

New Jersey's Zoning Amendment

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A half century before the New Jersey Supreme Court endorsed inclusionary zoning in Southern Burlington N.A.A.C.P. v. Mount Laurel Township, the state struggled to secure basic municipal zoning. While New Jersey's political elite embraced zoning in the 1910s and 20s to weather a period of tremendous growth and change, a disapproving judiciary steadfastly maintained that the practice violated basic property rights. Hundreds of state court decisions in the 1920s held zoning ordinances unconstitutional. Finally, the people of New Jersey in 1927 overwhelmingly passed an amendment to the state constitution overruling those decisions and affirming zoning as a reasonable exercise of the state's police power. This essay traces those uncertain early years of zoning in New Jersey. The amendment was not the result of a state monolithically coming to its senses. Instead, its passage documents a decade-long struggle played out not only in the courts and legislature but also in the press and the town meeting.

“The idea of restricting land use by government action was thought so radical that a constitutional amendment was found necessary to permit it in New Jersey. Since that amendment was adopted...the picture has completely changed.”

- Justice Frederick W. Hall, New Jersey Supreme Court¹

New Jersey's endorsement of inclusionary zoning since 1975 has helped make it a national land use leader.² A half century earlier, however, the state struggled to secure basic municipal

¹ Frederick W. Hall, “Speech of the Honorable Frederick W. Hall, Associate Justice, Supreme Court of the State of New Jersey,” in Herbert H. Smith, *The Citizen's Guide to Zoning* (Chicago, IL: APA Planner Press, 1983), 171.

² Southern Burlington County NAACP v. Township of Mount Laurel (*Mount Laurel I*), 67 N.J. 151, 336 A.2d 713 (1975); Southern Burlington County NAACP v. Township of Mount Laurel (*Mount Laurel II*), 92 N.J. 158,

zoning. While New Jersey's political elite embraced zoning in the 1910s and 20s to weather a period of tremendous economic and population growth, a disapproving judiciary steadfastly maintained that the practice violated basic property rights. Hundreds of state court decisions in the 1920s held zoning ordinances unconstitutional. Finally, after years of frustration, the people of New Jersey in 1927 overwhelmingly passed an amendment to the state constitution overruling those decisions and affirming zoning as a reasonable exercise of the state's police power.

This essay traces those uncertain early years of zoning in New Jersey, from political embrace to judicial rebuke to the amendment countermanding that rebuke. The amendment was not the result of a state monolithically coming to its senses. Instead, its passage documents a decade-long struggle played out not only in the courts and legislature but also in the press and the town meeting.

So Justice Hall was right: Zoning *was* thought so radical that a constitutional amendment was found necessary to permit it. But his passive construction obscures the divisions and imbalances at the heart of the story.³ From the start, those who thought zoning so radical (the judges of the high New Jersey courts) were different from those who found the constitutional amendment necessary to permit it (most of the rest of the state). And, despite zoning's uncertain

456 A.2d 390 (1983). Michael Allan Wolf, *The Zoning of America: Euclid v. Ambler* (Lawrence, KS: University Press of Kansas, 2008), 122 (considering New Jersey as "America's leading jurisdiction on zoning law").

³ The existing literature accords with Justice Hall in tying the amendment to the adverse decisions of the New Jersey Supreme Court and Court of Errors but goes into little detail about the amendment's election campaign or the reasons zoning was so popular to begin with. See, e.g., Robert F. Williams, *The New Jersey State Constitution: A Reference Guide* (New York: Greenwood Press, 1990), 70 (describing the amendment as "necessary to 'overrule' a 1923 decision of the Supreme Court"); *Roselle v. Wright*, 21 N.J. 400, 409, 122 A.2d 506 (1956) ("These constitutional provisions relating to zoning were designed to remedy the judicial denials of the fullness of the power..."); Francis W. Hopkins, *Zoning*, in *The Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention* (1947), 1528, 1529 ("This amendment was necessitated by adverse decisions of the New Jersey courts. The proposal was not opposed by either major party and it was carried by an overwhelming vote."); William A. Fischel, "An Economic History of Zoning and a Cure for its Exclusionary Effects," *Urban Studies* 41 (2004): 317, 319 ("That New Jersey's constitutional amendment was so quickly and easily adopted in that most suburban of states...is testimony to the suburban enthusiasm for zoning from the outset.").

status for much of the 1920s, its advocates seem to have far outnumbered its opponents the entire time.

Political Embrace

In the late nineteenth and early twentieth centuries, a steady stream of European immigrants and New Jersey's transition from garden state to industrial power made the state a desirable neighbor to Philadelphia and New York City. As this section explores, New Jersey's political leaders saw zoning as a natural tool to manage this demographic growth and social change. It was exceedingly popular, too: By 1925, New Jersey had more zoned municipalities than any other state.⁴

First, some background on zoning. Municipal zoning—the regulation of building and land use and population density⁵—developed at the turn of the twentieth century in response to the explosive growth of cities.⁶ The industrial revolution and the transition from hand to machine labor had driven the country's rural population to the cities,⁷ where they met successive influxes of immigrants.⁸ Early proponents of zoning noted the “great number of problems [that] have been created by this concentration of population,” including “[s]ewage disposal, traffic congestion, housing conditions, race segregation, public recreation, and the like.”⁹ They saw zoning as

⁴ Newman F. Baker, “Constitutionality of Zoning Laws,” *Illinois Law Review* 20 (1925): 213, 230.

⁵ Edward M. Bassett, *Zoning* (New York: Russell Sage Foundation, 1936), 45; Roger A. Cunningham, “Zoning Law in Michigan and New Jersey: A Comparative Study,” *Michigan Law Review* 63 (1965): 1171, 1171; “Developments in the Law: Zoning,” *Harvard Law Review* 91 (1978): 1427, 1427 (1978) (“[G]overnment efforts to foster particular social ends have increasingly taken the form of active state involvement in land use control. Zoning is the predominant technique by which governments have exercised this control over private property.”).

⁶ Lawrence A. Friedman, *American Law in the Twentieth Century* (New Haven, CT: Yale University Press, 2005), 399.

⁷ In 1800 under five percent of the country lived in cities; in 1840 it was about 10 percent; in 1860 around 15 percent; in 1900 30 percent, and by 1920 more than 50 percent. See Newman F. Baker, “Zoning Legislation,” *Cornell Law Review* 11 (1926): 164; Victor Gruen, *The Heart of Our Cities* (New York: Simon & Schuster, 1964), 20.

⁸ See, e.g., Baker, “Zoning Legislation,” 164.

⁹ Newman F. Baker, *Legal Aspects of Zoning* (Chicago: University of Chicago Press, 1926), 1-2.

“essentially urban co-operation,” a “necessary step to prevent utter chaos in municipal life, coming after years of unregulated city development.”¹⁰

Before zoning, nuisance law had been the main way to resolve competing property interests in this realm. Private nuisance, trespass to land, public nuisance, defeasible fees, and restrictive covenants were judicial “methods of addressing or even anticipating (and thereby avoiding) conflicts between competing property owners over the use and abuse of land.”¹¹ But these common law tools were ill-equipped to match the city fathers’ ambitions. First, they could only be adjudicated as specific actions; they were not forms of *ex ante* governmental regulation.¹² Second, they could not accommodate the aesthetic considerations that played a key role in affirmative zoning.¹³ In short, the problem required a more comprehensive solution.¹⁴

Zoning, which presented such a solution, spread like wildfire. In 1909, Benjamin Marsh published an influential book on city planning, and a National Conference on City Planning met in Washington, D.C.¹⁵ In 1914, the New York state legislature passed an enabling act to allow zoning and height restrictions. New York City enacted a zoning ordinance two years later after a Commission on Building Districts and Restrictions observed that the city had “reached a point beyond which continued unplanned growth [could not] take place without inviting social and

¹⁰ Ibid., 35.

¹¹ Wolf, *The Zoning of America*, 18.

¹² See Richard F. Babcock, *The Zoning Game: Municipal Practices and Policies* (Madison, WI: University of Wisconsin Press, 1966), 4 [“Zoning was no more than a rational and comprehensive extension of public nuisance law, with the great advantage (over the common law nuisance) of providing all landowners with knowledge before the fact of what they could and could not do with their land.”].

¹³ See, e.g., Baker, “Constitutionality of Zoning Laws,” 35-36 (“Before the zoning movement became general, there were few regulations to prevent the owner of land from using his property in any way he saw fit...[H]e might use this building in any way, short of actual nuisance; and the injurious effect of the lack of restraint upon the property owner would not be recognized by the courts.”).

¹⁴ See, e.g., Bassett, “Zoning,” in *National Municipal League* (1922), 137 (remarking that private restrictions had been of value but could not provide “sufficient or long-term protection from an all-city point of view. They are incapable of adaptation to the changing needs of the city. They sometimes stand in the way of normal and natural improvements”).

¹⁵ Ibid., 400.

economic disaster.” By 1925, twenty-seven of the thirty-three largest cities were zoned. The next year, 456 zoned areas housed thirty million Americans—more than half the country’s non-rural population.¹⁶

Functionally, local zoning emanated from a state enabling act. The enabling act set the scope and purposes of zoning within the state, “furnish[ing] state and local governments with a text which, if adopted by state legislatures, granted their towns and cities the police power to zone.”¹⁷ In 1922, Herbert Hoover’s Department of Commerce issued its Standard State Zoning Enabling Act,¹⁸ “[f]ramed to direct the legislatures along the safest and wisest channels in the course of zoning.”¹⁹ According to the Standard Act, zoning laws should be designed

to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.²⁰

To those ends, the Standard Act empowered municipalities “to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.”²¹ The Act also provided that the municipality’s legislative body should draw up the zoning ordinance and change it when necessary. A Zoning Commission should gather evidence and make a preliminary report to be discussed in public hearings to determine the boundaries of the zones and the regulations therein. Finally, a Board of Adjustment or Appeals would be charged

¹⁶ Ibid.

¹⁷ Friedman, *American Law in the Twentieth Century*, 401.

¹⁸ Seymour I. Toll, *Zoned American* (New York: Grossman Publishers, 1969), 201.

¹⁹ Baker, “Zoning Legislation,” at 43.

²⁰ *A Standard State Zoning Enabling Act* (1926), 6-7.

²¹ Ibid., 4-5.

with making special exceptions to the terms of the ordinance “in harmony with its general purpose and intent.”²² By 1926, forty-three states had enabling acts, many adopted from the Standard Act.²³

Zoning legislation at its most aspirational sought to restore order to chaos while promoting cultural and aesthetic growth. It was also a tool for communities to keep property values up.²⁴ Where in the late nineteenth century, land regulation had focused on traditional nuisance-abatement—restricting slaughterhouses, gunpowder houses, and other sources of pollution from residential districts²⁵—in the 1910s and 1920s the task turned to suburban economic security. For the millions of Americans whose home was the largest single asset they would ever own, zoning was insurance against property devaluation²⁶ and a “legal guarantee that neighbors would use their lots consistently with tastes, standards and economic goals set by the control group in the local community.”²⁷ Zoning was, in Lawrence Friedman’s estimation, “a restriction on property rights; but for the benefit of the middle-class mass.”²⁸

Given all this, it is little surprise that although zoning was born in the city, its formative years were in the suburbs.²⁹ Between 1920 and 1930, the percentage of Americans living in suburbs rose from under 20% to over 35%.³⁰ Suburban leaders took to zoning legislation much as

²² Ibid.

²³ Baker, “Zoning Legislation,” 39.

²⁴ It was, no less importantly, a tool of racial exclusion. Friedman, *American Law in the Twentieth Century*, 403; *Buchanan v. Warley*, 245 U.S. 60 (1916) (invalidating a racial zoning ordinance).

²⁵ See Eric R. Claeys, “Euclid Lives: The Uneasy Legacy of Progressivism in Zoning,” *Fordham Law Review* 73 (2004): 731, 737.

²⁶ William A. Fischel, “An Economic History of Zoning and a Cure for its Exclusionary Effects,” *Urban Studies* 41 (2004): 317, 327.

²⁷ Claeys, “Euclid Lives,” at 741.

²⁸ Friedman, *American Law in the Twentieth Century*, 401. See also John Delafons, *Land-Use Controls in the United States* (Cambridge, MA: M.I.T. Press, 1969), 23; Jess Dukeminier Jr., “Boards of Adjustment: The Problem Re-examined,” *Zoning Digest* 14 (1962): 361, 364 (“The zoning map ‘stabilized property values’ and that was what the city fathers were interested in.”).

²⁹ See Clifford L. Weaver & Richard F. Babcock, *City Zoning: The Once and Future Frontier* (Chicago, Ill. and Washington, D.C.: American Planning Association Planners Press, 1979), 13; Babcock, *The Zoning Game*, 3.

³⁰ Peter O. Muller, *Contemporary Suburban America* (Englewood Cliffs, NJ: Prentice Hall, 1981), 21.

urban leaders had a decade earlier. By the mid-1920s, it was clear that “the real zoning issues for decades to come would be suburban issues.”³¹ As Richard Babcock put it, “[i]f, in the beginning, zoning owed much to the fears of Fifth Avenue merchants in New York City that the garment industry would further encroach on their elegant sidewalks, zoning can thank the residents of the North Shores and Westchesters of this country for its remarkable survival.”³²

Endowed with their own share of North Shores and Westchesters, not to mention major cities, New Jersey’s political leadership in the early twentieth century felt the state needed zoning at least as much as the rest of the country. The state’s urban, suburban, and industrial development after the Civil War produced fertile ground.

The mid-1870s were the “frontier...between the old and the new in [New Jersey’s] industrial history.”³³ In 1872, John Wesley Hyatt, who discovered celluloid, resettled in Newark and pioneered the plastic industry. In 1875, Standard Oil set up its first New Jersey refinery at Bayonne. The same year, Thomas Edison moved from New York to Newark to set up a telegraph factory; in 1876 he established the nation’s first research and development laboratory in Menlo Park.³⁴ A great concentration of manufacturing establishments consequently emerged within ten miles of Newark.³⁵ Other industries followed Edison’s lead and established R&D labs as part of growing industrial complexes.³⁶ Between 1890 and 1920, industrial output jumped tenfold.³⁷ By

³¹ Weaver & Babcock, *City Zoning*, 13.

³² Babcock, *The Zoning Game*, 3.

³³ Robert Greenhalgh Albion, “Modern Industry,” in *The Story of New Jersey* (New York: Lewis Historical Publishing Company, 1945), 1, 19.

³⁴ *Ibid.* See also Paul Israel, “The Garden State Becomes an Industrial Power: New Jersey in the Late Nineteenth Century,” in *New Jersey: A History of the Garden State* (New Brunswick, NJ: Rutgers University Press, 2012), 175, 177.

³⁵ Albion, “Modern Industry,” 20.

³⁶ Israel, “The Garden States Becomes an Industrial Power,” 177.

³⁷ Albion, “Modern Industry,” 33.

the 1920s, New Jersey was the seventh largest manufacturing state.³⁸ A 1928 government report boasted that although New Jersey “can never be the geographic center of American territory [by] territory . . . it will continue to be the heart of the world’s most intensive and highly developed industrial life.”³⁹

All this industry needed hands, and the state’s population consistently rose to meet the need, creating new demands for transportation, food, and the like.⁴⁰ State leadership openly lobbied for new immigrants. In his 1879 annual message, Governor George McClellan requested that immigrants be given notice of New Jersey’s soil, taxes, climate, and proximity to good markets, “so that they may perceive the advantages offered to settlers in our state.”⁴¹ And an 1880 message from the state’s Bureau of Statistics asked, perhaps disingenuously: “Why should the immigrant go to Minnesota, where the climate is like Sweden, when he can secure a home in the southern part of New Jersey, where the climate is more like the south of France or the shores of the Mediterranean?”⁴²

Over the next few decades, new immigrants, drawn mostly from Southern and Eastern Europe,⁴³ flooded into Hoboken, Newark, Jersey City, Paterson, Trenton, and Camden.⁴⁴ By 1910, for the first time, New Jersey had fewer native-born inhabitants than foreigners. That year, the state was fifth in the nation in total number of immigrants. In each of the decades between 1890 and 1930, population increase exceeded the national average. Drawing from the growing population of immigrants, companies could lower the labor costs in their factories. They also took

³⁸ Charles A. Stansfield Jr., *A Geography of New Jersey: The City in the Garden* (New Brunswick, NJ: Rutgers University Press), 213.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 231.

⁴² *Ibid.*

⁴³ *Ibid.*, xix, 227

⁴⁴ *Ibid.*, 227.

advantage of New Jersey's liberal incorporation laws, which soon became the state's primary source of funding.⁴⁵

Railroads, too, guided the changes. Beyond bringing industry to the state's urban manufacturing giants, railroads helped lure Irish immigrants to lay the tracks.⁴⁶ They also helped create the suburbs. As John Cunningham notes, "[t]he Lackawanna vigorously advertised the beauties beside its routes...The Erie urged prospects to locate in Bergen County, that 'mecca of suburban dwells.' Such a move, the Erie promised, would make 'your children and your children's children rise up and call you blessed.'"⁴⁷ Around this time, New Jersey emerged as one of the most heavily concentrated areas in the country.⁴⁸ In 1905, a mere fourteen of 455 municipalities exceeded 25,000 people, while thirteen counties had no city greater than 25,000.⁴⁹ Two-thirds of the state's municipalities had fewer than two thousand inhabitants. By the 1920s, the state's suburban character had become its calling card. In 1925, only four percent of the Garden State's population lived on farms—well below the national average. Yet, despite extraordinary population increases, New Jersey "remained a state of small towns."⁵⁰

Small wonder, then, that state leaders turned to zoning legislation to help manage this complex growth. The state's first law providing for city planning was introduced in 1913. It authorized mayors of certain cities to appoint a commission "to prepare from time to time plans for the systematic and further development of the city."⁵¹ The commission could also make inquiries for "betterment" and report on architecture designs to the Municipal Government."⁵² In

⁴⁵ Ibid.

⁴⁶ John T. Cunningham, *New Jersey: America's Main Road* (New York: Doubleday, 1976), xix, 240.

⁴⁷ Ibid., 240.

⁴⁸ Albion, *supra* note 33, at 33.

⁴⁹ Cunningham, *supra* note 46, at 245.

⁵⁰ Ibid.

⁵¹ "New Jersey's Zoning Problem," *New York Times*, Feb. 18, 1925, 18.

⁵² Ibid.

1917, the state legislature passed the first zoning act.⁵³ Like other enabling acts, it allowed cities to regulate and limit the height and bulk of buildings, as well as the area of yards, courts, and open spaces.⁵⁴ A 1920 law empowered use regulation in cities.⁵⁵ By 1927, New Jersey had seen nine state enabling acts.

Public debate over a proposed ordinance in Red Bank, as recounted in the *Red Bank Register*, shows that zoning was no less popular at the municipal level. In 1921, William Mount purchased the Woodhead house on Broad Street and announced his intention to open an undertaking business there. “Objection to such a business was raised in certain quarters,” so Mount publicly abandoned the plans. Still, a petition asked the zoning board for an ordinance to prohibit all business on Broad Street, south of Peters Place. The petition had several hundred signatures by the public debate one evening in early December.⁵⁶

The debate’s early focus was on the boundaries of the proposed ordinance. Reckless Place was initially set as the north line. John Applegate, borough attorney, objected: his house on Maple Avenue would be left out of the anti-business zone. So too would the Peters Place home of Frank Price, president of the Monmouth Contracting Company. After all, Price exclaimed, “Why leave me out! I have just saved the town \$7,000 on the Throckmorton storm sewer job!” “You are left out,” Applegate responded (facetiously, according to the *Red Bank Register*), “because the president of the Monmouth Contracting Company lives on Peters place and therefore Peters place is a business street.” To which Price responded (perhaps less facetiously), “[i]f that is the case, then you are entitled to no more consideration than myself when it comes to being included in this

⁵³ N.J. Laws Ch. 54 (1917).

⁵⁴ *Ibid.*

⁵⁵ N.J. Laws Ch. 240 (1920).

⁵⁶ *Ibid.*

zone. You are the town boss and being the town boss is just as much a business as being president of the Monmouth Contracting Company.”⁵⁷

Later came more serious objections: The entire ordinance was unjust to property owners and detrimental to the welfare of the town—especially to the inhabitants of Maple Avenue, where opportunities would be forfeited to build railroad sidings and start garages to accommodate a proposed state highway. Dr. William Thompson questioned the constitutionality of the zoning act and wondered whether a scheme of zoning might result in new business being barred from every part of town. James Bunell, water superintendent, asked “[s]ince when . . . business [had] become a crime,”⁵⁸ noting that “[i]n the case of Mr. Mount, he decided not to use his property for business purposes when he learned there was opposition to this. I believe this would be the case in other similar instances. If a business were started in a district adapted for residences and not for business the business would soon cease to exist, because it would be unprofitable.”⁵⁹ Nevertheless, the proposed ordinance passed without a dissenting vote. It ran on the

easterly side of Branch avenue to Harding road, thence on the northerly side of Harding road to Broad street, thence on the easterly side of Broad street to Peters place, thence on the northerly side of Peters place to Maple avenue, thence to the New York and Long Branch railroad tracks, thence southerly along the railroads tracks to the line between the Morford and Wikoff propert[ies], thence easterly to the east side of Broad street, thence northerly along the eastern side of Broad street to the northern side of Pinckney road, thence easterly along the northern side of Pinckney road to the east side of Branch avenue, thence northerly along the east side of Branch avenue to the corner of Branch avenue and South street.⁶⁰

The Red Bank debate illustrates much about early zoning in New Jersey. First, as we have seen, zoning decision making was largely suburban. As a Cranford newspaper observed in March 1922, “[a]lready over 50 municipalities have adopted zoning laws and about 100 others have them

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

under consideration. The suburban community has been quick to see its advantage and in a short time all of...New Jersey will be working under zoning laws.”⁶¹ The professions of the Red Bank debate participants—borough attorney, contracting company president, physician, municipal superintendent—likewise reaffirms zoning debate’s middle-class status. The Red Bank zoning ordinance was precipitated not by a desire to prevent genuine nuisance businesses like slaughter houses or factories from threatening the health and safety of historically residential neighborhoods,⁶² but because William Mount’s Broad Street neighbors did not want a funeral parlor near where they sat on their front porches and where their kids walked to school.

The Red Bank debate also shows (unsurprisingly) that zoning debates were intensely personal. Note John Applegate’s and Frank Price’s early argument and the arbitrary specificity of the final boundaries, drawn down to “the line between the Morford and Wikoff propert[ies].”⁶³ Finally, Thompson’s and Bunell’s legal, policy, and economic counter-arguments to the ordinance presage those later adopted by New Jersey judges in invalidating zoning ordinances.

Political opposition to zoning in New Jersey did not abate in the 1920s. The *Red Bank Register* would itself write, in August 1923, that “[s]ometimes . . . zoning ordinances have been needful for the public good. Usually, however, these ordinances have been passed to satisfy the wishes of some of the people of the locality, who want to compel everyone else to follow their ideas in the use of property.”⁶⁴ A fair assessment, and certainly in line with Thompson’s and Bunell’s assertions. But, as with those two, the *Red Bank Register* editorialists held a minority

⁶¹ “The Proposed Zoning: Ordinance Nearing Completion Will Be Given a Public Hearing—Some of Its Provisions,” *Cranford (NJ) Citizen & Chronicle*, March 2, 1922, at 1. See also “New Jersey’s Zoning Dilemma,” *New York Herald Tribune*, Feb. 20, 1925, 14.

⁶² See, e.g., “Comment, The Constitutionality of Zoning Laws,” *Yale Law Journal* 32 (1924): 833, 835.

⁶³ “Barring Out Business: Ordinance Introduced for a Residential Zone,” *Red Bank (NJ) Register*, Dec. 7, 1921, 1.

⁶⁴ “Town Talk,” *Red Bank (NJ) Register*, Aug. 22, 1923, 12.

view, and zoning ordinances proliferated in New Jersey in the 1920s, as it did in the rest of the country.

Judicial Rebuke

In most states, enabling acts and municipal ordinances were free from serious legal challenge. The vast majority of state courts easily upheld zoning ordinances as reasonable exercises of the police power, a state's *inherent* authority to regulate the health, safety, welfare, and morals of citizens.⁶⁵ Thus, as the Standard Act confidently recognized, "[n]o amendment to the State constitution, as a rule, is necessary."⁶⁶ So when objections like those of Thompson, Bunell, and the *Red Bank Register* were outvoted at local hearings or in legislative debate, that was the end of the matter. Not so in New Jersey, where courts invalidated hundreds of ordinances in the 1920s. What follows is an analysis of the courts' efforts, which precipitated the constitutional amendment of 1927.

Opponents of zoning contended that, by restricting an individual's use of her own property, zoning ordinances "confiscate[d] and destroy[ed] a great part of its value,"⁶⁷ depriving property without due process of law or constituting an impermissible government taking. Alternatively, critics maintained that individual *applications* of municipal zoning, such as preventing the erection

⁶⁵ See, e.g., Baker, "Constitutionality of Zoning Laws," 216 ("Zoning is an exercise of the community or police power and not of the power of eminent domain. Where property is taken under eminent domain compensation must be paid the owner whenever damage can be shown. Under the police power no compensation is paid for property taken or for limitations imposed upon the use of property...Zoning is not accomplished by a new governmental power, but by the application of an old principle in a more general and comprehensive way."); *A Standard State Zoning Enabling Act* (1926) 1 ("Zoning is undertaken under the police power and is well within the powers granted to the legislature by the constitutions of the various States."); Baker, "Zoning Legislation," 40 ("The Standard Act [gives] an express delegation of the police power to the municipalities and can receive no other interpretation.").

⁶⁶ *A Standard State Zoning Enabling Act*, 1.

⁶⁷ See *Euclid v. Ambler Realty Company*, 272 U.S. 365, 384 (1926).

of a grocery store in a primarily residential neighborhood, were not *reasonable* restrictions on the use of property, and so could not be justified under the police power.⁶⁸

In 1926, the United States Supreme Court in *Euclid v. Ambler Realty Company* held that municipal zoning did not offend the United States Constitution.⁶⁹ The Ambler Realty Company owned sixty-eight acres of land in Euclid, Ohio, a suburb of Cleveland.⁷⁰ Under the village's zoning ordinance, that land spanned multiple districts, limiting the company's ability to freely build on each. Rejecting the Fourteenth Amendment challenge, the Court analogized zoning regulations to traffic regulations, "which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable."⁷¹ In both, the Court argued, a regulation that "find[s] [its] justification in some aspect of the police power, asserted for the public welfare," will be sustained.⁷² The Court upheld Euclid's ordinance, agreeing with "experts" that "segregation of residential, business, and industrial buildings" was appropriate and noting that unchecked growth—especially of apartment buildings—could interfere "with the free circulation of air and monopoliz[e] the rays of the sun."⁷³ The Court suggested that apartment houses "come very near to being nuisances;" and, in a famous formulation, said a nuisance was "merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."⁷⁴

New Jersey's courts were largely unconvinced by this logic. In fact, their discomfort with zoning legislation began well before the United States Supreme Court weighed in. In the beginning, the high New Jersey courts found deficiencies in state enabling acts. A 1917 state act

⁶⁸ See, e.g., *Ignaciunas v. Risley*, 98 N.J.L. 712, 121 A. 783 (1923).

⁶⁹ 272 U.S. 365 (1926).

⁷⁰ *Ibid.*, 379.

⁷¹ *Ibid.*, 387.

⁷² *Ibid.*

⁷³ *Ibid.*, 394.

⁷⁴ *Ibid.*, 388.

enabling cities of the first class to regulate building dimensions and open space sizes was impermissible because it provided no board of appeals.⁷⁵ A 1918 act extending the 1917 act to cities of the second class had the same deficiency.⁷⁶

And a number of decisions invalidated local ordinances wholesale. *Levy v. Mravlag*,⁷⁷ for instance, concerned a “block” ordinance providing that “no building permit should be granted for stores to be erected within five hundred feet in any direction along any street where three-fourths of the property is used or intended for use for residence purposes without written consent of three-fourths of the owners within the limit specified.”⁷⁸ The New Jersey Supreme Court held the ordinance unreasonable, hence unconstitutional, because of the veto power it gave to a particular subset of landowners.⁷⁹ Similarly, in *Village of South Orange v. Heller*,⁸⁰ the Court of Chancery invalidated an ordinance that, without express authority from the state enabling act, vested discretionary powers in a board of trustees to arbitrarily decide from whom to “withhold...the privilege of violating the ordinance.”⁸¹

But the vast majority of adverse court decisions, rather than invalidating ordinances, purported to merely restrict their application. These cases followed a largely fixed posture: a city or municipality enacted a zoning plan, following state authorization. An individual restricted by the plan—often a shop owner wishing to develop in a residential-only zone—petitioned the zoning board for a permit and, when denied, filed an appeal to the zoning board of appeals (if one existed at that point). After he lost there, he sought a writ from the New Jersey Supreme Court, the highest

⁷⁵ N.J. Laws Ch. 54 (1917). *See also* Baker, “Zoning Legislation,” 176.

⁷⁶ N.J. Laws Ch. 146 (1918). A board of appeals was finally established in 1921. N.J. Laws Ch. 82 (1921).

⁷⁷ 96 N.J.L. 367, 115 A. 350 (1921).

⁷⁸ *Ibid.*, 369.

⁷⁹ *Ibid.*, 370.

⁸⁰ 92 N.J. Eq. 505, 113 A. 697 (1921).

⁸¹ *Ibid.*

common law court, to compel the zoning board to allow him to build or set up shop. The defeated party then appealed to the Court of Appeal and Error, which sat above the Supreme Court and its equity counterpart.⁸² The Court of Appeal and Error's ruling was final. Where the zoning board usually held for the town, the Supreme Court and the Court of Appeal usually held for the individual.

Thus, in *Vernon v. Westfield*,⁸³ the municipality of Westfield prohibited multi-use residences in certain areas, pursuant to the 1920 state enabling act.⁸⁴ Catherine Vernon purchased a three-story brick house and petitioned Westfield's building inspector to allow her to subdivide it.⁸⁵ Her request was denied. She petitioned the Supreme Court for a writ of mandamus commanding the mayor and council of Westfield and the building inspector to allow her the requested subdivision. The Supreme Court issued the writ, holding that the zoning restriction bore no relation to public health and safety.⁸⁶

Similarly, at issue in *Henry Becker & Son v. Dowling* was an application to "erect a building...for use as a horse stable, storage of wagons, office building, and garage" contrary to a local zoning ordinance—passed pursuant to a 1924 state zoning act—restricting the erection of stables for business purposes.⁸⁷ In *Falso v. Kaltenbach*, the owners of a tailor shop, pharmacy, and barber shop in Elizabeth sought a permit to enlarge their stores in an area zoned residential.⁸⁸ Likewise for *Kantorowitz v. Bigelow*, in which Kantorowitz sought to build "a frame dwelling and stores" on a tract of land zoned residential.⁸⁹

⁸² N.J. CONST. OF 1844, Art. VI, Sec. I.

⁸³ 98 N.J.L. 600, 124 A. 248 (1923).

⁸⁴ N.J. Laws Ch. 240 (1920).

⁸⁵ *Ibid.*, 248.

⁸⁶ *Ibid.*, 249.

⁸⁷ 128 A. 395 (1925).

⁸⁸ 3 N.J. Misc. 333, 128 Atl. 394 (1925).

⁸⁹ 102 N.J.L. 13, 130 Atl. 811 (1925).

The most famous of the bunch was *Ignaciunas v. Risley*,⁹⁰ contemporaneously called the “leading New Jersey case . . . h[olding] zoning unconstitutional.”⁹¹ A 1922 Nutley, New Jersey zoning ordinance prohibited stores from a residential district. After the town building inspector denied Ignaciunas’ request to build a store among the residences, Ignaciunas asked the New Jersey Supreme Court for a writ of mandamus to compel the inspector to issue the permit, which Justice Katzenbach granted. Drawing from the state constitution’s protection against governmental takings⁹² and the federal due process clause,⁹³ he argued:

The right to acquire property, to own it, to deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right...The protection of private property is the aim of every well-considered form of government...A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a proscription of its ownership.⁹⁴

Ultimately, the Supreme Court could find “no justification for invoking the police power to exclude stores from residential districts.”⁹⁵

The Court of Errors and Appeals affirmed the Supreme Court’s decision on different grounds.⁹⁶ Justice Katzenbach had assumed the ordinance authorized by the state enabling act but found it violated constitutional property protections.⁹⁷ But, Chief Justice Gummere wrote for the majority, “a consideration of this fundamental principle is [not] required by us.” Rather, since the enabling act already required applications of zoning ordinances to “promote the public health, safety and general welfare,” the “narrow” question for the Court of Errors was merely whether

⁹⁰ 98 N.J.L. 712, 121 Atl. 783 (1923).

⁹¹ Baker, “Zoning Legislation,” 97, n.99.

⁹² See N.J. CONST. OF 1844, Art. I, § 16; Art. 4, § 8 (“Private property shall not be taken for public use without just compensation.”).

⁹³ See U.S. CONST. Amend. XIV (“No state shall deprive any person of life, liberty, or property without due process of law.”).

⁹⁴ 98 N.J.L. at 716.

⁹⁵ *Ibid.*, 717.

⁹⁶ 99 N.J.L. 389, 125 Atl. 121 (1924).

⁹⁷ *Ibid.*, 391.

Ignacianas' combined store and dwelling house would be a menace to the health or the safety of the people of the town of Nutley, or to the general welfare.⁹⁸

The answer, easily for the Court of Errors, was no: "Both common experience and common sense demonstrate the unsoundness of such an assertion." Thus, the Court concluded, not even the state enabling act (a lower hurdle to overcome than the federal or state constitution) permitted the Town of Nutley to prevent Ignacianas' combined dwelling and store on the corner of Conover Avenue and Yale Street.⁹⁹

Notwithstanding the different legal rationales in the Supreme Court and Court of Errors, the effect was the same. All told, two hundred-three cases followed the reasoning of *Risley* in neutralizing zoning ordinances.¹⁰⁰ In their time, these decisions constituted the largest number of cases in the United States on a single type of zoning question.¹⁰¹

What unites the New Jersey's high courts' disapproval is a sense that zoning laws ran roughshod over the little guy—Ignacianas, Catherine Vernon, or Mr. Mount, who just wanted to start an undertaking business—and that the ordinances, however palatable in theory, were not in practice serving legitimate public ends. The Court of Errors in *Ignacianas* had accurately acknowledged the underlying assumption of the zoning movement: that the presence of Ignacianas' store "would be objectionable to other property owners..., who would prefer that business places should not be established" there.¹⁰² Yet, the Court of Errors argued, "[t]he ordinary use of property is not authorized by the general welfare clause to be prohibited because repugnant

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ See Bassett, *Zoning*, 15 n.3.

¹⁰¹ Ibid.

¹⁰² 99 N.J.L. at 392.

to the sentiments or desires of a particular class residing in the immediate neighborhood thereof.”¹⁰³

Echoes of Red Bank’s Dr. Thompson and Mr. Bunell resound in Justice Katzenbach’s and the Court of Errors’ *Ignaciunas* opinions and their progeny. The difference, of course, is that the judges’ arguments could not be so quickly outvoted; hence the perceived need for a constitutional amendment.

Majoritarian Triumph

The adverse zoning decisions of the New Jersey Supreme Court and Court of Errors were popular in some corners.¹⁰⁴ For the most part, however, they were an intellectual embarrassment to the law elite and a very real setback for New Jersey’s municipal decision-makers. Passing a state constitutional amendment to overrule those decisions, the subject of this section, was a firm rebuke of the state’s high judges.

The national movement took early notice of the New Jersey’s adverse judicial treatment of zoning. In 1923, the *Yale Law Journal* complained that though New Jersey’s state acts for cities and municipalities “ha[d] the same purpose and use almost the identical language of the New York acts,” only New Jersey’s laws were subject to judicial rebuke.¹⁰⁵ As one commentator summarized dejectedly: “For years the position of zoning in New Jersey has been most unsatisfactory. Although New Jersey has always been first or second among all the states of the United States in the number

¹⁰³ Ibid.

¹⁰⁴ See, e.g., “Town Talk,” *Red Bank (NJ) Register*, Aug. 22, 1923, at 12.

¹⁰⁵ “Comments,” *Yale Law Journal* 32 (1923): 808, 833.

of zoning ordinances passed, the attitude of the state courts has been decidedly hostile.”¹⁰⁶ At home, newspapers regularly expressed their frustrations.¹⁰⁷

Until 1925, state leadership mobilized against the adverse court decisions in two ways. At the local level, municipalities offered exhaustive evidence that proposed ordinances were related to health, safety, and general welfare.¹⁰⁸ At the state level, the legislature repeatedly amended the enabling act. A 1924 version, which finally paralleled the Standard Act and repealed all previous enabling acts, was aimed explicitly at the courts:

[I]n construing the provisions of this act all courts shall construe the same most favorable to municipalities, it being the intention hereof to grant to the municipalities of this state in the fullest and most complete manner possible the police powers of the state for the regulation within the boundaries of the respective municipalities of all matters related to the subject matter of this act.¹⁰⁹

The 1924 act unsuccessfully beseeched courts to be kind to municipal zoning. In 1925’s *H. Krumgold and Sons, Inc. v. Jersey City*,¹¹⁰ the New Jersey Supreme Court invalidated a municipal application of New Jersey’s version of the Standard Act. *H. Krumgold*, a contemporary commentator noted, “was the knell to zoning under the existing constitution.”¹¹¹

But the road to a constitutional amendment was doubly challenged. Not only had just one other state (Massachusetts) passed a zoning authorization amendment,¹¹² but the existing New Jersey Constitution was notoriously difficult to amend. In the half century before the zoning amendment, twenty-one amendments had been voted on in five elections. Two passed narrowly,

¹⁰⁶ Coleman Woodbury, “New Jersey Zoning Amendment,” *Journal of Land and Public Utility Economics* 4 (1928): 102, 102.

¹⁰⁷ See, e.g., “Zoning Conference Today,” *Ocean Grove (NJ) Times*, June 20, 1924, at 1; “City Must Issue Building Permit,” *The New Era (NJ)*, July 31, 1924, at 5; “New Jersey’s Zoning Dilemma,” *New York Herald Tribune*, Feb. 20, 1925, at 14.

¹⁰⁸ Baker, “Constitutionality of Zoning,” 232.

¹⁰⁹ N.J. Laws Ch. 146 (1924).

¹¹⁰ 102 N.J.L. 170, 130 Atl. 635 (1925).

¹¹¹ Woodbury, “New Jersey Zoning Amendment,” 102-3.

¹¹² *Ibid.*

while the other nineteen were defeated decisively.¹¹³ Under the 1844 constitution, any amendments had to be passed by two successive legislatures.¹¹⁴ Then, only at least four months after the adjournment of the second legislature could the matter be put to a vote at a special constitutional amendment election.¹¹⁵ The “more recent systems of amending constitutions such as popular initiative of the direct or indirect types [we]re not in use in New Jersey.”¹¹⁶ Indeed, a major catalyst for the 1947 imposition of a new constitution was the difficulty of amending the old one.¹¹⁷

The path to a zoning amendment cleared up in February 1925, when it gained Governor George Silzer’s endorsement. In a message to the state legislature, Silzer urged a constitutional amendment that “will permit zoning” and the development of communities “under proper restrictions.”¹¹⁸ The message grounded the amendment’s necessity in the state’s suburban growth: “Many of our residents work in the cities of New York and Philadelphia, to which places they commute daily. They have sought homes in New Jersey because of the attractive surroundings offered them here.”¹¹⁹ The governor next echoed the refrain of zoning advocates that industry threatens traditional enjoyment of property:

Our unfortunate experience has been that after attractive suburban communities have been established, manufacture and business, pushing their way out of the more

¹¹³ Ibid.

¹¹⁴ N.J. CONST. of 1844, Art. IX. See *New Jersey: A History*, 580.

¹¹⁵ N.J. CONST. of 1844, Art. IX.

¹¹⁶ *New Jersey: A History*, 580.

¹¹⁷ See Williams, *The New Jersey Constitution: A Reference Guide*, 11-13; Charles R. Erdman, Jr., *The New Jersey Constitution: A Barrier to Governmental Efficiency and Economy* (Princeton, NJ: Princeton University Press, 1934), 10-30.

¹¹⁸ *Governor’s Message Recommending a Constitutional Amendment Permitting Zoning to the Legislature—Session of 1925*. The message was recorded in newspapers. See, e.g., “New Jersey’s Zoning Problem,” *New York Times*, Feb. 18, 1925, at 18; “Message on Zoning,” *Cranford (NJ) Citizen & Chronicle*, Feb. 19, 1925, at 10 (“A constitutional amendment to enable the enactment of zoning laws was recommended in a special message which Governor Silzer transmitted to the legislature.”); “New Jersey’s Zoning Dilemma,” *New York Herald Tribune*, Feb. 20, 1925, at 14; “Silzer Urges Zones for Community Development,” *Ocean Grove (NJ) Times*, Feb. 20, 1925, at 1.

¹¹⁹ *Governor’s Message*, 3.

thickly populated centers, constantly encroach upon these attractive suburban communities, with the result that communities are destroyed for suburban purposes...”¹²⁰

The governor framed zoning as the solution to this problem.¹²¹ He also echoed the fear that without a zoning amendment, good potential New Jerseyans would no longer desire the state: “[M]any who would be most desirable citizens, would erect handsome homes, and establish themselves in our communities, have been driven from here into other States because of failure to provide proper zoning restrictions...”¹²² They might be scooped up by New York, for instance, “where they are assured that, once having erected a handsome house in a suburban community, the character of that community will not change.”¹²³ Appealing directly to the legislators, he assured them of the tax benefits of these new citizens,¹²⁴ and noted how positive zoning protections would be for business.¹²⁵

The governor’s message was well-received. The *New York Herald Tribune* noted that “[t]he suburban towns in New Jersey, as in New York, are bent on safeguarding their attractions as places of residence. In a fair sense it for the ‘general welfare’ of a community that it be permitted to establish and maintain strictly residential sections.”¹²⁶ Though a version of the proposed constitutional amendment was smothered in legislative committee sometime before March

¹²⁰ Ibid.

¹²¹ Ibid. (“Our suburban communities have recognized this peril and endeavored to meet it by the enactment of statutes permitting zoning, but every such effort has met with failure when appealed to the courts, for the courts have uniformly set aside such statutes as being in contravention of the Constitution.”).

¹²² Ibid., 4.

¹²³ Ibid.

¹²⁴ Ibid. (“In this way we have been deprived not only of those who would have added to the quality of our citizenship, but also a large amount of ratables, as well.”).

¹²⁵ Ibid. (“It is easily possible to provide for business and manufacture and for residential requirements, as well. The whole character and type of our communities within easy reach of the large cities will be determined beyond possibility of change if we do not act soon.”)

¹²⁶ “New Jersey’s Zoning Dilemma,” *New York Herald Tribune*, Feb. 20, 1925, at 14.

1925,¹²⁷ by the end of the year the proposed amendment had passed both houses.¹²⁸ The proposed amendment read:

The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.¹²⁹

During the 1926 election, both parties endorsed zoning.¹³⁰ In 1926, as in 1925, the zoning amendment was passed by both houses of the legislature.¹³¹ In January 1927, the New Jersey legislature called for a special election.¹³² On February 8, 1927, the Senate unanimously adopted the resolution for a constitutional amendment, set for September 20.

Bipartisan support and strong civic engagement assured the zoning amendment a smooth campaign to ratification. In late 1926 and 1927, civil groups threw their support behind it. In March 1927, a tri-state regional council was formed to develop regional zoning and planning between Northern New Jersey, New York City, and a part of Connecticut.¹³³ The conference authorized its chairman to jumpstart a public education committee in favor of the amendment, which it urged as “vitaly necessary to progress of the improvements planned.”¹³⁴ The New Jersey Zoning

¹²⁷ See “New Jersey Zoners Get a New Setback,” *New York Times*, Mar. 22, 1925, at 172 (“The ‘progressive’ fellows who would take from New Jersey her ‘Garden State’ distinction and turn her into a big factory, got after that bill as soon as it reached the Clerk’s desk, rushed it into a committee of their own selection and put it to sleep there for the rest of the sitting; it never saw daylight afterward.”).

¹²⁸ See “Questions Passage of Zoning Amendment,” *Daily Home News (NJ)*, Aug. 26, 1925, at 5 (“Charles R. Hardin, attorney and Democratic Assembly candidate of a year ago questions the method by which the constitutional amendment to enable zoning laws...were passed by the 1925 Legislature...Objections...were based on alleged omission from the Assembly Journal of the yeas and nays by which the measure was passed...”).

¹²⁹ N.J. CONST. OF 1844, Art. IV, sec. 6.

¹³⁰ “Vote the Republican Ticket,” paid for by Charles H. Stewart, Campaign Manager, 45 Academy Street, Newark, N.J.; “Vote the Democratic Ticket,” *Jewish Chronicle*, Oct. 29, 1926, at 8.

¹³¹ Erdman, *The New Jersey Constitution*, 36.

¹³² “Legislative Plans Laid by G.O.P. Group,” *Daily Home News*, Jan. 7, 1927, at 6.

¹³³ “Regional Group Looking Toward Better Planning,” *New York Times*, March 26, 1927, at 1.

¹³⁴ *Ibid.*

Association also conducted a statewide campaign alongside the New Jersey League of Municipalities, the State Federation of Labor, the New Jersey Association of Real Estate Boards, the New Jersey Federation of Women's Clubs, and the New Jersey State Chamber of Commerce.¹³⁵

Editorials supporting the amendment flooded New Jerseyans' doorsteps. The *Elizabeth Evening Times* implored in June 1927 that though "there is little doubt about the zoning amendment being voted favorably...no chance should be taken upon the outcome. The League of Municipalities...could hardly accomplish anything of greater value to the cities and towns of the State than to help to bring about adoption of th[is] amendment." Thirty-six thousand dollars was appropriated from the executive committee of the League of Municipalities for the amendment campaign effort.¹³⁶ The Elizabeth editorialists were right to have little doubt about the zoning amendment being voted favorably. Formally, the Republican party endorsed the amendment in early 1927; the Democrats followed suit in June.¹³⁷

Zoning fights at the lower levels did not halt while the proposed amendment snaked its way through the state legislative process. Municipal action remained robustly pro-zoning. In June 1926, the Hillside Township Committee, pursuant to the zoning ordinance, denied Mike Tuschyn's permission to convert the garage of his residence into a blacksmith shop.¹³⁸ In Rahway, later in the same month, Elizabeth Avenue residents objected to a permit for a laundry at Scott Avenue.¹³⁹ If

¹³⁵ "Seek Zoning Regulation and Water Supply Body," *Ocean Grove (NJ) Times*, June 24, 1926, at 1.

¹³⁶ "Vote for Zoning," *Rahway (NJ) Record*, June 24, 1927, at 6.

¹³⁷ "Zoning in New Jersey," *New York Times*, June 27, 1927, at 18. Around this time, the *New York Times* also lent its support. "New York will be glad of the opportunity to welcome her sister State back into the zoning ranks. This State [New York] was a pioneer in the zoning movement, and the courts on this side of the Hudson have ever taken a forward-looking view of the extension of the police power to meet modern municipal conditions."

¹³⁸ "Blacksmith Shop Denied," *Hillside (NJ) Times*, June 4, 1926, at 10.

¹³⁹ "Elizabeth Ave. Folks Now Seek Injunction: 81 Names Affixed to Petition Against Permit to Build Laundry," *Rahway (NJ) Record*, June 18, 1926, at 1, 6.

construction work began, they threatened to seek an injunction.¹⁴⁰ In Cranford in October 1926, a zoning board meeting brought a mass of people opposed to a building permit on Burnside Avenue and an apartment house permit for Springfield Avenue, between Miln and Holly Streets.¹⁴¹ At the same meeting, however, “Lawrence Doyle’s application to build a five-car garage on Centennial Avenue was granted without opposition.”¹⁴² The Board of Adjustment of Rahway held a public hearing on January 6, 1927 “to determine whether or not an ornamental gasoline station should be erected at the northwest corner of St. George and Lake avenues.”¹⁴³ In July 1927, Mountain Lakes introduced a zoning ordinance of its own.¹⁴⁴

The judiciary, meanwhile, continued to hand down dozens of adverse decisions following *Risley*.¹⁴⁵ Many feared that the amendment would prove too little, too late. The editorial board of the *New York Times*, while acknowledging the zoning amendment “doubtless[] will be approved at the polls,” observed that “[f]or two or three years the real estate philanthropists have been bothering or bulldozing the building inspectors” and wondered whether, by the time zoning would be formally embedded in the constitution, “there [would] be much left for it to protect.”¹⁴⁶

Beyond concerns for the amendment’s vitality once passed, the amendment process presented a few (mostly insubstantial) roadblocks. At least one organization, led by retired Jersey City judge John Warren, opposed the amendment. Warren, also president of the State League of Building and Loan Associations, recapitulated the arguments that had failed at the municipal level

¹⁴⁰ *Ibid.*

¹⁴¹ “Permit Held Up,” *Cranford (NJ) Citizen & Chronicle*, Oct. 14, 1926, at 1.

¹⁴² *Ibid.*

¹⁴³ “Adjustment Board to Hold Public Hearing,” *Rahway (NJ) Record*, Dec. 3, 1926, at 1.

¹⁴⁴ “Mayor and Council Use Good Judgment: Mountain Lakes Will Have Zoning Ordinance,” *Rockaway (NJ) Record*, July 14, 1927, at 1.

¹⁴⁵ See, e.g., *Nelson Bldg. Co. v. Binda*, 3 N.J. Misc. 420, 128 Atl. 618 (1925); *Summit Porc. Co. v. Board of Adjustment*, 3 N.J. Misc. 728, 129 Atl. 819 (1925); *Reimer v. Dallas*, 129 Atl. 391 (1925); *Rudnevitz v. Bigelow*, 4 N.J. Misc. 480, 133 Atl. 174 (1926); *Eaton v. Town of Montclair*, 4 N.J. Misc. 507, 133 Atl. 400 (1926); *West End Inv. Co. v. Osterman*, 5 N.J. Misc. 335 (1927); *Bloom v. Dowling*, 5 N.J. Misc. 115 (1927).

¹⁴⁶ “Jersey’s Zoning Amendment,” *New York Times*, Feb. 15, 1927, at 24.

but succeeded with the judiciary. Zoning would take unfair advantage of the poor.¹⁴⁷ Corrupt municipal officials would manipulate it for their own profits.¹⁴⁸ And the amendment would upset property values and stifle natural community development—“all for the benefit of a selfish, wealthy minority of property owners and politicians in office, the latter desiring to perpetuate themselves in office through the control zoning would give them over every piece of property in their respective communities.”¹⁴⁹ Within the academic community, E.A. Merrill, a prominent zoning advocate, criticized the “unnecessary and undesirable constitutional amendment,” concluding that “in not a single opinion [of the New Jersey courts] will there be found any criticism of, or evidence of hostility toward, zoning within the legitimate bounds of the police power.”¹⁵⁰

Neither criticism appears to have made any real headway among voters. A more nearly detrimental challenge came from Mayor Frank Hague of Jersey City, the de facto boss of the New Jersey Democratic Party, who had the other constitutional amendments set for vote on September 20 on his mind. Five amendments were on the ballot. Zoning was first. The District Amendment (second) would have provided that “[t]he Legislature shall have power to establish water supply districts, sewerage districts, drainage districts, and meadow reclamation districts.”¹⁵¹ The Amendment (third) would have formally allowed for constitutional amendments to be voted on in regular elections, rather than during a special election, saving the state \$600,000-\$750,000 per election. The fifth proposed amendment would have corrected a defect in Article VII of the constitution regarding the appointment of Common Plea Judges. Like zoning, proposals two, three, and five were not opposed on principle by either party.¹⁵²

¹⁴⁷ “The Poor May Be Used on Both Sides in Debate on Zoning,” *Rahway (NJ) Record*, July 26, 1927, at 6.

¹⁴⁸ *Ibid.*

¹⁴⁹ “Zoning Proposal Has Support of Both Parties,” *Daily Home News*, Sept. 11, 1927, at 32.

¹⁵⁰ “Zoning in New Jersey,” *New York Times*, July 24, 1927, at X10.

¹⁵¹ *Ibid.*

¹⁵² Erdman, *The New Jersey Constitution*, 21.

The problem for Hague and the Democrats was the fourth proposal, known as the Biennial Sessions and Term Extender Amendment. Under the 1844 constitution, the gubernatorial election was not held the same year as the election for the President of the United States. The amendment would have synchronized both elections. It would also extend the terms of assemblymen from one to two years.¹⁵³ For decades, Republicans had controlled the legislature, while Democrats had long controlled the governor's mansion. Putting the gubernatorial election in the presidential year was good for Republicans, who could "utilize those apathetic Republican voters who turn out for nothing less than a presidential contest."¹⁵⁴ Hague worried that the Democratic voter would be too confused if asked to vote "yes" on Amendments 1, 2, 3, and 5 and "no" on Amendment 4, so he gave the order to vote "yes" only on the zoning amendment and "no" on the rest.¹⁵⁵

The vote, set for September 20, showed the effectiveness of the Hague machine. Two-thirds of Hudson County, Mayor Hague's Democratic stronghold, went to the polls; no other county did better than one-third.¹⁵⁶ Of the whole state, approximately 30 percent of eligible voters went to the polls. Zoning passed easily, carried by a majority of over 200,000.¹⁵⁷ The other four were decisively defeated.¹⁵⁸

¹⁵³ "The Proposed Amendment: Questions That Have Come Up Answered by Hon. Edward C. Stokes," *Cranford (NJ) Citizen & Chronicle*, July 28, 1927, at 1.

¹⁵⁴ "Editorial Comment: New Jersey Voters Approve Zoning—Reject Term-Extender," *National Municipal Review* 16 (1927): 680-81. See also "Vote for the Amendments," *Ocean Grove (NJ) Times*, Sept. 9, 1927, at 4. As one Democratic attack ad warned voters: "[T]he term-extender . . . is a vicious partisan political measure. It has no place in the Constitution . . . A sacred instrument should not be used as a political football." See *Cranford (NJ) Citizen & Chronicle*, Sept. 15, 1927, at 9. Naturally, the Republicans did not see things that way. According to state senator Walter Edge, "[i]f it is a diabolical political trick . . . for the Republicans to urge the election of Governors in Presidential years, when a majority of citizens go to the polls, then our Democratic friends must be guilty of a much more flagrant crime, begging as they are for a continuation of the existing plan of electing Governors by a minority." See "Jersey Democrats Assailed by Edge: Senator Says Selfish Motive Is Back of Opposition to Four-Year Term for Governor," *New York Times*, Aug. 27, 1927, at 14.

¹⁵⁵ See, e.g., Erdman, *The New Jersey Constitution*, 22; "Editorial Comment," at 681.

¹⁵⁶ Erdman, *The New Jersey Constitution*, 22.

¹⁵⁷ "New Jersey's Decision," *New York Times*, Sept. 22, 1927, at 28.

¹⁵⁸ *Ibid.*

We can only speculate whether the zoning amendment would have failed had it been listed third or fifth. Certainly, had it not been first, the amendment's overwhelming popular support might have given Hague pause before ordering it to be voted down. At the very least, the amendment's fortuitous placement helped assure it the smooth victory presaged by the political mobilization of 1925 through 1927.

Zoning entered the New Jersey constitution in 1927. In 1928, the legislature re-adopted its version of the Standard Act suggested by the Department of Commerce. In 1947, a substantially similar amendment was re-passed into New Jersey's new constitution.¹⁵⁹ In 1956, the New Jersey Supreme Court in *Roselle v. Wright* offered that the 1927 amendment "did not constitute a new grant of basic power theretofore beyond the domain of the Legislature," but was merely a stopgap necessary "to remedy the judicial denials of the fullness of the power."¹⁶⁰ The amendment makes a one-sentence appearance in *Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township*, the court's celebrated inclusionary zoning case.¹⁶¹

Still, the ease with which the amendment was ultimately pushed through conceals just how important its passage was. That a constitutional amendment—an extreme and rare political measure at any time—was the tool necessary for stable, lasting zoning in New Jersey demonstrates the strength of the judiciary at the time and the depth of majoritarian frustration with it. By 1927, New Jersey, the state perhaps most in need of zoning, was nearly alone in regarding it an open legal question. The amendment allowed the state to join the others and—finally—take the legality of municipal zoning for granted.

¹⁵⁹ N.J. CONST. Art. IV, § VI.

¹⁶⁰ *Roselle*, 21 N.J. at 409 (1956).

¹⁶¹ *Mt. Laurel*, 336 A.2d at 725.

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