relation to the public peace, supporting [the Buchanan] ordinance than can be urged under any aspect of the police power to support the present ordinance as applied to plaintiff's property. And no gift of second sight is required to foresee that if this Kentucky statute had been sustained, its provisions would have spread from city to city throughout the length and breadth of the land. And it is equally apparent that the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of the population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.

Cases decided by the Supreme Court during the two terms before Euclid came before Westenhaver provided him with significant additional support. The most important of the cases was Pennsylvania Coal v. Mahon, the 1922 decision finding that Pennsylvania's attempt to control subsidence of the surface from mining activities was a taking. Two other cases appeared in 1923, Adkins v. Children's Hospital, invalidating a Washington, D.C., minimum wage statute, and Wolff Co. v. Industrial Court, striking down a Kansas compulsory labor arbitration law. Westenhaver relied upon all three. The tenor of this segment of his opinions is revealed in the following excerpt:

> [C]onfusion of thought appears to exist touching the nature and extent of the police power. [C]ounsel [for Euclid] deduce that since the ordinance in question does not take away plaintiff's title or oust it from physical possession, the power of eminent domain has not been exercised, but that the police power has been. This conception recognizes no distinction between police power and sovereign power. The power asserted is not merely sovereign, but is power unshackled by any con-

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8 See, for example, Welch v. Swasey, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909), which involved limitations on building height. Even recognizing that tall buildings and the light they block were a major concern of the New York legislature when they first adopted zoning statutes, Westenhaver could say little more that the case involved "merely a reasonable regulation of the height of buildings." 297 F. at 315.

9 245 U.S. 60 (1918).

10 260 U.S. 393 (1922).

11 261 U.S. 525 (1923).

12 262 U.S. 522 (1923).
stitutional limitation protecting life, liberty, and property from its despotic exercise. In defendant's view, the only difference between the police power and eminent domain is that the taking under the former may be done without compensation and under the latter a taking must be paid for. It seems to be the further view that whether one power or the other is exercised depends wholly on what the legislative department may see fit to recite on that subject. Such, however, is not the law. If police power meant what is claimed, all private property is now held subject to temporary and passing phases of public opinion, dominant for a day, in legislative or municipal assemblies.\textsuperscript{13}

It was a major surprise when the Supreme Court reversed Judge Westenhaver and upheld Euclid's zoning ordinance. The reasons for this result have not become entirely clear, although suggestions have been made by those writing about the case. The Court may have been influenced by the recommendations emerging from successive, increasingly conservative, Republican administrations that zoning statutes be adopted. These endorsements of land use controls reflected a widespread feeling that urbanization problems were getting a bit out of hand, that skyscraper technology threatened the fabric of large cities, and that middle and upper income single family residential areas needed protection from industrial developments and from immigrants, blacks and others living in high density apartments.

A sense of the scope of change overtaking the United States may be gleaned by a quick glance at some demographic trends. The table below shows that the decade of the 1920's was the first era when more than half of the population of the United States lived in urban areas and more than 10,000,000 cars were registered with local authorities. In addition, the major eastern cities were swamped with the millions of immigrants that had crowded these shores before World War I. If ever there was a propitious time for city planners to have an impact on policies of urban America, the 1920's was that time.

\textsuperscript{13} 297 F. at 313-314.
### DEMOGRAPHIC TRENDS

<table>
<thead>
<tr>
<th>Year</th>
<th>Percent Population Urban</th>
<th>Auto Registrations</th>
<th>Decade Immigration Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1830</td>
<td>9%</td>
<td>—</td>
<td>2.4%</td>
</tr>
<tr>
<td>1840</td>
<td>11%</td>
<td>—</td>
<td>4.2%</td>
</tr>
<tr>
<td>1850</td>
<td>15%</td>
<td>—</td>
<td>12.4%</td>
</tr>
<tr>
<td>1860</td>
<td>20%</td>
<td>—</td>
<td>5.3%</td>
</tr>
<tr>
<td>1870</td>
<td>26%</td>
<td>—</td>
<td>8.1%</td>
</tr>
<tr>
<td>1880</td>
<td>29%</td>
<td>—</td>
<td>7.6%</td>
</tr>
<tr>
<td>1890</td>
<td>35%</td>
<td>—</td>
<td>7.3%</td>
</tr>
<tr>
<td>1900</td>
<td>40%</td>
<td>—</td>
<td>6.0%</td>
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<tr>
<td>1910</td>
<td>46%</td>
<td>8,000</td>
<td>11.0%</td>
</tr>
<tr>
<td>1920</td>
<td>51%</td>
<td>465,000</td>
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</tr>
<tr>
<td>1930</td>
<td>56%</td>
<td>9,239,100</td>
<td>1.7%</td>
</tr>
<tr>
<td>1970</td>
<td>73%</td>
<td>108,407,300</td>
<td>1.0%</td>
</tr>
</tbody>
</table>

The *Euclid* Court was evidently troubled by these land use issues. After oral arguments were first heard during January of 1926, the case was set down for reargument that fall. Reargument is a rare event. Since the Court never states reasons why a case is set down for further discussion, historians may only speculate about why it happened in *Euclid*. Several intriguing facts are known about the case which may help explain the situation. James Metzenbaum, Euclid's village counsel, requested and was granted the right to file a reply brief after the oral arguments; the other side was granted the same right. The month after these briefs were filed, the court announced it had set the case for reargument. In addition, the National Conference on City Planning wished to file an amicus curiae brief in the case, but inadvertently missed the original filing deadline. Their counsel, Alfred Bettman, was a long time advocate of city planning, the draftsman of much of Ohio's zoning legislation and secretary to the Advisory Committee on Housing and Zoning of the Commerce Department that drafted the Standard Zoning Enabling Act. He wrote to Justice Taft the month after the oral arguments in *Euclid* explaining the importance of the case to city planners and asking if he could file an amicus brief. Taft replied that he had brought the matter up in conference with the Court and invited

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14 Data is taken from Bureau of the Census, Department of Commerce, *Statistical History of the United States From Colonial Times to the Present* at 8, 11-12, 105-106, 716 (1976). The immigration rate listed is the number of immigrants entering the United States as a percentage of total population for a ten year period beginning five years before the listed year and ending five years after the listed year. The number in the table is the sum of ten years of data, with each year representing Total Immigration/Total Population for that year.

16 Fluck, note 59 supra, at 331.

17 Bettman was an old friend of Taft's and a fellow Cincinnatian. Id.
Bettman to submit the brief. Finally, a law clerk to Justice Harlan Fiske Stone at this time has claimed that Justice Sutherland, while writing an opinion striking down Euclid's zoning ordinance, was shaken in his convictions about the case after talks with those who would have dissented from his opinion. Justice Sutherland was also absent from the first oral arguments in *Euclid*, making it somewhat easier for him to justify rehearing the case. It may be of some importance that Justice Sutherland's three well known conservative colleagues—Justices Van Devanter, McReynolds and Butler—dissented from Sutherland's majority opinion when the *Euclid* case was finally decided. Perhaps Sutherland and another justice switched sides. The dissenters' failure to publish an opinion may indicate they were unwilling to publicly squabble with their conservative colleague. In any case, Sutherland's authorship of the opinion has been declared a "jurisprudential miracle."

In hindsight, Justice Sutherland, like Judge Westenhaver, may also have been influenced by the enormous racial controversy of the World War I era. As Garret Power's essay on Baltimore's segregation ordinances, real estate agent cabals, and racial covenants suggests, devices to overcome Buchanan's limitations on apartheid rules were in widespread use during the first half of this century. Attempts to establish separate zones for single family houses and apartments was surely part of that process. At a minimum, it is fair to say that keeping tenement houses and other structures likely to be occupied by disfavored people separate from middle and upper class residential areas was perfectly compatible with racial segregation. Perhaps Sutherland, more than his conservative colleagues on the Court, recognized that superficially neutral zoning ordinances could be used quietly for the very same purposes Buchanan banned from explicit use.

NOTES

1. Is *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), an embodiment of Realist jurisprudence?

2. What can the Takings Clause in the Constitution mean to a Realist? If property is once endorsed by the state and therefore given "realist" reality, may it be taken back later by the state only with payment of compensation? If so, are historic notions of wealth, once sanctioned by the state, forever frozen into our national charter?

D. Property as Protection From Large Enterprises and the Government: Individualism and the Welfare State in the 1960's

1. Liberty and Property in the Vietnam Era

The Realist reconstruction of property as a set of relational rights between people endorsed by the state effectively merged the notion of property into a system of government organization. The significant increase in the scope of economic regulation accomplished by the New Deal, the dramatic regulatory apparatus accompanying World War II, and the systematic anti-Communist ordering of the McCarthy era created great concern about the status of individuals or unprotected groups in the developing welfare state. The civil rights movement, a new wave of feminist activity,
welfare recipient organizations, tenant groups and anti-Vietnam War actions all brought the status of individuals to public notice in passionate ways.

Charles Reich's article on *The New Property* hit the legal world like a bombshell. Reich's argument that both accretion and loss of wealth were so dominated by state-controlled systems of largess that individual liberty was threatened turned lights on for a generation of lawyers. For conservatives it was a clarion call to rethink the underpinnings of the welfare state; for liberals it provided justifications for controls over the more arbitrary features of the modern state. For all it produced a vibrant dialogue about the meaning of property.

Thinking of property, as Reich did, as a barrier between the individual and the corporate state is quite different than the early Republican use of property ownership to define civic responsibility. Rather than setting a norm for merger of public and private functions, property for Reich established a boundary between public power and private needs. As a result, process became a major focus of attention. Bringing disputes into the public eye, providing a forum for evaluation of arbitrary actions, and establishing settings for individuals to openly dispute the legality of actions by government or other large organizations in society was an important method for giving property-like powers to those receiving government largess. Even the Supreme Court paid heed, holding in *Goldberg v. Kelly*, 357 U.S. 254 (1970), that welfare benefits could not be terminated without a hearing. Though the scope of procedural rights that attach to government largess has diminished with the decisions of later Supreme Courts, Reich's thesis had an important, and perhaps ongoing, moment in the sun. For his own retrospective views on *The New Property*, see Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 Brooklynl. Rev. 731 (1990).

The same basic reasoning structure produced a second famous article, by Christopher Stone, claiming that inanimate objects in the environment ought to be deemed holders of property rights subject to protection in American courts. If property is a right of exclusion endorsed by the state, then why not remove the requirement of a human relationship from the definition of property and permit protection of the ecology so that both human and ecological relationships may flourish?

But the articles of Reich and Stone, like those of the Realists before them, ultimately contained no clear guidance for defining property. To argue that property is both the creature of government, and the safeguard of individual liberty and environmental well being is to place liberty and well being constantly at risk. It in fact conflates public and private realms even as it proclaims the need for their separation.

The rest of this anthology contains a variety of materials selected to allow you to attempt your own reconstruction of the idea of property as a meaningful cultural category. Basic legal commentary is mixed with a variety of works using non-legal disciplines to structure analysis.