

ARTICLES

Singling Out Single-Family Zoning

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Single-family zoning is increasingly under attack in both the popular press and scholarly journals. Critics highlight how zoning districts that allow only detached, single-family homes exacerbate racial and economic segregation and perpetuate wealth disparities. Although a few local and state legislatures have eased regulations to permit denser development in existing single-family neighborhoods, such neighborhoods remain the dominant component of American zoning. The power of local governments to impose zoning derives from the police power—traditionally understood as the power to legislate in furtherance of health, safety, and the public welfare. These traditional concerns seem to provide little justification for prohibiting duplexes and triplexes in single-family enclaves. Recognizing this, many early zoning proponents feared that courts would strike down exclusively single-family districts. They confronted criticism that such zoning was merely aesthetic in nature and any actual benefits it conferred were problematically limited to those wealthy enough to live in a single-family home.

This Article provides an intellectual and legal history of single-family zoning districts. While others have documented the history of zoning generally, the discrete justifications for single-family districts have not been closely examined. This Article explains how a number of prominent early supporters of zoning, through writings and speeches, formulated distinct arguments in defense of single-family districting and refined those arguments in the face of legal challenges. Supporters justified single-family zoning as one component of a comprehensive zoning regime grounded in careful consideration of a community's existing needs and future demands. Because comprehensive zoning itself constituted a valid exercise of the police power, they argued, it rendered valid individual components, including single-family districts, that may not have been independently justified.

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Little contemporary zoning, however, reflects the comprehensive approach espoused by these early proponents. This reality suggests that even the fragile, early legal arguments for single-family districting cannot withstand critique. By carefully documenting the intellectual and legal history of single-family zoning, this Article sharpens contemporary criticism and can inform the efforts of zoning reformers. Singling out single-family zoning will enable scholars, reformers, and courts to both unbundle a particularly questionable element of zoning and reemphasize the importance of a more modestly comprehensive approach to zoning.

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INTRODUCTION

In the court of public opinion, single-family zoning faces the fiercest test in its century-long existence. Headlines declare “Americans Need More Neighbors,”¹ “America’s Future Depends on the Death of the Single-Family Home,”² and “It’s Time to Abolish Single-Family Zoning.”³ The roots of single-family zoning (and much of zoning more generally) in efforts to exclude on the bases of race, ethnicity, and class are increasingly widely discussed,⁴ as are the ways in which this zoning preserves segregated housing patterns and exacerbates racial wealth disparities.⁵ These and other concerns led local and state legislatures in Minneapolis, Oregon, California, and elsewhere to ease zoning restraints and permit greater density in existing single-family neighborhoods.⁶ Despite these efforts, much of the land in urban and suburban areas of the United States, including major cities, remains zoned exclusively for detached, single-family residences.⁷ Even with a Supreme Court critical of restraints on property rights in other contexts, it is unlikely that single-family zoning will be declared invalid by the judiciary.⁸

1. Editorial, *Americans Need More Neighbors*, N.Y. TIMES (June 15, 2019), <https://www.nytimes.com/2019/06/15/opinion/sunday/minneapolis-ends-single-family-zoning.html> (praising Minneapolis’s decision to eliminate exclusively single-family zoning districts).

2. Tanza Loudonback, *America’s Future Depends on the Death of the Single-Family Home*, BUS. INSIDER (Dec. 4, 2017, 1:50 PM), <https://www.businessinsider.com/us-housing-crisis-homeownership-single-family-home-2017-12> [<https://perma.cc/ERL3-EY6G>].

3. Charles Marohn, *It’s Time to Abolish Single-Family Zoning*, AM. CONSERVATIVE (July 3, 2020, 12:01 AM), <https://www.theamericanconservative.com/urbs/its-time-to-abolish-single-family-zoning/> [<https://perma.cc/77N2-NQTW>].

4. See Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House With a Yard on Every Lot*, N.Y. TIMES: THE UPSHOT (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html> (discussing how concerns over housing affordability, racial inequality, and climate change have led to a reckoning with single-family zoning). See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (examining the role of land-use regulations, including single-family zoning, in establishing and exacerbating segregation).

5. See Michael Manville, Paavo Monkkonen & Michael Lens, *Viewpoint: It’s Time to End Single-Family Zoning*, 86 J. AM. PLAN. ASS’N 106, 106–07, 109 (2020) (discussing relationship between single-family zoning and segregation and housing affordability); Jake Wegmann, *Viewpoint: Death to Single-Family Zoning . . . and New Life to the Missing Middle*, 86 J. AM. PLAN. ASS’N 113, 117 (2020) (“For decades planners have been at the forefront of lambasting the most destructive consequences of single-family zoning, from automobile dependence to racial segregation.”); see also Katherine Shaver, *Single-Family Zoning Preserves Century-Old Segregation, Planners Say. A Proposal to Add Density Is Dividing Neighborhoods.*, WASH. POST (Nov. 20, 2021, 6:00 AM), <https://www.washingtonpost.com/transportation/2021/11/20/single-family-zoning-race-equity/> (discussing efforts to allow duplexes, triplexes, and quadplexes in single-family neighborhoods of Montgomery County, Maryland).

6. See *infra* Section I.A.

7. See, e.g., Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. (forthcoming 2023) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792544 [<https://perma.cc/DZ2H-J67A>]) (finding that 90.6% of Connecticut’s land is zoned for single-family housing only); see also *infra* notes 31–33 and accompanying text (describing the prevalence of detached, single-family housing in the United States).

8. See, e.g., *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069, 2072 (2021) (holding California regulation granting unions right to access agricultural land constituted per se physical taking); *Horne v. Dep’t of Agric.*, 576 U.S. 350, 367 (2015) (declaring regulatory requirement that raisin farmers set aside percentage of crop constituted physical taking, requiring compensation). See generally John G.

Yet, it remains questionable how the police power, traditionally understood as the power of state and local governments to legislate in furtherance of health, safety, and the public welfare,⁹ justifies zoning that expressly prohibits anything other than a single-family residence in large swathes of the United States. The idea that a duplex next door will spread disease, increase risks of injury from fire, or harm the upbringing of children and the vibrancy of the American people seems frankly strange—and not just to modern ears.¹⁰ Admittedly, the mid-twentieth-century Supreme Court came to accept aesthetics—and not just health, safety, and welfare—as a valid rationale for the exercise of an ever-expanding police power.¹¹ Single-family zoning’s defenders no longer need to invoke more traditional conceptions of that power. Even so, single-family zoning significantly curtails the property rights of individual owners on the basis of, as this Article reveals, tenuous police power justifications.¹² It also negatively affects housing supply and affordability,¹³ exacerbates sprawl and concomitant environmental

Sprinkling, *Property and the Roberts Court*, 65 KAN. L. REV. 1, 1 (2016) (finding property owners prevailed against government in eighty-six percent of civil property-related cases examined).

9. See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* 13–15 (1996) (discussing early articulations of the state police power). A definition offered in the late nineteenth century provides a succinct statement of this power as “the inherent and plenary power of a State . . . to prescribe regulations to preserve and promote the public safety, health and morals, and to prohibit all things hurtful to the comfort and welfare of society.” Lewis Hochheimer, *The Police Power*, 44 CENT. L.J. 158, 158 (1897). As the Supreme Court declared in the *Slaughter-House Cases*, the police power “is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.” 83 U.S. 36, 62 (1873).

10. See *infra* notes 184–91 and accompanying text.

11. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (declaring that public welfare includes “spiritual as well as physical, aesthetic as well as monetary [values]”); see also STEWART E. STERK, EDUARDO M. PEÑALVER & SARA C. BRONIN, *LAND USE REGULATION* 184 (3d ed. 2020) (“Although in the early days of zoning, courts questioned whether municipalities had power to regulate for aesthetic purposes, most courts today find that municipalities have a legitimate interest in promoting an aesthetically pleasing environment.”).

12. See *infra* Section II.C.

13. See, e.g., Paavo Monkkonen, *The Elephant in the Zoning Code: Single Family Zoning in the Housing Supply Discussion*, 29 HOUS. POL’Y DEBATE 41, 42 (2019) (discussing importance of single-family zoning for broader debates over housing supply and affordability); see also Campbell Robertson, *A Fight Over Zoning Tests Charlottesville’s Progress on Race*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/08/01/us/charlottesville-va-zoning-affordable-housing.html> (“Propelled by research showing that single-family zoning restrictions have roots in discrimination and consequences in soaring housing prices and more segregated neighborhoods, Charlottesville is joining communities across the country in debating whether to ease these restrictions.”); *Atlanta City Design Housing: A Look into How Housing Policy Shaped Atlanta’s Design, How That Design Impacts the City’s Residents, and Ways to Design It for Everyone*, DEP’T CITY PLAN. (Mar. 15, 2021), <https://storymaps.arcgis.com/stories/e91c43ad299a4634add2bed4cf2eca9d> [<https://perma.cc/5NPX-D9GZ>] (discussing how a significant share of land in Atlanta devoted exclusively to single-family uses drives up housing costs); SEATTLE PLAN. COMM’N, *NEIGHBORHOODS FOR ALL: EXPANDING HOUSING OPPORTUNITY IN SEATTLE’S SINGLE-FAMILY ZONES* 14 (2018), <http://www.seattle.gov/Documents/Departments/SeattlePlanningCommission/SPCNeighborhoodsForAllFINALdigital2.pdf> [<https://perma.cc/D9LC-QEEF>] (“Policies meant to preserve aesthetic and physical form—part of a neighborhood’s ‘character’—are contributing to the increase in housing costs and the decline of economic diversity of Seattle’s single-family zones.”).

harms,¹⁴ establishes and perpetuates residential segregation,¹⁵ and contributes significantly to racial gaps in generational wealth.¹⁶ While these issues are attributable to low-density zoning generally, single-family zoning's unique prevalence, symbolic importance, and lack of justification in terms of traditional police power concerns further motivate efforts to eliminate it.

This Article provides an intellectual and legal history of how early zoning proponents defended the legitimacy of single-family districts specifically and, in the process, contributed to the steady expansion of the police power. Although others have documented the early history of zoning generally, the discrete justifications for single-family zoning—recognized at the time as the most controversial element of early zoning ordinances—have not been closely examined.¹⁷ This Article provides the first sustained account of how zoning's supporters, through writings and speeches, formulated distinct arguments in defense of single-family districting and then refined those arguments as such zoning encountered legal challenges. Retracing this intellectual history reveals important lessons for contentious debates currently playing out in local and state governments and across the pages of scholarly journals in law, planning, and other disciplines.

14. See, e.g., Margaret E. Byerly, *A Report to the IPCC on Research Connecting Human Settlements, Infrastructure, and Climate Change*, 28 PACE ENV'T L. REV. 936, 940–41 (2011) (“Single family, detached homes on large lots contribute to climate change because of increased energy consumption associated with the heating, cooling and transportation to and from these homes.”); Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 12 (2016) (discussing how large-lot zoning pushes housing construction further from cities, contributing to suburban sprawl); R. Pendall, *Do Land-Use Controls Cause Sprawl?*, 26 ENV'T & PLAN. B: PLAN. & DESIGN 555, 555 (1999) (finding land-use regulations that mandate low densities increase sprawl).

15. See, e.g., Stephen Menendian, Samir Gambhir, Karina French & Arthur Gales, *Single-Family Zoning in the San Francisco Bay Area: Characteristics of Exclusionary Communities*, OTHERING & BELONGING INST. (Oct. 7, 2020), <https://belonging.berkeley.edu/single-family-zoning-san-francisco-bay-area> [<https://perma.cc/FV7G-TEVC>] (revealing that jurisdictions in San Francisco Bay Area with larger shares of land zoned for single-family homes were more racially homogenous and segregated and less representative of the region as a whole); Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 12 (2016) (finding significant association between density restrictions and residential segregation, particularly of affluent households); Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290, 291 (2011) (“Using two datasets of land regulation for the largest metropolitan areas, the results indicate that anti-density regulations are responsible for a large share of the observed patterns in segregation between 1990 and 2000.”). See generally Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443 (2020) (providing evidence of relationship between stringent land-use regulations and racial homogeneity).

16. See Shaver, *supra* note 5 (reporting that amid efforts to allow multiple units on single-family parcels, Maryland planners highlighted how single-family zoning exacerbates segregation and racial wealth gap).

17. These include, among others discussed elsewhere, SEYMOUR I. TOLL, *ZONED AMERICAN* (1969), which examines the legal justifications for zoning generally, but not single-family districts specifically, and SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* (2014), which emphasizes the distinct American commitment to single-family districting, but does not explore in detail its early legal justifications.

Early zoning proponents expressed concern that courts would strike down exclusively single-family districts.¹⁸ They faced criticism that such zoning was merely aesthetic in nature and unrelated to any legitimate concern for health, safety, or even an increasingly expansive conception of the general welfare.¹⁹ Critics contended that use districting departed too much from the fire and other public safety justifications for earlier land-use regulations, including building-height limits, open-space requirements, and street setbacks.²⁰ Even if one accepted police power justifications for single-family districts, questions arose regarding why only those sufficiently wealthy to live in a single-family home should obtain the purported health and safety benefits.²¹ If single-family zoning *actually* served legitimate interests in health, safety, and the general welfare, why should different regulations—allowing greater density—be permitted in other parts of the city?

Zoning's supporters marshaled a series of arguments in response. They contended that zoning's benefits accrued to all residents and that in some ways zoning, including single-family districting, particularly benefited the less well-off.²² While single-family zoning was justified by concerns regarding health, safety, and the public welfare, in certain areas, particularly denser urban cores, reasonableness required balancing these interests against the burdens imposed on private owners.²³ By reinforcing existing, "natural" patterns of development, zoning—they argued—enabled the more efficient provision of city services in service to the public welfare.²⁴

Courts ultimately accepted single-family zoning as advocates advanced these and other arguments grounded in an expanding conception of the police power, particularly the power of the government to act in furtherance of the general welfare.²⁵ The police power, as an influential state court decision declared, developed to confront changing conditions and, in the process, moved beyond a focus of preventing threats to health and safety and toward the promotion of an increasingly broad conception of the public welfare.²⁶

The most important doctrinal move courts made was to accept an argument—refined over two decades—regarding the validity of *comprehensive* zoning ordinances.²⁷ A comprehensive zoning regime, grounded in careful consideration of existing and future needs, was itself a valid exercise of the police power and,

18. See *infra* Section II.C.

19. See *infra* Section II.C.1.

20. By "districting" I refer to the specific act of dividing a given jurisdiction into separate districts in which different uses are permitted and different regulations apply. This districting is one component, albeit a significant one, of zoning more generally. See STERK ET AL., *supra* note 11, at 23–24 (discussing relationship of zoning districts to zoning more generally).

21. See *infra* Section II.C.2.

22. See *infra* notes 197–208 and accompanying text.

23. See *infra* notes 209–23 and accompanying text.

24. See *infra* notes 224–29 and accompanying text.

25. See *infra* Section III.A.

26. *Miller v. Bd. of Pub. Works*, 234 P. 381 (Cal. 1925); see *infra* notes 297–303 (discussing *Miller*).

27. See *infra* Section II.D.

most importantly, rendered valid individual components, including single-family zoning, that may not have independently been justified.²⁸

This Article proceeds in four Parts. Part I examines the unique American obsession with single-family zoning before discussing recent reforms and critiques. As it reveals, single-family zoning has weathered prior periods of criticism. This is due, in part, to the social and cultural ideologies that reinforced a commitment to maintaining the single-family ideal.

The police power served as the principal doctrinal mechanism through which zoning's advocates established its legality. Part II discusses the evolution of this doctrine in the early twentieth century before turning to its invocation in pre-zoning efforts to control urban development. It then examines early forays into single-family districting and the contentious debates these efforts produced. Part II concludes by highlighting the role comprehensiveness played in the effort to establish the validity of these districts.

Part III examines how these districts fared in the courts, starting with state decisions prior to *Village of Euclid v. Ambler Realty Co.*, in which the Supreme Court upheld the legal validity of zoning generally.²⁹ It then turns to *Euclid* itself. Although the zoning ordinance at issue in *Euclid* included a district restricted to single-family residences, none of the plaintiff's property was located within that district. *Ambler Realty* raised a facial challenge to the ordinance, but the Court never explicitly addressed the validity of single-family districting. However, the Court's decision embraced important elements of the legal arguments zoning advocates offered in support of these districts during the prior decades. Finally, Part III reviews how single-family zoning, although never directly before the Court in the century since *Euclid*, was implicitly accepted while the police power was explicitly expanded in its favor. This history suggests that the architects of zoning relied on a bit of sleight of hand, emphasizing the "comprehensiveness" of zoning ordinances so as to push courts to focus on the validity of zoning as a whole when they encountered challenges to potentially problematic components, such as single-family districts.

Finally, Part IV briefly rejoins contemporary debates over single-family zoning and zoning reform more generally. In the century since zoning's advent, the faith of its early supporters in the capacity of comprehensive, rational planning processes to predict and account for future changes has proven misplaced. Much zoning occurs in the complete absence of any comprehensive planning rather than in conformity with it. This departure from a key theoretical and practical commitment of single-family zoning's early advocates provides an additional reason to question such zoning's persistence. Simply put, single-family zoning today is imposed in a manner that departs significantly from the procedural and substantive characteristics early advocates relied upon in establishing its legal validity. By singling out single-family zoning, scholars, reformers, and courts can both

28. See *infra* Sections II.D, III.A.

29. 272 U.S. 365, 387–88 (1926).

unbundle a particularly questionable element of zoning and reemphasize the value of a more modestly comprehensive approach to zoning.³⁰

I. THE SHAKY FOUNDATION OF SINGLE-FAMILY ZONING

This Part situates the legal history that follows in Parts II and III. First, it highlights scholarly critiques of single-family zoning as well as recent efforts to eliminate or reform exclusively single-family zoning districts. Second, it briefly examines the social and cultural factors that shaped and strengthened the uniquely American commitment to single-family housing.

A. QUESTIONING AN AMERICAN OBSESSION

Single-family housing dominates the American landscape. The percentage of total residences that are *detached*, single-family homes in the United States is nearly twice as high as it is in the European Union.³¹ This is not attributable to high levels of urbanization: in larger European cities, the share of housing units in multifamily structures is considerably higher than that in comparable American cities.³² Even those American cities where a significant share of residents live in multifamily housing have a relatively small percentage of land area where such housing is permitted.³³ Planning Professor Sonia Hirt describes “the creation of a residential district that permits *only* detached homes” as an American departure from zoning’s European origins.³⁴

The particular prevalence of single-family zoning in the United States by itself might appear unproblematic; it simply provides another example of American exceptionalism. But such zoning does not simply permit development of single-family homes; it prohibits any other form of housing in large portions of the

30. For discussion of the role of bundling in law, see generally LEE ANNE FENNEL, *SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE* (2019). For an example of the bundling argument as applied to zoning, see *infra* note 244 and accompanying text.

31. HIRT, *supra* note 17, at 20–21; see also Sonia Hirt, *Home, Sweet Home: American Residential Zoning in Comparative Perspective*, 33 J. PLAN. EDUC. & RSCH. 292, 292 (2013) (“Americans are not simply homeowners; they are *single-family* home owners. About 69 percent of U.S. housing comprises single-family dwellings. In *detached* single-family homes—homes with private yards—America resolutely beats almost all European nations and Europe as a whole. About 63 percent of American housing is detached single-family homes. The comparable average number for the EU 27 is 34 percent” (footnote omitted) (citation omitted)).

32. Hirt, *supra* note 31 (“Seventy-eight percent of the population of Amsterdam lives in [multifamily] buildings, 82 in Berlin, 94 in Paris, 96 in Rome, and 97 in Madrid. Compare this to American cities. Only New York comes close with 80 percent of its housing stock as multifamily housing (the figure drops, though, to 62 for New York’s metropolis as a whole). In Chicago, the numbers are 65 percent (city) and 37 (metropolis), in Seattle 46 (city) and 29 (metropolis)” (footnote omitted) (citation omitted)).

33. HIRT, *supra* note 17, at 22; see also Badger & Bui, *supra* note 4 (analyzing and mapping residential land zoned for detached, single-family homes in multiple U.S. cities).

34. Hirt, *supra* note 31, at 293; see also *id.* at 297 (“American zoning proponents saw the mixing of home and work as a problem that had [to] be fixed; the Germans found it less objectionable.”); FRANK BACKUS WILLIAMS, *BUILDING REGULATION BY DISTRICTS: THE LESSON OF BERLIN* 4–5 (1914) (criticizing German cities for inadequately separating residential and industrial uses).

country. As such, it denies current and prospective residents the opportunity to express a preference for other housing types.³⁵

In recent years, a small but growing number of local and state governments have taken steps to eliminate single-family zoning. In Minneapolis, Minnesota, these efforts were driven in significant part by concerns with the segregating effects (and intentions) of single-family zoning.³⁶ In 2019, the city council adopted a new comprehensive plan, *Minneapolis 2040*.³⁷ The plan allowed up to three dwelling units on lots previously zoned exclusively for single-family homes,³⁸ which constituted seventy percent of land zoned for residential uses.³⁹ Soon thereafter, Oregon passed a statewide measure requiring cities to allow, at a minimum, a duplex and, in some cases, a fourplex, on any land zoned exclusively for single-family housing.⁴⁰ In 2020, Oregon's largest city, Portland, adopted its own measure permitting duplexes, triplexes, and fourplexes in formerly single-family areas.⁴¹ A city report highlighted how single-family districts had remained homogenous and their boundaries "closely align[ed] with racially concentrated areas of privilege – areas with high concentrations of white and high-income people."⁴²

35. Cf. Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1099–100 (1996) (discussing how exclusively single-family zoning and an associated "car-centered environment" can make it difficult for individuals over sixty-five to remain in a neighborhood).

36. See Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html>; Henry Grabar, *Minneapolis Confronts Its History of Housing Segregation*, SLATE (Dec. 7, 2018, 4:48 PM), <https://slate.com/business/2018/12/minneapolis-single-family-zoning-housing-racism.html> [<https://perma.cc/RRS4-MAEF>].

37. See DEP'T OF CMTY. PLAN. & ECON. DEV., CITY OF MINNEAPOLIS, MINNEAPOLIS 2040—THE CITY'S COMPREHENSIVE PLAN 1–2 (2019), https://minneapolis2040.com/media/1488/pdf_minneapolis2040.pdf [<https://perma.cc/A8E8-BXFF>]. At the time of writing, implementation of *Minneapolis 2040* has been enjoined due to the city's failure to conduct an environmental review. See *Smart Growth Minneapolis v. City of Minneapolis*, 954 N.W.2d 584, 597 (Minn. 2021) (reversing the state court of appeals decision to dismiss claim alleging Minneapolis should have performed environmental review for *Minneapolis 2040*); *Smart Growth Minneapolis v. City of Minneapolis*, No. 27-CV-18-19587 (Minn. Hennepin Cnty. June 15, 2022) (granting injunction).

38. DEP'T OF CMTY. PLAN. & ECON. DEV., *supra* note 37, at 105–06; see also Erick Trickey, *How Minneapolis Freed Itself from the Stranglehold of Single-Family Homes*, POLITICO (July 11, 2019), <https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265/> [<https://perma.cc/M4CF-XJXK>] ("The city council approved the Minneapolis 2040 comprehensive plan, which declares the city's intent to abolish single-family-home zoning and allow duplexes and triplexes to be built anywhere in the city.").

39. Daniel Kuhlmann, *Upzoning and Single-Family Housing Prices*, 87 J. AM. PLAN. ASS'N 383, 383 (2021).

40. H.B. 2001, 80th Legis. Assemb., Reg. Sess., 2019 Or. Laws 639.

41. Everton Bailey Jr., *Portland Changes Zoning Rules to Allow Duplexes, Triplexes, Fourplexes in Areas Previously Reserved for Single-Family Homes*, OR. LIVE (Aug. 13, 2020, 9:38 AM), <https://www.oregonlive.com/portland/2020/08/portland-changes-zoning-code-to-allow-duplexes-triplexes-fourplexes-in-areas-previously-reserved-for-single-family-homes.html> [<http://perma.cc/6PE7-LAWN>].

42. BUREAU OF PLAN. & SUSTAINABILITY, CITY OF PORTLAND, OR., HISTORICAL CONTEXT OF RACIST PLANNING: A HISTORY OF HOW PLANNING SEGREGATED PORTLAND 19 (2019), <https://www.portland.gov/bps/documents/historical-context-racist-planning/download> [<https://perma.cc/49ME-26Q5>]; see also *id.* at 23 ("White households in single-family neighborhoods have accumulated wealth through rising home values, further contributing to racial disparities in wealth.").

In California, long-standing efforts to ease development of accessory dwelling units led, in 2019, to legislation permitting single-family homeowners statewide to both build a new detached accessory unit on their property and convert part of an existing structure into a third unit.⁴³ Shortly after, California's Senate Bill 9 went further, permitting multiple separately owned housing units on land zoned single-family.⁴⁴ In 2022, Maine passed legislation legalizing duplexes and accessory dwelling units statewide and allowing up to four units in certain areas.⁴⁵ Other less high-profile efforts appeared during the same period in cities including Charlotte⁴⁶ and Raleigh,⁴⁷ North Carolina, and Charlottesville, Virginia.⁴⁸ North Carolina,⁴⁹ Virginia,⁵⁰ and New York⁵¹ have introduced, but not passed, statewide

43. Assemb. B. 68, 2019 Leg., Reg. Sess. (Cal. 2019); see also Liam Dillon, *How Lawmakers Are Upending the California Lifestyle to Fight a Housing Shortage*, L.A. TIMES (Oct. 10, 2019, 5:00 AM), <https://www.latimes.com/california/story/2019-10-10/california-single-family-zoning-casitas-granny-flats-adus> (quoting former director of the state's Department of Housing and Community Development, who remarked: "We're on the precipice of single-family zoning functionally not existing").

44. See S.B. 9, 2021 Leg., Reg. Sess. (Cal. 2021) (allowing duplex development on single-family lots and/or the splitting of lots); see also John Healey & Matthew Ballinger, *What Just Happened with Single-Family Zoning in California?*, L.A. TIMES (Sept. 17, 2021, 4:09 PM), <https://www.latimes.com/homeless-housing/story/2021-09-17/what-just-happened-with-single-family-zoning-in-california>.

45. An Act to Implement the Recommendations of the Commission to Increase Housing Opportunities in Maine by Studying Zoning and Land Use Restrictions, § 4364-A, H.P. 1489 - L.D. 2003, 130th Leg., 2d Reg. Sess., (Me. 2022) (allowing up to two dwelling units in "any area in which housing is allowed"); see also Diana Ionescu, *Maine Looks to Legalize 'Missing Middle Housing'*, PLANETIZEN (Apr. 27, 2022, 5:00 AM), <https://www.planetizen.com/news/2022/04/116979-maine-looks-legalize-missing-middle-housing> [<https://perma.cc/2KJG-KL58>].

46. See James Brasuell, *Charlotte's New, Controversial Comprehensive Plan to End Single-Family Zoning*, PLANETIZEN (June 30, 2021, 10:00 AM), <https://www.planetizen.com/news/2021/06/113893-charlottes-new-controversial-comprehensive-plan-end-single-family-zoning> [<https://perma.cc/H4LB-ARA9>] (discussing plan to allow duplexes, triplexes, and accessory dwelling units in single-family neighborhoods); see also Henry Grabar, *The Most Important Housing Reform in America Has Come to the South*, SLATE (June 28, 2021, 10:55 AM), <https://slate.com/business/2021/06/charlotte-single-family-zoning-segregation-housing.html> [<https://perma.cc/3FWQ-J7SE>] (noting that Charlotte is faster growing and less dense than other cities that have eliminated single-family zoning).

47. See James Brausell, *Duplexes and Townhomes Legalized in Raleigh*, PLANETIZEN (July 8, 2021, 11:00 AM), <https://www.planetizen.com/news/2021/07/113971-duplexes-and-townhomes-legalized-raleigh> [<https://perma.cc/Z7L8-Y7U9>] (discussing bipartisan support for Raleigh measure relaxing zoning restrictions).

48. See Robertson, *supra* note 13 (discussing debates over single-family zoning in Charlottesville).

49. S.B. 349, 2021 Gen. Assemb., Sess. 2021 (N.C. 2021); see also Salim Furth & Joseph Coletti, *North Carolina's SB 349 Is the Most Ambitious State Zoning Reform Yet*, CAROLINA J. (Apr. 13, 2021), <https://www.carolinajournal.com/opinion-article/north-carolinas-sb-349-is-the-most-ambitious-state-zoning-reform-yet/> [<http://perma.cc/8UCH-8B7A>].

50. H.B. 152, 2020 Gen. Assemb., 2020 Sess. (Va. 2020) ("All localities adopting a zoning ordinance under the provisions of this article shall allow development or redevelopment of middle housing residential units upon each lot zoned for single-family residential use. For purposes of this section, 'middle housing' means a two-family residential unit, including duplexes, townhouses, cottages, and any similar structure by whatever name it may be known."); see also Kristin Capps, *With New Democratic Majority, Virginia Sees a Push for Denser Housing*, BLOOMBERG (Dec. 20, 2019, 8:03 AM), <https://www.bloomberg.com/news/articles/2019-12-20/inside-the-virginia-bill-to-allow-denser-housing> [<https://perma.cc/8BAS-C79W>] ("The bill would legalize duplex homes—townhouses, cottages, duplexes, and so on—in any place currently zoned for single-family homes.").

51. S.B. 7574, 2021 Leg., 2021–2022 Reg. Sess. (N.Y. 2021); see also Joe Lovinger, *New York Takes Aim at Apartment Bans*, REAL DEAL (Dec. 10, 2021, 4:19 PM), <https://therealdeal.com/2021/12/10/new->

measures to allow additional units in single-family districts. Smaller cities, from Northampton, Massachusetts,⁵² and Gainesville, Florida,⁵³ to Sheridan, Wyoming,⁵⁴ and Walla Walla, Washington,⁵⁵ have also considered or approved denser development in single-family zones.

These measures often simply re-legalize housing typologies that were widespread through the middle of the twentieth century.⁵⁶ It is not clear they will result in a significant number of new housing units due to factors including physical constraints, the relative costs of small-scale development, private restrictive covenants, and the need for existing owners to be interested in new development.⁵⁷ In some instances, regulations that remain in place, such as parking requirements or minimum lot sizes, reduce the potential for significant additional housing,⁵⁸ and local governments can impose new regulations that undermine state legislation.⁵⁹ Nonetheless, these efforts implicate important issues regarding the scope of property rights and the limits of police power regulation. Reforms to single-

york-takes-aim-at-single-family-zoning/ [https://perma.cc/Q6JT-LSHY] (discussing legislation that would prohibit minimum lot sizes larger than 1,200 square feet and permit quadplexes and six-family buildings in certain areas).

52. See Greta Jochem, ‘*Innovative Zoning*’ Package Advances in Northampton; Will Allow 2-Family Homes by Right, DAILY HAMPSHIRE GAZETTE (Mar. 5, 2021, 6:00 PM), <https://www.gazettenet.com/City-Council-takes-on-zoning-changes-39236453>.

53. See Patrick Spauster, *Gainesville, Florida, Moves to End Single-Family Zoning*, BLOOMBERG (Aug. 9, 2022, 1:38 PM), <https://www.bloomberg.com/news/articles/2022-08-09/gainesville-florida-moves-to-end-single-family-zoning#:~:text=Just%20before%20midnight%20last%20Thursday,zoned%20for%20single%2Dfamily%20homes> [https://perma.cc/9HX5-KSRA].

54. See Stephen Dow, ‘*That’s Not Sheridan*’: Residents Express Concerns About Accessory Dwelling Units, SHERIDAN PRESS (Aug. 9, 2021), https://www.thesheridanpress.com/news/local/residents-express-concerns-about-accessory-dwelling-units/article_b6592864-f91d-11eb-9187-cf0493052e93.html [https://perma.cc/AWS6-4ZPY].

55. In 2018, Walla Walla, Washington, eliminated its “Single Family Residential” zoning district, replacing it with the “Neighborhood Residential” zone, which allows a variety of housing types, including duplexes, triplexes, and quadplexes. Walla Walla, Wash., Ordinance No. 2018-53, § 19.26.011 (Dec. 27, 2018); see also *id.* at § 20.50.020 (“The Neighborhood Residential Zone is intended to provide for a variety of housing types . . .”). Olympia followed with a zoning reform permitting multiple units in traditionally single-family districts. Olympia, Wash., Ordinance No. 7267 (Dec. 15, 2020).

56. See Michael Anderson, *Oregon Just Voted to Legalize Duplexes on Almost Every City Lot*, SIGHTLINE INST. (June 30, 2019, 12:01 PM), <https://www.sightline.org/2019/06/30/oregon-just-voted-to-legalize-duplexes-on-almost-every-city-lot/> [https://perma.cc/9ZMJ-NCAF].

57. See BEN METCALF, DAVID GARCIA, IAN CARLTON & KATE MACFARLANE, TERNER CTR., WILL ALLOWING DUPLEXES AND LOT SPLITS ON PARCELS ZONED FOR SINGLE-FAMILY CREATE NEW HOMES?: ASSESSING THE VIABILITY OF NEW HOUSING SUPPLY UNDER CALIFORNIA’S SENATE BILL 9, at 6 (2021); see also Henry Grabar, *You Can Kill Single-Family Zoning, But You Can’t Kill the Suburbs*, SLATE, (Sept. 17, 2021, 5:38 PM), <https://slate.com/business/2021/09/california-sb9-single-family-zoning-duplexes-newsom-housing.html> [https://perma.cc/66WX-PKXD] (“[T]he largest limitation by far is simply that lightly densifying most parcels won’t pencil: Buying and building in California is expensive.”).

58. See Dan Bertolet, *Olympia Moves to Further Loosen the Stranglehold of Single-Family Zoning Laws*, SIGHTLINE INST. (Nov. 9, 2018, 1:07 PM), <https://www.sightline.org/2018/11/09/olympia-single-family-zoning-laws/> [https://perma.cc/2P5A-ZLMP] (discussing limitations of reforms in Olympia, Washington).

59. See Liam Dillon, *Some California Cities Try to Blunt New Duplex Law with Restrictions on New Developments*, L.A. TIMES (Nov. 30, 2021, 8:31 AM), <https://www.latimes.com/homeless-housing/story/2021-11-30/some-california-cities-aim-to-blunt-new-duplex-law>.

family zoning have symbolic importance in terms of what they convey regarding the ability of political communities to exclude certain households. They also expand opportunities for lower income prospective residents to move to higher opportunity areas. These incremental reforms highlight the arbitrary line drawing and questionable police power rationales behind the regulations they displace. As such, they may encourage local citizens to question the legal basis or wisdom of other zoning measures, potentially spurring broader reform.

As these reforms have gained attention, urban planners have debated the appropriateness of single-family districting. A 2020 issue of the *Journal of the American Planning Association* featured two articles arguing for the elimination of single-family zoning. Professors Michael Manville, Paavo Monkkonen, and Michael Lens contended that districts restricted exclusively to single-family detached homes are “inequitable, inefficient, and environmentally unsustainable” and “should not exist.”⁶⁰ They highlighted both the racist and classist motivations for such districts and their social costs in terms of exacerbating wealth gaps and sprawl and limiting access to areas with better opportunities.⁶¹ Questioning the empirical basis of one of the central police power justifications for single-family zoning, the authors declared: “The idea that R1 [exclusively single-family] neighborhoods are the only places families can thrive is supported by virtually no theory or evidence: It is a product mostly of rank classism.”⁶²

In a separate article, Professor Jake Wegmann asserted that “to make headway against the climate and inequality crises,” planners “must cease defending the indefensible concept of single-family zoning.”⁶³ There is, Wegmann continued, “no defensible rationale grounded in health, safety, or public welfare for effectively mandating a 3,000-ft² house with one unit while prohibiting three 1,000-ft² units within the same building envelope.”⁶⁴ In the same volume, Professor Anaid Yerena argued planners have a “professional and ethical responsibility” to remove single-family zoning from their planning.⁶⁵ However, as Wegmann noted, inertia may be the most significant obstacle to any rejection of single-family zoning.⁶⁶ Supporting this point, Professor Robert Ellickson recently documented, based on an empirical study of Silicon Valley, Greater New Haven, and Greater Austin, the extent to which zoning politics freeze land uses within single-family neighborhoods.⁶⁷ Inertia may also explain why previous announcements of the demise of single-family zoning proved premature.

60. Manville et al., *supra* note 5, at 106.

61. *See id.* at 107–08.

62. *Id.* at 109.

63. Wegmann, *supra* note 5, at 113.

64. *Id.*

65. Anaid Yerena, *Not a Matter of Choice: Eliminating Single-Family Zoning*, 86 J. AM. PLAN. ASS'N 122, 122 (2020).

66. *See* Wegmann, *supra* note 5, at 115.

67. Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 395 (2021). Other scholars have shown a similar dynamic

In the late 1970s, sociologist Constance Perin asserted that the combination of an energy shortage, rising land prices, and limited capital for housing construction would lead to “a pronounced change in the glorification of the single-family-detached house as the ideal. Families may still dream of it, but producers will sell something else.”⁶⁸ A few years later, in 1982, the President’s Commission on Housing called for a reexamination of *Village of Euclid v. Ambler Realty Co.*, declaring that localities had abused the broad discretion over zoning that it granted, particularly through exclusionary zoning.⁶⁹ The Commission called for state and local legislation that would significantly circumscribe the police power by “providing that no zoning regulations denying or limiting the development of housing should be deemed valid unless their existence or adoption is necessary to achieve a vital and pressing governmental interest.”⁷⁰

In his provocatively titled 1983 article *The Egregious Invalidity of the Exclusive Single-Family Zone*, Richard Babcock, one of the leading land-use attorneys of the twentieth century, offered a simple thesis: “[T]he single-family detached house zone, so rampant for so long, is patently invalid under the police power.”⁷¹ Babcock asked “if the exigencies of demography and cost lead to new demands for housing, why should a local ordinance force the builders and buyers to pay the costs of detached single-family units?”⁷² As he noted, Justice Sutherland’s opinion in *Euclid* relied on the proposition that “[w]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.”⁷³ Although tenements and portions of larger cities might have been undesirable and in some cases unhealthy places to live (or at least perceived as such through the social norms and scientific understanding of their day) in the early twentieth century,⁷⁴ apartments and urban areas

nationally. See David Schleicher, *Exclusionary Zoning’s Confused Defenders*, 2021 WIS. L. REV. 1315, 1339 & n.148 (2021) (citing sources).

68. CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 11 (1977).

69. PRESIDENT’S COMM’N ON HOUS., *THE REPORT OF THE PRESIDENT’S COMMISSION ON HOUSING* 201–02 (1982), <https://www.huduser.gov/portal/Publications/pdf/HUD-2460.pdf> [<https://perma.cc/6J84-JPY9>] (“The Commission recommends that the Attorney General seek an appropriate case in which to request review of the *Euclid* doctrine in the context of modern land-use issues and the due process protections afforded other property rights in the 50 years since *Euclid* was decided.”).

70. *Id.* at 200.

71. Richard F. Babcock, *The Egregious Invalidity of the Exclusive Single-Family Zone*, 35 LAND USE L. & ZONING DIG. 4, 4 (1983). Babcock, whose biography in the starred footnote of this article describes him as an “[i]tinerant lecturer, world traveler, and former APA president,” was also the author of *The Zoning Game*, one of the classic texts on land-use regulation. Twenty years before declaring single-family zones egregiously invalid, Babcock and Fred Bosselman more tentatively remarked: “There may be valid grounds for isolating the single-family home; we are only suggesting that, in the face of the multiple-family dwelling boom, the question is sufficiently urgent to merit more serious analysis than it has been given.” Richard F. Babcock & Fred P. Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1091 (1963).

72. Babcock, *supra* note 71, at 8.

73. *Id.* (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)).

74. See *id.*

have changed in the intervening decades. As such, “[t]oday, there can be no justification under the police power for *compelling* the construction of single-family houses.”⁷⁵ Babcock’s article questioned the basis for single-family zoning under traditional conceptions of the police power but did not closely interrogate the arguments that advocates and courts accepted in upholding such districts. This Article similarly questions the police power justifications for single-family districts but also advances a more nuanced argument, contending that even if we accept in principle the broad legal theory invoked to advance such districting, the actual practice of zoning undermines key assumptions upon which that theory rests.

The same year that Babcock’s article was published, legal scholar Edward Ziegler described “a renewed interest in the wisdom and legal validity of single-family zoning” and an “unprecedented assault’ on the practice.”⁷⁶ He contended that it was “increasingly debated” whether *Euclid* “can be relied on to justify and continue the practice of single-family zoning.”⁷⁷ According to Ziegler, “changing economic conditions and social values” were increasingly undermining “the pre-suppositions supporting the legal validity of single-family zoning.”⁷⁸ In hindsight, Ziegler was a bit too optimistic about the long-term effects of the developments he described in the early 1980s, which led him to conclude that

the now widespread practice of single-family zoning will likely be substantially curtailed in scope and restrictiveness as zoning policy changes from one of exclusion to one of accommodation and regulation—a change in policy that, if not voluntarily implemented by local communities, may eventually occur through state legislation or judicial decision.⁷⁹

Forty years later the tide—it seems—has started to move against single-family districts, at least on the ground and in state and local legislatures. As for the courts, a rejection of the police power rationale for single-family zoning would be a more dramatic and less likely change. Nonetheless, as Part II documents, the legal justifications were and remain shaky at best, and their perpetuation is perhaps the product of inertia as much as respect for precedent. That inertia, as the next Section shows, is attributable in significant part to the distinct cultural identity of the single-family residence.

B. SOCIAL AND CULTURAL CONTEXT

Although this Article’s focus is on the legal arguments raised by advocates and embraced by courts in the early days of single-family zoning, it is worth

75. *Id.*

76. Edward H. Ziegler, Jr., *The Twilight of Single-Family Zoning*, 3 UCLA J. ENV’T L. & POL’Y 161, 165 (1983) (quoting David R. Burch & Stephen M. Ryals, *Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982*, 15 URB. LAW. 879, 880 (1983)).

77. *Id.*

78. *Id.*

79. *Id.* at 166.

examining the social and cultural factors that firmly established such zoning. This isolating and privileging of single-family uses occurred in parallel with a denigration of multifamily housing, whether termed tenements or apartments, and its inhabitants.⁸⁰

Other scholars have documented the significant role that the desire to exclude racial and ethnic minorities, as well as lower income households, played in the embrace of zoning generally and single-family zoning particularly, even if the extent and significant lingering effects of these efforts remain underappreciated.⁸¹ Writing in 1931, one early zoning proponent declared—apparently without irony—that “[i]t may sound foreign to our general ideas of the background of zoning, yet racial hatred played no small part in bringing to the front some of the early districting ordinances which were sustained by the United States Supreme Court, thus giving us our first important zoning decisions.”⁸² The goal of this Section is not to repeat prior work documenting the racist motivations behind many zoning ordinances but rather to highlight the social and cultural values more explicitly invoked in the writing of zoning advocates and in early court decisions. Although such arguments frequently cloaked more insidious motivations, they served to establish the police power justification for zoning generally and single-family districts specifically.

80. See Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 613–14 (2001) (discussing how Supreme Court's language in *Euclid's* majority opinion created negative, stereotypical image of apartment buildings, validating zoning as a way to segregate based on race and class). Priya Gupta has argued

the extensive regulation put in place to secure the building of single-family detached houses across America was part of a political and social campaign on the part of the government to entrench this house as the aspirational norm for American society, grounded in the idea of seclusion and separation as personal fulfillment, and sold to the populace as mere enablement of free market forces.

Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187, 194 (2015). For discussion of both the villainization of the apartment and the private law restrictions that helped shape public regulation, see generally Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609 (2021). Brady's account particularly highlights the role played by the concept of the “near-nuisance,” including in the writings of Alfred Bettman. *Id.* at 1665.

81. See, e.g., ROTHSTEIN, *supra* note 4, at 39; Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

82. W. L. Pollard, *Outline of the Law of Zoning in the United States*, 155 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 17 (1931). Among the early planners and lawyers involved in zoning who are discussed in the next Part, Robert Whitten was perhaps the most explicitly racist. His plan for Atlanta segregated the city by race. See William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in Euclid v. Ambler*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 31, 42–43 (Charles M. Haar & Jerold S. Kayden eds., 1989). Whitten vigorously defended the plan on the grounds that race segregation existed in Atlanta prior to zoning and his plan, by establishing race-specific residence districts, “removed one of the most potent causes of race conflict.” Robert Whitten, *Social Aspect of Zoning*, 48 SURV. 418, 418 (1922) (“This is perhaps a sufficient justification for race zoning which is simply a common sense method of dealing with facts as they are.”). With regard to zoning's relation to segregation by economic class, Whitten remarked: “[I]n so far as it may be said in a small measure to facilitate the natural trend toward a reasonable segregation of economic classes, [zoning] is neither undemocratic or anti-social.” *Id.* at 419.

While prejudice and economic concerns motivated early supporters of single-family zoning, “they were also influenced by the domesticity, pastoral, and public health ideologies prevalent at the time.”⁸³ Zoning advocates deemed the single-family home the ideal place in which to “cultivate family life,” in proximity to the natural (but not-too-wild) world, and away from overcrowding and related conditions believed to breed disease.⁸⁴ Such overcrowding was associated with urban tenements, and the reification of single-family living occurred at the same time as “the development of anti-apartment ideologies and policies” between the late nineteenth century and *Euclid*.⁸⁵

Concerns regarding the public health implications of multi-family housing derived in part from late-1800s views of urban tenements as sources of disease, crime, and immorality.⁸⁶ Progressive reformers sought to transform tenement houses, advocating a “positive environmentalism” rooted in the belief that “changing surroundings would change behavior” and “lead people to make better moral decisions about the structure of their lives.”⁸⁷ When higher quality apartments marketed to middle- and upper-class households appeared, “leading housing reformers adopted the view that multifamily housing was an evil *per se*” with

83. Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 369 (1994). Nadav Shoked has framed the embrace of residential zoning as, in part, reflective of a redefinition of property ownership from the Jeffersonian yeoman into the suburbanite embracing the tranquil security of zoning. Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REGUL. 91, 128 (2011). Sonia Hirt partially attributes “the ubiquity of the single-family house in American landscapes” to early twentieth-century professional discourses that emphasized detached homes as “the most nourishing physical realm.” Sonia A. Hirt, *Privileging the Private Home: A Case of Persuasive Storytelling in Early Twentieth-Century Professional Discourses*, J. URBANISM 277, 278–79 (2018).

84. Lees, *supra* note 83, at 417; *see also* Frug, *supra* note 35, at 1082 (“Support for local zoning policies has often been articulated in the anti-urban language of sentimental pastoralism: A bedroom community of detached, owner-occupied, single-family houses, located in a natural setting, is often said to be ‘the best place to raise a family.’”).

85. Kenneth Baar, *The National Movement to Halt the Spread of Multifamily Housing, 1890-1926*, 58 J. AM. PLAN. ASS’N 39, 39 (1992) [hereinafter Baar, *The National Movement*]; *see also* Brady, *supra* note 80, at 1638–44 (discussing efforts to associate more upscale apartments with the evils already linked to tenements); Kenneth K. Baar, *The Anti-Apartment Movement in the U.S. and the Role of Land Use Regulations in Creating Housing Segregation*, 11 NETH. J. HOUS. & BUILT ENV’T 359, 363–65 (1996) [hereinafter Baar, *Anti-Apartment Movement*] (describing how housing reformers framed “multifamily housing [as] an evil *per se*”).

86. Baar, *The National Movement*, *supra* note 85, at 39–40.

87. Chused, *supra* note 80, at 601 (citing PAUL BOYER, *Positive Environmentalism: The Ideological Underpinnings*, in URBAN MASSES AND MORAL ORDER IN AMERICA 1820-1920, at 220, 221–23 (1978)); *see also* NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 28 (2010) (“The Progressive-era reformers who championed zoning were avowed ‘positive environmentalists,’ who firmly believed that the chaos of the industrial city was morally corrupting, and, moreover, that order-construction regulations—that is, zoning rules that segregated commercial and industrial establishments from residences, and, importantly, single-family homes from all other uses—would curb the social disorders plaguing those cities.”); TOLL, *supra* note 17, at 18 (“According to the developing theory, if man’s environment is decisive in his evolution, then the intelligent shaping of the environment ought to insure that evolution will bring improvement.”).

adverse effects for families in particular.⁸⁸ One reformer, James Ford, declared in 1913 that

[e]ven for the childless family, the most expensive apartment house as well as the cheapest tenement may constitute an undesirable environment, because of the facility with which disease may pass from one apartment to its neighbor through the common hall and through the mediation of vermin which pass easily from one suite to another.⁸⁹

Beyond concerns regarding their threat to health and moral fiber, there were worries that tenements and apartments would drive out single- and two-family houses. A 1903 report for the New York State Tenement House Commission contended this would lead to a neighborhood dominated by tenements and a class of undesirable tenants.⁹⁰ A few years later, invoking a phrase repeated in *Euclid*, the New York City Commission on Building Districts and Regulations concluded that a few apartment houses destroy a place for single-family home uses and that “in such sections the apartment house is a mere *parasite*.”⁹¹

These views were distilled in a 1924 opinion of the Massachusetts Supreme Judicial Court upholding a zoning ordinance that included a district exclusively for single-family homes:

[T]he health and general physical and mental welfare of society would be promoted by each family dwelling in a house by itself. Increase in fresh air, freedom for the play of children and of movement for adults, the opportunity to cultivate a bit of land, and the reduction in the spread of contagious diseases may be thought to be advanced by a general custom that each family live in a house standing by itself with its own curtilage.⁹²

Shortly before *Euclid*, the North Dakota Supreme Court lamented a looming future without single-family homes in which “every one will be living in hotels and apartment houses and eating in restaurants.”⁹³ Such conditions were, the court declared, “responsible for the great increase in the delinquency among children and for the increase in crime.”⁹⁴

Similar views were sufficiently established among advocates and policymakers that in 1930, prominent urban planner Harland Bartholomew confidently declared: “That the one-family dwelling is the desirable unit for happy living is

88. Baar, *Anti-Apartment Movement*, *supra* note 85, at 365.

89. James Ford, *Some Fundamentals of Housing Reform*, 8 AM. CITY 473, 476 (1913) (“The sounds from neighboring apartments frequently make rest and quiet impossible. True privacy and solitude, though very important to the growth of the moral individual, are difficult to obtain.”).

90. See Robert W. DeForest & Lawrence Veiller, *The Tenement House Problem*, in 1 THE TENEMENT HOUSE PROBLEM 1, 43 (Robert W. DeForest & Lawrence Veiller eds., 1903).

91. CITY OF N.Y. BD. OF ESTIMATE & APPORTIONMENT COMM. ON THE CITY PLAN, COMMISSION ON BUILDING DISTRICTS AND RESTRICTIONS: FINAL REPORT 31 (1916) (emphasis added).

92. *Brett v. Bldg. Comm’r*, 145 N.E. 269, 271 (Mass. 1924).

93. *City of Bismarck v. Hughes*, 208 N.W. 711, 716 (N.D. 1926).

94. *Id.* at 716–17.

the general concensus [sic] of opinion of all authorities.”⁹⁵ In a speech the next year, President Herbert Hoover emphasized the “wide distinction between homes and mere housing,” noting that the “immortal ballads, Home, Sweet Home; My Old Kentucky Home; and the Little Gray Home in the West” were written about individual homes and not “tenements or apartments.”⁹⁶ For only such a home was “alive with the tender associations of childhood, the family life at the fireside, the free out of doors, the independence, the security, and the pride in possession of the family’s own home—the very seat of its being.”⁹⁷ The individual, detached home was deemed by those in power the aspiration of all right-thinking individuals. Although such a perspective might have supported the development of such housing, why and how did it lead to the use of zoning to prohibit any denser form of housing from being built nearby?

Economist William Fischel offers one account linking these sentiments with zoning. Fischel contends that popular demand for single-family homes “filtered through housing developers, who . . . found that they sell homes for more profit if the community had zoning.”⁹⁸ On Fischel’s account, planners, as well as “progressives who supported scientific management of government” and “lawyers who argued for an expansive view of the police power” merely represented a “supply response[]” to this demand.⁹⁹ As flexible, motorized bus routes supplemented or replaced fixed streetcar lines, apartments spread into single-family neighborhoods, giving owners and developers reason to seek greater control over land uses through zoning.¹⁰⁰ We turn in the next Part to the legal arguments used to establish the validity of this separation of residential uses.

II. THE FRAMING OF SINGLE-FAMILY ZONING

Early proponents of zoning relied in significant part on the police power—“the inherent and plenary power of a State . . . to prescribe regulations to preserve and

95. HARLAND BARTHOLOMEW, *A PLAN FOR THE CITY OF VANCOUVER BRITISH COLUMBIA* 234 (1928).

96. President Herbert Hoover, Address to the White House Conference on Home Building and Home Ownership (Dec. 2, 1931) (transcript available at <https://www.presidency.ucsb.edu/documents/address-the-white-house-conference-home-building-and-home-ownership> [<https://perma.cc/ASM7-3VNU>]). Hoover’s speech was focused as much on home ownership as it was on single-family homes in particular. He went on to recognize such ownership was not available to all: “[M]any of our people must at all times live under other conditions. But they never sing songs about a pile of rent receipts. To own one’s own home is a physical expression of individualism, of enterprise, of independence, and of the freedom of spirit.” *Id.*

97. *Id.*

98. William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 *URB. STUD.* 317, 319 (2004); see also MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING* 149 (1987) (discussing advocacy for single-family zoning among builders seeking to stabilize patterns of land usage in and around their developments).

99. Fischel, *supra* note 98. Fischel rejects the argument that urban conditions alone gave rise to zoning, on the grounds that—given urban conditions were much worse in the eighteenth and nineteenth centuries—zoning would have likely arisen much sooner if nuisance conditions alone were its cause. *Id.*

100. See *id.* at 320–21.

promote the public safety, health and morals, and to prohibit all things hurtful to the comfort and welfare of society”¹⁰¹—to establish its validity. This Part first examines the development of the police power generally in the early twentieth century. It then considers efforts, before the first formal zoning ordinances, to control the use of land in urban areas. These early measures highlight the shift from a nuisance-based rationale for zoning to a more significant reliance on the police power. The discussion turns in Section II.C to the Article’s focus, single-family zoning districts, and introduces early debates regarding whether zoning ordinances should and legally could include such districts. The Part concludes by highlighting the role that the concept of comprehensiveness played in establishing the validity of single-family districts specifically.

A. EARLY TWENTIETH-CENTURY CONCEPTIONS OF THE POLICE POWER

The extension of the police power through zoning has been termed “one of the major judicial innovations of our century as well as the most important redefinition of the nature of private property ever made in United States courts.”¹⁰² In undertaking this redefinition of private property, early zoning advocates relied on Ernst Freund’s seminal 1904 treatise on the police power.¹⁰³ Freund distinguished the police power from the common law of nuisance, observing that the latter deals only with “more serious or flagrant violations of the interests which the police power protects” and does so “only after they have come into existence.”¹⁰⁴ In contrast, the police power checks, in advance, activities that might threaten public health, safety, and welfare by “plac[ing] a margin of safety between that which is permitted and that which is sure to lead to injury or loss.”¹⁰⁵ The standards set by the police power—in areas including building regulations, workplace health and safety laws, labor laws, and “the creation of districts for offensive establishments”—restrict activities that may not always constitute a nuisance.¹⁰⁶

When zoning reached the Supreme Court in *Euclid*, Alfred Bettman, a leading early zoning advocate, invoked Freund’s treatise in his amicus brief to argue that zoning moved beyond nuisance law, both by acting prospectively and by constraining a broader set of detrimental tendencies.¹⁰⁷ Zoning served not only to

101. Hochheimer, *supra* note 9.

102. Charles M. Haar, *Reflections on Euclid*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP*, *supra* note 82, at 333, 334.

103. See generally ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904).

104. *Id.* at § 29.

105. *Id.*

106. See *id.*

107. Motion for Leave to File Brief, Amici Curiae & Brief on Behalf of the National Conference on City Planning et al., Amici Curiae at 27, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665) [hereinafter *City Planning Brief*] (quoting FREUND, *supra* note 103, at § 29). Bettman also argued that zoning, “by comprehensively districting the whole territory of the city and giving ample space and appropriate territory for each type of use, is decidedly more just, intelligent and reasonable” and provides a greater degree of fairness and assurance by avoiding the uncertainty of nuisance law. *Id.* at 28. Bettman’s amicus brief restated many arguments he offered two years earlier in a law review article. See Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 841 (1924) (“[Z]oning and, in

suppress nuisances “but also [to] constructively and affirmatively . . . promot[e] . . . public welfare.”¹⁰⁸ In his own briefs, James Metzenbaum, the Village’s attorney in *Euclid*, also pressed an expanded understanding of the police power rooted in the general welfare.¹⁰⁹

In the years between Freund’s treatise and *Euclid*, discussion of the police power among advocates and courts increasingly emphasized broader general welfare justifications for its exercise, rather than relying on more specific health and safety concerns. The Supreme Court, in a 1912 decision involving early land-use regulations in Richmond, Virginia, emphasized that the police power extended “not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.”¹¹⁰ This was consistent with decisions from the prior decade that revealed a broadening of the police power beyond protection of health, safety, and morals and toward promotion of public welfare, convenience, and prosperity.¹¹¹

A series of California decisions from the early 1910s, which upheld prohibitions on certain occupations and industries within residential districts, proved particularly important for zoning proponents.¹¹² In the most well-known of these decisions, *Hadacheck v. Sebastian*, the California Supreme Court declared it

truth, all property regulation has the same fundamental basis as the law against nuisances, [and] no greater fallacy could exist than that zoning is restricted to or is identical with nuisance regulation.”).

108. Bettman, *supra* note 107, at 842.

109. Brief on Behalf of the Appellants at 81–82, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665) [hereinafter Brief of Appellants]. See generally Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 2 J. SUP. CT. HIST. 79, 84 (1997) (arguing that, in contrast with Metzenbaum, Bettman continued to emphasize the role of zoning as a form of nuisance suppression).

110. *Eubank v. City of Richmond*, 226 U.S. 137, 142 (1912) (citing *Chi., Burlington & Quincy Ry. Co. v. Illinois ex rel. Drainage Comm’rs*, 200 U.S. 561 (1906)). The regulations included minimum setback requirements and limits on lot coverage and building height. *Id.* at 141. The key issue in *Eubank*, however, was that the ordinance granted to “the owners of two-thirds of the property abutting on any street” the power to establish building lines. *Id.* This delegation of power, the Court ruled, failed to serve “the public safety, convenience or welfare” and instead “enable[d] the convenience or purpose of one set of property owners to control the property right of others.” *Id.* at 143–44; see also *id.* at 144 (“We need not consider the power of a city to establish a building line or regulate the structure or height of buildings.”).

111. See, e.g., *Chi., Burlington & Quincy Ry. Co.*, 200 U.S. at 592 (“We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.”); see also *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (“It may be said in a general way that the police power extends to all the great public needs.”), amended by 219 U.S. 575 (1911). State courts in the late nineteenth century also invoked an expansionary police power. See, e.g., *Bos. & M. R. Co. v. Cnty. Comm’rs of York Co.*, 10 A. 113, 114 (Me. 1887) (“[E]xercise [of the police power] must become wider, more varied, and frequent, with the progress of society.”).

112. See, e.g., *Ex parte Quong Wo*, 118 P. 714, 718 (Cal. 1911) (“There can be no question that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine the carrying on of the same to certain limits, whenever such restrictions may reasonably be found necessary to subserve the ends for which the police power exists, viz., to protect the public health, morals, safety, and comfort.”); *In re Montgomery*, 163 Cal. 457, 460 (1912) (“While a lumber-yard is not *per se* a nuisance, it takes no extended argument to convince one that in a residence district such a place may be a menace to the safety of the property in its neighborhood for various reasons, among which may be mentioned the inflammable nature of the materials kept there.”).

irrelevant that a brickyard was not a nuisance per se, noting that the police power was not limited to suppression of nuisances and highlighting public welfare justifications for the law.¹¹³ Lawrence Veiller, who served as Secretary of the National Housing Association and helped draft New York City's zoning ordinance, emphasized in 1916 that *Hadacheck* sustained the ordinance "not on the basis of public health nor public safety, but on that novel, broad and sweeping ground, 'the general welfare.'"¹¹⁴ Noting that "the police power has been a rather vague, indefinite thing," Veiller contended that *Hadacheck* "opens a door a crack, which may be opened very wide."¹¹⁵

How wide that door had been opened and how far regulations could go remained a subject of debate. Early cases involving land-use regulations, to which we turn in the next Section, focused narrowly on health and safety concerns. For some zoning advocates, these regulations, governing building setbacks, heights, and lot coverage, and grounded in concerns regarding the spread of fire, offered a sounder mechanism for encouraging development of single-family neighborhoods than the establishment of zoning districts that outright prohibited other housing types.

B. PRE-ZONING LAND-USE CONTROLS

In the period before the first zoning ordinances divided municipalities into separate zoning districts and prescribed regulations for each district, the fear of fire fueled simpler forms of land-use regulation. Some of the earliest of these regulations separated production activities from dwellings to reduce threats to wood frame buildings.¹¹⁶ Other measures imposed to prevent the spread of fire, such as minimum setbacks along lot lines, which served to increase the space between buildings, would inform the subsequent zoning of detached, single-family residential districts.¹¹⁷ Reflecting the general view of these measures, a New York court remarked: "[O]pen spaces not only tend to minimize the danger of fire to adjoining buildings and thus a spreading conflagration, but they also afford a greater opportunity for access by fire departments to a burning building and thus increase the possibility of successfully stopping a conflagration before it spreads

113. *Ex parte Hadacheck*, 165 Cal. 416, 419, 421–22 (1913), *aff'd sub nom.* *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The United States Supreme Court's decision in *Hadacheck* would declare the police power "one of the most essential powers of government, one that is the least limitable." *Sebastian*, 239 U.S. at 410.

114. Lawrence Veiller, *Districting by Municipal Regulation*, in PROCEEDINGS OF THE EIGHTH NATIONAL CONFERENCE ON CITY PLANNING 147, 153 (1916).

115. *Id.*

116. HIRT, *supra* note 17, at 156.

117. See A. C. Holliday, *Restrictions Governing City Development: II. Zoning for Use*, 9 TOWN PLAN. REV. 217, 231 (1922) (discussing Maryland state legislation requiring that dwelling houses in part of Baltimore be separate and unattached and requiring minimum separation of twenty feet for wood-frame dwellings and ten feet for those made of stone or brick); see also Peter L. Abeles, *Planning and Zoning* ("Based on an earlier need to have side yards for fire prevention, zoning ordinances provided endless details regulating all aspects of suburban housing production."), in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP, *supra* note 82, at 122, 131.

to other buildings.”¹¹⁸ The initial brief on behalf of the Village in *Euclid* highlighted expert testimony regarding the significant role street setbacks played in reducing fire risks.¹¹⁹ To the extent that setbacks furthered “the safety and general welfare of the community,” it went so far as to argue that municipalities had a duty to impose them.¹²⁰

Concerns regarding fire also motivated height restrictions, another important form of pre-zoning land-use regulation.¹²¹ Debates over these restrictions highlight concerns that would come to the fore in later discussions of the legality of districts that segregated residential uses. These include the differential treatment of property across districts, the scope of the general welfare as a basis for the exercise of the police power, and the need to make reasonable concessions to financial and other interests.¹²²

In 1908, the Supreme Court, in dicta, stated that “the police power may limit the height of buildings, in a city, without compensation.”¹²³ The Court addressed the legal validity of height limits directly the following year in *Welch v. Swasey*, a case challenging a Boston statute that limited building heights in designated areas to 80 feet.¹²⁴ The plaintiff objected that this limit was significantly lower than the 125 feet applicable elsewhere, that it unreasonably infringed upon his property rights, that the disparate treatment of different parts of the city denied his equal rights, and that the regulation was merely aesthetic in nature and not a valid exercise of the police power.¹²⁵

The Massachusetts Supreme Judicial Court’s earlier decision in *Welch* had addressed both whether height limits on buildings constituted a valid exercise of the police power and whether different limits may be prescribed in different parts

118. *Wulfsohn v. Burden*, 150 N.E. 120, 124 (N.Y. 1925).

119. Brief of Appellants, *supra* note 109, at 33 (“Investigation brought forth the statement from long experienced fire authorities, that the most reasonable and certain way of preventing widespread conflagration is by requiring the greatest possible distance between buildings and structures on one side of each street and those on the other side thereof, commensurate with a reasonable use of the land.”).

120. *Id.*

121. See Comment, *The Constitutionality of Zoning Laws*, 32 YALE L.J. 833, 835 (1923) (arguing that “fire and safety regulations as to height, area, and use of buildings . . . have been almost universally supported”).

122. See *infra* Section II.C.

123. *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (“The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.”).

124. 214 U.S. 91 (1909).

125. *Id.* at 103–04. The plaintiff conceded a 125-foot limit, as applied in the commercial districts of the city, was valid but objected to the differential classification of parts of the city and the imposition of lower limits of 80 to 100 feet in residential areas. *Id.* at 104.

of the city.¹²⁶ The court framed the police power as allowing regulation of property “in the interest of the public health, public morals and public safety.”¹²⁷ As for the more amorphous concept of the general welfare, the court suggested it must be read narrowly: “With considerable strictness of definition, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power.”¹²⁸ In addition to increasing the risk of damage from fire, tall buildings threatened “to exclude sunshine, light and air, and thus to affect the public health.”¹²⁹

As for different height limits in different neighborhoods, the regulation’s reasonableness had to be judged “not only in reference to the interests of the public, but also in reference to the rights of land owners.”¹³⁰ The “value of land and the demand for space” in commercial portions of the city called for allowing taller buildings and rendered the higher limit reasonable.¹³¹ Similar financial considerations would inform subsequent debates over the relative reasonableness of single-family districts.

The Supreme Court in *Welch* cited approvingly to the Supreme Judicial Court’s reasoning that land values and demand for space in denser, commercial areas justified allowing taller buildings in those locations.¹³² As for whether this permitted unsafe conditions to exist in such areas (the same conditions that justified the strict regulations in residential areas), the Court suggested that there may be less danger from taller buildings in commercial areas given differences—in construction materials, firefighting resources, and day and evening populations—between commercial and residential districts.¹³³ Analogous arguments would appear in debates over single-family districts.

These and other early land-use regulations did not explicitly ban particular uses of property (as zoning subsequently would do); rather, by reducing heights, limiting how intensely a lot could be developed, and mandating the use of certain building materials, they made certain uses significantly less likely than others.¹³⁴

126. *Welch v. Swasey*, 79 N.E. 745, 745 (Mass. 1907), *aff’d*, 214 U.S. 91 (1909).

127. *Id.*

128. *Id.* at 746.

129. *Id.* The Supreme Court declared the question of whether the height limit was “well calculated to promote the general and public welfare” depended on the particular circumstances at the place where it was imposed; accordingly, the decision of the state court, which was more familiar with the material facts, was “entitled to the very greatest respect.” *Welch*, 214 U.S. at 105–06.

130. *Welch*, 79 N.E. at 746.

131. *Id.*

132. 214 U.S. at 106–07.

133. *Id.* at 107–08. In 1925, the Supreme Court of Ohio justified greater restrictions on building heights in residential districts (in comparison with commercial districts) by highlighting differences in the building materials used in business districts and that it is “more difficult to use the fire apparatus, and more difficult to save life in residence districts, where people continually reside by night as well as by day, and where children and elderly people and the sick and infirm spend their time.” *Pritz v. Messer*, 149 N.E. 30, 34 (Ohio 1925).

134. See Baar, *The National Movement*, *supra* note 85, at 42 (discussing fire control measures in Philadelphia, Boston, and Chicago that, by requiring fireproofing or large side yards, severely constrained the construction of tenement houses).

While legitimate concerns regarding fire prevention informed these efforts, opponents of multifamily housing admitted to enlisting these regulations to drive up the cost of apartment construction or render the development of denser housing impossible.¹³⁵ Lawrence Veiller argued for taking steps to increase construction costs by requiring fireproofing, contending that “if we require fire-escapes and a host of other things, all dealing with fire protection, we are on safe grounds, because that can be justified as a legitimate exercise of the police power.”¹³⁶ Veiller feared “requiring larger open spaces . . . would be unconstitutional” and deemed requirements related to fireproofing “the easiest and quickest way to penalize the apartment house.”¹³⁷

Regulations related to fire safety and building height, which were widely accepted by the courts, were framed by Frank Williams, a member of the commission that drafted New York City’s zoning ordinance, as “really zoning measures.”¹³⁸ The same reasoning that supported these early measures, Williams argued, justified “more fully developed zoning.”¹³⁹ We turn now to one particular aspect of such zoning: districts that either excluded commercial uses or permitted only certain forms of housing.

C. THE DILEMMA OF RESIDENTIAL DISTRICTING

The most restrictive residential districts in early zoning ordinances frequently permitted both single- and two-family dwellings.¹⁴⁰ Berkeley’s 1916 zoning ordinance is often recognized as the first to establish districts exclusively for single-family dwellings.¹⁴¹ However, Berkeley’s ordinance did not cover the entire city, and zoning was imposed in a neighborhood only upon petition from the residents.¹⁴² Writing in 1931, Gordon Whitnall identified Los Angeles as the first

135. *See id.* at 43.

136. Lawrence Veiller, Sec’y, Nat’l Hous. Ass’n, Comments on “How Can We Keep Our City a City of Homes?” at the Third National Conference on Housing (Dec. 1913), in *PROCEEDINGS OF THE THIRD NATIONAL CONFERENCE ON HOUSING* 211, 212 (1913). Veiller viewed apartments as having “a very bad effect on American life and upon our political and social conditions.” *Id.*

137. *Id.*; *see also id.* at 212–13 (“In our laws let most of our fire provisions relate solely to multiple dwellings, and allow our private houses and two-family houses to be built with almost no fire protection whatever.”).

138. FRANK BACKUS WILLIAMS, *THE LAW OF CITY PLANNING AND ZONING* 283 (photo reprt. 1969) (1922).

139. *Id.* William Novak, in his study of early nineteenth-century American regulation, agrees, describing fire ordinances of the period as “a form of urban land-use regulation different only in degree from the comprehensive zoning ordinances of the Progressive Era.” NOVAK, *supra* note 9, at 67.

140. *See, e.g.*, *Miller v. Bd. of Pub. Works*, 234 P. 381, 383 (Cal. 1925) (discussing provision in 1921 Los Angeles ordinance); *State ex rel. Morris v. City of East Cleveland*, 31 Ohio Dec. 197, 198, 209 (Ct. Com. Pl. 1920) (discussing East Cleveland, Ohio, ordinance); *see also* Hirt, *supra* note 31, at 300 (discussing ordinances in Utica and Syracuse, New York).

141. *See* Berkeley, Cal., Ordinance No. 452 N.S. (Mar. 28, 1916). As Sonia Hirt notes, Minneapolis had a form of single-family district, established via resident petition, that predated Berkeley’s more formal designation of single-family districts. Sonia Hirt, *The Rules of Residential Segregation: US Housing Taxonomies and Their Precedents*, 30 *PLAN. PERSPS.* 367, 377 (2015).

142. Marc A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, 3 *BERKELEY PLAN. J.* 7, 17 (1986).

municipality to establish exclusively single-family districts in a more comprehensive manner through its 1920 zoning ordinance.¹⁴³ Regardless of when and where they were first introduced, there was significant uncertainty throughout the 1920s regarding the legality of exclusively single-family districts.

The 1926 Standard State Zoning Enabling Act, which would inform the drafting of many early zoning ordinances, referenced the possibility of single-family districts only in a footnote. That footnote—to the phrase “density of population” in a section granting the power to zone for a range of purposes that included regulating and restricting population density—states at its conclusion: “It is believed that, with proper restrictions, this provision will make possible the creation of one-family residence districts.”¹⁴⁴ A few years later, the President’s Conference on Home Building and Home Ownership, which included a number of individuals who were also involved in drafting the Standard State Zoning Enabling Act, released a report firmly declaring that zoning regulations “should provide for one-family dwelling districts, two-family dwelling districts, multiple dwelling districts.”¹⁴⁵

In the intervening years, as the remainder of this Part will reveal, advocates and scholars hesitant about the legality of single-family districts gradually embraced a broader conception of the police power and found justification for elements of zoning, particularly single-family districts, that, although questionable by themselves, were considered saved by their role within a comprehensive plan. As courts began to adopt a similar understanding and uphold single-family districting, these advocates grew more confident in their arguments.

1. Concerns Regarding the Police Power

Some early proponents of zoning expressed concern regarding whether single-family districts, which segregated such housing from more intense residential uses, represented a legitimate exercise of the police power.¹⁴⁶ These included

143. Gordon Whitnall, *History of Zoning*, 155 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 12 (1931) (“Up to 1920, probably the most distinctive American institution, the single-family detached home, had never been separately classified or directly protected against encroachment by more intensive property uses. In that year, when Los Angeles undertook to consolidate her numerous crude zoning ordinances into a more systematic act that would incorporate the map method of defining boundaries, and also instituted the practice of classifying all uses in one ordinance, it was determined to recognize the single-family detached home by a classification of its own and to protect it against intrusion by any other use.”).

144. A STANDARD STATE ZONING ENABLING ACT § 1 & n.12 (ADVISORY COMM. ON ZONING, DEP’T OF COM. 1926). Although putting this in a footnote may not suggest the strongest endorsement of the validity of single-family zoning, it should be noted that the footnotes to the Standard State Zoning Enabling Act—like some law review articles—are more extensive than the main text.

145. *City Planning and Zoning (Committee Report)*, in THE PRESIDENT’S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP: PLANNING FOR RESIDENTIAL DISTRICTS 1, 31 (John M. Gries & James Ford eds., 1932). The 1932 report was co-edited by John Gries, who was involved with preparing the Standard State Zoning Enabling Act. A STANDARD STATE ZONING ENABLING ACT (ADVISORY COMM. ON ZONING, DEP’T OF COM. 1926) (listing John M. Gries as Chief of the Division of Building and Housing at the Bureau of Standards in the Department of Commerce). Alfred Bettman and John Ihlder were also members of the committees that drafted both documents. *Id.*; *City Planning and Zoning (Committee Report)*, *supra*, at vii.

146. See Baar, *Anti-Apartment Movement*, *supra* note 85, at 367–68 (discussing concerns of early advocates regarding constitutionality of single-family zoning).

Edward Bassett, described as the father of American zoning.¹⁴⁷ Bassett, an influential author and advocate, was a member of the committee that drafted the Standard State Zoning Enabling Act.¹⁴⁸ He also chaired the 1913 New York City Heights of Buildings Commission, whose work “marked the beginning of the zoning movement in America.”¹⁴⁹ It led directly into the Commission on Building Districts and Restrictions, which Bassett also chaired and which produced the 1916 New York zoning resolution.¹⁵⁰

The 1916 New York City zoning resolution deliberately did not establish an exclusive single-family district.¹⁵¹ It included two zoning districts, “E” and “D,” in which regulations limited how much of a lot could be covered by a structure.¹⁵² These lot coverage regulations permitted, but discouraged, multifamily buildings.¹⁵³ The 1916 report of the Commission on Building Districts and Restrictions described the “D” districts as “especially appropriate for one and two-family house districts, especially where houses occur in rows” as well as for multifamily houses with more significant open space “than is now customary.”¹⁵⁴ The “E” district, the Commission noted, “[is] particularly appropriate for detached or semi-detached houses.”¹⁵⁵ Although these districts did not expressly prohibit apartments, their intent to discourage such housing was clear. In its report, beneath photos of apartment houses captioned as “invading detached house sections,” the Commission remarked:

Even as apartment districts are invaded by business so is the high-class private detached house district invaded by occasional tenements which cut off light and depress values for private residence purposes. In districts designated “E”

147. Randle, *supra* note 82, at 37–38; *see also* TOLL, *supra* note 17, at 143 (“[I]f American zoning has a father, he is Bassett.”).

148. Randle, *supra* note 82, at 38; A STANDARD STATE ZONING ENABLING ACT (ADVISORY COMM. ON ZONING, DEP’T OF COM. 1926) (listing Edward M. Bassett as member of the Advisory Committee on Zoning).

149. TOLL, *supra* note 17, at 148–50.

150. *Id.* at 172, 180.

151. HIRT, *supra* note 17, at 163–64.

152. WILLIAMS, *supra* note 138, at 274 & n.19.

153. *See id.* at 274 (“In the New York resolution although there is no district in which there are specific provisions protecting the one-family house, the ‘D’ districts were created in the attempt, the success of which remains to be seen, to require so much open space that in them it would not be profitable to erect tenements.”); Edward M. Bassett, Comments in Discussion Led by Edward M. Bassett and George B. Ford at the Eighth National Conference on City Planning (June 1916), in PROCEEDINGS OF THE EIGHTH NATIONAL CONFERENCE ON CITY PLANNING 158, 161 (1916) (“[T]he E district [is] the detached house class, although it will not be impossible to build apartment houses in that district, if plenty of light and air are given to them.”); Frank B. Williams, *Zoning and the Law of the One-Family House District*, CMTY. LEADERSHIP, Dec. 16, 1920, at 4, 5 (“New York City attempted to make her ‘E’ districts single-family house districts . . .”).

154. CITY OF N.Y. BD. OF ESTIMATE & APPORTIONMENT COMM. ON THE CITY PLAN, *supra* note 91, at 40.

155. *Id.* at 41.

on the Area maps, the erection of apartment houses will be discouraged by the requirement that a large percentage of the lot be left unoccupied.¹⁵⁶

Although the Commission may have feared that courts would not deem exclusive single-family districts a valid exercise of the police power, it did not hesitate to express the view in its report that “[i]t is important from the standpoint of citizenship as well as from that of health, safety and comfort, that sections be set aside where a man can own his home and have a little open space about it.”¹⁵⁷

Writing in 1922, Bassett explained the reasons for relying on lot coverage limits rather than including a “private residential district” that expressly excluded any use other than a single-family residence:

The reason is that the method of creating districts graduating from 100 per cent to 30 per cent [lot coverage limits] is a plain employment of the police power with a recognition of health and safety considerations, and the courts will protect a plan which is based on such a foundation. In New York at least it presupposes that an apartment house covering not over 30 per cent of the lot would be substantially as safe and healthful as a one-family house, although as a matter of practice landowners in E districts will not erect apartment houses. The courts will recognize the common sense of bringing light and air in greater abundance to suburban districts where children are growing up.¹⁵⁸

Although other cities might choose to create districts expressly limited to private detached residences, Bassett deemed this “the more hazardous course” because “the court is likely to inquire what dangers to health and safety exist in two-family houses, each built on a small fraction of the lot, which do not exist in

156. *Id.* at 41 & fig.22. Speaking in 1916 at the National Conference on City Planning, as the zoning resolution was still being enacted, Bassett would note that over time “a demand arose from other localities that wanted to come in to the E districts,” resulting in a threefold increase in the number of “E” districts. Bassett, *supra* note 153, at 162. The following year, at the same conference, Bassett discussed the police power generally, remarking that “[t]he decided cases show that there has been a constantly growing field within which the courts will justify the exercise of the police power, and that the federal courts will uphold the legislatures and courts of each state so far as police powers are concerned, unless there is a gross or discriminatory abuse of private rights.” EDWARD M. BASSETT, CONSTITUTIONAL LIMITATIONS ON CITY PLANNING POWERS 3–4 (1917). Bassett described debates over use regulations, particularly exclusion of businesses from residential areas, as the current battle line in determining the scope of acceptable regulation. *Id.* at 8.

157. CITY OF N.Y. BD. OF ESTIMATE & APPORTIONMENT COMM. ON THE CITY PLAN, *supra* note 91. Keith Revell argues that even though it lacked exclusively single-family districts, “[p]erhaps the most ambitious (and least publicized) goal of the New York zoning effort was protecting single-family homes from ‘invasion’ by apartments and retail establishments.” Keith D. Revell, *The Road to Euclid v. Ambler: City Planning, State-Building, and the Changing Scope of the Police Power*, 13 *STUD. AM. POL. DEV.* 50, 57 (1999); see also Raphaël Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, 64 *J. AM. PLAN. ASS’N* 170, 170, 172 (1998) (arguing that traditional accounts of New York’s zoning ordinance fail to acknowledge its significant residential dimensions and similarity to contemporaneous zoning and planning efforts).

158. EDWARD M. BASSETT, *ZONING* 323 (rev. 1922).

one-family houses similarly built.¹⁵⁹ Bassett saw the lot coverage limitation as consistent with the fire prevention measures already upheld by courts. His hesitancy regarding the scope of the police power persisted even after *Euclid*. In 1931, Bassett candidly described zoning as a “novel invocation of the police power . . . more drastic than any other form of regulation in this country had ever been.”¹⁶⁰

There were reasons for concern. State court decisions in the 1910s reached different conclusions regarding the legal validity of single-family districts. In *Byrne v. Maryland Realty Co.*, a 1916 case before Maryland’s highest court, the property owner sought to build two-family residences on land restricted to detached, single-family dwellings.¹⁶¹ The court found no substantial support for the proposition that two-family residences “would be a menace to the public health, and therefore their erection might be prohibited under the police power.”¹⁶² Given that “properly constructed semidetached brick houses” pose no inherent danger to health or safety, the prohibition “would be carrying the police power to an extent that would alarm the public.”¹⁶³ *Byrne* concluded that the regulation was aesthetic in purpose and therefore not a valid exercise of the police power.¹⁶⁴

According to Frank Williams, a member of both New York commissions, the hesitancy of the authors of New York’s zoning resolution to explicitly impose a single-family district was partly attributable to the city’s unique characteristics.¹⁶⁵ On Williams’s assessment, the courts’ determination of whether zoning would be upheld under the police power depended in part on its reasonableness “in the place and in the circumstances under which it is established.”¹⁶⁶ Given the predominance of tenements in their city, New Yorkers were cautious, fearing the single-family district would be “more difficult to defend than in most other

159. *Id.* at 323–24. Bassett further noted that “courts of some states of the far West are undoubtedly willing to recognize a greater scope of the police power than those of some of the more conservative Eastern states.” *Id.* at 324; *see also* Revell, *supra* note 157, at 93 (“Bassett was not convinced that even the wide authority to declare nuisances in law granted [by the Supreme Court] in *Reinman* and *Hadacheck* could be used to distinguish between apartments and homes.”).

160. Edward M. Bassett, *Zoning for Humanitarian Institutions*, 155 ANNALS AM. ACAD. POL. & SOC. SCI. 34, 35 (1931).

161. 98 A. 547, 547 (Md. 1916).

162. *Id.* at 549.

163. *Id.* (“There is no authority for such a proposition in this state, and we have found no American case to support it. So far as fire risk is concerned, the facts show that the proposed houses would be less dangerous than the frame cottages in the neighborhood.”).

164. *Id.* at 550.

165. Williams, *supra* note 153, at 4; *see also* WILLIAMS, *supra* note 138, at 274 (“[S]pecific protection for [the one-family house] was omitted in the New York ordinance partly because they were so few and partly because it was feared that the one-family district would not be supported by the courts.”).

166. Williams, *supra* note 153, at 4; *see also* Holliday, *supra* note 117, at 235 (“Mr. George B. Ford, Consultant to the Commission on Building Districts and Restrictions, sounds a note of warning in saying that it would be most unfortunate if the law [in New York] were applied as it stands to other cities, for it is full of unduly liberal provisions in the way of height and size that tend strongly to defeat the object of the law, but which were necessitated by the exceptional economic conditions of New York.”).

cities.”¹⁶⁷ In cities where single-family homes were already prevalent, such districts were more supportable.¹⁶⁸ Williams believed that districting regulations, to avoid legal problems, had to consider differences in the existing condition and character of the city.¹⁶⁹

In later writing Williams acknowledged the difficulty of justifying a line between two-, three-, four-, and five-family residences, but confidently declared the only differentiation “clearly based upon grave considerations of public welfare is that between the house that a man shares with others and the house that he, with his wife and children, occupies alone and can make a real home.”¹⁷⁰ Courts “are most likely to sustain,” Williams predicted, “the validity of the one-family house district most essential to the public welfare.”¹⁷¹ There was, it seems for Williams, something categorically different about single-family homes. Nonetheless, consistent with other early zoning advocates, Williams proposed a fairly limited separation of uses, arguing for the separation by street of residential and industrial uses, which he termed “the street district system,” but for their coexistence within the same neighborhood.¹⁷²

Other commission members expressed different concerns. Robert Whitten served as secretary to the Commission on Building Districts and Restrictions.¹⁷³ In a 1918 speech at the National Conference on City Planning, Whitten described the creation of zones limited to single-family detached houses as a “somewhat rigid and inelastic” method that “seems better adapted to private restrictions covering a single small subdivision than to a general zoning scheme.”¹⁷⁴ He doubted the constitutionality of such a limitation because “[i]t will be difficult, unless the courts take a very liberal attitude, to show a reason under the police power for the prohibition of the multi-family dwelling *as such* and without regard to yards, courts, open spaces or distribution of population.”¹⁷⁵ In separate remarks, Whitten noted that courts repeatedly approved lot-coverage limits and setback requirements.¹⁷⁶ He believed courts would approve reasonable districting that

167. Williams, *supra* note 153, at 4.

168. *See id.* at 5. For his part, Williams apparently believed early on in the validity of single-family districts, or at least that the state had granted New York City the power to create such districts. He noted that the City’s charter granted the power “to regulate and restrict ‘the location of buildings designed for specified uses’” and argued that one-family and multifamily houses were separate uses, which accordingly “may be regulated and restricted so as to form separate districts.” WILLIAMS, *supra* note 138, at 275 n.21.

169. *See* WILLIAMS, *supra* note 34, at 2.

170. WILLIAMS, *supra* note 138, at 292.

171. *Id.*

172. Frank Backus Williams, The Zone System in German Cities, Address Before the National Housing Conference at Cincinnati, Ohio (Dec. 4, 1913), in 2 J. AM. INST. ARCHITECTS 27, 28 (1914).

173. CITY OF N.Y. BD. OF ESTIMATE & APPORTIONMENT COMM. ON THE CITY PLAN, *supra* note 91, at ii.

174. Robert H. Whitten, *The Zoning of Residence Sections*, in PROCEEDINGS OF THE TENTH NATIONAL CONFERENCE ON CITY PLANNING 34, 36–37 (1918).

175. *Id.* at 37.

176. *The First Meeting of the American City Planning Institute*, 3 CITY PLAN, Dec. 1917, 1, 2 (summarizing statements of Robert H. Whitten, Secretary of the Committee on City Plan of the Board of Estimate and Apportionment, New York City).

regulated lot coverage and setbacks but was not as certain they would approve “a zone plan that directly creates, for example, a single-family detached house district.”¹⁷⁷ Whitten saw significant advantages in an “indirect method of area regulation,” which allowed for the creation of districts with slightly denser housing types.¹⁷⁸ Although he revealed concerns regarding how courts would respond to single-family districts, Whitten made clear his underlying desire to “preserve our American cities as cities of homes” by limiting the spread of apartments through other means.¹⁷⁹

Bassett, Williams, and Whitten would play prominent roles in early planning and zoning efforts across the United States. A few years after the New York ordinance took effect, Bassett drafted a “Statement of Principles of Zoning” on behalf of the American City Planning Institute.¹⁸⁰ The statement noted a “lack of agreement as to the desirability and legality of prohibiting apartment houses, flats, tenement houses and other multiple dwellings in certain districts limited to single family dwellings.”¹⁸¹ This lingering hesitancy regarding the legality of single-family districting drove early zoning advocates to find other means to protect the single-family home. These included setbacks and open-space requirements, which reflected continuity with earlier restrictions upheld in the name of the more traditional police power concern with fire safety.¹⁸² Looking back in 1925 on the first decade of zoning, the Committee on Community Planning at the American Institute of Architects forthrightly concluded that zoning as practiced to that point could not be justified by any contribution to the common welfare, but instead it served primarily to enable residential exclusion.¹⁸³

2. Concerns Regarding Equal Treatment

The idea that single-family zoning should be protected because of the perceived benefits it confers in relation to health, safety, and the rearing of strong children and upright, productive citizens raises the question of why any multifamily housing should be allowed.¹⁸⁴ If apartments are, as some courts and

177. *Id.*

178. *Id.* at 2–3.

179. Robert H. Whitten, *The Zoning of Apartment and Tenement Houses: An Important Legal Decision Which Will Help to Preserve Our American Cities as Cities of Homes*, 23 AM. CITY 140, 140 (1920).

180. WILLIAMS, *supra* note 138, at 204 n.14.

181. Edward M. Bassett, *Statement of Principles of Zoning* ¶ 13, reprinted in WILLIAMS, *supra* note 138, at 204 n.14.

182. *See, e.g., The First Meeting of the American City Planning Institute*, *supra* note 176, at 2–3.

183. Raphaël Fischler, *Health, Safety, and the General Welfare: Markets, Politics, and Social Science in Early Land-Use Regulation and Community Design*, 24 J. URB. HIST. 675, 675 (1998) (citing Am. Inst. of Architects, *The Architect and the City*, in THE URBAN COMMUNITY: HOUSING AND PLANNING IN THE PROGRESSIVE ERA 116, 127–28 (Roy Lubove ed., 1967)).

184. Nathanael Lauster has made this point in relation to *Euclid*, arguing that the concern with the protection of children expressed by the Court and in the “expert reports” upon which it depended appears to extend only to the middle class and not apartment dwellers. NATHANAEL LAUSTER, *THE DEATH AND LIFE OF THE SINGLE-FAMILY HOUSE: LESSONS FROM VANCOUVER ON BUILDING A LIVABLE CITY* 20 (2016).

commentators would declare, a nuisance or near nuisance,¹⁸⁵ why should any families and children be left to dwell in them? As Garrett Power has observed, zoning “required lots on which the fewest people lived to have the largest free areas for light and air, while those on which the most people lived had minimum requirements for light and air.”¹⁸⁶ This “turned utilitarianism inside out,” providing “the greatest good for the fewest and richest in number.”¹⁸⁷ A number of early zoning experts and advocates, as well as critics, were attentive to these concerns.¹⁸⁸

One attorney, in a 1913 report to the New York City Heights of Buildings Commission, questioned imposing different building height limits in different areas, contending that legislation must instead seek “the abolition of unsanitary conditions in all localities.”¹⁸⁹ He remarked that “[i]f health and sanitation warranted limiting buildings in the suburbs at a low height, then these same grounds could be consistently urged in remedying the congestion in the built-up areas [of the city].”¹⁹⁰ The attorneys in a 1924 case challenging Brookline, Massachusetts’s zoning ordinance, which excluded multifamily buildings from single-family districts, similarly argued that the law fostered class segregation and unfairly “allowed solely the wealthy residents of the town to enjoy the benefits—such as ample light and air—of a neighborhood of single-family homes with large yards.”¹⁹¹

Bruno Lasker, a social worker by trade, penned one of the strongest early critiques of single-family districts. Writing in 1920, he decried zoning regulations in western cities that created districts solely for single-family dwellings or separated types of residence more generally.¹⁹² Lasker asked “[w]hy, in this country of democracy, is a city government, representative of all classes in the community, taking it upon itself to legislate a majority of citizens—those who cannot afford to occupy a detached house of their own—out of the best located parts of the city area . . . ?”¹⁹³ In sum, these voices argued that even if one accepted the purported benefits of single-family zoning, one must still confront the question of why only a certain subset of the population should receive those benefits.

185. See *supra* notes 80, 90–91 and *infra* note 342 and accompanying text.

186. Garrett Power, *The Advent of Zoning*, 4 PLAN. PERSPS. 1, 7 (1989).

187. *Id.*

188. See Fischler, *supra* note 183, at 691–93 (discussing concerns regarding potential equal-protection problems posed by zoning that imposed different standards for access to light and air in different neighborhoods).

189. Revell, *supra* note 157, at 94 (quoting Walter Lindner, Couns., Title Guar. & Trust Co., Statement Submitted to the Heights of Buildings Commission (July 7, 1913), in REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION 244, 245 (1913)).

190. *Id.*

191. Lees, *supra* note 83, at 388 (citing Brief for Petitioners at 13, *Brett v. Bldg. Comm’r*, 145 N.E. 269 (Mass. 1924)).

192. Bruno Lasker, *Unwalled Towns*, SURV., Mar. 6, 1920, at 675, 676–77.

193. *Id.* at 677. Accessing affordable or moderately priced single-family detached homes has grown even more difficult in recent years. Emily Badger, *Whatever Happened to the Starter Home?*, N.Y. TIMES: THE UPSHOT (Sept. 25, 2022), <https://www.nytimes.com/2022/09/25/upshot/starter-home-prices.html>.

Zoning's supporters responded to these concerns in multiple ways. First, they argued that zoning's benefits did, in fact, accrue to all residents and that in some ways single-family districting particularly benefited less wealthy households.¹⁹⁴ Second, they contended that although constraints on development were justified by perceived service to the public good, they had to be balanced against the burdens imposed on private owners.¹⁹⁵ Third, and relatedly, they framed residential districting as necessary for the efficient provision of city services.¹⁹⁶

As to the first response, Charles Cheney, a Portland, Oregon planning consultant, argued that planning and zoning sought to

remove the social barriers in cities and to give the poor man, and particularly the foreign-born worker an equal opportunity to live and raise his family according to the most wholesome American standards, in contentment and safety and in a detached house of his own rather than in a tenement¹⁹⁷

It was too costly for developers to place deed restrictions on lower cost properties, but city governments could “use the police power in favor of the poor man, in order to give him the same kind of protected home districts that the rich man has.”¹⁹⁸ By doing so, the city would break down social barriers.¹⁹⁹ Progressive Era reformers framed the privately owned single-family home as an ideal for residents of all classes and in some cases actually pursued measures to achieve this ideal.²⁰⁰

The Boston City Planning Board similarly emphasized the benefits of zoning for those of lower income who received these benefits, such as increased safety and open space, that were otherwise available only to the wealthy.²⁰¹ Alfred Bettman offered an analogous argument in his amicus brief in *Euclid*, contending

194. See *infra* notes 197–208 and accompanying text.

195. See *infra* notes 211–23 and accompanying text.

196. See *infra* notes 225–39 and accompanying text.

197. Charles H. Cheney, *Removing Social Barriers by Zoning*, SURV., May 22, 1920, at 275, 275. Cheney was a consultant to the Portland City Planning Commission. *Id.*

198. *Id.*; see also Hirt, *supra* note 31, at 303 (“[Z]oning’s propagandists, while supporting class segregation, also apparently wished to spread the benefits of the single-family home to the wide American masses.”); Shoked, *supra* note 83, at 133 (“More than a century later, the Court’s neo-Jeffersonian endorsement of zoning was, similarly, not a mere attempt to protect suburban property holders by keeping the poor out; it was an effort to expand the detached-residence districts so that they could ultimately turn those members of the lower classes into owners and house them. The Court sought to keep apartment buildings out, in order, paradoxically, to allow their dwellers to eventually move in. Such a policy originated in the belief, characteristic of the genteel reform spirit of the day, that those less fortunate could someday adopt middle-class values and then share in the bourgeois way of life.”).

199. Cheney, *supra* note 197. Cheney also argued that writers from the East failed to understand the conditions and the nature of zoning in western cities. *Id.* at 275–76; see also Sonia A. Hirt, *Rooting Out Mixed Use: Revisiting the Original Rationales*, 50 LAND USE POL’Y 134, 142 (2016) (discussing similar populist arguments during this period).

200. The early twentieth-century New York Tenement House Commission investigated the possibility of building smaller houses on the outskirts of New York for working people, in hopes that tenements might be eliminated completely, but deemed this unrealistic. DeForest & Veiller, *supra* note 90.

201. Lees, *supra* note 83, at 392–94.

that zoning provides individuals with assurances regarding conditions outside their home, protections otherwise available only to “the rarely wealthy individual who can afford to buy large open spaces owned and controlled by himself.”²⁰² A particularly attenuated example of the benefits zoning was believed to confer on those of lesser means can be found in an amicus brief filed on behalf of the city of Duluth, Minnesota, in a prominent state zoning case. The brief argued that excluding apartments from single-family districts served a public use because

[v]ery fine residences are usually surrounded by spacious lawns and plenty of shrubs and trees. Such a district serves the same public use for which parks are created. They are in reality parks maintained at private expense. Every citizen takes pride in such districts and visitors to the city take away with them a fine picture of such city, owing to such districts.²⁰³

On this account the mere presence of desirable open space, which one might view from a distance and remember ever after, confers a benefit on those of lesser means.²⁰⁴

Judicial decisions similarly emphasized the benefits of single-family districts for “those of moderate means,” who were given an inducement for ownership by the protection of zoning, which brought with it “stability, the welding together of family ties, and better attention to the rearing of children.”²⁰⁵ Progressives, such as Justice Dibell of the Minnesota Supreme Court, grew to accept exclusively residential zoning once they “decided that upholding this use of zoning would benefit the poorer classes.”²⁰⁶ Even though residential districting, by separating less expensive multifamily housing from single-family homes, might exacerbate class segregation, Dibell declared: “[T]he police power, which permits the creation of exclusive residence districts, may enforce, when invoked, better housing conditions in localities where they are unwholesome”²⁰⁷ Dibell took the view,

202. City Planning Brief, *supra* note 107, at 30.

203. Lees, *supra* note 83, at 394 (quoting Brief for Amicus Curiae City of Duluth, Minnesota at 5, *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 176 N.W. 159 (Minn. 1920) (No. 21104)).

204. The experience of a visitor taking away a pleasant memory of a city’s fine residences on ample lawns is perhaps akin to that conveyed by Wordsworth in *Tintern Abbey*: “These beauteous forms, / Through a long absence, have not been to me / As is a landscape to a blind man’s eye: / But oft, in lonely rooms, and ’mid the din / Of towns and cities, I have owed to them / In hours of weariness, sensations sweet, / Felt in the blood, and felt along the heart” William Wordsworth, *Lines Composed a Few Miles Above Tintern Abbey, on Revisiting the Banks of the Wye During a Tour, July 13, 1798*, POETS.ORG, <https://poets.org/poem/lines-composed-few-miles-above-tintern-abbey-revisiting-banks-wye-during-tour-july-13-1798> [<https://perma.cc/4TA8-99LA>] (last visited Mar. 8, 2023).

205. *Miller v. Bd. of Pub. Works*, 234 P. 381, 387 (Cal. 1925).

206. Lees, *supra* note 83, at 389–91.

207. *State ex rel. Beery v. Houghton*, 204 N.W. 569, 570 (Minn. 1925), *aff’d sub nom. Beery v. Houghton*, 273 U.S. 671 (1927) (per curiam) (declaring constitutional zoning ordinance that excluded four-family building from district). *Houghton* expressly rejected three prior decisions that had adopted a more restrictive view of zoning. See *State ex rel. Lachtman v. Houghton*, 158 N.W. 1017, 1021–22 (Minn. 1916) (“Only such use of property as may produce injurious consequences, or infringe the lawful rights of others, can be prohibited without violating the constitutional provisions that the owner shall not be deprived of his property without due process of law nor without compensation therefor [sic] first paid

consistent with the emphasis on comprehensiveness discussed below, that zoning as an exercise of the police power must be viewed holistically and that when it was viewed in this light “[t]he advantage is not altogether to one class.”²⁰⁸ This approach suggests a reluctance to separate out and declare unlawful particular components of a zoning regime, perhaps for fear this would render the entire concept of land-use regulation through zoning questionable.

As to the second response, zoning’s defenders framed the differential treatment of parts of the city as a reasonable exercise of the police power in light of financial considerations. In certain locales the costs imposed by restrictions might be disproportionate to the public gain. A 1913 report by the Commission on Building Districts and Restrictions in New York described this situation:

[T]o justify more stringent regulations for dwelling-houses in the suburbs than for dwelling-houses in lower Manhattan it must appear either that such regulations for the suburbs are more important to the public health, safety or general welfare than for lower Manhattan, or that while equally important for one or more of these purposes in both districts the suburban regulations would if applied to lower Manhattan interfere so seriously with existing property values as to render them of doubtful expediency or constitutionality.²⁰⁹

Citing Freund’s treatise on the police power and its framing of “reasonableness” as a necessary characteristic of a valid exercise of the police power, the Commission declared that districting must reflect “some fair relation between the public good to be secured by the regulation and the private injury suffered.”²¹⁰ It was not that health, safety, and general welfare were more important in less dense areas. Rather, the cost of regulation would be too high where property was particularly valuable and higher density development was expected.²¹¹ It would be unreasonable to force suburban conditions on existing business districts in New

or secured.”); *State ex rel. Roerig v. City of Minneapolis*, 162 N.W. 477, 477 (Minn. 1917) (“[T]here is no tenable distinction between buildings such as were under consideration in [*Lachtman*] and an ordinary four-family dwelling”); *Vorlander v. Hokenson*, 175 N.W. 995, 995 (Minn. 1920) (per curiam) (applying *Houghton* rule to allow building inspector to issue permit to construct an apartment building). In *Euclid*, the Supreme Court specifically referenced the Minnesota cases, and the court’s rejection in *Houghton* of its earlier decisions, as indicative of a trend toward embracing a broader view of the police power. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926) (“As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way.”). *Ambler Realty’s* brief also highlighted this shift in Minnesota jurisprudence. Brief of Appellants, *supra* note 109, at 121–22.

208. See *Houghton*, 204 N.W. at 570.

209. HEIGHTS OF BLDGS. COMM’N, REPORT OF THE HEIGHTS OF BUILDINGS COMMISSION TO THE COMMITTEE ON THE HEIGHT, SIZE AND ARRANGEMENT OF BUILDINGS 25 (1913).

210. *Id.* at 25–26. A nearly verbatim analysis of this point appears in the 1916 report of the Commission on Building Districts and Restrictions. CITY OF N.Y. BD. OF ESTIMATE & APPORTIONMENT COMM. ON THE CITY PLAN, *supra* note 91, at 53–56.

211. Summarizing the 1913 Heights of Buildings Commission report, Bassett simply argued that, although it was not “ideal,” it would be unjust to impose “a low-height limit” on new development in denser areas already populated with taller buildings. Edward M. Bassett, *Value of Zone Plan*, J. AM. INST. ARCHITECTS, 1914, reprinted in *The Regulation of Building Heights*, N.Y. TIMES, May 10, 1914, at XXI (summarizing recent report of Heights of Buildings Commission).

York and require the owners of buildings already constructed to remove floors to allow more light and air.²¹²

The 1916 report of the Heights of Buildings Commission similarly emphasized the need for zoning to accommodate existing development patterns. For the Commission, the “advantage of location and the resulting enormous difference in land values tend strongly toward differentiation in the character and intensity of use and this and other social and economic factors tend toward a natural segregation of buildings according to type and use.”²¹³ Building restrictions must recognize existing divisions of the city into “natural districts,” with buildings surrounded by structures of a similar use and type.²¹⁴ Each district should provide “as much light, air, relief from congestion and safety from fire *as is consistent with a proper regard for the most beneficial use of the land and as is practicable under existing conditions as to improvements and land values.*”²¹⁵ In a phrase that reflects concerns regarding potential takings claims and foreshadows regulatory takings doctrine, the Commission stated that “varying district restrictions should also have in view the safeguarding of existing and future investments.”²¹⁶ James Metzenbaum, the attorney for the Village of Euclid in *Village of Euclid v. Ambler Realty Co.*, declared in a letter to the Clerk of the Court as *Euclid* was pending that he relied significantly on these reports “which really furnished the very basis and foundation for comprehensive zoning throughout the country” in his briefs.²¹⁷ Metzenbaum sent copies of the Commission’s reports to the Court, seeking to ensure that all members, and particularly Justice Sutherland, the opinion’s author, had a copy.²¹⁸

Individual zoning advocates offered comparable arguments regarding the need to balance the perceived benefits of less dense residential zoning with the demand for denser development in certain areas. Frederick Law Olmsted, responding to a presentation by Bassett at the National Conference on City Planning, contended that “[t]he value of concentration in business areas is so important that a moderate diminution of the amount of light and air is a reasonable and proper price to pay for the convenience of concentration, where it would not be a reasonable price in

212. To some extent the inverse of this point is that simply because certain beneficial conditions cannot reasonably be provided in dense urban areas does not mean they should not be provided in less dense areas. *See R. B. Const. Co. v. Jackson*, 137 A. 278, 281 (Md. 1927) (“The fact that it is not feasible to make similar provisions [regarding side lots] for the central portions of the city cannot be successfully urged by the appellant as a reason why the health and safety of the suburban population should not be promoted. The entire city is concerned in the reduction of fire hazards and the protection of health in its suburbs.”).

213. HEIGHTS OF BLDGS. COMM’N, *supra* note 209, at 67.

214. *Id.*

215. *Id.* (emphasis added).

216. *Id.*

217. TOLL, *supra* note 17, at 239 (quoting Letter from James Metzenbaum, Counsel, Vill. of Euclid, to the Clerk of the Sup. Ct. of the U.S. (Nov. 1926)).

218. *Id.*

the case of residential occupation.²¹⁹ Frank Williams argued in his 1922 treatise that, although modern science established the need for sun, light, air, and freedom from noise, it is impossible to provide each of these in business and manufacturing areas of cities and therefore even more important to ensure they are provided in “greater abundance” in other areas.²²⁰ The varying regulations in different districts were, he claimed, “more equal in burden and effect” due to differences in land prices and existing building types.²²¹ This concession to the built environment in larger cities was also recognized by courts.²²² In sum, concern regarding the inequity of restrictive zoning was resolved through an implicit balancing, which recognized a need for apartments within some part of the city and the harm that would be caused by an outright ban, but concluded that restricting apartments to certain areas would serve the needs of their residents while imposing the least harm on others.²²³

This was coupled with a third set of arguments emphasizing the separation of property uses so as to facilitate more efficient provision of services and utilities. A 1923 decision of the Louisiana Supreme Court highlighted these efficiency arguments.²²⁴ The Louisiana court noted, among potential police power justifications for an ordinance that separated residential and commercial uses, that use districting improved police and fire protection and allowed for more efficient and economic street paving (by concentrating more expensive roads in commercial areas).²²⁵

A similar point would convince Ernst Freund of the validity of zoning and of low-density residential districts specifically. Responding to a 1926 presentation by Edward Bassett, Freund conceded that he shared the concerns of those who criticized zoning for conferring the purported benefits of less congestion and density only on certain neighborhoods.²²⁶ However, the problem of differential

219. Frederick Law Olmsted, Comments at the Eighteenth National Conference on City Planning (Mar.–Apr. 1926), in NAT’L CONF. ON CITY PLAN., PLANNING PROBLEMS OF TOWN CITY AND REGION: PAPERS AND DISCUSSIONS AT THE EIGHTEENTH NATIONAL CONFERENCE ON CITY PLANNING 82, 83 (1926).

220. WILLIAMS, *supra* note 138.

221. *Id.*

222. *See, e.g.*, *Wulfsohn v. Burden*, 150 N.E. 120, 123 (N.Y. 1925) (“Outside of large cities where more or less congestion is inevitable, we ordinarily think of a residential district as devoted to private homes rather than to large commercial buildings The primary purpose of such a district is safe, healthful, and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits.”).

223. Lees, *supra* note 83, at 403.

224. *State ex rel. Civello v. City of New Orleans*, 97 So. 440, 444 (La. 1923).

225. *Id.* In this same vein, a 1922 article from England evaluated a series of early zoning measures and argued that, among the issues that “every zone ordinance should cover” was “[m]aking possible great economic cuts in the upkeep of roads through a decrease of width and method of construction where sizes and number of buildings are limited.” Holliday, *supra* note 117, at 217–18.

226. Ernst Freund, Professor of L., Univ. of Chi., Discussion at the Eighteenth National Conference on City Planning (Mar. 29–Apr. 1, 1926), in NAT’L CONF. ON CITY PLAN., PLANNING PROBLEMS OF TOWN CITY AND REGION: PAPERS AND DISCUSSIONS AT THE EIGHTEENTH NATIONAL CONFERENCE ON CITY PLANNING 73, 74 (1926) (“I do not quite see how you justify the discrimination between different localities to the extent to which it is carried out in the law of zoning If congestion is undesirable in a

treatment of different areas was solved, for Freund, by the Standard State Zoning Enabling Act's separate purpose "to facilitate the adequate provision of transportation, water, sewerage, schools and parks, and other public requirements."²²⁷ This desire to improve the provision of public services, he concluded, provided "a very excellent foundation for the entire matter of zoning."²²⁸ Since public improvements depended on private improvement (insofar as the government zones and provides certain basic infrastructure, but leaves further development to private actors), it was reasonable for a municipality to ensure confidence in the course of private development before it provided for public improvements.²²⁹

Other factors also appear to have led to Freund's seeming change of heart over the course of the 1920s with regards to the validity of zoning generally and residential districts in particular. Writing a few years after *Euclid*, Freund described residential districts as "the crux of the zoning problem," suggesting they emphasize preference for a particular amenity and therefore depart from the common law of nuisance in a way that may pose legal problems.²³⁰ In a somewhat obscure passage, he remarks that "social conditions" have the most significant effect on residential preferences.²³¹ As an illustration of these conditions, he suggests that "however regrettable prejudice may be, the coming of colored people into a district readily occurs to one who lives [as Freund, a professor at the University of Chicago, did]²³² on the South Side of Chicago."²³³ He goes on to say that "it would be impossible to find an appropriate legal formula" for drawing a line, through zoning, based on "social differences," which, it would seem, is a euphemism for racial differences.²³⁴ Freund then considers the possibility of districting based on the "physical conditions that constitute amenity" but finds such districting would be difficult given the relative terms within which an amenity must inevitably be expressed.²³⁵ This leads Freund finally to argue in favor of a "duty to abstain from unfair non-conformity," which he analogizes to laws against

residence district, it is also undesirable in a tenement district, and the very point is that you exceed in your regulation the limits which are the minimum limits of the public welfare, as we understand the term."); see also Power, *supra* note 186, at 2 (contending that Freund "resisted the popular delusion that zoning was consistent with traditional notions of the police power").

227. Freund, *supra* note 226.

228. *Id.*

229. See *id.* Although Freund concludes that this purpose provides, "theoretically, a perfect foundation in law for zoning, where the field is as yet open, but not where the field is already preempted," he proceeds to argue that "the legal principle of zoning is the idea that there is such a thing as unfair, illegitimate non-conformity." *Id.* at 75.

230. Ernst Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 ILL. L. REV. 135, 146 (1929).

231. *Id.* As Seymour Toll wryly remarks: "It probably would not have offended Freund's listeners if he had interrupted his theorizing with an occasional homely example of just what he had in mind." TOLL, *supra* note 17, at 266.

232. See UNIV. OF CHI. LIBR., GUIDE TO THE ERNST FREUND PAPERS 1882-1934, at 3 (2006), <https://www.lib.uchicago.edu/ead/rlg/ICU.SPCL.FREUND.pdf> [<https://perma.cc/P5NG-RQWM>].

233. Freund, *supra* note 230.

234. See *id.* at 146-47.

235. *Id.* at 147.

unfair competition.²³⁶ Established residential districts, Freund contends, might be best preserved through concepts of “fair and unfair non-conformity,” through restrictions on development that protect from profiteering and from “future downward development.”²³⁷ His observations suggest an acceptance and preservation of existing residential patterns and a defense of zoning grounded in preventing potential departures from these patterns of existing development. They echo arguments regarding the role of zoning in simply sustaining the “natural segregation” of uses.²³⁸ But they also suggest that sustaining the conformity of the physical environment is in large part merely a mechanism for maintaining a desired “social condition” of segregation, not just of uses but of residents.²³⁹

Zoning’s defenders responded in a number of ways to concerns that the differential treatment of certain neighborhoods undermined the police power justifications for single-family districts. They rejected the claim that single-family zoning favored a wealthy subset of residents by contending that its benefits could accrue to all. To ensure a reasonable exercise of the police power, they balanced the benefits of lower density development against the costs imposed on existing property uses in different neighborhoods. And they argued that existing, “natural” patterns of development should be reinforced, in part so as to enable the more efficient provision of city services and avoid what they perceived to be undesirable nonconformities.

D. THE IMPORTANCE OF COMPREHENSIVENESS

Accommodation to the existing built environment and a commitment to efficient provision of public services were both consistent with an emphasis on comprehensiveness among early zoning advocates. The appeal to comprehensiveness, I argue, played the most important role in efforts to establish the validity of single-family districts. As the New York Commission on Building Districts and Restrictions declared in 1916:

While a specific regulation taken by itself may not seem to have a very direct relation to the purposes for which the police power may be invoked, yet when taken as a part of a comprehensive plan for the control of building development throughout the entire city, its relation to such purposes may be unmistakable. Grant that a comprehensive system of districting is essential to the health and general welfare of the city and it follows that every specific regulation that is an essential part of such comprehensive system is justified under the police power.²⁴⁰

236. *Id.*

237. *Id.* at 148.

238. See *supra* note 213 and accompanying text.

239. See Power, *supra* note 186, at 9 (contending that Freund “determined not to make a ‘fetish’ out of opposing zoning” when he began to see African Americans moving into his neighborhood).

240. CITY OF N.Y. BD. OF ESTIMATE & APPORTIONMENT COMM. ON THE CITY PLAN, *supra* note 91, at 56.

On this logic, a comprehensive plan could save a provision that, by itself, might not constitute a valid exercise of the police power.²⁴¹ But there are multiple problems with this analysis. Why must we grant that comprehensive districting “is essential to the health and general welfare of the city?” Even if such a comprehensive approach is necessary, is single-family districting “an essential part” of such a system?

Prominent individual zoning proponents also stressed the importance of comprehensiveness and its potential to save otherwise questionable components of zoning, including single-family districts. Frank Williams argued in 1920 that a single-family district “as a part of a comprehensive zone plan, fair to all the varied interests of the community adopting it, may be created directly by excluding, in so many words, the multiple house, especially in a city where the single-family house is the prevailing type of residence.”²⁴² This again assumes quite a bit, including that the plan at issue is “fair to all the varied interests of the community.”²⁴³ Writing shortly before *Euclid* regarding Portland, Oregon’s comprehensive zoning ordinance, Arthur Kent similarly contended that a “carefully considered” plan that is not discriminatory and that “in its entirety is reasonably necessary to the protection of the public health, safety, morals or welfare, or . . . reasonably adapted to promote those objects” should be upheld “even though it work a hardship here and there upon an individual.”²⁴⁴ Williams and Kent, in a manner similar to the New York Commission on Building Districts and Restrictions, contended that one must consider a jurisdiction’s zoning plan in its entirety and uphold it even if individual components might be questionable.

This emphasis on the plan’s virtues when considered in its entirety was complemented by significant deference to the legislative body that imposed zoning. Kent, in the passage quoted above, argued for accepting the zoning plan a legislature devises so long as it is “reasonably necessary.” But is any *particular* plan, and the specific components within it, “reasonably necessary” to protect health, safety, and the general welfare? It might, on the whole, be one among many reasonable mechanisms for achieving these ends, which Kent suggests is sufficient when he writes “or if it [is] reasonably adapted to promote” proper objects of the police power.²⁴⁵ But if that alone—the determination that the plan *generally speaking* reasonably advances the general welfare—is enough to render every individual component of an ordinance valid, this suggests an all-or-nothing approach to reviewing the validity of zoning. Such an approach effectively

241. See Revell, *supra* note 157, at 54–55 (highlighting the role that comprehensiveness played in shaping judicial acceptance of zoning as a valid exercise of the police power).

242. Williams, *supra* note 153.

243. See *id.*

244. Arthur H. Kent, *Constitutional Law: Municipal Ordinance Establishing a Comprehensive Plan of Use: Zoning Is Within the Police Power*, 5 OR. L. REV. 140, 149 (1926) (reviewing decision of Oregon Supreme Court upholding City of Portland’s zoning ordinance). Kent was a law professor at the University of Oregon. UNIV. OF OR., ANNOUNCEMENTS 1926–1927, at 164 (1926).

245. See Kent, *supra* note 244.

shields zoning from any significant judicial review.²⁴⁶ This was the approach zoning's defenders would ultimately advance. Alfred Bettman argued that courts, failing to understand the significance of comprehensiveness, inappropriately focused on the particular parcels of property at issue when determining whether exclusion of a use was reasonable.²⁴⁷ Although a specific individual store excluded from a residential district may not threaten the health of the neighbor next door, "such method of determination involves either a complete denial of the validity of any zoning, or the absurdity of deciding the reasonableness of one item of a zone plan by excluding from consideration the plan which is itself the reason for the item."²⁴⁸ He made a similar point in a later article assessing the Supreme Court's post-*Euclid* decision in *Nectow v. City of Cambridge*, which he faulted for accepting the trial court's finding that the regulations applied to a particular parcel failed to promote health, safety, and welfare.²⁴⁹ This narrow focus, Bettman contended, inappropriately treated zoning as nuisance legislation, failing to recognize the justification of zoning as "a careful and reasonable comprehensive plan" for the whole city.²⁵⁰ Bettman's approach, however, ignores another alternative: that even if we accept the basic or general validity of a comprehensive zoning ordinance, we could reject as facially unreasonable one particular component, regardless of its purported relation to the overall plan. A few courts would take this precise approach regarding single-family districts in the years after *Euclid*.²⁵¹

246. *Cf.* FENNEL, *supra* note 30, at 215 ("Judicial deference to regulatory and legislative line drawing may reflect a sensitivity to indivisibilities or economies of scale that make it important to tackle some problems in a unified, blanket, or long-term way—judgments that are typically the domain of legislators or regulators."). Fennell argues that too much deference can allow "inefficient or disadvantageous" policies "to cannibalize" some of the benefits of a larger package. *Id.* This has, I would argue, become the case with single-family zoning, which problematically undermines and diminishes some of the broader benefits conferred by zoning generally.

247. *See* Bettman, *supra* note 107, at 845.

248. *Id.* Bettman goes on to argue that the exclusion of stores from a residential district is not attributable to the harm such a use might cause neighbors, but rather the product of a plan that "aimed to present a reasonable districting of the whole territory of the city; and the logically correct issue is whether that plan is or is not reasonably sustainable by the facts about the whole territory of the city, in the light of those purposes which are recognized as falling within the constitutional scope of the police power." *Id.* at 845–46.

249. Alfred Bettman, *Recent Zoning Decisions of the Supreme Court of the United States*, 3 U. CIN. L. REV. 319, 321 (1929); *see also* *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) ("Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case.").

250. Bettman, *supra* note 249, at 322; *see also id.* ("The justification for the regulations at any particular part of the city or neighborhood is derived from the fitness of those regulations in the comprehensive plan for the whole city; and, if the comprehensive plan for the whole city be promotive of health, etc., and is a thorough and careful plan and if the particular regulations under attack genuinely follow the principles of the planning, that is, are principled and not arbitrary, then the constitutionality of those provisions is demonstrated.").

251. *See infra* notes 357–65 and accompanying text.

In its 1922 *Zoning Primer*, the Department of Commerce reinforced the importance of comprehensiveness, declaring that “courts have approved zoning whenever it was done sensibly and comprehensively.”²⁵² The Standard State Zoning Enabling Act included language requiring that zoning be done “in accordance with a comprehensive plan,” modifying earlier language, which itself did not appear until the third draft of the document, that zoning be done “in accordance with a well-considered plan.”²⁵³ The *Zoning Primer* declared *State ex rel. Morris v. City of East Cleveland*²⁵⁴ “[t]he best zoning case to show how far the courts will go in distinguishing between zoning districts.”²⁵⁵ *Morris* involved a challenge to a zoning district limited to one- and two-family residences that expressly prohibited tenements.²⁵⁶ Relying in part upon a nuisance rationale, the court confidently declared “there could be no two opinions upon the proposition that the apartment house, or tenement, in a section of private residences, is a nuisance to those in its immediate vicinity.”²⁵⁷ But it sought to broker a compromise, recognizing the apartment as “a desirable convenience, and, for some, a necessity,” albeit not a proper place to raise children.²⁵⁸ The ordinance in question struck an acceptable balance, preserving both private homes and places for apartments, but keeping apartments to themselves, where they “will do the least damage to others.”²⁵⁹ Although it did not speak at length about the importance of comprehensiveness, the court noted “that there is no reported case in which the validity of a comprehensive zoning ordinance like the one in this case, has been passed

252. ADVISORY COMM. ON ZONING, U.S. DEP’T OF COM., A ZONING PRIMER 3 (1922).

253. Ruth Knack, Stuart Meck & Israel Stollman, *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 LAND USE L. & ZONING DIG. 3, 5 (1996) (explaining that the change in language came at the recommendation of Harland Bartholomew).

254. 31 Ohio Dec. 197 (Ct. Com. Pl. 1920).

255. ADVISORY COMM. ON ZONING, *supra* note 252, at 4. Ambler Realty’s initial brief in *Euclid* also highlighted *Morris*. Brief of Appellants, *supra* note 109, at 124 (“Though this case was the decision of but an inferior tribunal, the cogent reasoning of Judge Kramer and its logical presentation has caused it to be quoted from coast to coast.”).

256. 31 Ohio Dec. at 198. The court contended that, although restrictions on “slaughter houses, corrals, livery stables, laundries, carpet-beating establishments, etc.” had been challenged in the past on the same grounds, no one would now question that such restrictions are lawful under the police power. *Id.* at 201.

257. *Id.* at 202–03 (“Under the evidence, and as a matter of common knowledge, of which the court may take judicial notice, it shuts off the light and air from its neighbors, it invades their privacy, it spreads smoke and soot throughout the neighborhood. The noise of constant deliveries is almost continuous. The fire hazard is recognized to be increased. The number of people passing in and out, render immoral practices therein more difficult of detection and suppression. The light, air and ventilation are necessarily limited, from the nature of its construction. The danger of the spread of infectious disease is undoubtedly increased, however little, where a number of families use a common hallway, and common front and rear stairways.” (citation omitted)). *Morris* embraced the view of early zoning advocates that “common experience” revealed “the erection of one apartment drives out the single residence adjacent thereto” leading to the entire street eventually being “given over largely to apartment houses.” *Id.* at 203.

258. *Id.* at 203.

259. *Id.* at 204 (“Whatever of the burdens arising from apartments there are, will be borne by those whose purposes they serve, and not shifted to the other property owners of the city, to make their property unfit for use as a home.”).

upon by any court.²⁶⁰ It distinguished prior cases that rejected, as invalid exercises of the police power, zoning ordinances that were not comprehensive but instead were imposed solely “to protect private residence districts.”²⁶¹ In contrast, the ordinance in *Morris* was imposed following “a systematic study of the conditions in the city” and not to benefit residents of a particular area.²⁶² Comprehensiveness did much of the work for the court in distinguishing these other decisions and establishing the validity of the zoning ordinance in question.

Not every court would accept the saving power of comprehensiveness in the years before the Supreme Court’s decision in *Euclid*. In fact, in the district court decision in *Euclid*, which struck down the Village’s zoning ordinance, Judge Westenhaver declared that he “perceive[d] no distinction between comprehensive zoning ordinances applied to an entire city, and zoning ordinances applied to parts only of a city.”²⁶³ Rejecting appeals to comprehensiveness, Judge Westenhaver stated that “[t]he police power cannot be enlarged or its nature changed by extending its operation over a wider area.”²⁶⁴ Another judge, in the Delaware Court of Chancery, also rejected the appeal to comprehensiveness, declaring: “I am unable to find in the mere comprehensiveness of a zoning ordinance any circumstance which renders those things permissible which, if done on a smaller scale or in the case of partial zoning, would not be permissible.”²⁶⁵ The judge criticized arguments that comprehensive zoning would reduce municipal expenses related to street construction, traffic control, and policing.²⁶⁶ In language that seems a rebuke of what would later be termed “fiscal zoning,” the court stated that municipalities had a duty to provide and pay for streets, police protection, and other infrastructure.²⁶⁷ Their cost did not justify preventing a property owner from using their property in an “unobjectionable manner.”²⁶⁸ But these decisions were exceptions, and, as the next Part details, courts increasingly came to accept comprehensive zoning and the reasonableness of its individual provisions, including single-family districts. In the process, they emphasized both the expertise of zoning’s drafters and deference to the legislative bodies that passed it into law.²⁶⁹

III. SINGLE-FAMILY ZONING IN THE COURTS

While the prior Parts included some discussion of judicial decisions relevant to early land-use regulation, this Part looks at how single-family districts in

260. *Id.*

261. *Id.*

262. *Id.* at 211.

263. *Ambler Realty Co. v. Village of Euclid*, 287 F. 307, 316 (N.D. Ohio 1924).

264. *Id.*

265. *Mayor of Wilmington v. Turk*, 129 A. 512, 521–22 (Del. Ch. 1925) (declaring as improper exercise of the police power an ordinance that prohibited operation of a private hospital in the home of a nurse when the use was “inoffensive and of injury to no one”).

266. *See id.* at 522.

267. *Id.*

268. *Id.*

269. *See infra* Section III.A.

particular fared in the courts. It first considers state decisions prior to *Village of Euclid v. Ambler Realty Co.* It then turns to *Euclid*. Although the Supreme Court in *Euclid* did not rule directly on the validity of single-family districts, a close reading of the decision reveals that the Court’s reasoning reflects many of the legal theories zoning advocates offered in support of these districts. Finally, this Part concludes by examining how, in the century since *Euclid*, the Court has implicitly accepted the validity of single-family zoning districts as the police power has explicitly expanded.

A. THE EARLY 1920S: ZONING ON THE RAZOR’S EDGE

Over the course of the early 1920s, courts across the country confronted challenges to zoning and, in a number of cases, to districts restricted to one- and two-family homes specifically. Although the majority of decisions upheld zoning and a broad understanding of the police power, as the Supreme Court would note in *Euclid*,²⁷⁰ a few rejected ordinances that either prohibited commercial uses in residential districts or segregated among residential uses.²⁷¹

One notable example, the Supreme Court of Texas’s decision in *Spann v. City of Dallas*, involved a law prohibiting businesses, including retail stores, within a residential district.²⁷² The court rejected claims that the regulation protected health or safety or advanced the public welfare, declaring that it served instead merely to satisfy the “sentiment” and “taste” of neighbors.²⁷³ In the early- through mid-1920s, New Jersey’s Supreme Court approvingly cited *Spann* in striking down zoning ordinances across multiple decisions.²⁷⁴ The first, in 1923, declared invalid an ordinance establishing a residential district in which stores were

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

271. See *infra* notes 272–82 and accompanying text.

272. 235 S.W. 513, 513 (Tex. 1921). The ordinance allowed for a business use if three-fourths of property owners in the district gave their consent. *Id.* For the court this provided additional evidence that a store’s presence within a residence district did not cause an injury that justified the initial prohibition. See *id.* at 516. Although the decision did not deal with discrimination among residential uses, the *Spann* court stated in dicta that

“[i]t would be tyranny to say to a poor man who happens to own a lot within a residence district of palatial structures and his title subject to no servitude, that he could not erect an humble home upon it suited to his means, or that any residence he might erect must equal in grandeur those about it. Under his constitutional rights he could erect such a structure as he pleased, so long as it was not hazardous to others.”

Id.

273. *Id.* The court cited decisions in other states striking restrictions on stores within residential districts. *Id.* at 517 (first citing *People ex rel. Friend v. City of Chicago*, 103 N.E. 609, 612 (Ill. 1913); then citing *Willison v. Cooke*, 130 P. 828, 832 (Colo. 1913); then citing *Calvo v. City of New Orleans*, 67 So. 338, 339 (La. 1915); and then citing *City of St. Louis v. Dorr*, 41 S.W. 1094, 1099 (Mo. 1897)). Metzbaum, in his brief on behalf of Ambler Realty in *Euclid*, distinguished *Spann* in part by arguing that, unlike the Village of Euclid’s zoning ordinance, it was a “block” and not a comprehensive ordinance. Brief of Appellants, *supra* note 109, at 111 (“[T]his type of case should not be cited as bearing upon the constitutionality of the ‘modern,’ carefully drawn, and legally authorized zoning ordinance.”).

274. See *Ignacianas v. Risley*, 121 A. 783, 786 (N.J. 1923), *aff’d sub nom. Ignacianas v. Town of Nutley*, 125 A. 121 (N.J. 1924); *Jersey Land Co. v. Scott*, 126 A. 173, 174 (N.J. 1924); *Oxford Constr. Co. v. City of Orange*, 137 A. 545, 548 (N.J. 1927).

prohibited.²⁷⁵ *Ignaciunas v. Risley* emphasized that “the police power is based upon public necessity, and only public necessity can justify its use It should never be exercised unless it is clear that the object to be attained is so essential to the public health, safety, and welfare as to fully justify its exercise.”²⁷⁶ Although stores posed no threat to public safety, health, or welfare in a residential district, the court found that other parts of the ordinance—including regulation of open spaces, yards, and building heights—were consistent with earlier non-districting land-use regulations and constituted valid exercises of the police power.²⁷⁷

In a subsequent decision, *Jersey Land Co. v. Scott*, the New Jersey Supreme Court struck down an ordinance prohibiting apartment houses within a particular zone.²⁷⁸ Finding no police power justification for the provision, the court declared: “An apartment house is a mode of habitation specially recognized by the laws of the state as a necessary method of meeting the social congestion of our cities.”²⁷⁹ The prohibition on construction of a four-story apartment building was “wholly unnecessary, within the comprehension of the statute, for the public safety, public health, or the general welfare in this particular community.”²⁸⁰ Shortly after *Euclid*, New Jersey courts would reaffirm their position on the invalidity of zoning ordinances prohibiting apartments in specific districts.²⁸¹ They would not accept such prohibitions until a 1927 amendment to the state constitution granted the legislature the authority to enable municipalities to adopt zoning ordinances that included districts that separated and limited permissible uses.²⁸²

These cases represented the high-water mark of judicial resistance to districting and residential districts specifically. A majority of courts would accept such districts, relying on a combination of a broad view of the police power, and the general welfare in particular; the comprehensive nature of a given ordinance; and significant deference to local legislatures, particularly with regards to establishing

275. See *Risley*, 121 A. at 785, 786.

276. *Id.* at 785. The court acknowledged that “[t]he use of the police power has grown in recent years, and courts have sustained laws and ordinances as valid, which formerly would have been declared invalid and invasions of private rights.” *Id.*

277. See *id.* at 786.

278. 126 A. at 174.

279. *Id.* at 173.

280. *Id.*

281. See *Oxford Constr. Co. v. City of Orange*, 137 A. 545, 546–47 (N.J. 1927) (rejecting argument that the New Jersey Supreme Court’s decision that a zoning ordinance prohibiting apartments could not be enforced because the apartments “would not endanger the public welfare, health, or safety” was inconsistent with *Euclid*).

282. See *Lumund v. Bd. of Adjustment*, 73 A.2d 545, 549 (N.J. 1950). The state legislature subsequently passed legislation expressly permitting municipalities to establish zoning districts. *Id.* New Jersey’s 1947 Constitution “extend[ed] the zoning authority to include the regulation of ‘the nature and extent of the uses of land.’” *Id.* (citation omitted). In a 1955 decision, the New Jersey Supreme Court expressed satisfaction, following the expansion of power through the 1947 Constitution, “that at long last conscientious municipal officials have been sufficiently empowered to adopt reasonable zoning measures designed towards preserving the wholesome and attractive characteristics of their communities and the values of taxpayers’ properties.” *Pierro v. Baxendale*, 118 A.2d 401, 408 (N.J. 1955).

districts as part of a comprehensive zoning scheme.²⁸³ In 1923, the Wisconsin Supreme Court, in a decision the *Euclid* Court would cite as sustaining a “broader view” of the police power,²⁸⁴ upheld an ordinance prohibiting businesses within residential districts.²⁸⁵ The court invoked an expansive conception of the general welfare: “If such regulations stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare.”²⁸⁶ Contrasting a contemporaneous Minnesota decision, which involved the establishment of residential districts in limited portions of a city upon petition of residents, the Wisconsin court emphasized that the instant law reflected “a broad, comprehensive plan involving the entire city, and affecting all residents therein alike in an effort not to promote the desires of a majority of the people of a given district, but to promote the welfare of the city as a whole.”²⁸⁷ The court critiqued the decision in *Spann* for relying on “a rather too narrow view of the scope of the police power.”²⁸⁸

Of particular relevance to our focus, the Massachusetts Supreme Judicial Court in *Brett v. Building Commissioner of Brookline* ruled on an ordinance that included a district limited to detached, single-family residences.²⁸⁹ Petitioners sought to build two-family houses.²⁹⁰ The court framed the police power in broad terms, declaring “[i]t may be put forth in any reasonable way in behalf of the public health, the public morals, the public safety and, when defined with some strictness so as not to include mere expediency, the public welfare.”²⁹¹ *Brett* identified two justifications for limiting the use of land to single-family residences. First, it hearkened back to more traditional health and safety concerns, asserting that limiting the number “of persons or of stoves or lights under a single roof” reduced the risks of fire.²⁹² Second, echoing the ethos of the single-family enclave as well as concerns regarding the spread of disease, the ordinance promoted “the health

283. See *infra* notes 284–309 and accompanying text.

284. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390–91 (1926).

285. *State ex rel. Carter v. Harper*, 196 N.W. 451, 457 (Wis. 1923).

286. *Id.* at 455.

287. *Id.* at 455–56.

288. *Id.* at 456.

289. 145 N.E. 269, 269 (Mass. 1924).

290. *Id.* at 270. In separate cases decided the same day, the court upheld the validity of zoning, including the division of a municipality into commercial and residential districts. See *Bldg. Inspector v. Stoklosa*, 145 N.E. 262, 264 (Mass. 1924) (upholding ordinance excluding farming, gardening, and boarding or lodging houses from the definition of “business district”); *Spector v. Bldg. Inspector*, 145 N.E. 265, 267 (Mass. 1924) (upholding residential district that allowed multiple dwellings, but excluded industrial and commercial uses).

291. *Brett*, 145 N.E. at 271.

292. *Id.* (“It seems to us manifest that, other circumstances being the same, there is less danger of a building becoming ignited if occupied by one family than if occupied by two or more families. Any increase in the number of persons or of stoves or lights under a single roof increases the risk of fire. A regulation designed to decrease the number of families in one house may reasonably be thought to diminish that risk.”).

and general physical and mental welfare of society.”²⁹³ While it invoked public health and safety, *Brett* embraced a more open-ended public welfare rationale for single-family districts.

Brett also directly addressed the question of whether the ordinance conferred the benefits of the single-family neighborhood only upon a select few. The decision recognized that providing more fresh air, freedom of movement, and a bit of land to cultivate were “features of family life” of equal importance to individuals “whatever may be their social standing or material prosperity.”²⁹⁴ But, the court reasoned, the law on its face did not benefit just some subset of the community. Rather, the court observed, “[i]t is matter of common knowledge that there are in numerous districts plans for real estate development involving modest single-family dwellings within the reach as to price of the thrifty and economical of moderate wage earning capacity.”²⁹⁵ It was then, or so the court suggested, that the single-family home itself, and not a particular class of residents, was being protected from the dangers of the duplex. In their briefs, the attorneys representing the Brookline Building Commissioner cast two-family dwellings as likely to bring with them the same evils long attributed to apartments:

[A] street built up with two-family dwellings resulting as it would in darkened and crowded halls and stairways, increased congestion of traffic, two or three times as many children playing on the streets, a marked diminution in the amount of light and air available in the homes, and twice the quantity of refuse and garbage, is a distinct menace to their safety and health. Accidents, disease and not infrequently immorality follow. The conditions just pictured are not characteristic exclusively of tenement house districts. They prevail, of course to a lesser degree, in any district given over to dwellings for more than one family.²⁹⁶

Across the country, the Supreme Court of California, in *Miller v. Board of Public Works*, considered whether a residential district that prohibited housing for more than two families could be validly established.²⁹⁷ The police power, the court said, develops such that “[w]hat was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power.”²⁹⁸ While “public peace, safety, morals, and health” were the key factors informing the scope of the police power at its inception, as society grew more complex, the promotion of public welfare was seen as “a legitimate object for the exercise of the police power.”²⁹⁹ The

293. *Id.*

294. *Id.*

295. *Id.*

296. Lees, *supra* note 83, at 432 (quoting Brief for Respondent at 7, *Brett v. Bldg. Comm’r*, 145 N.E. 269 (Mass. 1924)).

297. 234 P. 381, 382 (Cal. 1925). The plaintiff sought to build a four-family flat. *See id.*

298. *Id.* at 383.

299. *Id.*

definition of public welfare also expanded “to embrace regulations to promote the economic welfare, public convenience, and general prosperity of the community.”³⁰⁰

The *Miller* court also rejected claims that the police power was confined to banishing nuisances or “near-nuisances,” instead concluding that it can move beyond the suppression of undesirable uses and, through zoning, be used “affirmatively, for the promotion of the public welfare.”³⁰¹ Invoking the concept of a “comprehensive and carefully considered zoning plan” adopted to promote the general welfare and therefore within the police power’s scope, the court rejected “unreasonable and discriminatory ordinances” imposed “for the exclusive and preferential benefit of particular localities.”³⁰² *Miller* upheld the two-family residential districts at issue as valid under the police power due in significant part to their role as “part of a systematic and carefully considered and existing zoning plan.”³⁰³ In sum, the *Miller* court relied on both an expanded reading of the public welfare and the low-density zoning district’s relationship to a comprehensive zoning plan.

In a separate decision, the California Supreme Court provided additional detail on what it understood a comprehensive ordinance to require. *In re White* declared unreasonable an ordinance that provided for one and one-tenth acres of “unrestricted” land and placed over 2,500 acres within a “residence district.”³⁰⁴ The “unrestricted” land was, at the time of enactment, “fully occupied to the exclusion of other business, by a gasoline service station and a restaurant.”³⁰⁵ The petitioner sought to use property within the residence district as a real estate office.³⁰⁶ The court held that, by creating a residential district *and* a business district, the town recognized both as necessary to the public welfare and therefore had a duty “to make adequate provision for both such uses.”³⁰⁷ By not allowing any future business development, it had failed to do so.³⁰⁸ Declaring the business district “so

300. *Id.* (internal quotation marks omitted) (citing *Chi., Burlington & Quincy Ry. Co. v. Illinois ex rel. Drainage Comm’rs*, 200 U.S. 561, 592 (1906)).

301. *Id.* at 384.

302. *Id.* at 385.

303. *Id.* In dicta, the court observed that residential zoning might also be justified by the need to protect “the civic and social values of the American home.” *Id.* at 386. Residential districts further the general welfare because they “promote and perpetuate the American home,” which in turn shapes the character of citizens “to the enhancement, not only of community life, but of the life of the nation as a whole.” *Id.* at 387. That same year, courts in Illinois and Kansas upheld ordinances that included districts limited to one- or one- and two-family residences. *See City of Aurora v. Burns*, 149 N.E. 784 (Ill. 1925); *West v. City of Wichita*, 234 P. 978 (Kan. 1925). In *Deynzer v. City of Evanston*, the court simply cited to *Aurora* in declaring constitutional an ordinance with a district restricted to single-family dwellings. *See* 149 N.E. 790, 793 (Ill. 1925).

304. 234 P. 396, 396–97 (Cal. 1925).

305. *Id.* at 397.

306. *Id.* at 396.

307. *Id.* at 397.

308. *See id.* The court noted that the ordinance “in effect grants a monopoly” to the existing businesses. *Id.*

small as to be an unreasonable restriction,” the court found the zoning ordinance invalid under the police power.³⁰⁹

Although one- and two-family districts within a comprehensive ordinance that seemed, on the whole, reasonable were likely to be upheld, courts still sometimes acknowledged the questionable nature of the police power justifications for exclusive residential districts. The Ohio Supreme Court, in a decision that would not be cited in *Euclid*, reviewed a challenge to a one- and two-family district by a party seeking to build a thirty-unit apartment building.³¹⁰ It concluded that the limitation of the district to one- and two-family residences lacked any relation to “public health, safety, morals, and welfare” and was therefore void.³¹¹ The court distinguished the ordinance, which covered only a small portion of the city, from the “comprehensive ordinance” in *Pritz v. Messer*,³¹² decided the same day.³¹³ But it proceeded to critique arguments that an apartment represented a *per se* threat to public health, morals, or safety:

It is true that noise affects health through nerve strain, and the apartment house is attacked upon the ground of noise; but people who live in apartment houses may not of themselves be so noisy as people who live in private houses. The very fact that they have learned to consider the foibles of others living within the same walls often makes them more thoughtful with regard to phonographs and pianos than the people who dwell in private houses. Two-family houses might house families which would make five times as much noise as the people in large apartment houses. There is not *per se* more danger from fire from an apartment house than from a private house, for modern apartments are apt to be fireproof, as is contemplated in this instance. Perhaps there is even less danger of fire from an apartment house than from a private house of frame and shingle roof. It is argued that an apartment house menaces the public health because it increases congestion of population. We fail to see how removing the congestion from an apartment district, and distributing it in a healthful park surrounding, will injure the health of the city at large; rather will it aid the public health.³¹⁴

In addition to finding nothing in the record suggesting the apartment house would impair the district, the court, noting “the testimony of the eminent physician who was chairman of the city planning commission,” wryly remarked that “so far as the health and safety of the inhabitants of this apartment house are concerned, there is in the city of Youngstown no more healthful and better spot in

309. *Id.* at 398.

310. *City of Youngstown v. Kahn Bros. Bldg. Co.*, 148 N.E. 842, 842–43 (Ohio 1925).

311. *Id.* at 845.

312. 149 N.E. 30 (Ohio 1925).

313. *Youngstown*, 148 N.E. at 844. The court noted that *Pritz* “did not raise the specific question as to whether property can legally be zoned in residence districts so as to exclude apartment houses which in other respects comply with valid building restrictions.” *Id.*

314. *Id.*

which to reside than in this particular district.³¹⁵ The court's statement reveals the irony of an ordinance that assumes lower density districts confer public health benefits but then excludes from such districts (and their purported health benefits) anyone who cannot afford a single-family home.

Maryland's highest court, in *Goldman v. Crowther*, also questioned the police power justifications for residential districts, albeit in a case involving the exclusion of commercial activities.³¹⁶ The court doubted that the police power justified restrictions on property "for purely æsthetic reasons or for any such elastic and indeterminate object as the general prosperity."³¹⁷ It criticized provisions upheld by courts in other states that sought to protect neighborhoods where persons might live apart from dwellings and businesses that "while not affecting the public health, the public morals, the public safety, or the public welfare, were nevertheless repugnant to the æsthetic sensibilities of that part of the public in whose interest they were drawn."³¹⁸

In *City of Providence v. Stephens*, a case involving a district limited to one- and two-family residences, the Rhode Island Supreme Court recognized the "considerable extension" of the police power by legislatures and courts from across the country.³¹⁹ After reviewing relevant cases the court conceded that "[t]he propriety of such a classification of residential districts is not as clear to us as is that of the exclusion of trade and industry from the sections devoted to residence."³²⁰ Such a restriction, the court went on, might serve the pecuniary interests of certain residents, or their aesthetic preferences, but neither constituted a "sufficient basis for the exercise of the police power."³²¹ Nonetheless, and "[n]ot without some hesitation," the court deferred to the legislature, suggesting it might have been justified by familiar concerns of protection from fire and contagious diseases and noting "these circumstances of particular benefit to the residents of that district would indirectly inure to the public good of the community as a whole."³²²

In sum, although a number of state courts rejected the exclusion of apartments and businesses from single-family residential areas in the years before *Euclid*, by the time that zoning reached the Supreme Court, lower courts typically were willing to uphold low-density residential districts. They relied significantly on the perceived power of comprehensive zoning to cure the defects of particular elements of a zoning plan. They also embraced increasingly broad conceptions of

315. *Id.*

316. 128 A. 50, 51 (Md. 1925).

317. *Id.* at 57.

318. *Id.* at 58. Such measures, the court suggested, were more appropriately the object of the power of eminent domain. *Id.* at 58–59. It declared the ordinance's restrictions on the use of property void on the grounds that they both violated the state constitution and were "not justified by any consideration for the public welfare, security, health, or morals." *Id.* at 59–60.

319. 133 A. 614, 616 (R.I. 1926).

320. *Id.* at 617.

321. *Id.*

322. *Id.*

the public welfare and substantial deference to legislative determinations of the proper means to advance that welfare.

B. EUCLIDEAN AMBIGUITY

Village of Euclid v. Ambler Realty Co., the case that upheld zoning as a valid exercise of the police power, did not rule on the validity of single-family districts.³²³ While the Village of Euclid's ordinance included a district restricted to single-family dwellings, none of Ambler Realty's property fell within it.³²⁴ Ambler's reply brief compared Euclid's ordinance to those in other jurisdictions and argued that no other ordinance included "such intensive and minute classification," emphasizing that Euclid "devotes more than half of its area to single family residences."³²⁵ As Michael Allan Wolf has noted, these arguments suggested that the Court could strike Euclid's zoning, because of its particular solicitude for single-family zoning, without departing too much from those state courts that had upheld zoning.³²⁶ The Court chose not to do so.

There was some discussion of single-family zoning in the *Euclid* briefs. The Village's initial brief referenced the Massachusetts Supreme Judicial Court's decision in *Brett*, which upheld single-family districts.³²⁷ The brief stressed the relationship between the "*American Home*" and the public welfare, arguing that "separate and individual homes and residences" were being lost in cities, threatening the access to light and air essential to sustain "a more vigorous generation" and "the American People and American Principles."³²⁸ Alfred Bettman's amicus brief similarly discussed single-family zoning in approving terms.³²⁹ Four of that brief's final five pages simply provided direct quotations from the New York Court of Appeals's decision in *Wulfsohn v. Burden*.³³⁰ Although that decision focused on height and setback regulations, Bettman asserted that "[t]he court discussed chiefly the right to exclude apartment houses altogether from single-family districts, deducing from the right of such exclusion the validity of the lesser actual restrictions" in the ordinance.³³¹ The cited passages from *Wulfsohn* discuss

323. See 272 U.S. 365, 390 (1926).

324. See *id.* at 385; see also Babcock, *supra* note 71 (noting that *Euclid* did not rule on the validity of single-family districts and that none of Ambler Realty's land was in a single-family district). In an initial amicus brief in support of the Village of Euclid, W.C. Boyle, writing on behalf of the Cleveland Chamber of Commerce, stated: "All unite in saying that the restriction of the first 150 feet for single- or two-family residences on Euclid Avenue is not the best or most profitable use to which it could and should be put." MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* 53 (2008). Wolf notes that Metzenbaum, the attorney for the Village, would force Boyle to amend the brief and take back this concession. *Id.*

325. Reply Brief of the Appellee at 22, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665).

326. WOLF, *supra* note 324, at 75.

327. See Brief of Appellants, *supra* note 109, at 100.

328. *Id.* at 69–70.

329. See City Planning Brief, *supra* note 107, at 55 (quoting *Miller v. Bd. of Pub. Works*, 234 P. 381, 386–87 (Cal. 1925)); *id.* at 58–60 (quoting *Wulfsohn v. Burden*, 150 N.E. 120, 122–23 (N.Y. 1925)).

330. 150 N.E. 120 (N.Y. 1925).

331. City Planning Brief, *supra* note 107, at 58.

themes that would make their way into the *Euclid* decision: large apartments increase congestion, exacerbate dangers to children due to traffic, and allow fire and disease to spread more easily.³³² As such, residential districts should be “devoted to private homes” except in “large cities where more or less congestion is inevitable.”³³³ Just before concluding, Bettman quoted a passage from *Wulfsohn* declaring that zoning authorities—to promote the purpose of providing “safe, healthful and comfortable family life”—should be able to exclude apartment houses from districts “devoted to private residences.”³³⁴

Although *Euclid* did not specifically address single-family districts, the Court deemed the “serious question in the case” to be “the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.”³³⁵ Bettman acknowledged the decision did not address single-family districts directly but, noting that much of the land in the village had been placed within a single-family district, claimed “[t]he logic of the decision quite clearly includes the single-family district; for all the considerations adduced by the Court in support of the validity of exclusively residential districts apply equally to the validity of the exclusively single-family district”³³⁶ The court’s logic, such as it is, embraced both the broad view of the police power advanced by zoning advocates and accepted by courts in prior years and strong deference to a comprehensive plan developed by experts.

The *Euclid* Court observed that state courts embracing a broader view of the zoning power “greatly outnumber those which deny altogether or narrowly limit it.”³³⁷ But it did not dive deeply into these decisions or differentiate between cases involving exclusion of multifamily housing versus exclusion of business uses. This may be because, as Nathanael Lauster observes, “apartment houses were not considered primarily residential” but instead “classified as business and trade” and treated akin to hotels due in part to their role in generating profit.³³⁸

The Court gave more sustained attention to the relationship between exclusion of business activities from residential districts and traditional concerns regarding

332. *See id.* If these facts are accepted, a court could not say that no justification exists for the exclusion of large apartment buildings. *See id.* at 58–59. Such regulation is, the *Wulfsohn* court suggested, the natural development of prior measures excluding factories and businesses from residential districts. *See id.* at 60.

333. *Id.* at 61.

334. *Id.* (quoting *Wulfsohn*, 150 N.E. at 123–24). As might be expected, Ambler Realty’s briefs, relying on Freund’s treatise, argued for a narrow reading of the police power and its appropriate use in service to the public welfare. *See* Brief and Argument for Appellee at 51, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665) (quoting FREUND, *supra* note 103, at § 511).

335. 272 U.S. at 390.

336. Alfred Bettman, *The Decision of the Supreme Court of the United States in the Euclid Village Zoning Case*, 1 U. CIN. L. REV. 184, 189 (1927).

337. 272 U.S. at 390.

338. LAUSTER, *supra* note 184, at 19; *see also* Brady, *supra* note 80, at 1638 (discussing New York case in which conversion of houses into a “French flat” was deemed a business use (citing *Musgrave v. Sherwood*, 60 How. Pr. 339, 362–63, 366–67 (N.Y. Gen. Term 1881))).

“fire, contagion and disorder.”³³⁹ It cited state court decisions supporting its view of this dangerous relationship before emphasizing the experts, investigations, and “comprehensive reports” that informed the drafting of zoning ordinances and the segregation of residential, business, and industrial uses specifically.³⁴⁰ As to the question of segregation within residential uses, the Court noted that these reports revealed the arrival of apartment houses sometimes rendered areas no longer appropriate for single-family homes.³⁴¹ It is at this point that the Court famously described the apartment as a “mere parasite” that takes advantage of the benefits of residential districts, bringing with it a parade of horrors that destroys the residential character, rendering “apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable . . . very near to being nuisances.”³⁴² While state courts and zoning advocates at times during this period distinguished between duplexes and larger apartment buildings, the Court—not having any need to do so given the case at hand—made no such distinction. Finally, the decision fell back on deference to the legislature, declaring these reasons “sufficiently cogent to preclude,” in the context of a facial challenge, a declaration the ordinance lacks any “substantial relation to the public health, safety, morals, or general welfare.”³⁴³

Aside from the reference to “comprehensive reports,”³⁴⁴ as well as mentions of the Village’s “comprehensive zoning plan,”³⁴⁵ and the “comprehensive building zone ordinance” at issue in *City of Aurora v. Burns*,³⁴⁶ the Court provided no discussion of the importance of comprehensiveness for the validity of zoning. Both Metzenbaum and Bettman had stressed comprehensiveness in their briefs before the Supreme Court, although privately Bettman expressed concerns regarding Euclid’s ordinance, declaring it “a piece of arbitrary zoning and on the facts not justifiable.”³⁴⁷ He criticized the Village for failing to make a “scientific survey” and for, “in an effort to keep the village entirely residential,” zoning only a narrow and impractical strip for industrial uses.³⁴⁸ In his brief, Bettman declared that a “true zoning ordinance” entailed “a comprehensive distribution of the whole or a major portion of the territory of the community among all the necessary uses of

339. *Euclid*, 272 U.S. at 391.

340. *Id.* at 392–94.

341. *See id.* at 394.

342. *Id.* at 394–95.

343. *Id.* at 395. The Court leaves open the possibility for a challenge to the ordinance’s application to a particular premise. *See id.*

344. *Id.* at 394.

345. *Id.* at 379.

346. *Id.* at 392.

347. Arthur V.N. Brooks, *The Office File Box—Emanations from the Battlefield* (quoting Letter from Alfred Bettman to D.J. Underwood, City Att’y, Tulsa, Okla. (Sept. 29, 1924) (in DANIEL R. MANDELKER & ROBERT A. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 71 (2d ed. 1985))), in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP*, *supra* note 82, at 3, 11.

348. *Id.* Bettman hoped that the Village would amend its ordinance following the district court decision rather than appeal. *See id.*

every kind . . . all worked out as a community plan for the promotion of the common health, safety and welfare”³⁴⁹ Comprehensiveness gave such an ordinance a “reasonableness which the block ordinance d[id] not possess.”³⁵⁰ A comprehensive zoning ordinance would derive from a robust planning process that measured a city’s available development capacity, expected population growth, and “topographic, economic and social facts” and then applied “recognized principles of health, safety, economic prosperity and convenience” to determine how best to distribute future growth so as to avoid “unwholesome and inconvenient congestion.”³⁵¹ For his part, Metzenbaum stressed that the ordinance covered the entire Village and was based on a “comprehensive survey of existing conditions and tendencies and estimates of the future needs of the community”³⁵²

The importance advocates ascribed to comprehensiveness is underscored by Bettman’s subsequent assessment of *Euclid*, which noted the opinion’s lack of discussion of “the importance, on the constitutional issue, of the fact that the ordinance was of the comprehensive type.”³⁵³ Despite this lack of discussion, Bettman contended that given the Court’s reference to “the quantity of territory which the ordinance allotted to industrial and commercial uses, the implications of the decision may be said to be a recognition of the importance of this factor of comprehensiveness.”³⁵⁴

Although it did not rule directly on the legal status of single-family districts, *Euclid* embraced some of the principles zoning advocates offered in support of such districts, including the importance of comprehensiveness and of deference to legislative determinations of the reasonable allocation of a community’s land. In the decades following *Euclid*, lower courts would build upon the decision and solidify the legal status of single-family districting.

C. SOLIDIFYING THE SINGLE-FAMILY DISTRICT

The primacy of the single-family home, and its protection through exclusive zoning districts, became increasingly established through judicial decisions in the years following *Euclid*. Courts continued to decry the dangers of apartment living³⁵⁵ and champion the single-family district’s unique contributions to the

349. City Planning Brief, *supra* note 107, at 4.

350. *Id.*

351. *Id.* at 25.

352. Brief of Appellants, *supra* note 109, at 45.

353. Bettman, *supra* note 336, at 187–88. Just a year after *Euclid*, the Court, in deciding a case out of California, would simply describe the zoning ordinance as one “of the now familiar comprehensive type.” *Zahn v. Bd. of Pub. Works*, 274 U.S. 325, 327 (1927). The Court in *Euclid* made three references to comprehensiveness: the Village’s “comprehensive zoning plan,” the “comprehensive building zone ordinance” at issue in *City of Aurora v. Burns*, and the “comprehensive reports” of commissions and experts on zoning. 272 U.S. at 379, 392, 394.

354. Bettman, *supra* note 336, at 188.

355. *City of Jackson v. McPherson*, 138 So. 604, 605 (Miss. 1932) (“It is too much to expect, or at least it is a dangerous experiment to suppose, that that profound and dependable patriotism which is necessary to preserve and maintain an ideal government like ours could survive the lapse of time

American project.³⁵⁶ A few did give a hard look at justifications for zoning restrictions. In 1931, the New York Court of Appeals struck down an ordinance for not permitting all necessary uses in the community and instead, without sufficient justification, excluding certain uses to preserve “a secluded quiet community of one-family detached homes.”³⁵⁷ The court deemed the ordinance to be grounded in “aesthetic considerations” that “[a]s yet, at least” did not fall within the concept of public welfare.³⁵⁸

In 1932, the Eighth Circuit confronted a challenge to a provision of the Kansas City, Missouri zoning ordinance that prohibited the use of an existing structure as an “old ladies’ home” within a district restricted to single- and two-family dwellings, as well as certain other uses.³⁵⁹ The court concluded that the ordinance was not a reasonable exercise of the police power because it required extending that power “not only to restricting certain districts to residence purposes, but to restricting such districts to particular classes of residents, and this has been quite universally condemned by the decisions.”³⁶⁰ The provision’s role within a comprehensive zoning system did not render it valid.³⁶¹ The court declared “[t]here must be limits as to what even a general plan may do, and the mere comprehensiveness of the zoning ordinance is in itself no justification for each separate restriction that the ordinance imposes.”³⁶² Carefully examining the restriction at issue, the court concluded it was not an essential part of the zoning plan.³⁶³ That same year, the Illinois Supreme Court found that no evidence had been put forth regarding the sufficiency or distribution of property for commercial uses within the jurisdiction in a case involving a property owner who sought to use property

crowded into apartments and tenements, where the children for generation after generation shall have no place to develop except in the immediate environments of commerce and in the clangor of factories.”).

356. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 203 P.2d 823, 825 (Cal. 1949) (“The provision in the ordinance for a single family residential area affords an opportunity and inducement for the acquisition and occupation of private homes where the owners thereof may live in comparative peace, comfort and quiet. Such a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civic and social values.”).

357. *Dowsey v. Vill. of Kensington*, 177 N.E. 427, 430 (N.Y. 1931) (“[T]he [village] board of trustees have not attempted in the zoning ordinance to segregate in appropriate places within the village all the activities of communal life. They have relegated business and industry to a very small section which the evidence shows is not adapted to business, and have excluded from the main portion of the village even residences excepting one-family detached houses.”).

358. *Id.*

359. *Women’s Kan. City St. Andrew Soc. v. Kan. City*, 58 F.2d 593, 594 (8th Cir. 1932). Specifically, the home was for the use of “12 aged white ladies.” *Id.* at 598.

360. *Id.* at 603. The court emphasized that no signs would indicate the property’s use and no law would have prevented the property owner from taking in the old ladies as roomers. *Id.* at 602.

361. *Id.* at 604 (“If the general plan, of which the particular restriction is an integral part, bears a definite and clear relationship to the well-established purpose of the police power, then the argument may well be made that the validity of the individual restriction may be based, not alone on its immediate relation to health, safety, morals, and general welfare, but as part of, and in furtherance of, a general plan designed to foster those ends.”).

362. *Id.* at 605.

363. *Id.*

zoned as single-family residential for a commercial use.³⁶⁴ Instead, the court stated:

[T]he undisputed fact that there is a demand for the locus involved for commercial uses at a value of \$350 to \$500 per front foot, most strongly indicates that the failure to occupy for business use the property zoned to such use finds its reason rather in the want of proper distribution than in the lack of need for space.³⁶⁵

These cases would prove outliers; in the years following *Euclid*, supporters of zoning became increasingly forthright about the role that invocations of traditional police power concerns played in their defense of zoning. Writing in 1931 in the *American Bar Association Journal*, Edward Landels, who served as co-author of the California Planning Act of 1929, described invocations of traditional police power concerns as a necessary fiction:

We seem, however, to find the courts indulging in something close to fiction, in recognizing extensions of the states' power to regulate the use of private property.

In recent years the constitutionality of stringent zoning ordinances has been sustained repeatedly on grounds that bear but little genuine relation to, or are but incidental to, the real purpose of such ordinances. Zoning ordinances have been paraded under the guise of measures designed to effect purposes usually unthought of by the city councils enacting them. In this way, what is really a very radical though necessary extension of the states' police power has become established.³⁶⁶

While judicial decisions on zoning said much about “public health, public safety and public morals,” they (properly, in Landels’s mind) said little about how specifically a given ordinance protected those interests.³⁶⁷ Deference to legislative determinations, Landels noted, did much of the real work in opinions that upheld zoning ordinances.³⁶⁸

Moreover, invocations of the police power were problematic because “[t]he state can scarcely be more solicitous of the health or the safety or the morals or the ‘welfare’ of people who live on one side rather than the other of a more or less arbitrarily drawn line.”³⁶⁹ Landels conceded that the exclusion of duplexes

364. *Forbes v. Hubbard*, 180 N.E. 767, 768, 773 (Ill. 1932).

365. *Id.* at 773.

366. Edward D. Landels, *Zoning: An Analysis of Its Purposes and Its Legal Sanctions*, 17 A.B.A. J. 163, 163 (1931).

367. *Id.*

368. *See id.* at 163–64 (“The courts, very properly, as a rule, do not inquire as to just how the public health, safety or morals are protected, but are satisfied with a finding that general, though perhaps indefinite, considerations of that character moved the legislative bodies.”).

369. *Id.* at 165.

from single-family districts “on the grounds of health and safety” rendered it “embarrassing to try and justify ten story apartments in another.”³⁷⁰ Rather than advancing health and safety, the primary purpose of zoning, he argued, is “protection of the value and usefulness of urban land, and the assurance of such orderliness in municipal growth as will facilitate the execution of the city plan and the economical provision of public services.”³⁷¹ Here the unequal treatment of different districts and their residents came to the fore again, but Landels was prepared to simply jettison reliance on traditional police power concerns with health and safety and instead champion zoning as a means for advancing orderly growth and preserving property values.

Landels’s analysis renders comprehensiveness not simply evidence that a zoning ordinance advances traditional police power purposes of health, safety, and welfare, but rather an independent justification for zoning. He goes on to say that zoning recognizes “that in any given city only a certain proportion of land can profitably be employed for certain uses,” including apartments.³⁷² Assuming, perhaps optimistically, that such proportions were “fairly easy of computation when certain factors are known,” Landels argued that through proper use restrictions the value of all land would be enhanced, advancing the public purpose of zoning by ensuring “maximum economic use of all land in the city.”³⁷³ The general welfare, on this account, moved far beyond any relationship with the suppression of near-nuisances.

Despite Landels’s view that zoning’s advocates could shed reliance on traditional police power doctrine, the doctrine remained important for courts. Two decades later Norman Williams, then-Director of the Department of Planning in New York City, frankly conceded:

In order to get planning decisions and regulations upheld by the courts, which are usually unknowledgeable about the problems involved and often tend to be hostile, primary emphasis in planning litigation has, naturally enough, usually been placed on whatever arguments seem likely to make the particular regulations involved easiest to uphold. Thus, in zoning cases, no matter what the real problems are, it is generally argued that the regulations under attack were really concerned with considerations of public health and safety. Moreover, it is customary also to invoke “the general welfare,” in a way which seems to assume that this is something definite and meaningful, and also something quite different from health and safety. It is rare that the particular problems affecting health, safety, or other aspects of welfare are spelled out, analyzed, and evaluated. There is then no reason to be surprised that the resulting court opinions tend to proceed on a remarkably low intellectual level.³⁷⁴

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. Norman Williams, Jr., *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 318 (1955) (footnote omitted).

Courts rarely probed too deeply into the specifics of how an ordinance, or a particular provision, advanced the public welfare. They also grew increasingly willing to accept aesthetic justifications for zoning. Writing in 1930, law professor Charles Light viewed cases upholding single-family districts as examples of courts invoking broad interpretations of traditional police powers concerns, such as welfare and morals, “to reach aesthetic results.”³⁷⁵ Light described an increasing tendency to give weight to aesthetic considerations (even though they may not have been independently sufficient to justify zoning) and to broaden the scope of the police power.³⁷⁶

The Supreme Court itself would soon expressly embrace aesthetic values as a component of the public welfare and a basis for government action pursuant to the police power. In *Berman v. Parker*, a 1954 eminent domain decision, the Court endorsed a “broad and inclusive” conception of public welfare³⁷⁷ coupled with strong deference to the legislature’s determination of its substance.³⁷⁸ The public welfare, the Court declared, represented values “spiritual as well as physical, aesthetic as well as monetary.”³⁷⁹ Accordingly, a legislature possesses the power “to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”³⁸⁰ Twenty-four years later, the Court reaffirmed the validity of land-use restrictions grounded in aesthetics in *Penn Central*.³⁸¹

A few years prior to *Penn Central*, in 1974, the Court ruled in a case involving a challenge to restrictions on who could occupy single-family dwellings, which were imposed by an ordinance’s definition of “family.”³⁸² Although the single-family district itself was not challenged, the majority and dissents provided no suggestion that they question its validity.³⁸³ In fact, the Village of Belle Terre at the time, and today, remains restricted exclusively to one-family dwellings.³⁸⁴ Writing for the majority in *Belle Terre*, Justice Douglas quoted *Berman*’s language regarding the “broad and inclusive” concept of the public welfare, and the

375. Charles P. Light, Jr., *Aesthetics in Zoning*, 14 MINN. L. REV. 109, 118 (1930) (citing NEWMAN F. BAKER, LEGAL ASPECTS OF ZONING 15 (1927)).

376. *Id.* at 121; see also *id.* at 122 (“The cases upholding use restrictions upon apartment houses and stores, in their *decisions*, seem to recognize the aesthetic as an important justifying factor.”).

377. 348 U.S. 26, 33 (1954).

378. See *id.* at 32 (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . .”).

379. *Id.* at 33.

380. *Id.*

381. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978) (“[T]his Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city . . .”).

382. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8–9 (1974).

383. See generally *id.*

384. VILLAGE OF BELLE TERRE, N.Y., CODE § 170-2 (1971) (“For the purpose of this chapter, the Village of Belle Terre will consist of one district to be known as ‘A Residence District.’”); *id.* § 170-5 (C) (2012) (providing that “[a]ny [residential] use other than a single-family dwelling is prohibited in the Village of Belle Terre”).

spiritual, physical, aesthetic, and monetary values it represents.³⁸⁵ Building off of *Berman*, Douglas declared “[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”³⁸⁶ In his dissent, Justice Marshall agreed with the majority that “deference should be given to governmental judgments concerning proper land-use allocation.”³⁸⁷ Effective land-use control, he suggested, depended upon such deference, and had the property’s owners challenged the ordinance either on the grounds that it “deprived them of their property or was an irrational legislative classification” he would have agreed with the majority that it should be sustained.³⁸⁸ For Marshall, as for the majority, the police power was not “narrowly confined” and the objectives put forth in support of the ordinance, including “making the community attractive to families” were legitimate.³⁸⁹ The Court’s role, Marshall stressed, “is not and should not be to sit as a zoning board of appeals.”³⁹⁰ It is unlikely, given these pronouncements accepting aesthetic justifications for the exercise of the police power and expressing an unwillingness to closely review local zoning, that the Court would strike down exclusive single-family districts.³⁹¹ In future writing, I plan to explore what legal arguments in that direction might look like and how they might establish a viable line between acceptable and unacceptable forms of residential districting. In the remainder of this Article, I briefly suggest implications of the intellectual and legal history of single-family zoning for contemporary legislative reform efforts.

385. 416 U.S. at 6 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

386. *Id.* at 9. As William Fischel notes, subsequent cases that sought to use the Equal Protection Clause to pry open these sanctuaries for lower income households proved unsuccessful because the Court declined to become involved in local zoning decisions. WILLIAM A. FISCHEL, *ZONING RULES! 102* (2015).

387. 416 U.S. at 13 (Marshall, J., dissenting). Marshall dissented on the grounds that the ordinance, by regulating the relationship of residents within a home, improperly burdened the freedom of association and right to privacy. *Id.*

388. *Id.*

389. *Id.* at 13–14 (“I . . . continue to adhere to the principle of [*Village of Euclid v. Ambler Realty Co.*] that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms.” (citation omitted)).

390. *Id.* at 13. Marshall does speak approvingly of “limited but necessary intrusions” by lower federal courts “to insure that land-use controls are not used as means of confining minorities and the poor to the ghettos of our central cities.” *Id.* at 14. Whether he would have been persuaded by any argument that single-districting can, indirectly, serve as a “means of confin[ement]” is impossible to answer. *See id.* Marshall also, in an interesting footnote, simply quotes without comment a decision of the Pennsylvania Supreme Court, which declared: “Perhaps in an ideal world, planning and zoning would be done on a *regional* basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city.” *Id.* at 16 n.4 (quoting *Appeal of Girsh*, 263 A.2d 395, 399 n.4 (Pa. 1970)).

391. I am grateful to Lee Fennell for conversation regarding *Belle Terre*.

IV. REFORMING SINGLE-FAMILY ZONING

The early history of single-family districting reveals that even supporters recognized its shaky police power justifications and distinguished it from other forms of use districting. At present, aesthetics constitute the primary police power justification for single-family zoning, an expansion of that doctrine that would likely have surprised even the boldest early proponents of zoning. Given the significant intrusion on private property rights effectuated by zoning in any form, this reliance on aesthetics, rather than health, safety, or even a broad conception of public welfare, is troubling. For some jurisdictions the questionable justifications for single-family districting, coupled with its problematic racial history, have led to outright rejection of such zoning. Other state and local governments may be unwilling to go so far. The history of single-family zoning offers lessons for jurisdictions open to less dramatic reforms, as well as courts willing to closely interrogate the continued dominance of such zoning.

A. EMPHASIZE COMPREHENSIVE PLANNING AND ZONING

First among these lessons is recognizing the important role comprehensiveness played for early proponents of single-family zoning. Comprehensive planning and zoning were not simply an aspirational norm; they were essential to judicial acceptance of zoning generally and single-family districting particularly. Single-family zoning constituted a valid exercise of the police power not on its own merits but as part of a comprehensive approach to zoning, an approach rooted in “long study of the city and all its features—channels of growth, traffic, uses, heights, bulk of buildings, and so on.”³⁹² To be valid under the police power, districting had to consider both “existing conditions” and “future growth and development.”³⁹³

Zoning’s early advocates emphasized that comprehensive zoning must provide adequate space for all of a city’s needs—commercial, industrial, and residential.³⁹⁴ Some early courts struck ordinances that failed to provide such space.³⁹⁵ Supporters stressed the need for zoning to be based upon “sound economic policy,” with laws of supply and demand governing “the *amounts of land needed* for the various purposes and the types of activities engaged in by citizens of any

392. BAKER, *supra* note 375, at 115; *see also* Freund, *supra* note 230, at 142 (describing “the comprehensive plan as one of the main features of zoning legislation”); Charles M. Haar, “*In Accordance with a Comprehensive Plan*,” 68 HARV. L. REV. 1154, 1154 (1955) (“For to the extent that zoning is properly to be conceived of as the partial implementation of a plan of broader scope, zoning without planning lacks coherence and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve.”).

393. *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1925).

394. *See* Pollard, *supra* note 82, at 15 (“Comprehensive zoning, when developed to its fullest extent, will so district a city that each use of land incident to the needs of that city will find an area set aside for its occupancy.”).

395. *See supra* notes 357–65 and accompanying text.

community.³⁹⁶ Zoning could only promote a community's health, safety, and general welfare if it derived from (and responded to) careful consideration of actual needs.³⁹⁷

Finally, a zoning ordinance needed to change with time to allow for growth and meet changes in demand for particular uses.³⁹⁸ Bettman argued that territory should be provided for "home uses," only "until the time arises when, by virtue of changes in land values or modes of transportation or the pressure of business and industry, the time shall have arrived when appropriately the residential areas should be moved elsewhere."³⁹⁹ This is admittedly not an argument for eliminating low-density residential areas. But it concedes that zoning must not remain static and that future growth and changes in use should be permitted in response to new demand.⁴⁰⁰

In many jurisdictions, zoning has long been untethered from any kind of comprehensive planning as a legal requirement.⁴⁰¹ Although prominent commentators have criticized this reality, it remains unlikely to change.⁴⁰² The vision of rational planning that can predict and account for future growth, which constituted a crucial component of early defenses of single-family zoning, has rightly faced significant criticism.⁴⁰³ Nonetheless, zoning reformers would benefit from foregrounding more modest elements of this early commitment to comprehensiveness. Single-family zoning was justified in part on the assumption that a jurisdiction would zone sufficient land for other uses, including multifamily residential. Zoning was not to be frozen in place; rather, its capacity to accommodate change was framed as a valuable feature.⁴⁰⁴ Absent a comprehensive approach to zoning that provides

396. Theodora Kimball Hubbard & Henry Vincent Hubbard, *Series Preface* of HARLAND BARTHOLOMEW, *URBAN LAND USES: AMOUNTS OF LAND USED AND NEEDED FOR VARIOUS PURPOSES BY TYPICAL AMERICAN CITIES: AN AID TO SCIENTIFIC ZONING PRACTICE*, at v, v (1932) (emphasis omitted).

397. See BARTHOLOMEW, *supra* note 396, at 4.

398. The need for change in response to new conditions was, of course, a crucial component of the Court's reasoning in *Euclid*. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) ("Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.").

399. City Planning Brief, *supra* note 107, at 34.

400. Robert Whitten suggested a similar point in 1918: "As a city reaches metropolitan size the demand for housing space near the central area become so great that the only way to make that location available to any but the wealthy is to permit a more intensive utilization of the land." Whitten, *supra* note 174, at 35. However, he was discussing the location of multifamily districts near business areas and not changes to previously zoned districts. See *id.*

401. See Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 901–09 (1976) (noting early view of courts that zoning need not be done in accord with a separate plan).

402. See *id.* at 910 (arguing for mandatory comprehensive planning); Haar, *supra* note 392, at 1174 (contending that zoning in the absence of formal planning may be "per se unreasonable" due to its failure to adequately consider the general welfare).

403. See ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* 68–70 (4th ed. 2013).

404. *Goldman v. Crowther*, 128 A. 50, 62 (Md. 1925) (Bond, C.J., dissenting) ("For a long time now, efforts have been made in the development of new residential areas in the city to prevent the environment objected to by covenants in deeds; but this has not proved entirely successful, and, if

adequate space to satisfy the demand for more intense land uses, including multi-family housing, a core component of early arguments for the legal validity of single-family zoning simply falls apart. Zoning reformers should emphasize that any provision for single-family zoning districts in a given jurisdiction must be balanced by an adequate provision of land for other uses, including multifamily housing.

B. CONSTRAIN THE SINGLE-FAMILY PRESERVE

In addition to emphasizing the need to provide adequate space for a variety of land uses, many early zoning advocates sought to ensure that districts limited to single-family homes were placed in close proximity to commercial or apartment areas, or had such areas at their center.⁴⁰⁵ John Gries and James Ford, writing in 1932 on behalf of the President's Conference on Home Building and Home Ownership, called for residential zones with easy "access to local shopping centers," in addition to convenient transportation to downtown retail.⁴⁰⁶ Their vision, albeit in the early years of the automobile, was not one of vast, car-dependent single-family districts.⁴⁰⁷

Nor did zoning advocates at the time endorse large single-family lots. Edward Bassett, reflecting in 1940 on the first twenty years of zoning, expressed caution regarding the willingness of courts to accept requirements of "unnecessarily large building plots," such as two-acre minimums, counseling that "[t]hree families to the acre is safe," but "[b]eyond that is doubtful."⁴⁰⁸ He suggested courts can easily be convinced that reasonable regulations on lot size relate to more clearly acceptable concerns regarding the prevention of fire, noise, and contagion, as well as the provision of access to light and air.⁴⁰⁹ However, at some point, zoning that mandated excessively large lots would become "unlawful for the reason that there is no substantial relation between the regulation and the health and safety of the community."⁴¹⁰ The police power, these comments suggest, could only be

successful, restrictions by this means are not entirely desirable, because they continue and bind the areas to which they are applied indefinitely in the future, in spite of almost all change, and so may become too burdensome to property owners there in course of time.").

405. Cheney, *supra* note 197, at 277 ("[I]n . . . recent zone ordinances of the West there are no single family dwelling districts without a small business or apartment house center located within a half mile or a few blocks at least, convenient for everybody."); City Planning Brief, *supra* note 107, at 35 (arguing that districting must grant appropriate territory to "local business and civic centers" placed "immediately adjoining to or in the center of the residential areas").

406. *City Planning and Zoning (Committee Report)*, *supra* note 145, at 32.

407. See Hirt, *supra* note 199, at 144 (arguing that as automobile use increased, U.S. zoning lost early emphasis on proximity between residential and business uses).

408. See EDWARD M. BASSETT, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 86–87 (1940); *City Planning and Zoning (Committee Report)*, *supra* note 145, at 32; see also Jacob L. Crane, Jr., *Progress in the Science of Zoning*, 155 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 197 (1931) (discussing trend of requiring larger minimum lot sizes and uncertainty of their validity under the police power).

409. See BASSETT, *supra* note 408, at 86.

410. *Id.* at 87. In the same treatise Bassett questioned whether the use of zoning to establish "a community exclusively of high-class private residences" represented a "reasonable exercise of the police power." *Id.* at 68. Bassett reasoned that if the uses excluded—schools, churches, clubs, and

stretched so far. Today, such large lots are increasingly common in suburban and exurban communities, aggravating sprawling development patterns.⁴¹¹

Smaller lots in close proximity to a commercial district are consistent with the recent embrace by zoning reformers and some local governments of “gentle density” and “missing-middle housing” in formerly single-family districts. As noted, a number of early ordinances allowed both one- and two-family residences in their most restrictive district. In *Miller v. Board of Public Works*, the California Supreme Court observed: “A two-family dwelling requires no radical change of architectural design and does not entail any added burdens over the single family residences in the way of fire or health protection”⁴¹² Nor, it continued, do such dwellings “radically change the character of the neighborhood.”⁴¹³ This description is consistent with contemporary arguments for “gentle density” in the form of accessory dwellings, duplexes, and triplexes in single-family neighborhoods.⁴¹⁴ In sum, the early history of single-family zoning reveals that such districts were intended to be small and in close proximity to compatible uses, including commercial and multifamily housing. Lots were to be small, and minimal increases in density, such as two-family homes, were seen by many as having no detrimental effect on the health or safety of a neighborhood.

C. PLAN AT A REGIONAL LEVEL

Finally, while calls for comprehensiveness during this period were focused on the individual city or town responsible for implementing a zoning ordinance within its boundaries, they also, at times, recognized the effects that zoning can have beyond a jurisdiction’s boundaries. In a recent article, Ezra Rosser discusses a passage in *Euclid* recognizing “the possibility of cases where the general public interest would so far outweigh the interest of the municipality [whose zoning ordinance was at issue] that the municipality would not be allowed to stand in the way.”⁴¹⁵ Rosser argues this proviso justifies limiting local authority in favor of a more regional approach to planning and zoning.⁴¹⁶ Discussing the same passage

libraries—caused harm in districts with large yards, then “it is difficult to see why they would not be even more so in residence districts having smaller yards or partly built up with multi-family houses.” *Id.*

411. See DESEGREGATE CONN., SMALL LOTS IN SMART PLACES: A RIGHT-SIZED SOLUTION FOR CT 5 (2022), <https://www.desegregatect.org/s/Issue-Brief-Minimum-Lot-Sizes.pdf> [<https://perma.cc/UGG5-LYMT>] (reporting that half of the residential land in Connecticut requires nearly two acres per single-family home).

412. 234 P. 381, 387 (Cal. 1925).

413. *Id.*; cf. PORTLAND, OR., PLANNING AND ZONING CODE § 33.110.010 (requiring denser infill housing to be “compatible with the scale of the single-dwelling neighborhood”). The law encourages the construction of multiple units by increasing the maximum number of square feet of development allowed as the number of dwelling units increases. *Id.* § 33.110.210.

414. See ALEX BACA, PATRICK MCANANEY & JENNY SCHUETZ, BROOKINGS INST., “GENTLE” DENSITY CAN SAVE OUR NEIGHBORHOODS (2019), <https://www.brookings.edu/research/gentle-density-can-save-our-neighborhoods/> [<https://perma.cc/2LYM-Z3S8>] (discussing potential for “gentle” increases in density in single-family neighborhoods to increase housing supply and reduce costs).

415. Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 819 (2021) (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926)).

416. *Id.* at 822.

shortly after *Euclid*, Bettman observed that it was not clear from the decision to what degree a municipality's relationship to its broader metropolitan area should bear upon a determination of the validity of its own zoning.⁴¹⁷ Bettman argued that zoning should take into account, in determining the appropriateness of districting, "the trend and logical avenues of development."⁴¹⁸ To the extent "the location of a municipality within a metropolitan urban area" bears upon development trends, he deemed it relevant to the plan's constitutional validity.⁴¹⁹ Bettman suggested that Justice Sutherland, in *Euclid*, "might have been conscious of this," noting the "reservation" that Rosser terms the *Euclid* proviso.⁴²⁰ This passage, Bettman contended, was "noteworthy" for presenting "the conflict not as one between the individual and the community, but rather as between different communities, different social groups or social interests, which is, when profoundly comprehended, true of all police power constitutional issues."⁴²¹ Consideration of the broader regional dimensions and implications of zoning—which have received renewed attention in legal scholarship and legislative reform efforts⁴²²—was, for early zoning supporters, consistent with their emphasis on comprehensiveness. However, it moved consideration beyond a jurisdiction's boundaries. The appropriateness of a municipality's single-family districts depended on its relation to the provision of adequate space for other necessary uses, not only within the municipality, but also at the metropolitan or regional level.

This was also consistent with a consideration that Howard Gillman has argued represented a primary concern of the late nineteenth- and early twentieth-century Court as it defined the contours of the police power.⁴²³ On Gillman's account, the Court was particularly concerned with legislation that "promoted only the narrow interests of particular groups or classes rather than the general welfare."⁴²⁴ Bettman alludes to such a concern in describing the conflict between "different social groups or social interests."⁴²⁵ This concern runs throughout the early history of single-family districts. Early hesitation regarding the exercise of the police power and the equal treatment of different neighborhoods and their respective residents was, in reality, reflective of a worry over whether single-family districts

417. Bettman, *supra* note 336, at 190.

418. *Id.*

419. *Id.*

420. *Id.*; see *supra* note 415 and accompanying text.

421. Bettman, *supra* note 336, at 190. He was careful, however, to stress that the Court's opinion did not require a suburban community "to merge its welfare completely in that of the metropolitan region." *Id.*

422. See, e.g., Rosser, *supra* note 415, at 811; Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 79 (2019); John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 824 (2019).

423. See generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

424. *Id.* at 7.

425. See *supra* note 421 and accompanying text.

problematically conferred benefits upon only a small subset of individuals. As mentioned, zoning's early advocates purported to address these concerns. Their arguments have not stood the test of time. Single-family districts continue to confer whatever benefits they provide upon only a small subset of the population. They also persist in exacerbating income, racial, and ethnic segregation and, by reducing the supply of housing, raising housing costs more generally. In addition, the reinforcement of existing residential patterns has served to freeze zoning in place, stymieing its capacity to respond to changes in local and regional demands and undermining, rather than furthering, the public welfare.

CONCLUSION

Exclusively single-family districts have long been accepted as *the* dominant component of American zoning. They remain, as they were at its inception, the most questionable component of zoning. Traditional police power concerns with health, safety, and the public welfare provide little basis for keeping duplexes and triplexes out of single-family enclaves. Zoning's earliest advocates recognized this and justified single-family zoning as one component of a comprehensive zoning regime grounded in careful consideration of existing needs and future demands. Little contemporary zoning results from such a comprehensive approach, a reality that suggests even the fragile early legal arguments for single-family districting cannot withstand critique. Single-family zoning should be rejected as an invalid exercise of the police power. Although it is unlikely American courts will choose this course of action, zoning reformers at the local and state level should draw upon the intellectual and legal history of single-family zoning to sharpen contemporary critiques and advance needed reform.