Washington University
Journal of Law & Policy

Evolving Voices in Land Use Law: A Festschrift in honor of Daniel R. Mandelker

Part I: Historical Background

Chapter 1: The Supreme Court

Prelude to *Euclid*: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900-1920

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Historical accounts of the United States Supreme Court's land use jurisprudence usually begin with the 1920s.[1] In that decade, the Court handed down four significant decisions—*Pennsylvania Coal v. Mahon*,[2] *Village of Euclid v. Ambler Realty*,[3] *Miller v. Schoene*,[4] and *Nectow v. Cambridge*,[5] which are usually credited with establishing the terms for a debate over the limits of state regulation under the

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1. For a summary of the conventional history, see J. HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST 121-34 (1998). For the early history of zoning, see generally, F. BOSSELMAN ET AL., THE TAKINGS ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973) and R. BABCOCK, THE ZONING GAME (1967).
2. 260 U.S. 393 (1922).
3. 272 U.S. 365 (1926).
4. 276 U.S. 272 (1928).
5. 277 U.S. 183 (1928).

police power that has now raged for eight decades.

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.

I. THE FULLER COURT (1888-1910)

During its first twelve years, the Fuller Court (1888-1910) was not called upon to decide any land use cases. However, between 1900 and 1910, it handed down five decisions involving municipal ordinances that either confined particular usages to specific districts or banned the usage altogether. The first of these cases was *L'Hote v. New Orleans* in 1900.[6]

A. L'Hote v. New Orleans

In July 1896 the Louisiana legislature approved a new city charter for New Orleans, replacing the one issued in 1882.[7] Section 15 of the new charter authorized the city to regulate prostitution, and among the powers granted was the authority to restrict brothels and other dwelling places of prostitutes to a specific district within the city. There was nothing new about this approach; in fact, the city had imposed such a requirement as early as 1857, and similar provisions had been included in the 1870 and 1882 city charters.

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6. 177 U.S. 587 (1900).

7. Unless otherwise noted the factual background of all cases discussed in this article are taken from the published case reports, both state and federal.

Pursuant to this provision New Orleans Common Council adopted a new ordinance on January 29, 1897, which declared it unlawful "for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live or sleep in any house, room or closet situated without the following limits. . .." The ordinance then defined an area of the city bounded by the Custom House, Basin, Robertson, and St. Louis Streets. Only the southern side of the last mentioned street was included in the district.

Before the ordinance took effect on October 1, the Common Council concluded that the boundaries in the original ordinance had been drawn too narrowly, and on July 7, it enacted a revised ordinance, which expanded the special "district" so that it now included both sides of St. Louis Street as well as other areas contiguous to the district defined by the January 29 ordinance. Neither side of St. Louis Street had been included within the designated area drawn by earlier ordinances.

Shortly thereafter the revised ordinance was challenged by George L'Hote. L'Hote resided with his wife and children in a house on Treme Street in New Orleans, which was one-half block north of St. Louis Street. In requesting that the Civil District Court for Orleans Parish declare the ordinance "unconstitutional, illegal, unreasonable and oppressive" and enjoin the city and the superintendent of police from enforcing the new boundaries, L'Hote insisted that the ordinance, if enforced, would deprive him of property without due process of law and deny him the equal protection of the laws guaranteed by both the United States and Louisiana constitutions. He also maintained that it effectively legalized prostitution and deprived him of his vested right to bring an action for private nuisance. Finally, he argued that having once laid out the boundaries for the area in which prostitutes could live, the Common Council could not, consistent with notions of due process, redraw the lines.

L'Hote was subsequently joined in his suit by Bernardo Gonzales Carbajal and the Church Extension Society of the Methodist Church of New Orleans. Carbajal was a homeowner who, unlike L'Hote, actually owned property within the area designated for prostitutes. The Methodist Church's Union Chapel which had a congregation of more than six hundred including one hundred seventy children was also located in the new district. Both Carbajal and the Church insisted

that the new district lines would severely damage the value of their property; the Church in fact maintained that some of its members were now leaving the congregation as construction of brothels, saloons, and concert halls had already begun in the district even before the ordinance took effect. In contrast to L'Hote, who was willing to accept the continuation of the old district lines, both of the intervenors took the position that the plan for a special district for prostitutes was unreasonable and unconstitutional regardless of where the lines were drawn.

This distinction was apparently crucial for the District Court judge who enjoined the city on behalf of L'Hote but dismissed the petitions of the two intervenors. Both the city and the Methodist Church appealed the decision to the Supreme Court of Louisiana. In an opinion that cited no cases as authority, the higher court upheld the ordinance in all respects and dissolved the injunction awarded to L'Hote.[8] While it admitted that a truly arbitrary drawing of lines could give rise to a valid cause of action, the court's Justice Miller found that the record showed that St. Louis Street and the other new areas were sufficiently close to the old district that the new district lines were not "arbitrary, or as calling for any substantial sacrifice of private rights beyond that required by antecedent ordinances."[9] Citing the highly respected treatise *Dillon on Municipal Corporations*, the court concluded:

> [P]olice laws and regulations, though they may disturb the enjoyment of individual rights, are not unconstitutional. They do not expropriate property for public use. If the individual sustains injury it is deemed *damnum absque injuria*, or in the theory of the law, the injury to the owner is deemed compensated by the public benefit the regulation is designed to subserve.[10]

After the Louisiana court denied his petition for a rehearing, L'Hote appealed to the United States Supreme Court. His case was argued on

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8. L'Hote v. City of New Orleans, 51 La. Ann. 93 (1898).
9. *Id.* at 98.
10. *Id.* at 98-99 (quoting JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 793 (4th ed. 1890)).

March 20, 1900, and responsibility for the Court's opinion was assigned to Associate Justice David Josiah Brewer.

When the Supreme Court heard L'Hote's arguments, it had few precedents of its own in the area of land use control. In *Fertilizing Co. v. Hyde Park* (1878), it had upheld an Illinois Supreme Court ruling that let stand a village ordinance banning the manufacture of animal fertilizer within its limits even though the affected company possessed a state charter authorizing its operation for fifty years on its current site.[11] Rejecting the company's challenge under the Constitution's Contracts Clause, the Court ruled that corporate charters were implicitly subject to the state police power, and so long as it was exercised properly, there was no impairment of the obligation of contracts even if the company was required to shut down its entire operation.

In *Mugler v. Kansas* (1887), the Court upheld a statute enacted pursuant to an amendment to the Kansas Constitution, which outlawed the manufacture and sale of alcoholic beverages for all but a few limited purposes.[12] Mugler was the operator of a brewery that he claimed had been made virtually worthless as a result of the amendment. When convicted of continuing to manufacture and sell alcoholic beverages, he challenged his conviction on the grounds that the amendment constituted a deprivation of property in violation of the Fourteenth Amendment. Although the Kansas Supreme Court upheld his conviction, while his appeal was pending before the Supreme Court, the federal circuit court for Kansas had declared a revised version of the statute unconstitutional in *State v. Walruff*[13] (1886) on due process grounds. Nevertheless, the Supreme Court upheld the statute and the constitutional amendment on the grounds that the people of Kansas had determined that the manufacture and sale of alcoholic beverages constituted a nuisance and that the state was within it powers to make sure that the nuisance was abated.

In a third case, *Yick Wo v. Hopkins* (1886), decided the year before *Mugler*, the Court struck down the application of a San Francisco ordinance prohibiting the operation of laundries in wooden

11. 97 U.S. 659 (1878).
12. 123 U.S. 623 (1887).
13. 26 F. 178 (1886).

buildings without a city license when it was demonstrated that Chinese applicants for licenses were always turned down while Caucasian applicants were always accepted.[14] This was a clear abuse of the police power of the state, according to Justice Stanley Mathews, and the city could not hide its discriminatory motive behind a facially neutral statute. Taken together the three cases suggested that neither the Contracts Clause or the Fourteenth Amendment limited the state police power so long as the governmental entity had in fact acted on behalf of the public health, welfare, and safety. If the exercise was legitimate, then the amount of economic loss that fell upon a particular property owner seemed irrelevant. Furthermore, the passage from *Dillon on Corporations* cited by the Supreme Court of Louisiana in L'Hote's case suggested that state courts applied a similar standard.

However, by the end of the nineteenth century, the willingness to tolerate significant economic injury in the name of the police power had come under attack. The most influential critic was law professor and legal scholar Christopher Tiedeman who argued forcefully that American courts had tolerated a much more expansive use of the police power than was warranted and that property owners were too often denied the compensation to which they were entitled. In addition, from the bench, there was no more outspoken opponent of the abuse of the state police power than David Josiah Brewer. As a member of the Kansas Supreme Court, Brewer had refused to join the majority opinion in *State v. Mugler*,[15] and it was Brewer as a United States Circuit Court judge who had declared the Kansas Prohibition Act unconstitutional.[16] Although this latter ruling was implicitly reversed by the Supreme Court's *Mugler* opinion, his belief that the Fourteenth Amendment imposed real limitations on the state police power was not dampened. At different times in his career he described the police power as the "legislative scalping knife,"[17] "the

14. 118 U.S. 356 (1886).

15. State v. Mugler, 29 Kan. 181, 194 (1883).

16. *Id.*; State v. Walruff, 26 F. 178 (1886). Brewer reiterated his view of the unconstitutionality of the Prohibition Act in *State v. Kansas City, Ft. S. & G. R. Co.*, 32 F. 722 (1887), which was handed down before the Supreme Court's *Mugler* decision.

17. Cotting v. Kansas City Stock Yards, 183 U.S. 79, 104-05 (1901).

refuge of every grievous wrong upon private property,"[18] and an "omnivorous governmental mouth, swallowing individual rights and immunities."[19]

Joining the Supreme Court in 1890, Brewer quickly established himself as the Court's most outspoken advocate of property rights.[20] His best known public address, delivered shortly after his appointment, was entitled "The Protection of Private Property from Public Attack" and contained numerous accusations that property was being unconstitutionally appropriated and destroyed behind the mask of the state police power. He also was an unabashed judicial activist with no patience for the argument that the review of legislative motive lay beyond the powers of the judiciary. As he stated shortly before his appointment to the Supreme Court: "We [judges] are not limited to the letter of the statute. We can look beyond that, and see what is the spirit and meaning of the law, and determine whether, under the guise of police regulation, rights guaranteed by the federal constitution are infringed."

In his early years on the Supreme Court, he sought unsuccessfully to convince his colleagues to overrule the Court's 1878 holding in *Munn v. Illinois*[21] that the state police power included the right to regulate prices for businesses "clothed with the public interest."[22] He had greater success in cases involving the constitutionality of railroad rate regulation in which Brewer's position that the Fourteenth Amendment guaranteed the regulated party the right to earn some profit was eventually adopted by the Court as a whole.[23] Moreover,

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18. Chicago, Burlington & Quincy Ry. v. Drainage Comm'rs, 200 U.S. 561, 600 (1906).

19. 55 NEW ENG. & YALE REV. 97 (1891), *reprinted in* 10 RY. & CORP. L.J. 281 (1891).

20. *Ex parte* Kieffer, 40 F. 399, 401 (1889).

21. 94 U.S. 113 (1877).

22. Brewer's unsuccessful efforts came in *Budd v. New York*, 143 U.S. 517 (1892), and *Brass v. North Dakota*, 154 U.S. 391 (1894). In arguing that the regulation of rates of ordinary business constituted a deprivation of property without due process of law, Brewer distinguished ordinary businesses, specifically unincorporated grain elevators from corporations and enterprises like common carriers and inns which had historically been viewed as quasi-public. In Brewer's view, only the rates of the latter could be regulated.

23. *See* Chicago & Northwestern Ry. v. Dey, 35 F. 866 (1888); Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Becker, 35 F. 883 (1888). Although Brewer was not the author of *Smythe v. Ames*, 169 U.S. 466 (1898), the decision upheld a ruling he had made while riding circuit. Ames v. Union P. R. Co., 64 F. 165 (C.C.D. Neb. 1894). Because railroads were incorporated, Brewer acknowledged that they were subject to rate regulation; however, to force

prior to his appointment to the Supreme Court he had embraced the view that it was not always sufficient that governmental action be based on a legitimate exercise of the police power. In the Kansas prohibition cases, he first mused over and then embraced the position that an otherwise valid exercise of the police power can be unconstitutional if it imposed too great an economic loss on someone whose actions were not in and of themselves a nuisance (like the operator of a brewery).

Unfortunately for L'Hote neither Brewer nor any of his colleagues found merit to his arguments. Although Brewer acknowledged that the police power could not interfere with individual rights protected by the Constitution, he rejected L'Hote's claim that the ordinance was an improper exercise of the police power. Brewer acknowledged that the social problem involved in this case was a difficult one and that the solution chosen by the New Orleans Common Council might not be the wisest. However, he emphasized, "it is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature."[24]

Brewer found L'Hote's argument that the ordinance constituted a taking of his property without compensation equally unpersuasive. Although L'Hote had asserted in his original petition that the ordinance, if allowed to take effect, would render his property useless for residential purposes and significantly diminish its value, Brewer clearly was not persuaded that would be the effect. Unlike the prohibition cases in which Brewer had been persuaded that the near destruction of value of the breweries warranted a finding that compensation was due, in L'Hote's case he saw the effects of the statute as merely inflicting a "pecuniary injury." As he put it: "The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character."[25] For authority, he cited *Fertilizing Company v. Hyde Park*, and, somewhat ironically, *Mugler v. Kansas*. Although

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them to operate without a profit would be tantamount, he argued, to taking the property of their investors without compensation.

24. 177 U.S. at 597.

25. *Id*. at 598.

Brewer admitted that those cases had involved injury to those who had committed prohibited acts (i.e., operating a brewery or fertilizer plant in violation of law), whereas L'Hote had done nothing inappropriate, he rejected L'Hote's argument that the state was obligated to compensate "innocent" parties who suffered losses as a result of a valid exercise of the police power. He then quoted the same passage from *Dillon on Municipal Corporations* relied upon by the Louisiana Supreme Court to the effect that property owners who suffered injuries from a valid exercise of the police power were compensated by their right to share in the general benefits, "which the regulations are intended and calculated to secure."[26]

Finally, Brewer emphasized the speculative nature of L'Hote's injury. As he put it, the law in question "subjected that [L'Hote's] property to no burden, it cast no duty or restraint upon it, and only in an indirect way can it be said that its pecuniary value was affected by this ordinance."[27] Moreover, Brewer noted, not only were the damages indirect, they were uncertain. There was no assurance that any prostitutes would move into L'Hote's neighborhood, and even if they did, L'Hote could force them to move by bringing an action for private nuisance.

Brewer's *L'Hote* opinion established the framework through which the Supreme Court would decide land use cases for the next two decades. The central question was whether or not the state or its municipality had engaged in a legitimate exercise of the police power. So long as the state was acting on behalf of the public's health and safety and the ordinance in question seemed reasonably directed toward protecting those interests, an injured property owner had no grounds for arguing either that the statute should be invalidated or that she was entitled to compensation.

B. Banning Harmful Uses

In 1904 the Supreme Court decided two cases involving municipal ordinances prohibiting the operation of more conventional types of business enterprises in designated districts. In one it found the

26. *See supra* note 10.
27. 177 U.S. at 600.

challenged ordinance to be a legitimate exercise of the police power, while in the other it concluded that under the facts presented the police power rationale was insincere, and the ordinance in question was therefore illegitimate.

On April 6, 1896 the city of St. Louis enacted an ordinance which prohibited the establishment of any "dairy or cow stable" within the city limits "without having first obtained permission to do so from the municipal assembly by proper ordinance."[28] Violators were guilty of a misdemeanor and subject to a fine of one hundred to five hundred dollars. The ordinance was enacted pursuant to a state statute authorizing the city to "prohibit the erection of . . . cow stables and dairies . . . within prescribed limits, and to remove and regulate the same."[29] Dairies and stables in operation prior to the date of the ordinance were exempted from the permission requirement.

At the time of the ordinance's adoption, Fischer operated a dairy and stable at 6305 Bulwer Avenue in St. Louis. Elsewhere in the city, a different proprietor operated a similar business at 7208 and 7210 North Broadway. In March 1898 the dairy on North Broadway was closed, and a dwelling on the premises was occupied by a family for residence purposes only. Sometime thereafter Fischer acquired the rights to the property on North Broadway, and in September 1898 he moved thirty cows from the Bulwer Avenue site to the stable at 7208-10 North Broadway and opened a dairy at that location.

On November 16, 1898 Fischer was charged in Police Court with violating the dairy control ordinance. He defended on three grounds: first, the use of the North Broadway stables was not prohibited by the ordinance since they were in use as a dairy at the time the ordinance was adopted; second, the statutory authority to prohibit the erection of dairies "within prescribed limits" did not authorize their prohibition from the entire city; and third, the ordinance violated the Fourteenth Amendment.[30] Fischer was convicted, and the Missouri Supreme Court upheld his conviction in spite of his lawyer's assertion, "[i]f such an ordinance as the one in question be upheld, than all our constitutional provisions for the protection of property

28. *Id.* at 659.
29. *Id.*
30. *Id.* at 655, 661-62, 665.

rights are meaningless and worthless."[31]

In his argument before the United States Supreme Court, Fischer did not question the right of a community to restrict the location of dairies. Instead, he argued that the ordinance denied him the equal protection of the laws since it allowed some individuals to continue to operate dairies in the city while denying the right to others. Furthermore, he insisted that the ordinance was deficient on due process grounds because the city assembly had reserved for itself the authority to decide who could operate and who could not and because the statute delegated a judicial power—the authority to determine what constituted a nuisance to—a legislative body.[32]

In a very brief opinion, Justice Henry Brown, writing for a unanimous court, dismissed Fischer's claims. "The power of the legislature to authorize municipalities," Brown wrote, "to regulate and suppress all such places or occupations as in its judgment are likely to be injurious to the health of its inhabitants or to disturb people living in the immediate neighborhood by loud noises or offensive odors, is so clearly within the police power as to be no longer open to question."[33] Although Brown acknowledged that some state courts had questioned the constitutional legitimacy of vesting a dispensing power with individual officials, he insisted that the city assembly's retention of the power to permit the keeping of cattle within city boundaries did not make the ordinance constitutionally suspect. As Brown noted, there were many reasons why a licensing authority might permit one dairy and not another—the size of the two operations, their proposed locations, or the reputations of their operators for "good order and cleanliness."[34] There was no problem with granting a license to one party and not another so long as the discrimination was made in the public interest. Brown did acknowledge that there might be situations where the power to issue permits was abused and where licenses could be issued or denied for reasons having nothing to do with the merits of the application. If such conditions were present (as in *Yick Wo*), then the Court could

31. Fischer v. City of St. Louis, 167 Mo. 657, 656 (1902).
32. Fischer v. City of St. Louis, 194 U.S. 361, 370-72 (1904).
33. *Id.* at 370.
34. *Id.* at 371.

properly invalidate the action.

Later that year, the Court heard what appeared to be just such a case. In August 1901 the city council of Los Angeles adopted an ordinance requiring that all gasworks in the city be operated within a specified district. The following month Caroline W. Dobbins purchased a tract of land within the designated area, and on November 22 the Los Angeles Board of Fire Commissioners granted her a permit to erect a gasworks on the newly purchased site. Dobbins' agents, the Valley Gas and Fuel Company, immediately began construction.[35]

However, three days after construction began on Dobbins' gasworks, the Los Angeles City Council amended its gasworks ordinance so that Dobbins site was no longer within the district in which gasworks were permitted. At the time of the amendment, the foundations for Dobbins proposed gasworks had been substantially completed at a cost in excess of twenty-five hundred dollars.[36]

Dobbins' agents apparently continued to build in spite of the amended ordinance, and in late February 1902, the city began arresting workers engaged in building the Dobbins' gasworks. In an attempt to remove any doubts about the legitimacy of the earlier amendment to the gasworks act, the City Council on March 3d enacted a completely new gasworks ordinance, which also placed the Dobbins site outside of the permitted area.[37]

Dobbins then filed a bill of complaint in the Superior Court of Los Angeles County asking that the city be enjoined from enforcing the revised gasworks ordinance against her and her employees. In her complaint she alleged that the area in which she had begun construction was an industrial area suitable for the construction of gasworks and that her proposed structure was to be built on a concrete foundation with a superstructure of non-combustible materials, which as such posed no special danger. She also alleged that the action of the city council had been taken at the behest of the

35. Dobbins v. City of Los Angeles, 139 Cal. 179, 181-84 (1903).
36. *Id.*
37. *Id.* at 182.

Los Angeles Lighting Company, which was the operator of the only gasworks in the city.[38]

The city demurred, and the Superior Court dismissed the complaint, apparently on the grounds that an ordinance regulating the location of the gasworks was clearly within the police powers of the city and therefore subject to no further review. Dobbins appealed to the California Supreme Court, but the lower court dismissal was upheld.[39] On appeal, the court held that the regulation of gasworks was clearly within in the power of the municipality and, citing Chief Justice Morrison Waite's observation in *Munn v. Illinois* that the reasonableness of a particular exercise of the police power was a legislative, not a judicial, matter. Thus, the Court announced that an examination of legislative motive for the revision of the Los Angeles gasworks ordinance was not a proper function for the judiciary.[40]

In *Dobbins v. Los Angeles*, Justice William Day revealed just how far the Supreme Court had moved since *Munn* when it came to the review of legislative motive.[41] While Day acknowledged for a unanimous court that the regulation of the location of gasworks was unquestionably appropriate, he denied that the City Council's decision as to where to locate the gasworks was non-reviewable. Citing a variety of more recent United States Supreme Court decisions including *Lawton v. Steele*,[42] *Holden v. Hardy*,[43] and *Connolly v. Union Sewer Pipe Co.*,[44] Day asserted that such review was entirely proper. As he put it:

> [I]t is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances . . . are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with

38. Dobbins v. Los Angeles, 195 U.S. 223, 226-27 (1904).
39. Dobbins v. Los Angeles, 139 Cal. 179 (1902).
40. 139 Cal. at 183, 186.
41. 195 U.S. 223 (1904).
42. 152 U.S. 133 (1899).
43. 169 U.S. 366 (1898).
44. 184 U.S. 540 (1902).

> the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.[45]

Once the Court acknowledged that this type of review was appropriate, the result was fairly obvious. Since the city had demurred to Dobbins' bill of complaint, the Court was obligated to accept the validity of all of her statements of fact. Dobbins had asserted that her proposed gasworks were safe, that they were perfectly suited for their location, that the change is the ordinance was not necessary to protect the public interest, and that the city council had acted to protect the monopoly status of another private gas company. If these assertions were correct, a court could hardly conclude that the challenged ordinance was a legitimate exercise of the police power.

It would be a mistake, however, to read too much into Justice Day's opinion, since the Court was not required to say that the city had in fact acted in an unconstitutional fashion or that Dobbins had been deprived of her property without due process of law. All the Court held was that the original trial court should have overruled the city's demurrer and heard evidence on the validity of Dobbins claims. Moreover, Day was careful to explain that the court was not holding that Los Angeles could not change the boundary lines for its gasworks district. He also acknowledged that notwithstanding the building permit, the city could subsequently prohibit the maintenance of gasworks in a district even once construction was completed if the structure now represented a menace to the public health and safety. "In other words," Day wrote, "the right to exercise the police power is a continuing one, and a business lawful to-day may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good."[46] Citing *Fertilizing Co. v. Hyde Park* as authority, Day gave no indication that compensation would be required in such a situation.[47]

Consequently, although *Dobbins* indicated the Court's belief that

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45. 195 U.S. at 236.

46. 195 U.S. at 238.

47. Day also cited *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 672 (1885), which had reiterated the general principles of Fertilizing Co.

truly bad-faith exercises of the police power were prohibited, *L'Hote*, *Fischer*, and *Dobbins* together suggested that the Court remained favorably disposed to restrictions on the use of land. *L'Hote* had apparently ruled out any possibility of relief where the damage was *only* pecuniary. *Fischer* allowed municipalities to ban certain types of lawful businesses altogether (as opposed to restricting them to districts within the city) and accepted the principal of discretionary permits. *Dobbins* suggested that when the public interest required it, lawful businesses could be forced to relocate without a right to compensation. Of course, the Court insisted that it had the right to scrutinize the situation to make sure that the police power was not being improperly invoked, but there was little reason to believe in 1904 that it was inclined to use its power to impede the development of zoning and other forms of land use control.

C. New Uses for the Police Power

Limiting agricultural usages in urban areas (*Fischer*) and restricting the location of potentially dangerous enterprises (*Dobbins*) were hardly controversial usages of the police power. However in 1909 and 1910, the Fuller Court heard two cases involving new and more innovative applications. The first involved restrictions on the height of buildings and the second, a county-wide moratorium on human burial.

In 1906 Francis C. Welch, acting in his capacity as a trustee, applied to the building inspector of the City of Boston for permission to construct a building 124.5 feet in height on a lot on the corner of Arlington and Marlborough Streets in the Back Bay section of Boston. The request was refused on the grounds that the lot in question was located in a district in which the height of any new building was limited by ordinance to no more than one hundred feet.[48]

The restrictions involved were the product of a 1904 act of the Massachusetts legislature that created a "Commission on Height of Buildings in the City of Boston" and divided the city into two districts labeled A and B. District A included those parts of the city in

48. Welch v. Swasey, 193 Mass. 364, 366 (1907).

which a majority of buildings were currently used for business or commercial purposes, while District B was made up of areas where the predominant use was residential. Under the original ordinance new buildings were limited to one hundred twenty-five feet in height in District A and to eighty feet in District B. A revision of the statute the following year permitted the Commission to authorize buildings up to one hundred feet in certain parts of District B and up to one hundred twenty-five feet for lots in District B within twenty-five feet of the boundary between the two sections, provided that the owner also owned land in District A.[49]

The 1904 and 1905 acts represented a new approach to the control of building heights in Boston. In 1891 a Massachusetts state law applicable to every city in the state had limited the heights of new buildings to one hundred twenty-five feet above street grade.[50] In 1898 the state legislature further limited the height of buildings around Boston's Copley Square to ninety feet and the following year imposed a seventy foot cap on new buildings on Beacon Hill in the vicinity of the State House. Both of these statutes had characterized the height restrictions as takings of property under the state's power of eminent domain and had provided for compensation. A series of decisions—including one by the United States Supreme Court—had upheld the validity of this use of the eminent domain power and of the compensation provisions provided by the statutes.[51] However, in 1904 the Massachusetts legislature embraced the position that the height of buildings could be restricted under the police power without incurring an obligation to compensate.

Welch's lot was clearly more than twenty-five feet from the line separating the two districts and thus did not qualify for an exception. When his request for a permit was denied, he appealed to the Board

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49. *Id.* at 367-69.

50. An 1892 act specifically imposed the same limitation on Boston.

51. Williams v. Parker, 188 U.S. 491 (1903); Attorney General v. Williams, 178 Mass. 330 (1901); Parker v. Commonwealth, 178 Mass. 199 (1901); Attorney General v. Williams, 174 Mass. 476 (1899). In the latter case, the Court, in an opinion by Brewer, found the compensation scheme provided by the state to satisfy the requirements of the Fourteenth Amendment. Brewer also stated that the Court at that time took no position on the argument that the height restrictions could be justified on the basis of the police power alone.

of Appeal that oversaw the decisions of the building commissioner.[52] When the Board upheld the original decision, Welch petitioned the Massachusetts Supreme Judicial Court for a writ of mandamus compelling the Board to issue him a building permit. Welch conceded that his proposed building was higher than the current law permitted, but he maintained that the statutes upon which the refusal was based were void. The Supreme Judicial Court disagreed and ruled that the statutes at question were constitutional since they were enacted on behalf of public health and safety.[53]

Welch argued before the Supreme Court that the height restrictions could not be justified as a legitimate exercise of the police power. The appearance of buildings taller than one hundred twenty-five feet in cities other than Boston with no ill effects was proof, he argued, that the public safety did not require such restrictions as those adopted by the Massachusetts acts. Moreover, he claimed that the purpose behind the acts in question was purely aesthetic, i.e., they had been adopted only to preserve architectural symmetry and regular sky-lines. (Massachusetts' highest court had asserted that the police power could not be used for exclusively aesthetic purposes as recently as 1903.[54]) Since they reduced the value of the affected parcels but were not designed to protect the public health and safety the acts were, therefore, arbitrary and unreasonable. In addition, Welch insisted that the difference between one hundred twenty-five feet and one hundred or eighty feet was wholly arbitrary so that even if the subject of the statutes was a legitimate object of the police power, the statutes were still unreasonable because they imposed a great deal of economic loss on individuals for a minimal public benefit.[55] In reply, the lawyers for the city insisted that the Supreme Court should defer to the conclusions of the Massachusetts legislature and Supreme Judicial Court that the statutes represented a reasonable use of the police power and that they were not based solely on aesthetic considerations but on issues of public safety as well.[56]

52. 193 Mass., at 366.
53. Welch v. Swasey, 193 Mass. 364 (1907).
54. Commonwealth v. Boston Advertising Company, 188 Mass. 348 (1905).
55. *Id.* at 98, 100.
56. *Id.* at 101-02.

The decision in *Welch v. Swasey*[57] was written by Justice Rufus Peckham, the author of the majority opinion in *Lochner v. New York*[58] and a staunch defender of property rights.[59] However, Peckham had no difficulty upholding the Massachusetts statute. Since Welch had conceded that the state had the power to place general limits on the heights of buildings, the only issue, according to Peckham writing for a unanimous court, was whether or not the height restrictions in District B bore some reasonable relationship to the police power.[60]

True to the principles of substantive due process, Peckham began by noting that the state supreme court decision on the reasonableness of the statute was not binding on the United States Supreme Court. Nevertheless, he explained, that decision was entitled to great deference, and since the Massachusetts court had found the statute to be based on concern for the safety of the citizens residents, the Supreme Court could hardly say that the limitation here was "so unreasonable that it deprives the owner of the property of its profitable uses without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights."[61] In fact, Peckham indicated that he agreed the discrimination was reasonable and that the acts in question were justified by the police power.

Laurel Hill Cemetery v. City and County of San Francisco, which reached the Court the following year, proved no more difficult to resolve.[62] The appellant was the operator of a large cemetery that opened in 1854 in a rural area and had been incorporated in 1867. Over time the San Francisco area developed around it and by 1900, over forty thousand lots had been sold. On March 26, 1900 local authorities enacted the San Francisco Burial Ordinance which dictated that after August 1, 1901 no further burials would be permitted within the City and County of San Francisco. An earlier act

57. 214 U.S. 91 (1909).
58. 198 U.S. 45 (1905).
59. *See* William Duker, *Mr. Justice Rufus W. Peckham and the Case of Ex Parte* Young: *Lochnerizing* Munn v. Illinois, 1980 BRIGHAM YOUNG U.L. REV. 539.
60. *Id.*
61. 214 U.S. at 107.
62. 216 U.S. 358 (1910).

had prohibited burials in the city or county except in existing cemeteries or in those approved by the San Francisco County Board of Supervisors, but this was the first time that burials had been banned throughout the county.[63] The ordinance was based on the police power, and it stated specifically in its text that the burial of the dead within the jurisdiction was "dangerous to life and detrimental to the public health." At the time the ordinance took effect, the appellant still owned unsold lots worth seventy-five thousand dollars.[64]

When the Laurel Hill Cemetery sought to restrain the enforcement of the ordinance, its request was denied by the trial court, and the denial was subsequently upheld on appeal.[65] Although the appellant's case was rooted in the claim that it had been deprived of property without due process of law, its argument did not focus upon the impact of the ordinance on the value of the unsold lots. There was no claim that the ordinance left the unsold lots without value, since much of the land could presumably be used for other purposes. Instead, Laurel Hill sought to convince the court that the premise upon which the ordinance was based—that the burial of the dead posed a health threat to the living—was so contrary to the scientific evidence that the act was an unreasonable exercise of the police power.[66]

For the first time in a land use case, the opinion for the Supreme Court was written by Justice Oliver Wendell Holmes. Holmes had been appointed to the Court in 1902 and had concurred in *Fischer*, *Dobbins*, and *Welch v. Swasey*. In *Laurel Hill* he upheld the refusal to issue an injunction for a unanimous court. In his opinion Holmes began by emphasizing the importance of deferring to the judgment of local authorities on questions of reasonableness in a manner that was reminiscent of his famous *Lochner* dissent. In his opinion he took a mild swipe at *Dobbins* (in which he had concurred) and *Lochner*, suggesting that in those cases the Court had incautiously second guessed state officials. He then pointed out that Justice Peckham, the

63. The constitutionality of the earlier ordinance had been upheld by the California Supreme Court in *Odd Fellows' Assn. v. San Francisco*, 140 Cal. 226 (1903).

64. 216 U.S. at 363.

65. Laurel Hill Cemetery v. San Francisco, 152 Cal. 464 (1907).

66. 216 U.S. at 359-60.

author of the majority opinion in *Lochner* but now retired, had counselled just the sort of deference in *Welch v. Swasey* that he (Holmes) now advocated.[67]

However, having made the case for deferring to the California Supreme Court's determination that the ordinance at issue was a reasonable exercise of the police power, Holmes suggested that it was the long tradition of the regulation of burial and the prohibition of it in certain locales that established the reasonableness of this type of regulation. In the opinion's final sentence—"The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own State uphold"[68]—Holmes acknowledged that there were situations where deference might be inappropriate. Although the tone of Holmes' opinion made it clear that he did not expect such cases to be a common occurrence, even he acknowledged that a police power regulation that was contrary to "an established consensus of civilized opinion" could be invalidated.[69]

II. THE WHITE COURT (1910-21)

By 1911 the Supreme Court had undergone a dramatic change in personnel. Fuller, Brown, Peckham, Brewer, and Harlan, the mainstays of the Fuller Court, had all left the bench, and only Justices McKenna and White (named chief justice in 1910) remained from the Court that had decided *L'Hote*. Nevertheless, the land use decisions of the second decade of the twentieth century saw no significant departures from the standards applied in the first. While the White Court did strike down ordinances restricting the use of land in two cases, both involved atypical circumstances. In *Eubank v. Richmond* (discussed below), the issue was not the legitimacy of the restriction but the fact that regulatory authority had been delegated to private citizens. [70] In *Buchanan v. Warley*, the land use restriction did not

67. *Id.* at 365.
68. 216 U.S. at 366.
69. *Id.* at 366.
70. 226 U.S. 137 (1912).

pertain to the actual usage of the land but was a residential segregation scheme, which restricted the sale of land on the basis of race.[71] In seven more conventional cases, the Court had little difficulty upholding the restrictions at issue.

A. The Costs of Retroactive Application

On three occasions between 1912 and 1915, the White Court was presented with challenges to land use regulations that prohibited previously lawful uses and imposed substantial economic losses on the private parties involved. Without denying the magnitude of the injuries suffered, the Court found that no constitutional violation had occurred in any of the cases.

In *Murphy v. California*, the appellant, J. L. Murphy, was the operator of a billiard parlor in South Pasadena, California.[72] At a time when no restrictions were in place regulating such establishments Murphy had rented space in a building in the town's commercial district and had outfitted it with pool tables and other appropriate equipment. Then at the beginning of January 1908, the municipality adopted an ordinance that "prohibited any person from keeping or maintaining any hall or room in which billiard or pool tables were kept for hire or public use."[73] Murphy refused to close and was arrested on January 18. His petition for a writ of habeas corpus was denied by both the California Court of Appeals and the California Supreme Court.[74]

Murphy was then tried in the Recorder's Court (a police court), found guilty, and ordered to pay a fine. Unwilling to give in, he appealed his conviction to the County Superior Court where it was upheld.[75] Under California law there was no right of appeal for a misdemeanor conviction to either the Court of Appeals or the California Supreme Court, so Murphy appealed directly to the United States Supreme Court. For his appeal, Murphy retained noted Chicago attorneys Alfred Austrian and Levy Mayer.

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71. 245 U.S. 60 (1917).
72. 225 U.S. 623 (1912).
73. *Id.* at 441.
74. *Ex parte* Murphy, 8 Cal. App. 440 (1908).
75. 225 U.S. at 628.

Murphy's investment in high priced legal counsel did not achieve the desired result. Writing for a unanimous court, Justice Joseph Lamar dismissed the claim that the ordinance unconstitutionally deprived Murphy of the right to follow a lawful occupation that was not a nuisance per se. While Lamar admitted that the Fourteenth Amendment protected the right of a citizen to "engage in any lawful business," the protection, he explained, did not prevent states from regulating lawful occupations, "which, because of their nature or location, may prove injurious or offensive to the public."[76] Certainly Lamar had no difficulty seeing Murphy's "occupation" as falling in the latter category. As he put it, "[t]hat the keeping of a billiard hall has a harmful tendency is a fact requiring no proof."[77] As for the pecuniary damages Murphy incurred (or would incur) by the closing of his business, Lamar insisted that such losses were entirely foreseeable since he was engaged in an occupation that "he was bound to know could lawfully be regulated out of existence."[78] The Court also dismissed Murphy's claim that he was denied the equal protection of the laws because the ordinance contained an exception for large hotel which were permitted to maintain a billiard room for the exclusive use of their guests.

Reinman v. City of Little Rock also involved a municipal ordinance that required the closing of a previously lawful business.[79] This time the ordinance in question prohibited the operation of livery stables in the main commercial district of Little Rock. Reinman had operated a livery stable in that district for many years and rather than comply with the ordinance, he filed a bill of complaint in the Pulaski County Chancery Court requesting that the city be enjoined from enforcing the new restrictions. In support of his request, Reinman did not attack the reasonableness of the regulation of stables in urban areas (which was unquestionablely permitted) but instead focused upon the particular unfairness of the ordinance as applied to his situation. First, he argued that he had established his business at the encouragement of the city, and to operate it more effectively he had

76. 225 U.S. at 628.
77. *Id*. at 629.
78. *Id.* at 630.
79. 237 U.S. 171 (1915).

constructed brick stables, which could neither be relocated nor reasonably used for any other purpose.[80] Then, echoing *Dobbins*, he claimed that passage of the ordinance had been secured by certain named individuals (not made defendants) who desired to purchase his property at a low price and use it for other purposes.[81]

Reinman was able to convince the local chancery court judge to issue a permanent restraining order, but the order was vacated by the Supreme Court of Arkansas on February 24, 1913.[82] His appeal to the United States Supreme Court failed to alter the result. "So long as the regulation in question," Justice Pitney wrote for the Court:

> is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment.[83]

Pitney admitted that if it could be shown that the ordinance in question failed to confer a public benefit while imposing a substantial economic harm on Reinman, then the ordinance would be deemed unreasonable and an arbitrary exercise of the police power. Here, however, the Arkansas Supreme Court had determined that the ordinance addressed a legitimate public need and that Reinman had failed to establish his claim that it had been improperly motivated. Pitney saw no reason to question that court's judgment.

The final and the best known of the retroactive application cases was *Hadacheck v. Sebastian*,[84] which like *Murphy*, *Faith Hill Cemetery*, and *Dobbins*, arose in California. In 1902 J. C. Hadacheck purchased an eight acre tract of land outside the city of Los Angeles, which contained substantial amounts of clay. Hadacheck installed kilns and other brick-making machinery on the tract and began

80. *Id.* at 173.
81. *Id.*
82. City of Little Rock v. Reinman-Wolfart Auto. Livery Co., 107 Ark. 174 (1913).
83. 237 U.S. at 177.
84. 239 U.S. 394 (1915).

producing bricks. When the tract was subsequently incorporated into the city of Los Angeles, his business continued undeterred. However, in April 1910 the city adopted a "Brick Yard Ordinance," which prohibited the manufacture of bricks in a three square mile area, including Hadacheck's property.[85]

Hadacheck refused to comply with the ordinance and was convicted of a misdemeanor. He was sentenced to time in jail, and while in the custody, he filed a petition for a writ of habeas corpus with the California Supreme Court. In his petition, Hadacheck asserted that his land was worth eight hundred thousand dollars as a brickyard, but only sixty thousand dollars for some other purpose, and that the deep excavations done to remove the clay made it unlikely that the land would be used for any other purposes. The writ was issued, but after receiving the city's answer, the higher court determined that the ordinance was a valid exercise of the police power and remanded the defendant to the Los Angeles County Sheriff.[86] Hadacheck then appealed to the United States Supreme Court, but while waiting for his case to be heard, he filed a separate action in Los Angeles County Superior Court seeking an injunction restraining the city from implementing the Brick Yard Ordinance. In this second case Hadacheck presented additional evidence ostensively demonstrating that the ordinance was unreasonable and "ill-digested." The request was refused, and in March 1915, the Supreme Court of California again upheld the ordinance.[87]

Seven months later the United States Supreme Court heard his appeal from the denial of the writ of habeas corpus. Predictably, Hadacheck argued that the ordinance was unreasonable and that its enforcement would destroy his entire investment in his property. Writing for the Court, Justice Joseph McKenna reiterated the standard enunciated by Justice Pitney in *Reinman*. If the ordinance could be shown to be arbitrary, it would be invalid. However, the arbitrariness of the ordinance must be apparent, and in the present case, McKenna noted, Hadacheck's claim of arbitrariness had been rebutted by the city and rejected by the courts of California. The fact

85. *Ex parte* Hadacheck, 165 Cal. 416, 416 (1913)
86. *Ex parte* Hadacheck, 165 Cal. 416 (1913).
87. Hadacheck v. Alexander, 169 Cal. 616 (1915).

that Hadacheck suffered substantial damage—by his account, the value of his property was reduced by 92.5%—was unfortunate but not grounds for attacking the legitimacy of the police power. As McKenna explained, "It [the police power] may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes *any limitation* upon it when not exerted arbitrarily."[88]

McKenna did suggest that had the ordinance banned the removal of clay from Hadacheck's property (as opposed to the manufacture of bricks on it) it *might* be deemed arbitrary and unenforceable. As McKenna noted, the Supreme Court of California had reached such a conclusion a decade earlier in a case involving a ban on removing rock and stone from quarries within San Francisco County where the court found no showing that such an extreme solution was necessary.[89] However, McKenna was quick to point out that the Brick Yard Ordinance permitted Hadacheck to remove clay from his property and use it to make bricks at another location. While Hadacheck denied this could be done, he was not claiming physical impossibility but only that he did not believe that it could done profitably, which was insufficient grounds for challenging an otherwise valid exercise of the police power. Whether an absolute ban on removal might be unconstitutional was, according to McKenna, a question for another time.

B. Administrative Discretion and the Police Power

In *Fischer v. St. Louis*, Fischer tried to argue that the power granted to the city government to issue (or deny) licenses for stables on a case by case basis offended the Fourteenth Amendment. Although Fischer's argument failed, during the 1910s the White Court heard a number of challenges to police power regulations on similar grounds. These cases reflected a growing trend toward flexible land use controls as well as an awareness that challenges to the reasonableness of regulation per se were unlikely to succeed.

In *Eubank v. The City of Richmond* (1912), this approach

88. 239 U.S. at 410 (emphasis added).
89. *In re* Kelso, 147 Cal. 609 (1905).

appeared to work as the Supreme Court invalidated a land use ordinance for the first time.[90] At issue in *Eubank* was a Richmond, Virginia ordinance that allowed the owners of two-thirds of the land abutting any street to request the city Committee on Streets to establish a building line on the side of the square on which their property fronted. If such a request were made in writing, the committee was required to lay out a building line at least five but not more than thirty feet from the street. Once the line was established, no new building permits were to be issued for that side of the block except for structures that complied with the building line.

Eubank was the owner of a lot on Grace Street in Richmond located between 28th and 29th Streets. On December 19, 1908 he received permission to build a detached brick building on the site. However, on January 9, 1909 the owners of two-thirds of the lots on Grace Street between 28th and 29th petitioned the Committee on Streets for a building line. The committee responded by establishing a building line fourteen feet from the street. Eubank, who had purchased material for his building but had yet to begin construction, was then notified by the building inspector that his house would have to comply with the new line. As planned, Eubank's house was set back fourteen feet from the street except for an "octagon bay window," which protruded three feet beyond the new line. Eubank appealed to the Board of Pubic Safety, which upheld the order of the building inspector.[91]

Eubank then ignored the directive from the building inspector and constructed his house as originally planned. He was in turn charged with violating the city building line ordinance and fined twenty-five dollars in the city police court. Although he had received the minimum penalty under the ordinance—he could have been fined as much as five hundred dollars—Eubank appealed his conviction to the Hustings Court of the City of Richmond and when that court upheld his conviction, to the Virginia Supreme Court. In a very brief opinion, which primarily relied upon *Welch v. Swasey*, that Virginia court sustained the ordinance as a legitimate exercise of the state police power and found that the delegation of authority to the

90. 226 U.S. 137 (1912).
91. 226 U.S. 137, 142 (1912).

Committee on Streets was proper.[92] From that decision, Eubank appealed to the United States Supreme Court.

For the first time in a land use case, the Supreme Court found the statute to be an unreasonable exercise of the police power and ordered Eubank's conviction reversed. However, the decision in no way suggested that states and municipalities lacked the power to establish building lines. In an opinion written by Justice McKenna, the Court acknowledged that the police power extended to building lines, but it found that the delegation of the authority to determine when lines were to be established to private citizens could not be reconciled with concern for the public health and safety. As McKenna noted, such a system could result in inconsistent lines from one block to the next, and it gave individuals who owned two-thirds of the land on a particular block the power to advance their own selfish interests at the public's expense. Although the present case did not present evidence of such practices, McKenna wrote, once again for a unanimous court: "It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed."[93]

Plymouth Coal Company v. Pennsylvania, concerned the alleged failure of the state to provide sufficient guidelines for a procedure in which a state official working with representatives of the affected private parties was given the authority to impose substantial restrictions on the use of the subsurface.[94] The regulation at issue in this case was not a municipal ordinance but a twenty-year old state statute, which required owners of adjoining coal mines to leave boundary pillars of coal sufficient to protect workers in the other mine should one mine be abandoned and fill up with water.

The Plymouth Coal Company leased land containing an anthracite coal mine in Luzerne County, Pennsylvania. Adjacent to their tract was another coal mine operated by the Lehigh & Wilkes-Barre Coal Company. Approximately three hundred miners worked the Plymouth mine while Wilkes-Barre employed more than seven hundred. On August 31, 1909 District Mine Inspector D. T. Davis

92. Eubank v. City of Richmond, 110 Va. 749 (1910).
93. 226 U.S. at 1-42.
94. 232 U.S. 531 (1914).

wrote to John C. Haddock, president of Plymouth Coal, requesting that his engineer meet with him (Davis) and the engineer for Lehigh and Wilkes-Barre Company to determine the "thickness of barrier pillar to be left unmined between the properties."[95] Haddock refused to agree to such a meeting, and in October, Davis filed a bill of complaint in the Court of Common Pleas of Luzerne County requesting that the Plymouth Coal Company be barred from operating its mine without leaving a proper barrier pillar. The Company defended on the grounds that the 1891 act was "confiscatory, unconstitutional, and void."[96]

The Court of Common Pleas issued the requested injunction prohibiting Plymouth from operating its mine unless it left a barrier pillar at least seventy feet wide. (The injunction did provide that the size of the pillar could be reduced if a subsequent examination complying with the terms of the statute determined that a smaller pillar was appropriate.) On appeal to the Pennsylvania Supreme Court, Plymouth Coal unsuccessfully attacked the Anthracite Mining Act as a taking of property without compensation under the Pennsylvania constitution as well as a violation of the Fourteenth Amendment.[97] It also estimated that the seventy foot wide pillar amounted to 734,147 tons of coal, which could be mined at a profit of about three hundred thousand dollars.

The coal company then appealed to the United States Supreme Court, which heard the case in January 1914. Lawyers for Plymouth Coal, apparently feeling that their chances of success before the Supreme Court were very limited, decided to reduce the issues on appeal to a single question, specifically whether the method of fixing the width of the barrier pillar was "so crude, uncertain and unjust" as to amount to a deprivation of property without due process of law. As the Supreme Court noted in an opinion by Mahlon Pitney, this particular issue had not been raised in the state court proceedings. However, rather than dismiss the case on this basis, Pitney went ahead and decided the cases on its merits and ruled for the state of Pennsylvania. While admitting that the statute was in some regards

95. *Id.*
96. *Id.* at 536.
97. *Id.*

vague as to the method to be deployed when determining the size of the support pillar, Pitney brushed aside the appellant's suggestion that this made the statute constitutionally defective. Since it was possible to read the statute in a way that resolved the ambiguities highlighted by the appellant, he saw no reason why the Supreme Court should not accept that interpretation.[98]

In 1916 the Court had the opportunity to revisit the issue of delegating discretion to private parties. In *Thomas Cusack Company v. City of Chicago* it heard a challenge to a 1910 Chicago ordinance that prohibited the erection of billboards on blocks in which one-half or more of the buildings were used for residential purposes.[99] In spite of the prohibition, billboards could be erected but only if the owner of the billboard obtained the written permission of majority owners the lots on the block on which the proposed board was to be erected.[100]

In 1914 the Thomas Cusack Company, an outdoor advertising company, attempted to have the ordinance invalidated on the grounds that it improperly delegated decision-making authority to private individuals, *à la Eubank*. While Cusack was successful in getting the ordinance enjoined by the Superior Court of Cook County, the Illinois Supreme Court dissolved the injunction. In an opinion which prompted two dissents and which failed to mention *Eubank v. Richmond*, the Illinois court found that the city of Chicago had the authority to adopt such an ordinance and that the ordinance was not unreasonable or oppressive.[101] Cusack then appealed to the United States Supreme Court.

In a very brief opinion written by the Court's newest member, Justice John Clarke, Cusack's claim was dismissed as "palpably frivolous."[102] Clarke asserted that the separate regulation of billboards was clearly within the bounds of the police power and that the delegation of the authority to decide whether or not to permit billboards to the people themselves posed no constitutional problem.

98. *Id.* at 547.
99. 242 U.S. 526 (1917).
100. *See* 242 U.S. at 527 (for text of the ordinance).
101. Cusack v. Chicago, 267 Ill. 344 (1914).
102. 242 U.S. at 530.

As for appellant's argument that *Eubank v. Richmond* ought to be controlling, Clarke insisted that the two cases could be clearly distinguished, although the basis of his distinction—that the ordinance in *Eubank* permitted lot owners to impose a restriction on other owners while the ordinance in this case permitted lot owners to remove a restriction—seemed almost disingenuous. Most likely, the Court had realized that its decision in *Eubank* had been incorrect and that the delegation of this sort of authority to private citizens could be a beneficial land use device. Only McKenna, the author of *Eubank* dissented, and he did so without opinion.[103]

C. Buchanan v. Warley

Buchanan v. Warley was not really a land use case since the ordinance in question focused on who could own the land rather than how it could be used.[104] The city council of Louisville had made it illegal to sell residential property to someone who was not a member of the current racial majority of the city block in which the residence was located. Over time, black homeowners in white majority blocks would be forced to sell their homes to whites and vice versa, resulting in a socially engineered segregation in residence that paralleled the segregation in the public sphere mandated by the Jim Crow laws of the era. Ordinances like this were adopted in a number of southern cities, and they were always justified as legitimate exercises of the police power on the theory that they promoted the public peace and general welfare by preventing racial conflicts and preserving property values. The Louisville, Kentucky ordinance at issue in *Buchanan*, for example, was entitled: "An ordinance to prevent conflict and ill-feeling between the white and colored races of the City of Louisville."

Buchanan, an African-American, brought an action for specific performance to purchase a vacant city lot at the corner of 37th Street and Pflanz Avenue in Louisville. At the time of the contract, there were ten residences on this particular block, eight of which were occupied by caucasians. The contract for sale contained a provision

103. *Id.* at 69-70.
104. 245 U.S. 60 (1917)

that the buyer (Buchanan) was not obligated to purchase the property unless he had the right to use it as residence. Since the ordinance at issue, which had been adopted in 1914, clearly prohibited a black buyer from purchasing a house on this block, Buchanan's contract was enforceable only if the ordinance was invalid. Both the local court and the Court of Appeals of Kentucky (the state's highest court) found the ordinance to be a valid exercise of the police power.[105]

While the White Court is usually given high marks by historians for striking down the Louisville ordinance, it is usually faulted for doing so on the basis of private property rights rather than a constitutional protection against state mandated racial segregation. Whatever the merits of that argument, the Court's decision in *Buchanan* did not require a departure from the standards that it had articulated in previous cases. In *L'Hote* Justice Brewer had emphasized that the police power could not be used "to infringe private rights secured by the Constitution of the United States,"[106] and in *Buchanan v. Warley*, the Court for the first time found such an infringement. Reviewing the history of the post-Civil War Constitutional Amendments Justice William Day concluded: "The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."[107] Day went even further, however, and pointed out that the statute did not even satisfy its own stated objectives. If the goal was racial separation, that was not accomplished because the ordinance allowed black servants to work for white families, and it permitted whites and blacks to live next to each other if they occupied the corner houses on adjacent blocks. Furthermore, Day noted, prohibitions on the sale of property do not prevent the amalgamation of the races (presumably, that was done by the state anti-miscegenation statute) and undesirable white neighbors could do just as much to depreciate the value of property as undesirable black

105. Harris v. City of Louisville, 165 Ky. 559 (1915). At the Court of Appeals level, *Buchanan v. Warley* was treated as a companion case to Harris, which involved a criminal conviction for violating the statute.

106. 177 U.S. at 596.

107. 245 U.S. at 79.

neighbors. In other words, the ordinance in this case could not be upheld as a legitimate exercise of the police power.[108] All nine justices concurred in Day's opinion.

D. The Final Cases

Any suggestion that *Buchanan v. Warley* signalled a shift to more rigorous standards of review in land use cases was put to rest by two decisions handed down in 1919. Both involved municipal ordinances banning certain usages, and both were disposed of in extremely brief opinions by Justice Holmes.

Pierce Oil Corporation v. City of Hope involved a municipal ordinance of Hope, Arkansas (the birthplace of future President Bill Clinton), which prohibited the storage of more than sixty gallons of petroleum products in above-ground tanks within three hundred feet of any dwelling.[109] (Underground tanks were limited to six hundred gallons.) As its name implied, Pierce Oil was a petroleum distributor whose business was located along the railroad that ran through Hope. According to the record, Pierce had established its business at its current site at the city's request but the site was within three hundred feet of a dwelling. (In fact, all potential locations in the city for Pierce's tanks were within three hundred feet of dwellings.) The effect of the ordinance was to require Pierce to relocate outside of the city limits.

Pierce sought to enjoin the enforcement of the ordinance in the Hempstead (County) Chancery Court. The city demurred to the request, which was subsequently dismissed by the Chancery Court judge. A unanimous Arkansas Supreme Court affirmed the dismissal.[110] On appeal, Pierce, apparently relying upon *Dobbins*, maintained that the city's demurrer had been improperly granted. In its complaint Pierce asserted that because of the design of its tanks and the valves and pipes used to transfer products from railroad cars to the tanks, the storage of petroleum products posed no threat to the rest of the community. Moreover, it claimed that the ordinance imposed serious

108. *Id.* at 81-82.
109. 248 U.S. 498 (1919).
110. Pierce Oil Corp. v. City of Hope, 127 Ark. 38 (1917).

economic hardship on it since it would be required to locate its tanks outside of town at considerable expense and would, for all practical purposes, be left with a useless lease for its present site. Consequently, it maintained that the ordinance was "arbitrary, unnecessary, and unreasonable." Since the city had not contested any of these assertions, Pierce insisted, the chancery court had erred in dismissing the request for an injunction without a hearing.[111]

In rejecting this argument, the Arkansas Supreme Court took judicial notice of the fact that "disastrous explosions have occurred for which no satisfactory explanations have ever been offered. The unexpected happens."[112] Consequently, even if all of Pierce's claims could be verified, an ordinance like the one at issue would still be a valid exercise of the police power.

When the case reached the United States Supreme Court two years later, the matter was dismissed in a three paragraph opinion upholding the decision of the Arkansas Supreme Court.[113] Holmes emphasized that the fact that the plaintiff may have operated its plant in a safe manner in no way limited the ability of the state to regulate, or even ban, dangerous oils. As he put it, "[i]f it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be enough to invalidate it or to remove such an object from its grasp."[114] In other words, Pierce's only options were to seek out a location outside of the city limits or work to get the ordinance repealed.

The final case, *St. Louis Poster Advertising Company v. City of St. Louis* involved a 1905 city ordinance which required permits for all but the smallest billboards and imposed a large number of restrictions on the height, size, and placement of billboards.[115] In addition, it imposed a license fee of one dollar for every five linear feet of billboard. The appellant erected three billboards on its own property that failed to comply with the terms of the ordinance. In response, the

111. *Id.* at 407.
112. 191 S.W. at 407.
113. 248 U.S. 498.
114. 248 U.S. at 500.
115. 249 U.S. 269 (1919). This was actually two cases involving the same parties. One began in state court, the other in federal. Since both reached the Supreme Court docket during the same term, the two cases were consolidated and argued as a single case.

city threatened to tear down the structures unless they were brought into compliance with the ordinance.

The company filed requests for injunctions against the enforcement of the ordinance in both state and federal court, but both requests were dismissed upon demurrers.[116] Writing for the Court, Holmes this time dismissed the appellant's claims in two paragraphs. The reasonableness of billboard regulation had been resolved by *Cusack*, Holmes explained, and that consistent with its right to ban billboards altogether the city was free to impose a high tax on them. As with Pierce Oil, the advertising company's options were to relocate or else work to get the law changed through the legislative process.

III. EVALUATING THE LEGACY OF THE FULLER AND WHITE COURTS

In his argument before the Supreme Court in *Eubank v. Richmond*, Richmond lawyer H. R. Pollard complimented the court on its reasonable approach to land use regulation: "This court, in a larger sense than any other court of the land, has taken judicial cognizance of the everyday facts of modern complex, social and industrial life, and has responded thereto with less apparent reluctance than the courts of last resort of most of the States."[117] Although Pollard subsequently suffered the indignity of being the first lawyer to lose a land use case before the Supreme Court, he was correct that the Supreme Court had demonstrated a high degree of acceptance of state and municipal efforts to regulate the use of land.

Although the Court in this era viewed the determination of the reasonableness of a police power regulation as one of its responsibilities, it routinely upheld the legitimacy of local land use controls. In eleven of fourteen cases decided by the Fuller and White Courts, challenged regulations were upheld routinely and in only one case was there even a single dissenting vote.[118] Moreover, in two of the

116. St. Louis Poster Advertising Co. v. City of St. Louis, 195 S.W. 717 (1917). The federal case is apparently unreported.

117. 226 U.S. at 139.

118. Two other land use cases reached the Supreme Court in the 1910s but both were subsequently dismissed without opinion. Broussard v. Baker, 241 U.S. 639 (1916) (dismissed for want of jurisdiction); Pacific States Supply Co. v. City and County of San Francisco, 235

three cases in which landowners prevailed, the court implied that the regulation at question would not have been unreasonable if it was in fact adopted out of a legitimate concern for the public welfare (*Dobbins*) or had it been directly imposed by a governmental body (*Eubank*). Only in *Buchanan v. Warley* was an ordinance found to be an unreasonable exercise of the police power and that case involved a blatant effort to use the police power to shield an unconstitutional act of racial discrimination. In spite of the "pro-property" reputation of the Supreme Court under Fuller and to a lesser extent White, the Court proved repeatedly that it was indifferent to pecuniary losses suffered by the landowners. Ordinarily the benefit of the doubt went to the state, and so long as the evidence did not show that the action was undertaken in bad faith or for a purpose that went beyond the contemporary understanding of the police power or violated a separate constitutional right (like the right to buy and sell property free from state-imposed racial restrictions), the statute was presumed legitimate.

The only further restriction appeared to be a requirement of a more or less proportionate fit between the harm to be remedied and the solution adopted, although there was no case in which a statute or ordinance was found deficient for this reason, and the Court asserted on a number of occasions that the mere fact that an ordinance might affect those whose property uses posed no immediate danger to the public did not threaten its validity. Even more importantly, once the act in question was found to be a reasonable exercise of the police power, the degree of damage to affected landowners was irrelevant. Since the public health and safety required, or at least justified the regulation at issue, it was no defense that the measure might have a particularly harsh impact on an individual property owner.

While an examination of the landmark land use opinions of the 1920s is beyond the scope of this article, the decisions of the Fuller and White Courts provide a highly informative vantage point for evaluating those cases. Certainly, they make it clear that Justice Holmes' opinion in *Pennsylvania Coal v. Mahon*,[119] striking down Pennsylvania's anti-subsidence Kohler Act, represented a real

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U.S. 709 (1914) (dismissed with costs).

119. 260 U.S. 393 (1922).

departure from the Court's previous land use decisions, at least to the extent that it focused upon the extent of the diminution of "values incident to property." When Holmes wrote that "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,"[120] he was not stating a principle relied upon in previous cases. Similarly when he implied that the exercise of the police power in *Plymouth Coal* and other cases had been warranted because they "secured an average reciprocity of advantage"[121] he was asserting a standard that the Court had not invoked in those cases.

While the result in *Mahon* was not necessarily inconsistent with the earlier cases, it seems likely that the seven justices who joined in Holmes' opinion probably felt that the record established that the Kohler Act was not motivated by concerns for the public health and safety. This was the argument advanced by Pennsylvania Supreme Court Justice Kephart in his dissent to the opinion appealed to the Supreme Court and by noted attorney John W. Davis who argued the case; Holmes reached that result in a manner that seemed to be in conflict with the spirit of the earlier cases.[122] Not surprisingly, in his dissent he argued that the statute in question fell squarely within the bounds of the police power, Justice Brandeis cited numerous opinions from the previous two decades including *Welch v. Swasey*, *Hadacheck*, *Pierce Oil*, *Laurel Hill Cemetery*, *Murphy v. California*, *Reinman v. Little Rock*, and *St. Louis Poster*.

On the other hand, Justice Sutherland's opinion in *Village of Euclid v. Ambler Realty*,[123] upholding a comprehensive zoning scheme against a facial challenge to its constitutionality, was consistent with the deference shown by the Fuller and White Courts to local governmental determinations of what constituted the public interest. While the scope of the zoning act at issue in *Euclid* exceeded anything that the court encountered in the 1900s and 1910s, only three of the nine justices found that distinction sufficient to warrant a

120. 260 U.S. at 415.

121. *Id.* at 415.

122. For Kephart's decision see Mahon v. Pennsylvania Coal Co., 274 Pa. 489, 507 (1922). A summary of Davis' argument appears at the outset of the United States Supreme Court opinion.

123. 272 U.S. 365 (1926).

finding that the village had exceeded its authority under the police power. *Miller v. Schoene*,[124] with its holding that the state of Virginia could order the destruction of infected ornamental cedar trees which threatened the state's apple crop, was entirely consistent with the Fuller and White Court decisions. So too was *Nectow v. Cambridge*.[125] Although the court found that the zoning ordinance in that case was unconstitutional (which it had been reluctant to do in earlier cases), the key fact in *Nectow* was that a court-appointed master had found that the classification of Nectow's parcel did not serve any public interest; a finding that the Court was unlikely to make on its own, but also one that it was unlikely to ignore.

As twenty-first century courts wrestle with the question of what the proper requirements for a legislative taking should be, they may well benefit from a reexamination of the answers provided to comparable questions by the United States Supreme Court at the outset of the twentieth century.

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124. 276 U.S. 272 (1928).
125. 277 U.S. 183 (1928).