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Earning Deference: Reflections on the Merger of Environmental and Land-Use Law

MICHAEL ALLAN WOLF*

The bedrock notion that courts should, in the overwhelming majority of cases, defer to lawmakers is currently under attack in the nation's courts, commentary and classrooms. Leading the way are several United States Supreme Court Justices who, in cases involving the Commerce Clause,¹ the Takings Clause² and Section Five of the Fourteenth Amendment,³ are much more willing than their immediate predecessors to second-guess the motives and tactics of elected and appointed officials at all levels of government.⁴

Given this new juris-political reality, it is more important than ever that local government officials—who are often (though, certainly, not always justifiably) viewed as occupying the bottom rungs of the ladder of governmental competence—take special care when operating beyond the scope of their “traditional” regulatory tasks. Local environmental law, the focus of this very timely symposium, is perhaps the most important area in which local officials are stretching beyond their conventional roles. The purpose of this paper is not to urge the prohibition of these regulations, for doing so would run contrary to my commitment to a more healthy environment for humans and other animals and

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1. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power. . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

2. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

3. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

4. See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 91 (2001) (“[L]egislative record review demonstrates judicial suspicion of congressional motives.”).

living things.⁵ Instead, I wish to offer a caveat to local elected and appointed officials, as well as, the counsel who advise these important actors in the land development and preservation drama, regarding the “nature and extent”⁶ of environmentally flavored local regulatory activities. This caveat can be simply expressed, “before implementing, applying or enforcing local environmental law, make sure that you can demonstrate that you have earned deference.”

I. In the Comfort Zone

For more than eight decades, zoning and land-use planning have been located squarely within the “comfort zone” of local government. Indeed, it has been an unshaken principle of American constitutional jurisprudence since 1926 that local governments are entitled to generous deference when exercising their traditional police powers, including zoning and planning. In that year, Associate Justice George Sutherland somewhat surprisingly wrote the following sentence for a six-member majority of a Court that to this day carries a reputation for striking down regulations affecting property and contract rights: “the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions.”⁷

In that same case, Sutherland and his colleagues encapsulated the practice of generous, though not unlimited, deference in two phrases that continue to pose serious problems to landowners, developers and speculators who bring to the courtroom their challenges to zoning and planning decisions and regulatory tools. These phrases are “fairly debatable” and “clearly arbitrary and

5. See, e.g., Michael Allan Wolf, *Environmental Law Slogans for the New Millennium*, 30 *Envtl. L. Rep.* (Envtl. L. Inst.) 10283 (Apr. 2000), *reprinted and revised in* 35 *U. RICH. L. REV.* 91 (2001).

6. The quotation marks are the author's (perhaps too-subtle) attempt to link his cautionary message to the Court's “rough proportionality” test in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in *nature and extent* to the impact of the proposed development.”) (emphasis added). By no means, however, is the author unqualifiedly endorsing the Court's more exacting test. See Michael Allan Wolf, *Fruits of the “Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 *WASH. U. J. URB. & CONTEMP. L.* 5 (1996).

7. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926).

unreasonable.”⁸ “If the validity of the legislative classification for zoning purposes be fairly debatable,” the *Euclid* opinion reads, “the legislative judgment must be allowed to control.”⁹ A few pages later, Sutherland noted that the reasons proffered by the local government need “not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry.”¹⁰ What was required was much less onerous: “the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹¹

Two years later, in *Nectow v. City of Cambridge*,¹² a unanimous Court found that the municipality had exceeded its constitutional powers in designating part of the plaintiff’s prime industrial parcel for residential use. As the Court used the *Euclid* formulation, it would not be accurate to say that Euclidean deference necessarily means a positive outcome for local government regulators. Still, it would be disingenuous to assert that local officials are not greatly benefited by the “fairly debatable” and “clearly arbitrary and capricious” formulations.

Today, Euclidean zoning—regulation of land by height, use, and area—is squarely within the comfort zone of local officials. Indeed, zoning and education are probably the two most important functions performed by local officials. More than eight decades of experience and experimentation with zoning and planning have produced a system of regulation that is more flexible, more responsive to changing development patterns and less prone to corruption than was true during the formative period. This evolution has taken place under a policy of benign neglect by the nation’s courts. Armed with their twin weapons of “fairly debatable” and “clearly arbitrary and capricious,” local officials could enter the legal battlefield assured of victory except in the most egregious cases of governmental abuse and excess.¹³

8. *See id.*

9. *Id.* at 388.

10. *Id.* at 395.

11. *Id.*

12. 277 U.S. 183 (1928).

13. *See generally Euclid*, 272 U.S. 365.

II. Going "Too Far"¹⁴

As the nation entered the latter half of the twentieth century, local governments began to experiment with the incorporation of environmental policies and practices into their zoning and planning schemes, a practice that soon brought them into direct conflict with a majority of the Supreme Court. Beginning in the late 1960s and early 1970s, environmental issues began to capture the attention of elected officials (driven by constituent concerns and demands) on the federal level. By the time Ronald Reagan took office in 1981 with his "government is the problem"¹⁵ approach, the *United States Code* and *Code of Federal Regulations* contained reams of pages devoted to the regulation of air pollution;¹⁶ water pollution;¹⁷ waste treatment, transport and disposal;¹⁸ toxic chemicals;¹⁹ pesticides and other poisons;²⁰ ocean dumping;²¹ safe drinking water;²² protection of endangered and threatened species;²³ management of the coastal zone;²⁴ federal public land management;²⁵ and releases of hazardous substances.²⁶ All of the activity was not confined to the federal level, however, as activists in states and localities successfully urged lawmakers to implement legal controls over activities that endangered our fragile ecological balance.

By the close of the twentieth century, this non-federal experimentation was in serious jeopardy. One legacy of the Reagan years has proved to be a significant barrier to the growth and even

14. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("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.").

15. President Ronald Reagan, Inaugural Address, 1981 PUB. PAPERS 1 (Jan. 20, 1981).

16. See Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000).

17. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000).

18. See Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2000).

19. See Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (2000).

20. See Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (2000).

21. See Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (2000).

22. See Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f to 300j-26 (2000).

23. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000).

24. See Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1465 (2000).

25. See Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (2000).

26. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2000).

continued vitality of state and local environmental activity. The fortieth President and his successor, George Bush *père*, remade the federal judiciary, particularly the United States Supreme Court. One key and controversial contribution to American jurisprudence made by the new conservative majority on the High Court has been the reinvigoration of the Takings Clause, a move that has posed serious problems for a wide range of environmental regulations promulgated and enforced by local and state officials.²⁷ State and local floodplain controls, wetlands restrictions, beach access easements, bicycle paths, coastal development bans, endangered species protections, and open-space ordinances have all been subjected to regulatory takings analysis, and some of these regulations have fallen as a result of increased and heightened judicial scrutiny.

A quick review of several of the leading regulatory takings cases reveals the tension between non-federal environmental regulation and private property rights protection by the Rehnquist Court. For years, the Court had avoided deciding the substantive question of whether, in fact, a regulation that went "too far" effected a taking that required compensation from the government.²⁸ In 1987, the new Chief Justice, writing for the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*,²⁹ answered that question affirmatively, assuming that the challenged restriction (local floodplain controls) deprived the landowner "of all use of [his] property."³⁰ A few weeks later, in *Nollan v. California Coastal Commission*,³¹ a five-member majority expanded the reach of the regulatory takings doctrine beyond deprivation of value to allow for the invalidation of regulations that do not "substantially," as opposed to "rationally" or "reasonably," advance a "legitimate state interest."³² A state coastal commission's exaction of a beach access easement use in exchange for permit-

27. See Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002).

28. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). The Court could not decide whether a regulatory taking had occurred because the local regulator had not yet made "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *Id.*

29. 482 U.S. 304 (1987).

30. *Id.* at 321. But see *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 901 (Cal. Ct. App. 1989). On remand, the appellate court found that the ordinance did not deny the landowner of "all uses." *Id.*

31. 483 U.S. 825 (1987).

32. *Id.* at 834-35.

ting beachfront construction was voided because of the lack of a substantial connection between the ends and the means.

The regulatory takings steamroller picked up steam in 1992 when, in *Lucas v. South Carolina Coastal Council*,³³ the Court held that “[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, [the State] may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”³⁴ In 1994, regulators received an even more significant jolt from the Justices. The majority in *Dolan v. City of Tigard*,³⁵ built on *Nollan*’s activist foundation and obligated a local government to carry the significant burden of demonstrating that the bicycle path and floodplain easements it had exacted from a plumbing supply business were roughly proportional to the impact of a planned expansion of its building.³⁶ This was a far cry from Euclidean deference, occasioned (and justified) most likely, by the majority’s concern about the motives and abilities of local regulators to craft and impose fair environmental protection measures.

More recent cases have brought additional bad news to state and local environmental regulators and their supporters. Five years after *Dolan*, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,³⁷ the Court considered a case involving a frustrated landowner’s efforts to secure site plan approval for a beachfront residential development.³⁸ This time, there was no need to expand the *substantive* reach of regulatory takings; instead the Court permitted the extremely puzzling questions of “economically viable use” and “substantially advanc[ing] a legitimate public purpose” to be submitted to a jury.³⁹ In 2001, in *Palazzolo v. Rhode Island*,⁴⁰ we learned that even landowners who maintained a “token interest” could claim a *Lucas*-type total deprivation.⁴¹

33. 505 U.S. 1003 (1992).

34. *Id.* at 1027. On remand, the Supreme Court of South Carolina held that *Lucas* suffered a temporary taking deserving of compensation. *Lucas v. S. C. Coastal Council*, 424 S.E.2d 484 (S.C. 1992).

35. 512 U.S. 374 (1994).

36. *Id.* at 391 (“rough proportionality”).

37. 526 U.S. 687 (1999).

38. *See id.* at 697-98. In this case, county officials imposed open-space requirements due to their concern about the impact on the critical habitat of an endangered butterfly. *Id.*

39. *See id.* at 700-01.

40. 533 U.S. 606 (2001).

41. *Id.* at 615-16.

Moreover, we learned that even if those landowners acquired their ownership interest in the property with notice of existing restrictions, they were not necessarily foreclosed from bringing a regulatory takings lawsuit challenging those very regulations.⁴² At risk in *Palazzolo* were state controls over-filling coastal wetlands.

It is important to recite this litany because it demonstrates quite clearly the hazards of implementing and enforcing state and local environmental controls affecting the use of land. Although not all non-federal regulation has been struck down in recent years,⁴³ a majority of the Rehnquist Court views such restrictions as the Achilles heel of property regulation generally, and the result has been the dramatic expansion of the judiciary's power to strike down a wide and increasing array of regulatory work-product by nonfederal elected and administrative officials.

Supporters of local environmental law in legislatures, agencies, nongovernmental organizations and law schools can (and do) rail against this unfortunate development. But, after the rhetorical smoke clears, one stark jurisprudential reality still stands in the way of further progress: the current Court does not believe that state and local governments are necessarily entitled to generous deference when engaging in environmental regulation of land use.

III. Revisiting the "Environmentalization" of Land-Use Planning

In the mid-1990s, I first explored the mixture of land-use planning and environmental law on the local level,⁴⁴ identifying four major problems:

First, because there is no barrier separating land-use planning from environmental regulation, local officials often operate in a realm in which they have little expertise and even less control over negative externalities. . . .

Second, neoLochnerean judges can use the corruption, haphazardness, and prejudice frequently associated with local land-use planning and zoning to rationalize greater activism in the area

42. *Id.* at 626-30.

43. See, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 202 (2002) (holding that development moratoria totaling thirty-months did not effect *per se* regulatory taking).

44. See Wolf, *supra* note 5, at 92-109.

of environmental regulation—at local, state, and federal levels.

...

Third, the state of takings jurisprudence was already confused before *Dolan* and before the activism that cases such as *Nollan* and *Lucas* inspired in the state and lower federal courts. . . . The combination of Scalia's incantation of nuisance law [in *Lucas*⁴⁵] and Rehnquist's rethinking of judicial deference [in *Dolan*⁴⁶] promises to make a perplexing body of law even more puzzling. Statutes that attempt to "strengthen" private property protections . . . promise to complicate the matter even further.

Fourth, decision-making in private real estate markets is frustrated because of the ambiguities of takings law and the merging of land-use planning and environmental law tools and analysis.⁴⁷

These problems have only been exacerbated in the succeeding years. First, even more localities, many inspired by the Smart Growth movement,⁴⁸ have taken on a new set of environmentally flavored land-use regulations. There is no indication, however, that the level of expertise has meaningfully improved *across the board*, despite the efforts of the American Planning Association, the Environmental Protection Agency (EPA), and other proponents of the concept.

Second, *Del Monte Dunes* and *Palazzolo* are strong evidence that the activist judges' commitment to private property rights protection is not waning in the least. We have even seen efforts to expand the regulatory takings doctrine beyond its traditional real property "moorings."⁴⁹

45. See *Lucas*, 505 U.S. at 1029.

46. See *Dolan*, 512 U.S. at 390-91.

47. Wolf, *supra* note 5, at 78-84 (footnotes omitted).

48. See, e.g., JOHN R. NOLON, WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH (2001); Timothy Beatley & Richard Collins, *Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 287 (2000).

49. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (invalidating a program that expanded health benefits for coal mine employees and their dependents, with four Justices finding a regulatory taking and a fifth Justice finding a violation of the Due Process Clause); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (allowing a regulatory takings challenge to IOLTA program to proceed); see also Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355 (2000) (criticizing these and other attempts to expand regulatory takings analysis).

Third, the elusive regulatory takings “quark”⁵⁰ is still out of our grasp. Rather than clearing up this hopelessly confused area of the law, the Justices have muddied the waters even further by, for example, tampering with the “notice” defense,⁵¹ raising questions about modes of and timing for compensation⁵² and offering suggestive dictum regarding conceptual severance⁵³ and the rough proportionality test.⁵⁴ This author, like many of his colleagues, has found ample cause for concern regarding the Court’s sojourns in this crucial area.⁵⁵

Finally, as the sad sagas detailed in *Del Monte Dunes*, *Palazzolo*, and *Tahoe-Sierra* so starkly testify, landowners continue to suffer emotionally and financially from the inabilities of some environmental regulators to render a final answer regarding development permission. As long as landowners are left hanging for years, even decades, we will see even more judges who choose not to indulge in Euclidean deference to environmental land-use regulators.

50. CHARLES M. HAAR, *LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND* 766 (3d ed. 1976), *quoted in* *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 n.17 (1985); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 650 n.15 (1981) (Brennan, J., dissenting).

51. *See Palazzolo*, 533 U.S. at 628 (“A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.”).

52. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1977) (considering ripeness of a regulatory takings case involving transferable development rights).

53. Professor Margaret Jane Radin uses the phrase “conceptual severance” to describe the strategy of reducing the focus of the regulatory takings analysis to the affected portion of the landowner’s property. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674-78 (1988). *See also Palazzolo*, 533 U.S. at 631 (citations omitted) (“Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators.”). *But see Tahoe-Sierra*, 122 S.Ct. at 1483 (“Petitioner’s ‘conceptual severance’ argument is unavailing because it ignores *Penn Central*’s admonition that in regulatory takings cases we must focus on ‘the parcel as a whole.’ We have consistently rejected such an approach to the ‘denominator’ question.”). The *Tahoe-Sierra* dissenters were not convinced. *See id.* at 1496 n.* (Thomas, J., dissenting) (“The majority’s decision to embrace the ‘parcel as a whole’ doctrine as settled is puzzling.”) (emphasis in original).

54. *See Del Monte Dunes*, 526 U.S. at 703 (*Dolan*’s “rough-proportionality test. . . is inapposite to a case such as this one” that is “based not on excessive exactions but on denial of development.”).

55. *See, e.g., Haar & Wolf, supra* note 27; Michael Allan Wolf, *Pondering Palazzolo: Why Do We Continue to Ask the Wrong Questions?*, 32 *Envtl. L. Rptr.* (Envtl. L. Inst.) 10367 (Mar. 2002).

IV. The Takings Pitfalls of Smart Growth

Some of the most familiar examples of local environmental law are identified with the Smart Growth movement. A list of ten "Smart Growth Principles" appears in *Getting To Smart Growth*,⁵⁶ a 100-plus page publication of the Smart Growth Network that can be downloaded from EPA's Smart Growth web site:

1. Mix land uses
2. Take advantage of compact building design
3. Create a range of housing opportunities and choices
4. Create walkable neighborhoods
5. Foster distinctive, attractive communities with a strong sense of place
6. Preserve open space, farmland, natural beauty, and critical environmental areas
7. Strengthen and direct development towards existing communities
8. Provide a variety of transportation choices
9. Make development decisions predictable, fair and cost effective
10. Encourage community and stakeholder collaboration in development of decisions⁵⁷

Several of these principles are consistent with the goals of Euclidean zoning and can be accomplished by slight modifications of traditional zoning ordinances, modifications that should not trigger judicial skepticism. While a traditional zoning map segregates land uses into residential, commercial, and industrial zones (as well as into subcategories), localities can implement Principle One by creating mixed-use zones⁵⁸ or incorporating erstwhile incompatible uses in a planned unit development.⁵⁹ For decades, many municipalities have been using traditional planning and zoning powers such as Floor Area Ratio modifications⁶⁰ and park-

56. Smart Growth Network & Int'l City/County Mgmt. Ass'n, *Getting to Smart Growth: 100 Policies for Implementation*, at <http://www.smartgrowth.org/pdf/gettosg.pdf> (last visited Mar. 6, 2002). [hereinafter *Getting to Smart Growth*]. The publication is part of "an ongoing series" available on the Smart Growth Network web site. See also DEVELOPMENT, COMMUNITY, & ENVIRONMENTAL DIVISION, U.S. EPA, ENCOURAGING SMART GROWTH, at <http://www.epa.gov/smartgrowth> (last visited Mar. 6, 2002) [hereinafter "EPA SMART GROWTH"].

57. *Getting to Smart Growth*, *supra* note 56, at ii.

58. See CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 283-84 (4th ed. 1989).

59. See DANIEL R. MANDELKER, LAND USE LAW §§ 9.24-9.30 (4th ed. 1997).

60. See *id.* § 5.65.

ing space controls to encourage compact building design (Principle Two). Planners have also made real progress in the areas represented by Principles Nine and Ten, by, for example, involving citizens in key comprehensive planning decisions and keeping the public involved regarding zoning maps, procedures and changes.

Unfortunately, several of the suggested tools for accomplishing other Smart Growth principles are the kinds of devices that raise the suspicion of judges concerned with the erosion of private property rights. For example, if localities choose to use exactions to create or expand sidewalks, to reroute traffic, or to create parks and greenways as ways of achieving "walkable communities" (Principle Four), they will run head-on into the rough proportionality standard and burden-shifting from *Dolan*. In some communities, "foster[ing] distinctive, attractive communities" (Principle Five) means preserving scenic vistas and restricting visual clutter such as billboards and large signs. While aesthetic regulation is much more acceptable now than in the early years of zoning,⁶¹ these post-Euclidean tools also increase the likelihood of a successful court challenge brought by frustrated landowners, based not only on the Takings Clause but on the First Amendment Freedom of Speech Clause as well.⁶²

Principle Six, "preserve open space, farmland, natural beauty, and critical environmental areas,"⁶³ is not only the goal most closely linked to local environmental law, but also the goal that poses the most serious regulatory takings problems for government officials. The lesson of cases such as *Nollan*, *Dolan*, *Suitum*, *Del Monte Dunes*, and *Palazzolo* is clear and sobering: public amenities, such as greenways, paths, trails, and open spaces containing wetlands and critical habitats, are not there for the people to obtain through regulations and exactions alone. Unless local environmental regulators perform their tasks very carefully and efficiently, there may very well be a price to pay, and that price is called "just compensation."

While infilling programs that target redevelopment toward existing urban and older suburban areas (Principle Seven) do not

61. See, e.g., Georgette C. Poindexter, *Light, Air, or Manhattanization: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 483 (1998) ("Aesthetic zoning has evolved from an impermissible use of police power to a possible public good.").

62. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (invalidating sign ordinance as a violation of the First Amendment's free speech protections).

63. *Getting to Smart Growth*, *supra* note 56, at ii.

necessarily raise regulatory takings questions, there could be a problem if a locality uses a greenbelt or urban growth boundary (UGB) as a means of directing development "inward."⁶⁴ Landowners who find themselves outside the boundary may catch the court's attention if they can demonstrate arbitrariness in setting the line or that their exclusion has caused a severe loss of "economically beneficial or productive use of [their] land."⁶⁵ Another tool designed to further infilling—brownfields redevelopment⁶⁶—raises even more significant concerns regarding public health and environmental justice, as inner-city residents who live near contaminated sites are faced with the dilemma of no action or a potentially inadequate cleanup.⁶⁷ Therefore, in terms of a generous judicial reception, the long-term outlook is not bright for many local environmental tools.

V. Shedding History

Compounding the problems faced by regulators and their supporters is the dubious history of local environmental law. Too often, environmental protection and conservation have been a cloak for exclusion of the poor, minorities, students, and the elderly.⁶⁸ Large-lot zoning mandates and growth control measures, which effectively eliminated the possibility of new affordable housing in many outlying suburbs,⁶⁹ were often defended as sound conservation strategies.

In an early New Jersey exclusionary zoning case, for example, the judge was unconvinced when the locality offered the following reason for its growth control measures: "low population density zoning provides protection against floods and other surface drainage problems and against diversion of water from an aquifer, an

64. The Portland, Oregon metropolitan region features the most famous UGB. See, e.g., Metro, *Urban Growth Boundary*, at <http://www.metro-region.org/metro/ugbursa/ugbursa.html> (last updated Feb. 14, 2002).

65. *Lucas*, 505 U.S. at 1015.

66. See, e.g., Joel B. Eisen, "Brownfields of Dreams"?: *Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883.

67. See Michael Allan Wolf, *Dangerous Crossing: State Brownfields Recycling and Federal Enterprise Zoning*, 9 FORDHAM ENVTL. L.J. 495, 514-19 (1998).

68. Professor Daniel R. Mandelker addressed this problem in the early 1980s, with the same sharp insights that have typified his scholarship. See DANIEL R. MANDELKER, *ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE* (1981).

69. In the 1950s, Professor Charles Haar sounded a warning about suburban zoning's exclusionary potential. See, e.g., Charles M. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953). See also CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 15-22 (1998).

underground water resource.”⁷⁰ The judge’s skepticism is palpable in the following two paragraphs:

Flood or drainage problems were not discussed in the proposed master plan of May 1970, in no specific detail in the studies of the previous planning consultant. There was no consideration in the record of alternative plans, such as retention basins. The common knowledge that impermeable surfaces, specifically roofs and streets, increase surface water run-off is insufficient to support the rezoning of substantially all vacant land in the township into one and two acre zones. Similarly, whether the Englishtown aquifer would be imperiled by the development of the Burnt Fly Bog area is a specialized hydrological subject.

Only engineering data and expert opinion and, it may be, ecological data and expert opinion could justify the ordinance under attack. These were lacking both in the legislative process and at the trial. The record fails to substantiate that safeguarding against flood and surface drainage problems and protection of the Englishtown aquifer would be reasonably advanced by the sweeping zoning revision into low population density districts along the four water courses and elsewhere or the exclusionary limitations on multi-family apartment units.⁷¹

A similar suspicion about the motives of local officials appears in the most famous exclusionary zoning case, *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* (“*Mount Laurel I*”).⁷²

70. *Oakwood at Madison, Inc. v. Township of Madison*, 283 A.2d 353, 358 (N.J. Super. Ct. Law Div. 1971).

71. *Id.* at 359.

72. 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975). Justice Frederick W. Hall wrote for the court:

The propriety of zoning ordinance limitations on housing for ecological or environmental reasons seems also to be suggested by Mount Laurel in support of the one-half acre minimum lot size in that very considerable portion of the township still available for residential development. It is said that the area is without sewer or water utilities and that the soil is such that this plot size is required for safe individual lot sewage disposal and water supply. The short answer is that, this being flat land and readily amenable to such utility installations, the township could require them as improvements by developers or install them under the special assessment or other appropriate statutory procedure. The present environmental situation of the area is, therefore, no sufficient excuse in itself for limiting housing therein to single-family dwellings on large lots. This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at last being recognized, should always be considered.

Id. at 731 (citation omitted).

Moreover, in one of the most influential cases approving a New York suburb's innovative growth management program, the majority felt the need to address (and dismiss) the charge that the community was engaging in exclusionary practices:

What we will not countenance, then, under any guise, is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land. The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth.⁷³

Judge Breitel disagreed:

It has indeed reflected the larger understanding that American society is at a critical crossroads in the accommodation of urbanization and suburban living, with effects that are no longer confined, bad as they are, to ethnic exclusion or "snob" zoning. Ramapo would preserve its nature, delightful as that may be, but the supervening question is whether it alone may decide this or whether it must be decided by the larger community represented by the Legislature.⁷⁴

Furthermore, Judge Breitel, in a somewhat prescient aside, hinted that this growth management scheme raised constitutional issues including those "relat[ing] to the power of government to deprive the landowner of any reasonable use of his land for a period of years, up to 18 years, without compensation."⁷⁵

Today's advocates and practitioners of local environmental law must take care to purge statutes and ordinances, as well as their application and enforcement, of this historical taint and to guard against the very real possibility that a court will find a violation of the Takings Clause. It is time to turn our attention to concrete strategies for earning deference.

73. *Golden v. Planning Bd.*, 285 N.E.2d 291, 302 (N.Y. 1972).

74. *Id.* at 311 (Breitel, J., dissenting) (citation omitted).

75. *Id.* at 309.

VI. "All I'm Asking Is for a Little Respect"⁷⁶

This author proposes three strategies, each designed to bring local environmental law within the shelter of Euclidean deference. There are, in turn, three reasons local governments, with the assistance of state and federal officials, should pursue these strategies. First, once deference is earned, the presumption will decidedly shift (or remain) in favor of the local government, making it much more likely than not that these environmentally based restrictions will survive a private property rights-based challenge. Second, bolstering the constitutional and political legitimacy of local environmental law will mean that the Supreme Court may well slow down its amplification of the confusing and already expansive regulatory takings doctrine, an amplification that threatens a wide array of "mainstream" federal and state environmental law. Finally, all three strategies for earning deference include a public participation element that will potentially allow a large portion of the public to be invested in the success of the local environmental law project.

A. Pay as You Go

A large component of local environmental law consists simply of the protection of sensitive lands and resources, such as floodplains, wetlands, critical habitats, aquifers, ridgelines, scenic views, streams, and trees from over-development by landowners and their agents. In the realm of traditional real property law, concerned parties accomplish this same goal by acquiring a servitude that burdens the estate of the private landowner. The landowner whose property is subject to an easement, covenant, or equitable servitude runs the risk of a damages award or an injunction forbidding future interference if the landowner conducts activities inconsistent with the property rights in the land held by the servitude owner.⁷⁷

The safest way for localities to effectuate these protective measures is to acquire the fee interest in the targeted land or the right to stop or punish over-development of that land. Should the landowner refuse to accept the offer, the locality can then exercise its power of eminent domain—for environmental protection

76. Aretha Franklin, *Respect*, on I NEVER LOVED A MAN THE WAY I LOVE YOU (Atlantic Records 1967).

77. See, e.g., WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* §§ 8.1-8.33 (3d ed. 2000).

should certainly meet the definition of "public use" or "public purpose" as defined by modern courts.⁷⁸

We know that local governments are aware of this option because state-authorized conservation easements are quite popular devices for accomplishing environmental protection goals.⁷⁹ We also know why local governments would prefer to accomplish the same results by regulations that do not require a direct expenditure of funds from the public coffer, funds that may require public approval or even, heaven forbid, a property tax hike. However, this is just the kind of strategy that gets local environmental regulators in trouble with the judiciary.⁸⁰

There is an important precedent for pursuing the "pay as you go" strategy that bears careful study by advocates of local environmental law. In November 1998, New Jersey voters overwhelmingly approved an ambitious plan to borrow one billion dollars over ten years for the purpose of preserving one million acres of open space and farmland.⁸¹ New Jersey citizens now have an ownership interest, not only in this specific preservation program, but more importantly in the general notion that the protection of sensitive lands is good public policy. State and local officials in other jurisdictions may desire to follow New Jersey's lead, but may be apprehensive about voter reaction. It is imperative that the electorate be educated concerning the benefits of this program. As an alternative, or as an interim approach pending public approval of direct expenditures, government officials and non-gov-

78. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (attacking "certain perceived evils of concentrated property ownership in Hawaii [was] a legitimate public purpose.").

79. Wyoming is the only state to lack a specific statute authorizing conservation easements. See RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 34A.01 n.1 (Michael Allan Wolf ed., 2002).

80. In the most important regulatory takings case that nearly made it to a substantive decision by the Supreme Court, the locality had actually proposed to the voters a bond issue in order to raise the funds for acquiring open-space lands that the municipality had designated in accordance with a state statute. Included among the open-space lands were fifty acres of a larger parcel upon which an energy company intended to construct a nuclear power plant. Although the voters turned down the bond issue, the open-space designation remained in place, giving rise to the company's regulatory takings challenge. *San Diego Gas & Elec. Co v. City of San Diego*, 450 U.S. 621 (1981) (dismissing landowner's appeal from order of state appellate court that was not deemed final for jurisdictional reasons).

81. See Jennifer Preston, *The 1998 Elections: Around the Region — The Ballot Questions*, N.Y. TIMES, Nov. 4, 1998, at B14. See also Garden State Preservation Trust Act, N.J. STAT. ANN. §§ 13:8C-1 to C-42 (2002); Garden State Preservation Trust Home Page, at <http://www.state.nj.us/gspt> (last visited Mar. 6, 2002).

ernmental organizations can continue their efforts to secure voluntary donations of money and real property interests.⁸²

Some will scoff at this suggestion, either because they feel that the same results can be accomplished by regulation or be-

82. It may also be a good time to experiment with land banking, the perennial favorite of many in the professional planning community. Several years ago, Professor Stoebuck conceived of their use in a provocative manner:

[T]he purpose of land banking would be to control the development of new suburban communities. The land bank would acquire land by negotiation or, if necessary, by eminent domain, hold the land for some years, and then sell it mostly to private developers, although it would retain some land for public facilities. Key to the system would be conditions attached at the time of sale by contract and restrictive covenants. The land bank would control use of each parcel of land. Such a system of control would have a fundamental advantage over traditional police power regulations, such as zoning. The conditions would operate affirmatively, whereas zoning restrictions are usually negative. Thus, land banking would give more precise control over community development than traditional regulations. In particular, land banking would allow precise timing and placement of land uses to produce a community that would develop efficiently and harmoniously.

The enormous amounts of money necessary for initial land acquisition would most likely have to come from the federal government, although commentators have suggested plans for financing by public bonds. Governmental entities engaged in land banking would also incur substantial costs during the holding period. Because the value of the land would increase during the holding period, profits made upon sale might pay for the program or even result in a net profit. A certain tension would exist between the desire to make a profit, which would promote sale of the land for market-intensive uses, and the ultimate objectives of community planning, which would support sale of the land for less intensive uses. Considering the costs and benefits of land banking to all of society, the question of whether, in strictly economic terms, benefits would exceed costs is unclear. Even if costs exceeded benefits, land banking still provides a service, good community planning, which, like all services, must be bought with a price.

William B. Stoebuck, *Suburban Land Banking*, 1986 U. ILL. L. REV. 581, 605-06 (1986).

In January 1999, the Clinton Administration included a proposal for Better America Bonds in its budget request:

The largest single item of new spending in the Administration growth proposal is a five-year, \$700 million program that will allow state and local governments to issue no-interest "Better America Bonds" to lenders, who would claim a tax credit for the life of the bond, rather than receive interest. The money would be used to preserve parks and open spaces, protect water supplies and develop abandoned industrial sites for commercial use—all vital components to controlled growth.

Mr. Gore said the bonds could leverage as much as \$10 billion in investment around planned growth areas.

Michael Janofsky, *Gore Offers Plan to Control Suburban Sprawl*, N.Y. TIMES, Jan. 12, 1999, at A16. The plan was never implemented by legislation.

cause they are not sanguine about the prospects of securing approval from parsimonious voters. The reality, however, is that a judge who is aware that the citizens in some states and localities (or their elected representatives) have voted to pay to preserve environmentally sensitive lands will be less sympathetic with, and less deferential to, state and local officials who choose the regulatory path to accomplish the same goal.

B. Getting Back into Uniform

American zoning is truly a federalist creature. While local actors pass the controlling ordinance and make the day-to-day decisions regarding rezonings, special use permits, and variances, they do so at the behest of the state legislature, in accordance with the state enabling act.⁸³ Professor Chused recently described the federal piece of this puzzle:

Herbert Hoover, known most widely for escorting the Great Depression into existence, served as Secretary of Commerce under Presidents Harding and Coolidge from 1921 until his accession to the presidency in 1928. Among the first things he did after taking over the department was to create the Division of Building and Housing in the Bureau of Standards and to appoint John M. Gries to run it. Gries helped organize a number of initiatives, all designed to encourage local authorities to alter the ways they dealt with real estate planning, development and construction. The Better Homes Organization, for example, was formed to encourage local initiatives for housing construction.

A panel was established to develop a model building code to reduce domination by "contractors and labor organizations who greatly and unnecessarily increased costs." In July of 1921, Gries, over the signature of his boss Herbert Hoover, began to invite a number of prominent real estate development and planning professionals to form a small "committee to consider the question of zones." The group that emerged was a "who's who" of the real estate development and planning worlds—Edward Bassett, Irving B. Hiatt, John Ihlder, Morris Knowles, Nelson Lewis, J. Horace McFarland, Frederick Law Olmsted, and Lawrence Veiller. The committee devoted itself to gathering information about zoning. They published tens of thousands of copies of a widely read tract called the *Zoning Primer*, and crafted a *Standard Zoning Enabling Act*, a model statute that

83. See, e.g., MANDELKER, *LAND USE LAW*, *supra* note 59, §§ 4.15-4.16.

was quickly used by states all across the country to authorize local government zoning.⁸⁴

This experiment in model legislation was quite successful, setting the pattern for American zoning for several decades and, in the process, lending an air of expertness to local planning and zoning.⁸⁵

Five decades later, the American Law Institute adopted the Model Land Development Code,⁸⁶ the product of a second collection of experts who envisioned a new paradigm that: (1) was much more sensitive than its predecessor to the dangers development posed to the environment and (2) defined a greater role for the states in the planning and zoning process.⁸⁷ It appears now that, despite its popularity with many professionals in law and planning, this model act was premature, given the lukewarm reception it has received in state legislatures.

While the *substance* of the Model Land Development Code may not have caught on with lawmakers, the *process* of drafting a uniform act can yield many benefits at this time. First, there has been an impressive amount of experimentation with state land-use controls and growth management in states such as Florida (inspired by the Model Land Development Code), Oregon, and Washington, to name but a few.⁸⁸ Veterans of battles over legisla-

84. Richard H. Chused, Euclid's *Historical Imagery*, 51 CASE W. RES. L. REV. 597, 598-99 (2001).

85. The most important endorsement of expert involvement can be found in *Euclid*, 272 U.S. at 394. "The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports." *Id.*

86. A MODEL LAND DEVELOPMENT CODE 524 (1976).

87. See Thomas R. McKeon, Comment, *State Regulation of Subdivisions: Defining the Boundary Between State and Local Land Use Jurisdiction in Vermont, Maine, and Florida*, 19 B.C. ENVTL. AFF. L. REV. 385 (1991). McKeon writes:

The Model Code, while maintaining local government as the primary arbiter of local land use issues, also created a role for the states. The drafters of the Code envisioned a state-supervised approval process for any development with the potential to have impacts beyond the particular locality that otherwise would have regulatory responsibility for the development. Exercising power through a state adjudicatory board, the state would review any development within "area[s] of critical state concern" or "development of regional impact" (DRI). To enable a state agency to define a DRI, the Code proposed a set of criteria. State regulation of subdivisions under the Model Code would occur when a subdivision fit the definition of a DRI.

Id. at 409-10.

88. See, e.g., James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L.

tion, implementation, and enforcement from these states can provide invaluable input for the new draft.

Second, the Supreme Court's regulatory takings activism—particularly the Court's skepticism regarding environmental goals, the requirement for "rough proportionality,"⁸⁹ and the shift of burden to the public side—has created a new reality for government regulators.⁹⁰ By participating in a national uniform law effort that yields an effective work product, local and state officials can make headway toward winning back the respect and deference of fair-minded judges.

Third, by including representatives of the building industry, real estate agents, the environmental remediation industry, private property rights advocates, community activists, and elected officials from states with reputations both friendly and not-so-friendly to environmental controls on land use and development, there is a serious opportunity to carve out a new consensus amid the current chaos. The natural hosts for a nationwide effort of this kind would be the two federal agencies with the most experience and expertise in environmental regulation and land-use planning—the EPA and the Department of Housing and Urban Development (HUD).

As an interim measure, until momentum grows for a new uniform law effort, HUD and EPA should enhance their clearinghouse and support functions.⁹¹ Local environmental regulators are in great need of information regarding "best practices" by their counterparts in other jurisdictions. National internships, training sessions, fellowships, and awards programs should be established and, where they exist already, expanded to bring as many state and local actors closer to the information and the skills they need in order to make informed decisions regarding granting permits and exemptions, enforcing laws on the books, enacting new statutes and regulations, and coordinating efforts on the regional and state level. In these ways, the federal government can recapture

REV. 489 (1994). The title refers, of course, to the most influential, seminal study of state and regional land-use planning. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

89. See *Dolan*, 512 U.S. at 391.

90. Another aspect of the "new takings" reality is the growing popularity of state takings statutes. See, e.g., Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187 (1997).

91. See, e.g., EPA SMART GROWTH, *supra* note 58; U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, *WHAT WORKS IN COMMUNITIES*, at <http://www.hud.gov/whatworks/index.cfm> (last updated Apr. 22, 2002).

the key role it played eight decades ago at the infancy of the American zoning and planning movement.

C. Stopping to Think (Locally)

More than thirty years ago, federal environmental law was revolutionized by a seemingly simple statute that appeared to require very little of federal agencies—the National Environmental Policy Act of 1969 (NEPA).⁹² In the hands of activist judges, led by the legendary J. Skelley Wright, NEPA quickly shed its “paper tiger” image.⁹³ By the mid-1970s, NEPA was widely understood to mandate federal agencies to “stop and think”⁹⁴ carefully and expansively about the implications of “major Federal actions significantly affecting the quality of the human environment,”⁹⁵ and, perhaps, to engage in time and resource-consuming studies of those wide-ranging implications.⁹⁶ As a result, the Environmental Impact Statement (EIS) process triggered by NEPA, and by state versions in several jurisdictions,⁹⁷ has become a focal point for active public participation and, at times, lawsuits orchestrated by federal, state, and local non-governmental organizations.

The process of making and enforcing local environmental law could benefit from the adoption of four NEPA elements. First, at the proposal stage for a new environmental regulation device or program, local regulators could do an initial analysis concerning whether the implementation of that device or program would “significantly affect the market value of private property within the jurisdiction.”⁹⁸ While it is hard to imagine any land-use or environmental regulation that does not have some negative effect on property values, the impact of some measures can be quite dramatic. The first stage would identify those “high-impact” devices

92. 42 U.S.C. §§ 4321-4370e (2000).

93. *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (writing for the court, Judge Wright stated, “Congress did not intend the Act to be such a paper tiger.”).

94. See, e.g., ZYGMUNT PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 612 (2d ed. 1998).

95. 42 U.S.C. § 4332(2)(C).

96. See generally WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* §§ 9.1-9.9 (2d ed. 1994).

97. See Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 58 n.364 (1998) (citations to state environmental policy acts (SEPA's)).

98. 42 U.S.C. § 4332(2)(C) (“[M]ajor Federal actions significantly affecting the quality of the human environment. . .”).

or programs that are most likely to raise serious property rights concerns.

Should the answer to the first inquiry be “yes,” local officials would then “consult with and obtain the comments of any federal, local or state agency or governmental unit that has special expertise with respect to the type of proposed regulation.”⁹⁹ In this second, consultative step, local officials would receive the counsel of those who have access to information regarding (1) actual experiences with the operation of the proposed or closely related devices or programs and (2) ways to mitigate the negative impact on property values while maintaining the essential environmental character of the proposed tool.

During the next step, local officials would, in a document made available for public comment, explain the proposed measure and any feedback received during the consultative step, and “objectively evaluate reasonable alternatives to the proposed device or program in a document that is made available for public comment.”¹⁰⁰ Local governments, like all lawmakers, often govern least effectively when they quickly respond to perceived emergencies. Moreover, local land-use regulation has always been associated with suspicions of graft and corruption that, regrettably, are sometimes warranted.

A common concern voiced by judges in modern regulatory takings cases is that one or a few landowners may be unfairly singled out to bear heavy burdens for the benefit of the wider community. Requiring local environmental regulators to report their plans, findings, and evaluations of reasonable alternatives to the public would be an effective step toward reducing the perception and reality of corruption, favoritism, and bias. By inviting public comments, government officials will be able to consider arguments and alternatives offered by private property owners and their advocates, and by interest groups favoring real estate development, in a non-confrontational setting removed from the pressures and expenses of litigation.

The fourth step, before implementation of the device or program, would be the production of a document that responds to the public comments received as a result of the third step. In this fi-

99. *Id.* (“[R]esponsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”).

100. 40 C.F.R. § 1502.14(a) (“Rigorously explore and objectively evaluate all reasonable alternatives.”).

nal stage, local government officials will have the opportunity to make some private parties stakeholders in the final product that emerges from the regulatory process. Should landowners challenge the implemented program or device in court on regulatory takings grounds, the judge might very well look askance at plaintiffs who failed to participate in this "stop and think" process, or who allege that the local government acted hastily or arbitrarily.

VII. In Good Company

State and local environmental regulators are not the only Rodney Dangerfields who cannot get enough respect in the estimation of the current Supreme Court. Even the work product of Congress has been treated skeptically by a majority of Justices who are making a body of new, non-deferential law the likes of which have not been seen since before "the switch in time that saved nine"¹⁰¹ during the New Deal.

In their provocative article concerning the new demands placed on Congress, Professors Buzbee and Schapiro observe: "[s]ince 1995, the Court's review of the predicate for congressional legislation has assumed a less deferential cast. In reviewing challenges to legislation based upon the Commerce Clause and Reconstruction Amendment Enforcement Clauses, the Court has embraced an increasingly rigorous mode of legislative record review."¹⁰² These authors identify this new form of scrutiny as a "new and intensive skeptical review of legislative materials."¹⁰³ Buzbee and Schapiro's assertion that "applying . . . suspicion to the legislative process represents an unjustified and unworkable judicial arrogation of legislative authority"¹⁰⁴ is right on point and, stripped of its federalism context and implications, serves as a useful analogy for the Court's treatment of efforts of state and

101. See Michael Arians, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 623 n.11 (1994) (speculating on the origins of this now-famous phrase).

102. Buzbee & Schapiro, *supra* note 4, at 109. See also *Bd. of Treasurers v. Garrett*, 531 U.S. 356 (2001) (holding that in enacting Title I of the American Disabilities Act, Congress exceeded its power to enforce the Fourteenth Amendment); *Fla. Pre-paid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (1999) (holding Congress did not meet its burden of demonstrating that states were engaging in age discrimination in violation of the Equal Protection Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding Congress exceeded its powers under Section Five of the Fourteenth Amendment in enacting portions of the Religious Freedom Restoration Act); *United States v. Lopez*, 514 U.S. 549 (1995) (holding Congress exceeded its Commerce Clause power in enacting the Gun-Free School Zones Act).

103. Buzbee & Schapiro, *supra* note 4, at 89.

104. *Id.* at 91.

local environmental regulators. Still, the considerable force of their logic unfortunately is unlikely to sway a majority of the Court as it is currently composed.

The challenge facing advocates and practitioners of local environmental law is to shape and pursue an action strategy that will enable progress to continue even in the current, non-deferential judicial milieu. Paying as they go, getting back into uniform and stopping to think (locally) are your humble author's suggestions comprising such a strategy. Let us hope that this symposium will be the first step toward enabling local environmental law to earn the deference it needs in order to survive and thrive for the public good.