IN DEFENSE OF "FOOTNOTE FOUR": A HISTORICAL ANALYSIS OF THE NEW DEAL'S EFFECT ON LAND REGULATION IN THE U.S. SUPREME COURT

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At the turn of the nineteenth century, the U.S. Supreme Court established and reinforced numerous so-called "economic rights." *Lochner v. New York*—this period's paradigm case—held that the Fourteenth Amendment's Due Process Clause contained an implicit right to contract.[1] During the *Lochner* era, the Court invalidated almost 200 federal and state economic and labor regulations for interfering with the right to contract and for violating substantive due process.[2] In 1937, however, Justice Stone's famous "footnote four" in *United States v. Carolene Products Co.*[3] closed the coffin on *Lochner*. After *Carolene Products*, the Court stopped applying heightened scrutiny to economic legislation, and it began consciously protecting "discrete and insular minorities."[4] Though most would accept that footnote four greatly affected the Court's review of social legislation, some also see *Carolene Products* as ending an era of heightened protection for real-property rights.[5] This view is mistaken.

Though *Carolene Products* marked a dramatic shift in the Court's approach

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1. 198 U.S. 45 (1905).

2. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 466 (13th ed. 1997); *see, e.g.*, Weaver v. Palmer Bros., 270 U.S. 402 (1926) (declaring consumer-protection legislation unconstitutional); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (holding minimum-wage law unconstitutional); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down federal child-labor regulation); Adair v. United States, 208 U.S. 161 (1908) (declaring law protecting unionizing unconstitutional).

3. 304 U.S. 144 (1938).

4. *Id.* at 152 n.4.

5. *See, e.g.*, STEVEN J. EAGLE, REGULATORY TAKINGS 79 (1996) ("Since *Carolene Products*, the Court has been vigilant in cases involving civil rights, but deferential towards economic legislation."); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 133 (2d ed. 1998) ("[T]he *Carolene Products* analysis instituted a double standard of constitutional review . . . ."); Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 821–22 (1993) (labeling the post-New Deal Court's review of property rights a "judicial abdication"); *see also* Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in* First English Lutheran Church *and* Nollan, 59 U. COLO. L. REV. 427, 446 (1988) (stating that the Court's heightened scrutiny of local zoning regulations ended with the demise of Lochnerian jurisprudence).

to social and labor legislation, it did not affect the Court's already deferential review of land regulation. And why would it? The *Lochner* Court did not review land regulations with the same heightened scrutiny as it did economic legislation. The *Lochner* Court deferred to local exercises of the police power to regulate health, safety, and morality. It rejected most landowner challenges to land regulations and applied a consistent standard of review that favored government regulators, striking down only those land regulations it deemed "clearly arbitrary." There was no need for the post-*Carolene Products* Court to lower the scrutiny of land regulation because, unlike its approach toward social legislation, the *Lochner* Court deferred to state and local governments in the area of land regulation.

A comparison of *Lochner*-era land-regulation cases with post-*Carolene Products* land-regulation cases reveals that the New Deal did not doctrinally relax the Court's review of land regulation. The Court continued to apply the *Lochner*-era test through the New Deal's jurisprudential realignment. In fact, beginning in the late 1970s, the Court's balancing test actually favored property-owner plaintiffs and raised the bar for land regulators relative to the *Lochner* Court's standard of review. This article's purpose is neither to exhaustively catalog land-regulation cases, nor to judge the propriety of the Court's decisions. Rather, its purpose is to correct the mistaken view that the New Deal and the accompanying shift in the Court's social-welfare jurisprudence affected the Court's approach to land-regulation cases.

Part I of this article explains the *Lochner*-era Supreme Court's standard of review through an analysis of land-regulation cases decided between 1909 and 1937. Part II describes the approach taken by the Court after *Carolene Products*, between 1937 and 1980, and demonstrates that the Court's approach did not become more government-friendly, but if anything, became more landowner-friendly. Part III concludes.

I

LAND REGULATION IN THE *LOCHNER* ERA

Philip Nichols' 1917 treatise on eminent domain demonstrates the broad scope of the *Lochner*-era police power. Of that era's police power, Nichols wrote, "[I]t is not confined to the suppression of what is offensive, disorderly or unsanitary, but extends to so dealing with the conditions which exist in a state as to bring out of them the greatest welfare of its people."[6] Nichols explained that the police power was defined by a reasonableness standard, which focused solely on the government's action—judicial scrutiny concentrated on the regulation's purpose, requiring only that it serve the general welfare.[7]

During the *Lochner* era, the Court did not analyze land-regulation cases as it does today. Then, the Court reviewed land regulations through the lens of the

6. PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN 272 (2d ed. 1917).
7. *See id.* at 279.

Fourteenth Amendment's Due Process Clause rather than the Fifth Amendment's Takings Clause.[8] This due-process approach focused on whether the government's action was a proper exercise of the police power, and it largely ignored the effect on the landowner. The Court applied a "clearly arbitrary" test: government action was valid unless clearly unreasonable and arbitrary.[9]

Land-regulation cases in the *Lochner*-era demonstrate this standard. *Welch v. Swasey* is a classic prevention-of-harm case in which the Court upheld a Boston ordinance that limited the height of certain residential buildings to eighty feet.[10] Boston derived its power to enact the regulation from a 1904 Massachusetts statute that delegated to city mayors the power to appoint a commission to set maximum-building-height regulations within individual cities.[11] In Boston, the mayor appointed such a commission, and the commission issued the regulations.[12] The plaintiff contended that the city's purpose was solely aesthetic and, therefore, illegitimate.[13] The city claimed that the ordinance's purpose was safety: fires in taller buildings are more difficult to put out than those in shorter buildings, and commercial buildings are usually built with more fireproof materials than residential buildings.[14] Given the city's declaration of a clear safety concern, the Court could have upheld the law on those grounds alone.

Instead, after noting the safety rationale, the Court went on to broadly define the police power in general and apply a "clearly arbitrary" standard: only if "the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish—if the statutes are arbitrary and unreasonable and beyond the necessities of the case"—will regulations be invalid.[15] The Court left judging the wisdom and the necessity of the regulation to the legislature: "These are matters which it must be presumed were known by the legislature, and whether or not such were the facts was a question, among others, for the legislature to determine."[16]

The Court reaffirmed this deferential standard in *Reinman v. City of Little Rock*.[17] *Reinman* concerned an ordinance prohibiting livery stables in certain

8. The Court changed its approach in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), discussed *infra* II, in which it began looking at land regulation through the Takings Clause of the Fifth Amendment.

9. *See* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 39 (1964) (explaining that the turn-of-the-century Court largely believed that the Takings question "never turns upon an examination of the economic consequences of the government's action.").

10. 214 U.S. 91, 103, 108 (1909).

11. *Id.* at 108.

12. *Id.*

13. *Id.* at 104.

14. *Id.* at 107–08.

15. *Id.* at 105.

16. *Id.* at 107.

17. 237 U.S. 171 (1915).

parts of the city.[18] Despite the ordinance's recitation that livery stables were "detrimental to the health, interest, and prosperity of the city," the plaintiffs, livery stable operators, had operated their stable without specific complaints from nearby residents and with their own considerable investment, which the city had encouraged.[19] The ordinance effectively closed the plaintiffs' business, as no suitable alternative site was available.[20] The plaintiffs challenged the city ordinance as a violation of due process under the Fourteenth Amendment.[21]

Granting the city extensive room to regulate, the Court concluded that the ordinance regulated health and welfare; whether the stables were in fact a nuisance was "beside the question."[22] As in *Welch*, the Court applied the "clearly arbitrary" test.[23] Justice Pitney, writing for the Court, explained, "[S]o long as the regulation in question is not shown to be clearly unreasonable and arbitrary, . . . it cannot be judicially declared that there is a deprivation of property without due process of law . . . ."[24] Impact on investment-backed expectations and the loss of business were insufficient to overcome the regulation's validity. The city had the power to broadly regulate for the "general welfare of the people."[25]

The Court again affirmed this generous standard in a clear "coming to the nuisance" case, *Hadacheck v. Sebastian*.[26] The Court upheld a Los Angeles city ordinance that prohibited brick manufacturing.[27] The plaintiff was a brickyard operator who built his business outside of the city.[28] However, over a term of years the business fell within the city limits as Los Angeles grew around it.[29] The regulation devastated Mr. Hadacheck, causing more than a ninety-percent reduction in value in his property: once worth $800,000 as a clay brickmaking source, the property value dropped to only $60,000 as a residential site.[30] Other facts weighed in Hadacheck's favor: he had investment-backed expectations in extensive infrastructure improvements, the city code failed to list brickmaking as a nuisance, and nothing suggested that his activity actually harmed the public health or safety.[31]

Regardless, the Court upheld the ordinance as a valid exercise of the police power.[32] Far from fanning *Lochner*'s flame, in a sweeping statement the Court

18. *Id.* at 172.
19. *Id.* at 172–73.
20. *Id.* at 173.
21. *Id.*
22. *Id.* at 176–77.
23. *Id.* at 177.
24. *Id.*
25. *Id.*
26. 239 U.S. 394 (1915).
27. *Id.* at 404, 414.
28. *Id.* at 405.
29. *Id.* at 404.
30. *Id.* at 405.
31. *Id.* at 405–06.
32. *Id.* at 409–10.

said, "There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."[33] The Court reiterated that it would uphold the police power so long as it was not exercised arbitrarily.[34] The Court explained, "It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily."[35]

Seven years later, the Court decided the case that some regard as the flagship of regulatory-takings cases,[36] *Pennsylvania Coal Co. v. Mahon*.[37] The facts of *Mahon* are well known. In 1878, the Pennsylvania Coal Company had sold the surface rights of land to individuals in Scranton.[38] The deed specifically waived any right by the surface owner to the support of the underlying land.[39] Yet a rapidly growing population soon moved to the area, and people began building structures on the surface.[40] The legislature passed several statutes, including the Kohler Act in 1921,[41] prohibiting anthracite coal mining that caused subsidence of land used for "human habitation."[42] The U.S. Supreme Court held the Kohler Act was unconstitutional.[43]

Mahon is where those who wave the property-owner's bloody shirt seem to have gone wrong. The language of the opinion, along with cases surrounding *Mahon*, show that the case was not about the emergence of a new standard in land-regulation review,[44] but about Pennsylvania's interference with a bargained-for contract.[45] Writing for the Court, Justice Holmes said the Kohler Act "cannot be sustained as an exercise of the police power . . . *where the right to mine such coal has been reserved*."[46] Holmes suggested that such an act would

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33. *Id.* at 410.

34. *Id.*

35. *Id.*

36. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978); *see also* William M. Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 822–26 (1998) (discussing this interpretation of *Mahon*).

37. 260 U.S. 393 (1922).

38. *Id.* at 412.

39. *Id.*

40. Lawrence M. Friedman, *A Search for Seizure:* Pennsylvania Coal v. Mahon *in Context*, 4 LAW & HIST. REV. 1, 2 (1986).

41. *Id.* at 3. Across the state, "pillar robbing" became a serious problem, for coal companies had similar waiver clauses upheld in court. *Id.* at 2.

42. In its brief, the coal company argued that several elements in the statute showed it was not meant as a safety regulation. It said the statute was underinclusive and applied only to coal mining—not to other mining that could have the same effects on land owners. It argued that the Act was meant to "merely augment the property rights of a favored few." *Mahon*, 260 U.S. at 394–404.

43. *Id.* at 416.

44. *Cf.* Friedman, *supra* note 40, at 4 (explaining that the Court applied the same standard as previously applied in land-regulation cases and concluded merely that the legislature had crossed the line in *Mahon*).

45. In dissent, Brandeis argued that the Act was valid because the legislature enacted it to prevent harm. *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting).

46. *Id.* at 414 (emphasis added). Furthermore, the Mahons' brief argued that the state had a right to use the police power to "regulate contracts to land." *Id.* at 406.

likely fail as an exercise of eminent domain; that the Mahons were attempting to avoid a bad bargain that even the legislature could not have avoided:

> If [the legislature had] been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.[47]

The heart of the issue was that the Pennsylvania legislature was trying to undo a bad deal—a deal that was embodied in a contract. It was the disruption of this contract that Holmes focused on, not the mere act of "taking." He explained, "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders."[48]

Those who label *Mahon* a "takings" case point specifically to what has become the most famous sentence of his five-page opinion: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[49] Yet one must view this "goes too far"[50] language in context. "Too far" most likely refers to Pennsylvania's interference with that contract, not only to the regulation's impact on land use.[51] Reciprocity of advantage is evidence of reasonableness,[52] presumably because a regulation that creates mutual benefit leaves the landowner whole (at least theoretically). And conversely, a drastic diminution in value is evidence of arbitrariness: it requires one person to shoulder an unfair burden.[53] But these are both just indicators—it is doubtful that Holmes intended either factor to be determinative.[54] Rather, Holmes probably believed that they were merely effects by which to weigh the legitimacy of the government action.[55] It would have been inconsistent with the Court's history of focusing on the regulation itself instead of its effect on the landowner to interpret lack of reciprocity of advantage and diminution of value as new rules created by the *Mahon* Court. Furthermore, cases decided immediately after *Mahon* do not show that the Court intended to change its approach to aggressive land regulations.

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47. *Id.* at 415. Justice Kephart's Pennsylvania Supreme Court dissent shows the problem was the State's interference with an existing contract: "[T]his is merely part of a scheme to force the coal companies to support the surface of owners who have either for value released the right of support or have purchased their lots for a less price by reason of not acquiring this right with their purchase." Mahon v. Pa. Coal Co., 118 A. 491, 500 (Pa. 1922) (Kephart, J., dissenting).

48. *Mahon*, 260 U.S. at 416.

49. *Id.* at 415.

50. *Id.*

51. Holmes closes his opinion saying, "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Id.* at 416.

52. *Id.* at 415.

53. *Id.* at 413.

54. Holmes discusses reciprocity of advantage as an explanation for why the Court upheld a previous regulation, but he never says it is required. *Mahon*, 260 U.S. at 415; *see also* Treanor, *supra* note 36, at 857–58 (explaining how Holmes's previous opinions show that he intended diminution of value to be part of a balancing test, rather than a complete test in itself).

55. *See* Treanor, *supra* note 36, at 857–58.

If the champions of *Mahon* are correct, and it was intended to introduce a new era in land-use jurisprudence, then the Court would have changed its approach to these cases. But it did not. To the contrary, two years after *Mahon*, beginning with *Village of Euclid v. Ambler Realty Co.*,[56] the Court decided a string of zoning cases in which it continued applying the pre-*Mahon* standard of review. A comparison of the Court's standard in pre-*Mahon* cases with post-*Mahon* cases shows that the police power remained broad, and the Court remained deferential to legislative judgment as it continued applying the "clearly arbitrary" test.

Euclid involved extensive zoning regulations in a Cleveland suburb.[57] The *Euclid* zoning plan organized the village into six districts and subdivided each according to the use, height, and area of its buildings.[58] The plaintiff was a residential landowner who challenged the regulation's validity under the Fourteenth Amendment.[59] Like the pre-*Mahon* plaintiffs, he alleged that the regulation significantly affected his property value, lowering the value from $10,000 per acre to $2,500 per acre—a seventy-five percent reduction in value.[60] The Court, however, again sided with the city.[61]

Defining its role as part of the state's police power, Justice Sutherland wrote that nuisance law served as a useful, though not exclusive, guideline: "The law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [police power]."[62] Sutherland also explained that the legislature has room for error.[63] Repeating the Court's now entrenched deference, he said, "The inclusion of a reasonable margin to insure effective enforcement[] will not put upon a law, otherwise valid, the stamp of invalidity."[64] If diminution of value were meant to be a new test for land regulation, *Euclid* would have been a perfect case in which to apply it. Seventy-five percent is an enormous reduction in value. Yet the Court did not bite.

As the sun set on the *Lochner* era, the Court continued upholding zoning laws and applying the same deferential standard of review. The Court affirmed *Euclid* in *Zahn v. Board of Public Works*[65] and *Gorieb v. Fox*.[66] In *Zahn*, the plaintiff wanted to operate a business along Wilshire Avenue in Los Angeles;

56. 272 U.S. 365 (1926).
57. *Id.* at 379–80.
58. *Id.* at 380.
59. *Id.* at 384.
60. *Id.*
61. *Id.* at 397.
62. *Id.* at 387–88.
63. *Id.* at 388–89.
64. *Id.*
65. 274 U.S. 325 (1927).
66. 274 U.S. 603 (1927). Interestingly, Justice Sutherland, one of the notorious "four horsemen" of the *Lochner* era, authored the majority opinions in *Euclid*, *Zahn*, and *Gorieb*. If any one Justice had been the authoritative interpreter of the *Lochner* era's impact on land regulation, it would have been Sutherland.

however, the area was zoned residential.[67] Given the property's location and high traffic volume, the plaintiff claimed that he could make more money operating a business, and that the ordinance violated due process.[68] Rejecting the plaintiff's argument, the Court explained, "The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable."[69]

Likewise, in *Gorieb*, the Court evaluated a Roanoke zoning ordinance that had setback restrictions.[70] The plaintiff claimed that the ordinance's vagueness violated due process.[71] Nonetheless, the Court again deferred to local judgment and upheld the ordinance.[72] It followed the zoning precedent and reaffirmed its broad view of the police power.[73]

In fact, during the *Lochner* era, the Court invalidated zoning ordinances in only two cases: *Nectow v. City of Cambridge*[74] and *Washington ex rel. Seattle Title Trust Co. v. Roberge*.[75] Both resembled *Euclid* in that they involved challenges to comprehensive zoning schemes. The zoning ordinance in *Nectow* divided Cambridge, Massachusetts, into residential, business, and unrestricted districts.[76] The plaintiff owned a divided tract of property. Property to the north and west were zoned residential, while property to the south[77] and east[78] were unrestricted. The plaintiff's property was zoned residential, and the ordinance further required the western edge of the property to be set back by 100 feet, leaving only sixty-five feet in depth.[79]

Unlike the result in *Euclid*, however, a special master found that *no use* could be made of the property as a residential property, given that the surrounding property was zoned "industrial" and that the usable space was limited.[80] Exacerbating the situation, there was an outstanding contract to sell the land, but the buyer refused to comply in light of these new restrictions.[81] The Court held that the city had engaged in arbitrary line-drawing and that the regulation was therefore unconstitutional.[82] The diminution of value served as

67. *Zahn*, 274 U.S. at 327.
68. *Id.*
69. *Id.* at 328.
70. *Gorieb*, 274 U.S. at 604.
71. *Id.* at 605–06.
72. *Id.* at 608.
73. *Id.* ("[Legislative] conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.").
74. 277 U.S. 183 (1928).
75. 278 U.S. 116 (1928).
76. *Nectow*, 277 U.S. at 185.
77. The Ford Motor Company had a large assembly plant on the southern property. *Id.* at 186.
78. This property belonged to the plaintiff. *Id.*
79. *Id.*
80. *Id.* at 187.
81. *Id.*
82. *Id.*

evidence that the ordinance did not advance the general welfare.[83] The plat revealed no reason that the plaintiff's property had to be zoned residential; the city could have drawn the line a mere 100 feet to the left.[84]

In *Roberge*, a lack of procedural due process and an invalid delegation of power led a unanimous Court to invalidate a building regulation. *Roberge* involved a challenge to a Seattle ordinance requiring neighboring-landowner permission to build any "philanthropic home for children or for old people."[85] The plaintiff owned and operated a home for the "aged poor" and wanted to tear it down to build a new, fireproof home.[86] The city had denied the plaintiff a building permit because he had failed to gather the required consent of his neighbors.[87] The Court held that this delegation of power to neighboring landowners violated due process.[88] There was no mechanism for review, so neighbors could easily abuse the power.[89] Such delegation, the Court said, was "repugnant" to due process.[90] Comprehensive zoning was not the problem; the problem was the way in which such a plan circumvented due process in its application. Interestingly, rather than requiring a safety improvement (as most regulations do), the *Roberge* regulation actually *prevented* one. Contrary to the views of some scholars,[91] *Nectow* and *Roberge* are unique exceptions to the Court's otherwise overwhelming approval of zoning; they do not represent trends or principled attempts to limit zoning by wielding the tool of nuisance restraints.

The last land-regulation case in the *Lochner* era was *Miller v. Schoene*.[92] A Virginia law required landowners to cut down any cedar-rust-infected tree located within two miles of an apple orchard.[93] Under the act, neighboring landowners could petition the state entomologist, who would conduct an investigation and ultimately decide whether trees should be destroyed.[94] As it had in *Welch*, the Court made it a point to not limit the police power to prevention of harm alone: "We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute."[95] Unlike *Roberge*, the final decisionmaking authority rested with a state official, rather than with

83. *Id.*

84. In reference to the line-drawing, the Court said, "[S]uch restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Id.* at 188.

85. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 118 (1928).

86. *Id.* at 117.

87. *Id.* at 119.

88. *Id.* at 122.

89. *Id.*

90. *Id.*

91. *See, e.g.*, Williams, *supra* note 5 (treating nuisance categories as a comprehensive constitutional boundary for *Lochner*-era zoning regulations).

92. 276 U.S. 272 (1928).

93. *Id.* at 277–78.

94. *Id.*

95. *Id.* at 280.

neighboring landowners. With appropriate procedures in place, the law was valid under the "clearly arbitrary" test.[96]

The *Lochner*-era cases exhibit a deferential standard regarding review of land regulation. So long as land regulations were reasonable and not clearly arbitrary, and so long as proper procedural checks were available, the legislature could regulate land without compensating landowners. Nuisance and harm-prevention aided in defining, not limiting, the police power. Diminution of value and absence of reciprocity of advantage were only evidence of unreasonableness and arbitrariness, and were not, arguably, tests in themselves. Except for *Roberge* and *Nectow*, every one of the zoning cases affirmed lower-court decisions. The grants of certiorari in these cases show the Court's desire to strengthen the legitimacy of local land regulation by reaffirming precedent. The affirmations also show that lower courts understood the Court's repeatedly articulated standard.

II

LAND REGULATION AFTER *LOCHNER*

Few Supreme Court cases addressed land regulation in the period immediately following the *Lochner* era. Some suggest this dearth of land-regulation cases is evidence of the Court's lowered protection of property rights.[97] But there is another explanation. In the wake of the *Lochner* era's demise, land-regulation cases fell by the wayside in the Court's effort to avoid questioning the police power.[98] For the half century leading up to the New Deal, the Court had zealously protected economic rights by restricting the police power. With the rise of the administrative state and the rejection of *Lochner*, however, it was likely simpler for the Court to avoid reviewing the police power in general. Thus, Supreme Court review of land regulation was the baby that was thrown out with the bath water.

Yet, in the cases in which the Court did address the validity of land regulations immediately following the enactment of the New Deal, the Court stayed focused on the government's police-power exercise and continued using the "clearly arbitrary" standard. The Court's standard remained constant through *Carolene Products*.

A quarter century after *Carolene Products*, however, a misinterpreted resurrection of *Mahon* caused the Court's approach to shift. The Court began glancing obliquely at land regulation, not through the Fourteenth Amendment's Due Process Clause, but through the Fifth Amendment's Takings Clause. Yet this shift favored landowners. Rather than focus solely on the government

96. *Id.* at 280–81.

97. *See* James L. Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 608 (1981) ("[P]roperty rights were essentially confined to a legal dust bin.").

98. Justice Black's majority opinion in *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.* observed that, at least since 1934, the Court had "steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases." 335 U.S. 525, 536 (1949).

action, as the Fourteenth Amendment analysis did, the Court developed a Takings Clause jurisprudence that, in addition to analyzing the government's action, examined the regulation's effect on the landowner.

The first post-*Lochner*-era case to examine a land regulation was *Queenside Hills Realty Co. v. Saxl*,[99] in which the Court continued its traditional deference to legislatively determined exercises of the police power. The debate in *Saxl* was over the validity of a 1944 safety regulation, a traditional exercise of the police power.[100] Factually and doctrinally, the case fits squarely within its *Lochner*-era precedent. New York required nonfireproof lodging houses to comply with new regulations, including a requirement for sprinkler systems.[101] The plaintiff said his lodging house was not a fire risk, the property was worth $25,000, and the sprinkler system would cost $7,500.[102] The regulation, he argued, was unreasonable.[103]

The Court upheld the regulation under a traditional due-process analysis, focusing on the government's action: "The question of validity turns on the power of the legislature to deal with the prescribed class."[104] Following the deference seen in *Reinman* and *Hadacheck*, the Court explained, "It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum."[105]

In 1962, the Court decided *Goldblatt v. Town of Hempstead*,[106] another case in the factual and doctrinal line of *Reinman* and *Hadacheck*. The town of Hempstead, New York, passed a drainage and pit-excavation ordinance, restricting how deep a company could dig.[107] When the town attempted to enforce the ordinance, a landowner and mining company challenged its constitutionality.[108] As in *Hadacheck*, the town came to the harm,[109] and as in *Reinman*, the ordinance effectively closed the plaintiff's business.[110] As it had in the *Lochner* era, the Court began by judging the ordinance through Fourteenth Amendment due process.[111] The Court detoured slightly from its traditional approach, however, after identifying a legitimate purpose.

Mindful of *Mahon*, Justice Clark opined that a regulation could be a taking.[112] Channeling Holmes, he wrote, "There is no set formula to determine

99. 328 U.S. 80 (1946).
100. *Id.* at 81.
101. *Id.*
102. *Id.* at 82.
103. *Id.*
104. *Id.* at 83.
105. *Id.*
106. 369 U.S. 590 (1962).
107. *Id.* at 590–92.
108. *Id.* at 590–91.
109. *Id.* at 591.
110. *Id.* at 592.
111. *Id.* at 592–93.
112. *Id.* at 594.

where regulation ends and taking begins."[113] The Court did not proceed down this path because, it explained, there was no evidence the Hempstead excavation ordinance reduced the land's value.[114] Rather, the Court returned to its traditional Fourteenth Amendment analysis—"whether the prohibition . . . is a valid exercise of the town's police power"[115]—and declared the regulation valid.[116] But a seed was planted in precedent that *Mahon* might stand for something different than what the Court appears to have originally intended.

The Court significantly changed its approach in 1978, when in *Penn Central Transportation Co. v. City of New York*,[117] it shifted to a multifactor test. *Penn Central* involved the 1965 New York Landmarks Preservation Law,[118] which restricted alterations to designated historic landmarks in New York City. Following the designation of Grand Central Terminal as a historic site, and without seeking judicial review of the designation, Penn Central entered into an agreement with a British company to build a structure above the terminal.[119]

A mixture of Takings Clause analysis with traditional Due Process Clause analysis differentiates *Penn Central* from its predecessors.[120] Formally inviting the Takings Clause to the dance changed the issue from, "Did the state have the power to enact this regulation?," to, "What is this regulation's effect?" This combined analysis required considering not only the government's action, but also the impact on the landowner. From precedent,[121] the Court derived factors relevant to determining whether a regulation is a taking: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action."[122] Although the Court ultimately held for the city,[123] doctrinally these factors weigh in favor of the property owner: two of the three factors focus on the regulation's impact on the property owner. The property owner thus has a chance for compensation, regardless of the propriety of the government action.

Finally, the Court formally applied the *Penn Central* factors in *Agins v. City of Tiburon*.[124] The *Agins* plaintiff challenged use and density restrictions that

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 596–97.
117. 438 U.S. 104 (1978).
118. N.Y. CITY, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0–207-21.0 (1976).
119. *Penn Central*, 438 U.S. at 116–19.
120. *Id.* at 122. The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment, and the Court notes this. But the operative constitutional mechanism is the Takings Clause of the Fifth Amendment, rather than the Due Process Clause of the Fourteenth Amendment.
121. *Id.* at 124–28. The Court looked at a number of cases from during and after the *Lochner* era.
122. *Id.* at 124.
123. *Id.* at 138.
124. 447 U.S. 255 (1980).

limited the number of homes he could build on his property.[125] The property had great value as a development site, and the landowner claimed the ordinance was a taking that required compensation.[126] Like the balance of factors in *Penn Central*, the *Agins* test presumptively weighs in favor of the property owner. The Court explained, "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."[127]

Analogizing to *Euclid*, the Court held the ordinance substantially advanced state interests.[128] However, the *Agins* Court continued beyond the point where the *Lochner*-era Court would have stopped—it recognized that a challenge to the regulation could be based on effects alone.[129] Though the Court did not apply the full test, for ripeness reasons,[130] a new standard fully emerged. Not only will the government's action be judged for reasonableness, but the regulation's impact will be judged in degree. This test gives property owners an avenue of attack that was unavailable in the *Lochner* era.

Empirical evidence also reveals that the Court considers *Lochner*-era land-regulation cases to be different from *Lochner*-era substantive due-process cases. The Court has completely rejected *Lochner*-era cases protecting substantive due process and economic freedoms. Since that time the Court has not cited *Lochner v. New York*,[131] *Adkins v. Children's Hospital*,[132] *Hammer v. Dagenhart*,[133] or *Weaver v. Palmer Bros.*[134] as binding precedent or to support a principle of law. Yet the Court regularly cites *Lochner*-era land-regulation cases for support in land-regulation cases. Between 1938 and 1980, the following cases were cited as precedent in land-regulation cases: *Welch* twice,[135] *Reinman* three times,[136] *Hadacheck* three times,[137] *Mahon* three times,[138] and *Euclid* nine times.[139]

125. *Id.* at 257–58.

126. *Id.* at 258.

127. *Id.* at 260.

128. *Id.* at 261.

129. *Id.* at 260 ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land.").

130. Because the plaintiff had not submitted plans for development, the Court could not compare what he could and could not have done with his property. Thus, a diminution assessment could not be performed. *Id.* at 262–63. Interestingly, the plaintiff in *Euclid* committed this same strategic blunder by suing too quickly. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

131. Last cited as support by a majority opinion in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

132. Overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

133. Overruled by *United States v. Darby*, 312 U.S. 100 (1941).

134. Last cited as support by a majority opinion in 1934 in *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535 (1934), and there only for a procedural issue. *Id.* at 558.

135. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978); Bowles v. Willingham, 321 U.S. 503, 518 (1944).

136. *Penn Central*, 438 U.S. at 126; Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946).

137. *Goldblatt*, 369 U.S. at 593; *Saxl*, 328 U.S. at 83; S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 191 (1938).

138. *Penn Central*, 438 U.S. at 127; *Goldblatt*, 369 U.S. at 594; Armstrong v. United States, 364 U.S.

The Court has also cited cases that struck down zoning laws: *Nectow* four times,[140] and *Roberge* twice.[141] These are particularly striking numbers given the relative paucity of land-regulation cases decided.

III
CONCLUSION

A common misunderstanding of the *Lochner* era and a common, but mistaken, interpretation of *Mahon* have engendered belief that the New Deal ended an era of heightened scrutiny of land regulation. An examination of *Lochner*-era land-regulation cases, however, shows that the *Lochner* Court did not apply heightened scrutiny toward land regulation. Instead, it only invalidated regulations that were obviously unreasonable or arbitrary[142] or those that deprived property owners of procedural due process.[143] Far from favoring landowner plaintiffs, this test virtually ensured success for government defendants.

If the New Deal affected the Court's approach to land-regulation cases, the cases following the *Lochner* era should reflect such a change. But no significant doctrinal change emerged in the wake of *Carolene Products*. The Court continued applying the "clearly arbitrary" standard under the Fourteenth Amendment, eventually introducing a multifactor analysis grounded in the Takings Clause that tipped the scale in the property owner's favor. Property-rights advocates may lament the level of scrutiny applied to land regulation, but any fault with the level of scrutiny should not be ascribed to the legacy of *Carolene Products* and the New Deal.

40, 48 (1960).

139. Agins v. City of Tiburon, 447 U.S. 255, 261 (1980); *Penn Central*, 438 U.S. at 125; *Bowles*, 321 U.S. at 518; New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 107 (1978); Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977); Young v. American Mini Theatres, Inc., 427 U.S. 50, 73 (1976); Reitman v. Mulkey, 387 U.S. 369, 384 (1967); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 277 (1964).

140. *Agins*, 447 U.S. at 260; *Penn Central*, 438 U.S. at 125; *Moore*, 431 U.S. at 498; *Arlington Heights*, 429 U.S. at 263.

141. City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668, 677 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 6 (1974).

142. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

143. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).