proved of more value to their designated audience, according to the publisher's release, of "aspiring law students . . . [and] journalists and members of broadcast media."

Given the brevity, limited currency, and awkward organizational format of *Criminal Justice and the Supreme Court*, it seems doubtful that it will offer much competition to the existing literature.

ZONING AND THE AMERICAN DREAM. Edited by Charles M. Haar[1] and Jerold S. Kayden.[2] Chicago: Planners Press. 1989. Pp. v, 386. Cloth $39.95.

Douglas W. Kmiec[3]

This celebratory volume contains the contributions of thirteen planners, economists and lawyers on the occasion of the sixtieth anniversary of the *Euclid* decision upholding the constitutionality of zoning. Since I neglected to send an anniversary card, perhaps this review can serve as something of a substitute. Not that I have been a great fan of the zoning process. From the writing in this volume, it would seem that few land-use specialists are—at least, wholeheartedly. Yet the editors are probably right when they proclaim at the outset that "zoning is here to stay, as firmly entrenched a part of the landscape as the buildings it regulates."

Now that is something of a startling proclamation, especially as the editors note a number of zoning's major deficiencies: its failure to deliver high-quality working and living environments, its exclusion of low-income and minority families, and a standardlessness which invites corruption, or at least uneven application. Beyond this list is the now well-documented fact that zoning and other land use controls can add unnecessarily to the cost of construction. It is often inefficient. Of course, the constituencies supporting zoning like matters the way they are. Affluent suburbanites usually like low-density zoning, thank you, and some lawyers, planners and mu-

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it overruled, *Spinelli v. United States*. A third selection on probable cause relies entirely on *Spinelli* to illustrate the law without any reference to *Gates*.

Each essay is followed by a short bibliography. As the book has not been updated since 1986, when it was published in hardcover, these bibliographies are incomplete. For example, "Informant's Tip," like some of the other essays, cites only the first edition of Professor LaFave's masterful four volume treatise, Search and Seizure, published in 1978.

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nicipal administrators may relish the absence of standards and the concomitant increase in their discretionary power.

The four major divisions of the book chronicle zoning in its historical setting, the physical environment, litigation, and the calculations of economists. A fifth division contains Professor Haar's predictions about zoning's future. While the thirteen individually-written chapters within these five parts contain many useful observations, some of the most compelling material can be found in Part I. In chapter 1, Cleveland lawyer Arthur Brooks opens the files of Newton D. Baker, the prominent lawyer who represented the landowner in *Euclid*. Baker's correspondence reveals that he largely conceded the existence of a "police power" to suppress nuisances but no more. His greatest concern was that the presumption of legislative correctness coupled with a misuse of zoning for aesthetic purposes would lead to unlimited legislative power. He wrote: "if the right of private property is subject to the unrestrained caprice of village councils and the courts can do nothing [because of the presumption of legislative validity] then obviously we have outgrown the civilization established by the Constitution and have surrendered into a sort of communistic ownership and control . . . ."

In opposition to Baker stood James Metzenbaum, another Cleveland lawyer, father of Ohio's current senior senator, and then chairman of Euclid's Planning and Zoning Commission. To him, zoning was not the destruction of the American way, but its enshrinement. Zoning protected home and neighborhood, and the associated values. In his words, "the bulwark and stamina of this country ha[ve] always been credited and conceded to the home owning tendencies of the American people . . . . Is it not doubly to the general welfare of all suburban municipalities to look after the safety and the health, the general welfare of those who have, and the many who want to come just because they found a haven and a promised land in the suburbs in their effort to escape from the congested, accident producing and smoke-filled condition of the city and where, in the suburbs, they hope to find fresh air and sunlight and a yard for children."

In hindsight, it is easy to understand why the case for zoning, resting on the very tangible importance of the family home, proved more powerful than the relatively remote and theoretical strictures of laissez-faire ideology. Since the battle in *Euclid* was fought on the lofty plane of zoning's *general* validity, zoning won its constitutional imprimatur—though only after reargument. Had the Court's attention been directed to the actual application of zoning to the Ambler Realty tract, the file reveals that even Alfred Bettman, the

intellectual leader of the planner *amici* supporting Metzenbaum, thought the ordinance "a piece of arbitrary zoning." The greatest regret of Mr. Baker, and indeed of many landowners since, is that the Court failed to explicitly limit the police power to the prevention of harm, as Baker had argued with considerable force.

In Chapter 2, another Cleveland lawyer, William Randle, describes some of the other personalities behind early zoning efforts. Randle's chapter reveals the extent to which zoning was a product of a larger progressive movement for social reform. At first, it played second fiddle to Henry George's single tax. That proposal, it will be recalled, sought to capture from undeveloped land, but not improvements, the so-called "unearned increment" of value attributable to community endeavors surrounding raw land. Major real estate players would have none of that, and instead these business interests aligned themselves with the branch of the reform movement championing zoning. An old story is being told here, but an important one: public regulation can be easily misused to dampen economic competition. That zoning could create valuable scarcity for the owners of existing improvements through a publicly-conferred monopoly was not lost on zoning's founding generation.

It was not only competitive exclusion that zoning fostered, but racial segregation, and Randle reports that this was not an insignificant feature. He reports that racial tensions were high at the time of the enactment of the *Euclid* ordinance, and keeping out "undesirable neighbors" was clearly a motivation for a distinct part of the zoning movement.[4]

This theme of exclusion is further explored in Part II of the book dealing with zoning's (mis)application. The most troubling chapter in this section is that authored by Yale Rabin. Rabin is a planner, and while admitting that his evidence is less than wholly complete, he portrays a practice that he denominates "expulsive zoning"—namely, the introduction into black neighborhoods of disruptive, incompatible uses. Rabin views *Euclid* as essentially pro-investment—keeping non-residential uses out of residential areas. Zoning "was a public mechanism for promoting and stabilizing private development, reducing risk in property investment, and protecting the character and quality of single-family residential neighborhoods." If this is true, then the use of this public mechanism to not only exclude, but expel, minorities was a sinister perversion of zoning's principal purpose.

Explicitly racial zoning was outlawed in 1917 by the Supreme

4. *See also* S. TOLL, ZONED AMERICAN (1969).

Court's decision in *Buchanan v. Warley*.[5] Yet Rabin reports that the practice continued as late as 1949. From zoning literature, Rabin finds two examples of the just slightly more subtle expulsive technique in Baltimore and St. Louis. He relies on Professor Garrett Power, who wrote that: "the south and southeast Baltimore tenement districts which housed first-generation immigrants, and the alley districts which housed poor blacks, were placed in industrial districts so as to encourage their displacement by factories."[6] Rabin also finds proof of expulsion in a St. Louis Plan Commission Report that is deliberately aimed at reducing residential areas by more than one third. "The report makes no mention of race, but the city's history of racial zoning makes it reasonable to assume that the bulk of those intended for displacement by this draconian population reduction were black."

Rabin outlines several current examples from his planning practice. All deserve serious concern. That said, it should be pointed out that except for the Baltimore example mentioned above, each of the so-called expulsive techniques is amenable to an alternative explanation. For instance, some cases may be explained by the use of industrial and commercial districting as covert "holding zones" discouraging all new development, subject to discretionary approval. This introduces flexibility into an otherwise rigid *Euclid* format; it may reveal little or nothing about racial animus. "Expulsive zoning" may also have more to do with wealth than race. Zoning has always been the province of the "haves," who possess the political influence and acumen to say "not in my backyard," and mean it.

The exclusionary theme is continued through much of Part II. Peter Abeles, an urban planner, forthrightly states that zoning is of little relevance to the developed city, being primarily of use to the developing suburb. Here, issues of growth control readily collide head on with the pressure for growth. The battlegrounds are school and street capacities, lot and house size, and in the modern era, open space and agricultural preservation. Suburban growth also sounded the death-knell for central city shopping districts.

Lingering in a portion of part II is planningtalk, a variant of bureaucratese. With only limited ability and patience to translate such passages, I can report that Joe Feagin tries to explain the new "more critical power-conflict paradigm substantially influenced by a sophisticated reading of Marx . . . ." Translation: Feagin likes

5. 245 U.S. 60 (1917).

6. Power, *The Unwisdom of Allowing City Growth to Work Out its Own Destiny* 7-22 (unpublished paper, 1985), *quoted at* p. 108.

Santa Monica, where zoning has raised income redistribution to an art form. Thus, Feagin reports that "Santa Monica exacted a whole new category of social goods: low- and moderate-income housing, day care centers, public parks, energy-saving features, and affirmative action hiring." Some of these may well be desirable, but linking them to land use control merely takes unfair advantage of the leverage of regulatory power. It would be far better if these policy choices were implemented more openly than individual land use applications allow and pursuant to a general tax mechanism which requires everyone, planner and nonplanner alike, to put *their* money where their mouths are.

Demonstrating that analytical ideas can be turned inside-out, Michael Kwartler portrays zoning as the taming of the "commons." The tragedy of the commons, or unowned land, was well described by Garrett Hardin,[7] who demonstrated that absent the internalizing economic force of private ownership, each of us has an incentive to over-exploit natural resources. In other words, we are apt to treat littering in the park as somebody else's problem. Regulation is used in the park as an imperfect substitute for the economic and personal interest one has in private property. Incredibly, Kwartler posits that zoning private property is regulating the commons. In fact, zoning is just the reverse, subjecting to collective or common judgment decisions that previously were made privately. Perhaps what Kwartler is actually (and rightly) concerned about is that some private decisions do impose external costs on commonly-held resources: rivers, streams, air, highways and the like. But zoning is not the best solution for that problem. It would be far better to search for devices like transferrable pollution fees that would internalize environmental costs.

The commons problem, however, is not Mr. Kwartler's principal interest. He is after better, freer, more flexible building design than traditional zoning accommodates, but somehow design that is still subject to regulation. He thus evinces the curious trait of an architect yearning to breath free, but not too free. As best I can make it out, he believes "performance zoning," the regulation of the effects of uses, rather than the old fashioned categorization of uses on the presumption of their effects, may be his way out of the desert. I honestly cannot say whether his nomadic search is over, but I doubt that performance zoning will yield the oasis of beauty that Kwartler desires. But then, what is beauty? For Santayana, beauty was indescribable: "what it is or what it means can never be said." For Kwartler, "beauty must relate directly to the way in which we

7. Hardin, *The Tragedy of the Commons*, 162 *Science* 1245 (December 13, 1945).

perceive the world around us physiologically and psychologically. It must recognize the constitutional and psychological values embodied in freedom of expression by encouraging a diversity of design responses while simultaneously defining the level of unacceptable environmental dissonance." Huh?

Just when I though I was going down for the third time in a planner's bog (that is, a wetland—defined roughly in federal law as an area capable of sustaining aquatic plant life, but not its owner), along came Part III dealing with "Zoning and the Courts." Thus, I immediately grasped that the earlier obfuscations were perhaps consciously designed to lend comparative clarity to the ruminations of the Supreme Court. Not surprisingly, the first submission in this set by co-editor lawyer Jerold Kayden describes the Supreme Court's decision in *Nollan v. California Coastal Commission*.[8] *Nollan*, he asserts, was a return to the substantive economic due process days of *Lochner*,[9] the case that has come to represent illicit judicial inquiry into legislative motive in the name of freedom of contract. *Euclid*, says Kayden, established a highly deferential standard of review for land use decisions; *Nollan* a rigorous one, and the latter is wrong. To prove his point, Mr. Kayden disparages Justice Scalia, *Nollan*'s author, for "shoddy scholarship and misguided analysis."

By and large, Kayden makes an advocate's argument. He likes one set of cases (the deferential ones), better than the Court's more recent pronouncement. He accurately criticizes the *Nollan* majority's statement that the "verbal formulations in the takings field" have generally been quite different than in the ordinary economic due process cases. In *Nollan* the Court said: "[w]e have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that the State '*could rationally have decided*' that the measure adopted might achieve the State's objective.' "[10] If the Court has required this, the Justices largely kept it to themselves. This more exacting scrutiny may have been applied once, in *Nectow v. City of Cambridge* (1928), but prior to *Nollan* some, perhaps many, considered *Nectow* to be in the substantive due process dust bin.

Kayden does his best to explain *Nollan* as an aberration, arguing that the Court has not relied on it since, and suggesting that its outcome had more to do with the imposition of a condition inviting physical invasion than a sea-change in land use law. Maybe, maybe not. It is too early to tell, and being a good lawyer, Kayden advises

8. 483 U.S. 825 (1987).
9. Lochner v. New York, 198 U.S. 45 (1905).
10. 483 U.S. at 834 n.3 (citation omitted) (emphasis added).

that if *Nollan* means what it says, planners and municipal officials better recognize that the old boilerplate will no longer justify regulation. He writes:

> "Courts will neither accept, nor invent, planning rationales or goals that could have been, but were not, demonstratively relied upon by the government agency. Undocumented assertions will not substitute for hard evidence that planners and other public officials thought about what they were doing . . . . Judges may no longer be satisfied that one credible expert witness is willing to testify as to the planning validity of a regulation . . . ."

Kayden implies, but does not demonstrate, that judicial activism is improper in the land-use field. Professor Robert Williams in a later chapter elaborates, offering the familiar refrain that such judicial behavior "usurps a function most wisely regarded as vested in the legislative branch of government."

Williams persuasively argues that *Euclid* is in the *Lochner* mold. In this regard, the heart of the opinion is Justice Sutherland's citation of the Latin maxim, *sic utere tuo ut alienum non laedas*, or use your land so as not to cause injury to another. By invoking this common law nuisance principle, Sutherland implied that the Court—and not the legislature—would determine the scope of the police power. Williams demonstrates, however, that with minor exceptions, the Court did not second-guess local legislatures on zoning matters, and that from *Berman v. Parker*[11] to *Belle Terre*,[12] the Court deferentially accepted most land-use regulations. But in *Moore v. City of East Cleveland*,[13] where enforcement of a land use ordinance would have prevented extended related family from living under one roof, the Court invalidated the regulation. Criticizing this decision, Williams labels Justice Stevens's concurring opinion "anachronistic." Stevens "analyz[es] the case within *Euclid's* original Lochnerian framework: as an example of a regulation that could not be justified because it could not clearly be shown to be in furtherance of the public safety, health or welfare." Ditto, says Williams, for *Nollan*.

I agree that an unelected federal judge ought not displace the proper exercise of legislative power. Nevertheless, to be proper, legislative power must be within its enumerated limits. A reasonable case can be made that the framers considered the police power to be nuisance-based, just as Sutherland decided, and if that is so, judicial insistence upon legislative observance of that fact is no usurpation

11. 348 U.S. 26 (1954).
12. 416 U.S. 1 (1974).
13. 431 U.S. 494 (1977).

of legislative power.[14] But even putting the scope of the police power to one side, both *Moore* and *Nollan* dealt with the relationship between regulatory means and ends, not with the legitimacy of police power ends. This distinction is not brought out by either Kayden or Williams, yet it may be significant. Constitutional literalists insist that due process means procedure, not substance. And *Moore* and *Nollan* are in a sense about "procedure": the Court did not question the legislative goal, but asked whether the regulation furthered it. This may explain why the Court's most articulate literalist, Justice Scalia, had little difficulty in *Nollan* reconciling deference on ends with heightened scrutiny of the means.

Professor Michael Alan Wolf's contribution forgoes discussion of the proper judicial role, for a careful review of the legal effect of the traditional zoning framework spawned by *Euclid*. He believes that *Euclid* has planted four seeds that have borne poisonous fruit: exclusion, anti-competitiveness, parochialism, and aestheticism. The last concern raises the Kwartler problem again; that is, whether zoning can be used to justify the regulator's conception of what is beautiful. Despite its rotten apples, Wolf cautions against the drastic step of abandoning the traditional zoning model, since he believes that enlightened planners and lawyers can avoid the bad outcomes of traditional zoning.

But just as Wolf warned us, the reformers are at the door. The first is economist Robert Nelson in Part IV. Nelson thinks the nuisance justification for zoning is just rationalization, and that the name of the game in the suburbs has always been to maintain low-density. In this respect, Nelson characterizes zoning in the fashion of Charles Reich, as a form of "new property" like a welfare check or other government benefit. Zoning is not premised upon scientific or expert advice, but is merely a type of middle-class largesse (control of other people's property for one's own self-interest). Nelson's concern is not so much the equity of this arrangement, but its efficiency. He argues that the existing zoning structure is less than optimal because entitlements are not sufficiently defined, and they are nontransferable. In existing neighborhoods, he would transfer these entitlements to a newly created neighborhood association that could sell entitlements when developers make offers that cannot be refused. In the undeveloped context, Nelson also favors an auction system, seemingly indifferent to whether the rights are initially allocated to the municipality and then bought with cash payments by developers, or vice versa.

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14. *See* Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1639 (1988).

Nelson's proposal has much administrative merit, as do a number of the other reform proposals he thoughtfully explores. Similarly, fellow economist William Wheaton's subsequent chapter suggests the need to put a price on zoning decisions, in the form of more frequent compensation to landowners or even communities burdened by an unfavorable land use of a neighboring municipality. Prices, claims Wheaton, will help zoning achieve "Pareto Optimality"—that is, resource allocations making all better off.

As matters now stand, Nelson's and Wheaton's ideas are utopian. As an academic theorist, myself, I am certain that I have just called the kettle its usual color. It is not meant disparagingly, as the conceptual challenges outlined in Part IV are some of the best in the book. Thus, the reader coming to zoning's birthday table should not get the erroneous impression that these fellas are a couple of party poopers. As Nelson's own citation to Oliver Wendell Holmes reminds us, when the historical reason for a rule is long forgotten, "[s]ome ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things."[15] In all likelihood, it will be the Nelsons and Wheatons who will supply the new justifications of land use policy, and in doing so, help zoning to modify itself to fit its new justification.

Summing matters up, Professor Charles Haar finds reason to rejoice as well as to regret on zoning's anniversary. To Haar, zoning's greatest weakness has been its tendency to exclude, to protect the "haves" from the "have nots." He also acknowledges that "the *Euclid* case and its progeny represent[s] an extraordinary expansion of government power into what previously had been considered a relatively autonomous area of private decision making." He speculates that this encroachment upon private property was possible only because of the nuisance law analogy. Yet, as Haar aptly reveals, the linkage to nuisance law is also a "brake" on the use of zoning as an affirmative tool for "the promotion of efficient community service patterns, of reciprocity of benefit and burden, and of equal treatment of other owners similarly situated."

Haar believes that our society has outgrown nuisance-based land use control. In his words, "[t]o put the proposition bluntly, modern conditions have undermined the assumptions underlying Euclidean zoning." The use of the automobile and the development of rural tracts, new "shopping center" forms of retail sale, service-based light industries, mixed uses, large-scale rather than lot-by-lot development, new forms of financing, and more, are all cited to justify the need for a "new planning age" and to "make city planning

15. O. HOLMES, THE COMMON LAW 5 (1881).

less rigid and abstract." Haar believes this "will call for review by administrative agencies specializing in land transactions and private property, by state and regional boards supervising local zoning efforts with an eye toward reinjecting considerations of the more general welfare, or by agencies directed toward reducing the cacophony of present procedures."

Professor Haar's plea for more rigorous review of zoning decisions is surely sound, and, if understood, will shatter the myth that zoning is a legislative, rather than an adjudicative, action. That single readjustment would itself bring a level of accountability and regularity to land use decisions that has long been absent. Beyond this, Haar's is obviously a clarion call for new, creative forms of regulation, a demonstration of faith in the power and appropriateness of government to design our physical environments, and in so doing, to structure our lives. On this score, Professor Haar and I worship in different churches. Yet one thing is certain, the intellectual contributions made by this single volume are significant, even if—at zoning's party—a good time was not had by all.

PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES 1607-1788. By Jack P. Greene.[1] Athens, Ga.: The University Press of Georgia. 1986. Pp. x, 274. Cloth, $30.00.

James Hutson[2]

Despite the trendy title and subtitle, this is an old-fashioned volume, addressing the old-fashioned question of the constitutional dispute between Great Britain and her American colonies, which, not yielding to peaceful settlement, resulted in the appeal to arms in 1776. Professor Jack Greene's approach, as he himself is the first to admit, has much in common with the old, "imperial" school of American history, dating back to the beginning of this century and represented by the writings of such venerable scholars as Charles Andrews and Charles McIlwain. These writers contended that American historians and legal scholars were too parochial in their perspective, focusing as they did on the relationships between Great Britain and the thirteen colonies that formed the United States in

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