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Judith A. Gilbert

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Tenements and Takings: Tenement House Department of New York v. Moeschen as a Counterpoint to Lochner v. New York

Cover Page Footnote

Doctoral candidate, Department of Urban History, Graduate Center of New York; Goleib Fellow, New York University School of Law, 1989-90.

TENEMENTS AND TAKINGS: *TENEMENT HOUSE DEPARTMENT OF NEW YORK V. MOESCHEN* AS A COUNTERPOINT TO *LOCHNER V. NEW YORK*

Judith A. Gilbert*

I. Introduction

The sharp rightward shift in land use law, and particularly in “takings” jurisprudence,¹ in the 1980s prompted anguished responses from advocates of government regulation who characterized the trend as a “return to the good old days of Locke and *Lochner*,”² “the Reagan Revolution’s *Lochnerian* [r]eturn,”³ “a revival of decisions like *Lochner*,”⁴ “origins [in] the set of beliefs associated with the *Lochner*

* Doctoral candidate, Department of Urban History, Graduate Center of New York; Goleib Fellow, New York University School of Law, 1989-90.

1. “Takings” refers to the government’s power to “take” private property for public use — the power of eminent domain — granted through the fifth amendment to the United States Constitution: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. This “takings clause” of the fifth amendment was made applicable to the states by the Supreme Court in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

Takings jurisprudence has proceeded along two lines. When an action is brought against the state asserting that an uncompensated direct physical invasion of private property has taken place, the court generally holds that a *per se* taking has occurred. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A more contested aspect of takings jurisprudence is the second line — “regulatory” takings. A regulatory taking occurs when a government action results in the use restriction or regulation of private property that goes as far as to constitute a constructive taking. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); cf. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987). Since government land use regulations generally do not involve the physical occupation of land, which is necessary to make out a case under a *per se* theory, the claim of regulatory taking has become the preferred theory with which to challenge housing and land use regulations. See *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). See also *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S. Ct. 500 (1989).

2. Huffman, *A Coherent Takings Theory at Last: Comments on Richard Epstein’s Takings: Private Property and the Power of Eminent Domain*, 17 ENVTL. L. 153 (1986) (citing, in disagreement, liberal reaction to R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)).

3. Williams, *Legal Discourse, Social Vision and the Supreme Court’s Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427, 455 (1988) [hereinafter Williams].

4. Osgood, Book Review, 37 JOURNAL OF LEGAL EDUC. 453, 454 (1988) (reviewing R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)) (italics added).

era,"⁵ and "Back to the Future: From *Nollan* to *Lochner*."⁶ Critics were reacting in particular to an ominous alignment in the constitutional heavens: a constellation of United States Supreme Court decisions restricting the ability of state and local governments to regulate the uses of private property,⁷ and a flurry of books giving scholarly underpinnings to "New-Right" constitutional takings theory.⁸ No longer deferring to the presumed validity of police power regulations,⁹ the Court seemed to signal a new era of strict scrutiny of zoning laws and environmental controls and, more troubling to state and local officials, to open the way for landowners to claim compensation, under certain conditions, for "regulatory takings."¹⁰ To many critics,¹¹ it seemed as if the Court were bent on turning the clock back to the days

5. Sunstein, *Two Faces of Liberalism*, 41 U. MIAMI L. REV. 245 (1986).

6. Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627 (1988) [hereinafter Karlin].

7. See, e.g., *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting, in particular); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). But see *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

8. The most influential, and hence most controversial, of these books is Epstein's. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter *TAKINGS*]. It was the subject of a symposium and was widely, and almost universally, negatively reviewed in the law journals. *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986); see, e.g., Merrill, *Rent Seeking and the Compensation Principle*, 80 N.W.U.L. REV. 1561 (1986). Hewing to an extreme "natural rights" position, Epstein argued that "[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state." *TAKINGS*, at 95 (emphasis in original). Epstein followed in the ideological footsteps of Bernard H. Siegan, who, in his book, insisted that economic *laissez-faire* was enshrined in the constitution and urged stricter judicial scrutiny of government regulation of private property. B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980) [hereinafter *SIEGAN*]. And, going even farther than Siegan or Epstein, Ellen Paul argued that regulations that are not "pressing instances of protecting the public health and safety" should be treated as takings that ought to be compensated. E. PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 264 (1987) [hereinafter *PAUL*].

9. For example, in a stinging dissent in *First English*, Justice Stevens warned that "the loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area." 482 U.S. at 341.

10. See generally *supra* note 7. The qualifying word "seemed" is used because commentators have differed in assessing the meaning of the recent "takings" cases. For a guide to an extensive literature of law review articles and comments, see Looper-Friedman, *Constitutional Rights as Property?: The Supreme Court's Solution to the "Takings Issue"*, 15 COLUM. J. ENVTL. L. 31, 32 n.10 (1990) [hereinafter *Looper-Friedman*].

11. See, e.g., Asher, *Solving the Problem by Making It Worse: Land-Use Jurisprudence after Hamilton Bank, Lutheran Church, and California Coastal*, 59 U. COLO. L. REV. 105 (1988); Karlin, *supra* note 6; Williams, *supra* note 3; Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984).

when the judiciary had been a guardian of economic *laissez-faire*. In the words of one commentator, "[a]ll the New-Right judges want . . . is to return to the *Lochner* tradition, perhaps mildly modified."¹²

*Lochner v. New York*¹³ is a decision so famous that it, together with its derivatives *Lochnerism* and *Lochnerian*, has passed into the English language as an epithet, a shorthand reference to a brand of judicial activism more concerned with private property rights than with the public interest. Decided in 1905, it is generally held to symbolize an era of pro-business, anti-regulation decisions stretching from the 1897 case of *Allgeyer v. Louisiana*¹⁴ to the 1937 case of *West Coast Hotel v. Parrish*¹⁵ and the famous footnote 4 in *United States v. Carolene Products Company*¹⁶ of the same year. Even the appearance of revisionist scholarship¹⁷ has not lessened the use of "*Lochnerism*" as "the pejorative of pejoratives."¹⁸ When, for example, Robert A. Williams, Jr. sought to discredit *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*¹⁹ and *Nollan v. California Coastal Commission*,²⁰ he traced their genealogy to *Lochner* and gloomily prophesied the "reemergence of a social vision previously regarded as discredited in the Supreme Court constitutional jurisprudence."²¹

The characterization of the recent shift in land use law as *Lochnerian*, however, is inaccurate, particularly in its implication that the jurisprudential root of state regulation of private property is found in *Lochner*. Despite the infamy of the case, the social vision²² ascendent

For a sampling of comments on *First English* and *Nollan*, see Berger, *The Year of the Taking Issue*, 2 B.Y.U.J. PUB. L. 261, 303-30 (1987).

12. Williams & Ernst, *And Now We Stand on a Darkling Plain*, 13 VT. L. REV. 635, 672 (1989).

13. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating New York's sixty-hour limit on bakery employees' work week. *not* on the ground that it was an invalid exercise of the police power, but on the ground that it was an undue invasion of the right of employers and employees to contract).

14. 165 U.S. 578 (1897).

15. 300 U.S. 379 (1937).

16. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1937).

17. See, e.g., Stephenson, *The Supreme Court and Constitutional Change: Lochner v. New York Revisited*, 21 VILL. L. REV. 217 (1976) [hereinafter Stephenson]; Tarrow, *Lochner Versus New York: A Political Analysis*, 5 LAB. HIST. 277 (1964) [hereinafter Tarrow].

18. Karlin, *supra* note 6.

19. 482 U.S. 304 (1987).

20. 483 U.S. 825 (1987).

21. Williams, *supra* note 3, at 429.

22. In using the term, "social vision," the author borrowed, as did Williams, the concept offered by Joseph Singer: a picture of the social world that gives us "our fundamental images about the relations among individuals and between individuals and the

in 1905 in relation to land use controls was not that of *Lochner*, but of a much less well-known case, *Tenement House Department of New York v. Moeschen*.²³ While *Lochner* concerned the power of the state to regulate private contracts,²⁴ *Moeschen* dealt directly with state regulation of private property under the police power.²⁵ It is *Moeschen* that more accurately illuminates the social climate of 1905 in relation to land use controls.

Moeschen established the constitutionality of New York's Tenement House Act of 1901 (Tenement House Act or Act),²⁶ a piece of regulatory legislation that was, for its time, a bold intrusion into the rights of private property owners. *Moeschen* was recognized in its time as an extraordinarily significant case: "a milestone in litigation,"²⁷ "a decision of much importance,"²⁸ "an important victory for health and sanitation,"²⁹ "a splendid exposition of the law."³⁰ The *Columbia Law Review* followed its progress, along with that of *Lochner*, as both wound through the appeals process.³¹ Legal treatises quickly incorporated *Moeschen* as an example of how far the police power could impinge on property rights without necessitating a compensable exercise of eminent domain.³² The New York Court of Appeals cited it in upholding the 1916 zoning law in *Lincoln Trust Co. v.*

community," and, in doing so, largely determines our commitment to a particular form of social life and establishes the terms of debate over issues involving that life. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 627-28 (1988).

23. 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

24. 198 U.S. 45 (1905).

25. The police power is the general means by which state and local governments regulate land use. One oft-cited definition of the police power is the power of government to regulate conduct to protect or promote "public health, safety, morals, or general welfare." *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926).

26. 1901 N.Y. LAWS 334, amended by 1902 N.Y. LAWS 352, sec. 47. For the history of tenement house legislation, see J. FORD, SLUMS AND HOUSING, WITH SPECIAL REFERENCE TO NEW YORK CITY (1936) [hereinafter FORD]; L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION (1967) [hereinafter FRIEDMAN]; A. JACKSON, A PLACE CALLED HOME: A HISTORY OF LOW-COST HOUSING IN MANHATTAN (1976) [hereinafter JACKSON]; R. LUBOVE, THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1890-1917 (1962) [hereinafter LUBOVE].

27. 3 N.Y.C. TENEMENT HOUSE DEP'T REP. 140 (1906).

28. N.Y. Daily Tribune, June 20, 1903, at 2, col. 2 (reviewing municipal court trial).

29. N.Y. Daily Tribune, November 10, 1903, at 8, col. 3 (editorial on decision of Appellate Division).

30. *Charities*, July 4, 1903, at 1 (reviewing the charge to the trial jury in Manhattan municipal court).

31. Recent Decisions, 4 COLUM. L. REV. 299 (1904); Recent Decisions, 5 COLUM. L. REV. 59 & 471 (1905) (*Lochner* and *Moeschen*); see also Note, *The Police Power and the Fourteenth Amendment to the Constitution*, 5 COLUM. L. REV. 462 (1905) (*Lochner*).

32. See, e.g., 2 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 698 (5th ed. 1911); 1 LEWIS, LAW OF EMINENT DOMAIN § 99 (3d ed. 1909); 3

Williams Building Corp.,³³ and the United States Supreme Court used it as a controlling precedent in upholding emergency rent control in the 1921 case, *Levy Leasing Co. v. Siegel*.³⁴

Yet the case soon slipped into obscurity, surviving today only in the odd footnote. Monographs³⁵ and law review articles³⁶ on regulatory takings make no mention of it, nor do casebooks and treatises dealing with land use law.³⁷ There are a number of reasons for this undeserved obscurity. First, and most obvious, is *Moeschen's* low visibility in the case reports that are the raw material of legal commentators.

E. MCQUILLIN, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 980 (3d ed. 1911); 1 NICHOLS, LAW OF EMINENT DOMAIN §§ 248, 249 (3d ed. 1917).

33. 229 N.Y. 313, 317 (1920); 1916 N.Y. LAWS 497.

34. 258 U.S. 242, 246-47 (1921).

35. See B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) [hereinafter ACKERMAN]; F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973) (the seminal work on the takings question) [hereinafter BOSSELMAN]; J. DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES (1962); PLANNING WITHOUT PRICES: THE TAKING CLAUSE AS IT RELATES TO LAND USE REGULATION WITHOUT COMPENSATION (Siegan ed. 1977) [hereinafter PLANNING WITHOUT PRICES].

36. Out of a vast literature, the leading articles that the author surveyed for a mention of *Moeschen* are: Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine*, 14 B.C.L. REV. 753 (1986) [hereinafter Hippler]; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter Sax I]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter Sax II].

37. No entry for *Moeschen* is found in the following case indices: J. BEUSCHER, CASES AND MATERIALS ON LAND USE (2d ed. 1976) [hereinafter BEUSCHER]; D. CALLIES & R. FREILICH, CASES AND MATERIALS ON LAND USE (1986) [hereinafter CALLIES & FREILICH]; C. HAAR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND (3d ed. 1977) [hereinafter HAAR]; D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW (1971) [hereinafter HAGMAN]; G. LEFCOE, LAND DEVELOPMENT LAW: CASES AND MATERIALS (1966) [hereinafter LEFCOE]; D. MANDELKER, LAND USE LAW (2d ed. 1988) [hereinafter MANDELKER]; P. ROHAN, ZONING AND LAND USE CONTROLS (1978) [hereinafter ROHAN]. Nor, judging from a sampling, does *Moeschen* appear in other legal texts touching on this area of the law. See, e.g., C. ANTIEAU, MUNICIPAL CORPORATION LAW (1989) [hereinafter ANTIEAU]; J. CRIBBET & C. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY (1989) [hereinafter CRIBBET]; R. CUNNINGHAM, W. STOEBUCK AND D. WHITMAN, THE LAW OF PROPERTY (1984) [hereinafter CUNNINGHAM]; F. GRAD, ENVIRONMENTAL LAW (3d ed. 1985) [hereinafter GRAD]; G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985) [hereinafter GUNTHER]; E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS (3d ed. 1987) [hereinafter MCQUILLIN]; W. ROGERS, ENVIRONMENTAL LAW (1986) [hereinafter ROGERS]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) [hereinafter TRIBE]. (Neither author, Antieau nor McQuillin, provide a case index, but *Moeschen* does not appear in the sections dealing with housing and land use controls.) The only mention of the case is found in Williams' and Taylor's book, *American Planning Law* — and there only as a "see also" footnote identifying "commonplace requirements" that can legitimately be placed on property. N. WILLIAMS & J. TAYLOR, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER (1988) [hereinafter WILLIAMS II].

Affirmed without opinion by the Supreme Court, it is *Lochner's* poor relative — drab, sparse, and mute. Nothing about it is calculated to send one rushing to the New York Court of Appeals report to see what it is about.

The second reason follows from the first: legal commentators do not so much research legal history as they “Shepardize”³⁸ it. That is, they follow a thread of legal thought backward from one case to another, typically limiting their evidence to appellate reports. Comparing, contrasting, distinguishing, and reconciling successive opinions, they arrive at a sense of how a certain piece of law developed over time — but in doing so, they necessarily overlook decisions like *Moeschen*. Not only is it inconspicuous in the Supreme Court case reports, but it is seldom cited in the cases from which they are working their way backward.³⁹

A third reason for the case's present-day obscurity is the lack of a direct connection between *Moeschen* and modern land use law — a connection that has been broken by an intervening body of zoning law. Typically, textbooks date modern land use law to the arrival of statutory zoning in 1916⁴⁰ and its validation by the Supreme Court in 1926.⁴¹ “Modern land use regulation began with the first comprehensive zoning ordinance, adopted by New York City in 1916,” declares Mandelker's *Land Use Law*.⁴² In their *Cases and Materials on Land Use*, Callies and Freilich teach that “it was through zoning that land use controls came into their own in the United States.”⁴³ While conceding a “long history” of public controls over land (Mandelker goes all the way back to the Roman Twelve Tables),⁴⁴ authors traditionally treat nuisance law and building and housing codes as background, “predecessors” of the real thing. In general, writers have followed, without questioning, Donald Hagman's dismissal of building and housing codes in his 1971 textbook on land use law: “The subject matter is not generally treated as a land use control because land use

38. Shepard's Citations (M-H).

39. Most cases citing *Moeschen* as a precedent are lower court cases in New York. Altogether, fewer than 20 cases cite the Supreme Court report, and about twice that number the New York Court of Appeals report. Shepard's Citations (M-H).

40. 1916 N.Y. LAWS 497 (Building Zone Ordinance, City of New York).

41. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

42. MANDELKER, *supra* note 37, § 1.01, at 1.

43. CALLIES & FREILICH, *supra* note 37, at 4. See also ROGERS, *supra* note 37, at 186-87 (chief limitations on land use were nuisance law and restrictive covenants until arrival of zoning in twentieth century); ROHAN, *supra* note 37, at iii (beginnings in *Euclid*); WILLIAMS II, *supra* note 37, at 103-06 (division into pre- and post-zoning periods, with land use controls generally held constitutional *pre-zoning*).

44. MANDELKER, *supra* note 37, § 1.01, at 1.

controls deal primarily with land, and with the relationship between buildings and land. Building and housing codes generally deal with matters of construction, that is, with matters inward from the outside skin of a building."⁴⁵

As a result of this sort of reasoning, land use and environmental lawyers have cut themselves off from a large and useful body of takings jurisprudence. They have accepted distinctions that need not have been made. They have set land use and environmental controls off from "traditional areas of exercises of the police power," such as health and safety regulations and construction, building or housing codes, that affect land use, but do not raise the takings issue.⁴⁶ "There is, after all, a very substantial difference between the kind of regulation that tells an owner of real property that he cannot build a tenement that does not provide a water faucet on every floor, and a regulation that limits the development of wetlands . . ."⁴⁷

Moeschen offers some striking parallels between yesterday's tenement house legislation and present-day land use and environmental controls. It demonstrates that what we see today as "traditional" exercises of the police power were, in their day, questions as troubling as today's wetlands regulations or logging moratoriums. And in showing how a "*Lochner*-era" judiciary was brought to validate, unanimately, an egregious interference with marketplace economics, it suggests that the same may be possible regarding land use questions with a "New-Right" judiciary.

To get at the meaning of *Moeschen* and to understand the social vision it illuminates, however, one needs to get behind the printed case report. It is the case itself — the testimony, the arguments of counsel, the appellate briefs — that reveals the hammering out of doctrine. Government reports, newspapers, trade journals, memoirs, and the like further put the case in its social context as the vehicle for resolving the conflicting wishes of property owners, tenants, reformers, and politicians. "[D]octrines do not come from thin air," wrote Lawrence Friedman in 1975.⁴⁸ "Intellectual debate does not make case-law; cases are controversies, and they presuppose conflicts, not to mention people and groups who take steps to set the legal process in

45. HAGMAN, *supra* note 37, at 277. As the first text written specifically for a course in land use law, this hornbook to a great extent established the contours of the field. See Hagman, *The Teaching of Land-Use Controls and Planning Law in American Law Schools*, 1972 LAND-USE CONTROLS ANNUAL 61, 68.

46. GRAD, *supra* note 37, at 10-21.

47. *Id.* at 10-23.

48. L. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 2 (1975) [hereinafter FRIEDMAN II].

motion."⁴⁹

II. *Moeschen* In Context

On April 13, 1903, Katie Moeschen was served with the following order from the City of New York:

You are hereby notified that the tenement house known as No. 332 East 39th Street, of which you are reported as being the owner is maintained in violation of law. You are hereby directed to at once remove this violation in the following manner: Entirely remove from the yard the present school sink including the masonry of the vault, the iron trough, and all other parts, properly disinfect the site, and provide one water closet for every two families, in the said house. . . . Unless you comply forthwith . . . proceedings will be instituted against you according to law.⁵⁰

Originally designed for use in schoolyards, "school sinks" had become a ubiquitous fixture in the rear yards of the city's tenements, with estimates of their number ranging from 8,000 to 9,000.⁵¹ A school sink, as defined by one sanitary engineer, was "simply a masonry privy with a drain connecting [it] with the public sewer."⁵² An iron trough at the bottom of the vault held its contents until an attendant opened a plug and flushed it with a stream of water — ideally, at least once a day.

Mrs. Moeschen and her husband Louis were affronted by the order. They lived on the premises, sharing the school sink with their tenants and keeping it in as spotless a condition as if it had been their own private facility — which, in a sense it was, albeit one shared with 43 tenants.⁵³ Not only did Mrs. Moeschen clean it daily, but Mr. Moeschen, a plumber by trade, maintained it scrupulously, adding little touches of his own design to make it more sanitary.⁵⁴ In their view,

49. *Id.*

50. Trial Record at 8, *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 72 N.E. 231 (1904) (Exhibit A), *aff'd without opinion*, 203 U.S. 583 (1906).

51. Brief of Plaintiff in Error at 28, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

52. *Id.* at 79 (affidavit of Albert Webster). The school sink was an improvement over the traditional privy, whose contents leached into the soil or were periodically hauled away. Unlike the water closet, which was susceptible to freezing, the school sink could be used outdoors because its water connection was below the frost line.

53. There were 19 families, or 48 persons in all at 332 E. 39th Street, including the Moeschens — a family of five according to the 1900 U.S. Census. Trial Record at 26, *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

54. Trial Record at 26, 28, *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

no fault could be found with a properly maintained school sink such as theirs. In fact, there had never even been any complaints from their tenants about its condition.⁵⁵

But for many tenements, those with absentee owners and indifferent janitors, daily maintenance was ignored, creating potentially serious sanitation and health problems.⁵⁶ After trooping through a number of tenement yards, the commission responsible for the Tenement House Act declared the school sinks "among the worst evils" they had encountered:

[T]he majority of them are sewer-connected and provided with an ostensible means of flushing, yet the condition in which they are usually kept is indescribable. They are seldom flushed, as the process is fraught with difficulty, and is most unpleasant. They are distinct nuisances, not only to the tenement house itself but to the neighborhood in which they are located, and pollute the air for a considerable distance. They are, moreover, a serious and potent source of contagion and a means of spreading disease.⁵⁷

Accordingly, the Tenement House Act incorporated a notably tough section abolishing all privies and school sinks, including those in existing tenement houses, and ordering their replacement with one water closet for every two families.⁵⁸

To the Moeschens and a great many other landlords, it was an outrageous requirement. Property owners had installed school sinks because laws passed in the 1880s required it of them; in fact, the school sink at 332 East 39th Street had been put in under order of the Health Department.⁵⁹ How could the City order something and later declare it illegal? How could something that had been *required* up to April 11, 1901, become unlawful the next day?⁶⁰ Where was justice to the law-abiding owner? "If there is a slave in America today, it is the property owner of New York City," declared a disgruntled landlord.⁶¹

55. Affidavit of Josephine Kloster, Papers on Appeal from Order for Mandatory Injunction, Enrollment No. 1904-1851 (1st Dep't Oct. 13, 1903).

56. Webster, *Tenement House Sanitation*, in THE TENEMENT HOUSE PROBLEM 307-09 (R. De Forest & L. Veiller eds. 1903) (two volumes in one) [hereinafter 1 TENEMENT HOUSE PROBLEM or 2 TENEMENT HOUSE PROBLEM].

57. 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at xvii-xviii.

58. 1901 N.Y. LAWS 334, § 100, *as amended by* 1902 N.Y. LAWS 352, sec. 47. Empted were houses in areas lacking sewers.

59. *See* 1882 N.Y. LAWS 410, § 653, *as amended by* 1887 N.Y. LAWS 84.

60. Unlawful, that is, in principle; owners were given until January 1, 1903, to comply.

61. N.Y. Times, Oct. 12, 1901, at 16, col. 3 (comments of William P. Slensby at hearings on proposed amendments to Tenement House Act, 1901 N.Y. LAWS 334).

The Moeschens had a great deal of company in feeling unfairly burdened by the Tenement House Act. There were 82,652 tenement houses in New York City at the time of its passage,⁶² each one perfectly legal on April 11, 1901, but subject to all manner of retroactive restrictions the very next day. Landlords had to provide, at their own expense, not only indoor toilets, but also windows for each room, fire escapes, hall lights, a skylight, and waterproof cellars.⁶³ Outraged, New York City's tenement owners began to organize in opposition to the law, and in the fall of 1901 held a packed, standing-room-only meeting at the Turn Verein Hall. "We real estate men are opposed to a law that positively destroys property," President Henry Markus told the cheering crowd. "It is a law that orders improvement in already existing tenements that are neither based on common sense nor on justice."⁶⁴ The law was, in the words of another speaker, "spoliation and confiscation under the force and guise of law."⁶⁵

The landlords' anger was matched by that of real estate builders and developers, for the new law placed even more stringent restrictions on new construction. New buildings had to provide fire-proof stairs and entry halls, and each room had to have a window of specified size opening to the outdoors.⁶⁶ The building could occupy no more than 70 percent of the lot, courtyards had to be of certain dimensions, and the building's rooms had to have a minimum square footage.⁶⁷ Viewed individually, the requirements were onerous enough, but taken together, they spelled doom to the familiar "dumbbell" tenement.⁶⁸ For all practical purposes, the new law made it im-

62. 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 3. Over half were in Manhattan, with most of the remainder in Brooklyn. A tenement was any residence housing three families or more, but it was generally taken to mean a squalid four-to-six-story building squeezed into a 25-by-100 foot lot and divided into four cramped apartments per floor. Middle-class apartment houses were not regulated by the Tenement House Act until 1912. Tenement House Act, 1901 N.Y. LAWS 334, § 2(1). See J. MCGOLDRICK, S. GRAUBARD, AND R. HOROWITZ, BUILDING REGULATION IN NEW YORK CITY 6-7 (1944) [hereinafter MCGOLDRICK].

63. Tenement House Act, 1901 N.Y. LAWS 334, §§ 29-31, 79-83, 101-102. Interior rooms not opening onto an airshaft had to have a window cut into a room that did have an airshaft. In addition, to prevent overcrowding, landlords were prohibited from renting apartments that provided less than 600 cubic feet of space per tenant, and bedrooms that provided less than 400 cubic feet per adult and 200 cubic feet per child. 1901 N.Y. LAWS 334, § 112.

64. N.Y. Times, Sept. 13, 1901, at 12, col. 2.

65. *Id.*

66. 1901 N.Y. LAWS 334, §§ 18-20, 67-68.

67. 1901 N.Y. LAWS 334, §§ 51, 53-64, 70.

68. Named for the characteristic shape of its floor plan, the "dumbbell" tenement reduced the width of interior rooms by running an air shaft from cellar to roof along their outside walls. Designed to bring light and air to dank interior rooms, it won first prize in

possible to build a tenement house on New York's 25-foot lot. The only feasible way to build "new-law" tenements was to work with a lot 50 feet wide, or, ideally, 100 feet.⁶⁹ The result was a constructive exodus away from the "tenement" class altogether. Builders instead opted for the pricier "French flat" or "garden apartment."⁷⁰

The crowning blow of the Act, however, was that it removed tenement houses as a class from supervision by entrenched offices of city government and handed it over to the severe, reform-minded minions of the new Tenement House Department (Department).⁷¹ Although tenement house builders and owners had been subject to regulation since the first tenement house legislation in 1867,⁷² they had developed a bag of tricks for evading it, aided, in the words of the Tenement House Commission, because "the laws contain[ed] many conflicting sections and many serious inconsistencies, and [were] in their requirements often illogical . . ."⁷³ In particular, the legislation vested so much discretionary power in local officials that, in the words of one report, "it practically means that there are no fixed and determined building laws of the city of New York, but that all buildings may be erected, altered or repaired at the discretion of the head of the building department."⁷⁴

To ensure that this discretion was exercised in their favor, property owners cultivated cozy relationships with city officials, voting the Tammany ticket and contributing loyally to political campaigns. As the piecemeal nature of tenement legislation scattered its enforcement among competing departments of city government — buildings, health, fire, police — owners and builders became adept at playing

an 1879 architectural design contest and, even after its deficiencies became apparent, set the standard for New York tenement house construction. For an assessment of its problems, see 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 7-10, 8 (a sketch of the dumbbell floor plan).

69. Of seven "new-law" designs endorsed by the Tenement House Commission, only one, an incredibly awkward layout of three apartments per floor, used a 25-foot lot. The others, only slightly less awkward, used 50- or 75-foot lots. 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 58-66.

70. R. PLUNZ, A HISTORY OF HOUSING IN NEW YORK CITY: DWELLING TYPE AND SOCIAL CHANGE IN THE AMERICAN METROPOLIS 122-23 (1990) [hereinafter PLUNZ]. The new law accelerated a trend perhaps already underway. Even before passage of the Tenement House Law, the Real Estate Record noted that apartments measuring fifty feet in width were more profitable than those measuring twenty-five feet in width. Real Estate Record, Feb. 24, 1900, at 31.

71. See 1903 N.Y. LAWS 139.

72. 1867 N.Y. LAWS 908. See also 1879 N.Y. LAWS 504; 1887 N.Y. LAWS 84; 1887 N.Y. LAWS 288; 1895 N.Y. LAWS, Ch. 567.

73. 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 11.

74. N.Y.A. Doc. 26, xviii, 21 (1900) (Appendix).

one against another. As a frustrated attorney in the Buildings Department told the commission, "The shifting of official responsibility [has become] quite a science."⁷⁵

The Act made that science obsolete. It codified existing tenement laws, added newer and tougher regulations, and concentrated administration in the Tenement House Department. Worst of all, from the point of view of tenement owners and builders, it left practically no discretion to its administrators, spelling out its rules in language that could admit to only one interpretation.⁷⁶ It was not the severity of the new law that so alarmed property owners; rather, it was the distinct possibility that it might be enforced.⁷⁷

There was, then, a great deal more at stake than one might suppose from even a careful reading of the statute, and there is every sign that both sides — the tenement "interests" and the tenement reformers — realized this. Assertions that might be seen as hyperbole were, in fact, well founded. When the president of the West Side Real Estate Owners Association declared it "impossible" to bring thousands of older tenements into compliance, he was correct; it was, in many instances, cheaper to raze them and build anew — the catch being, however, that one could not economically build a "new-law" tenement on the old 25-foot lot.⁷⁸ The Act had, in effect, outlawed this particular use of metropolitan land, rendering the existing tenements worthless without any recompense to its owners. "If I could rid of any property today, I would not own a brick," moaned one frustrated landlord.⁷⁹

Builders and developers, too, were quick to grasp the implications of the new law, with opposition to its implementation centering in Brooklyn. Anticipating the arrival of the subway, many investors had assembled tracts along Brooklyn's periphery with the expectation that it would be the tenement district of the future.⁸⁰ Now the Tenement House Act dashed those expectations and lessened the value of their

75. 2 TENEMENT HOUSE PROBLEM, *supra* note 56, at 427 (testimony of Eugene Otterbourg).

76. *E.g.*, 1901 N.Y. LAWS 334, § 18 (the treads of stairs should be "of metal, slate or stone, or of hard wood not less than two inches thick"); 1901 N.Y. LAWS 334, § 68 (windows to be "at least one-tenth of the superficial area of the room").

77. The previous laws regarding tenement houses had been poorly enforced. See Testimony of Eugene Otterbourg, Assistant Corporation Counsel assigned to the Department of Buildings, before the Tenement House Commission, Dec. 11, 1900, in 2 TENEMENT HOUSE PROBLEM, *supra* note 56, at 424-35.

78. N.Y. Times, Sept. 13, 1901, at 12, col. 2 (speech of Dr. Gustav Scholer). See also Real Estate Record, Oct. 26, 1901, at 530-31 (estimates of costs of compliance).

79. N.Y. Times, Oct. 12, 1901, at 16, col. 3.

80. Land prices in Manhattan had become so high that there was little profit in building tenements there, but development in the outer boroughs had been stymied until cheap mass transit freed tenement dwellers from the necessity of living within walking distance

investments. The South Brooklyn Board of Trade declared that erection of more tenements in Brooklyn would be "almost absolutely prohibited."⁸¹ The new law would increase construction costs by at least 40 percent, making it no longer feasible to build cheap rental housing.⁸² It was simply impossible, builders argued, to build the "new-law" tenement on a regular-sized, 27-foot lot.⁸³ A New Year's real estate section in the *Brooklyn Daily Eagle* recapitulated this prophecy in gloomy headlines: "Tenement House Law's Effect on Brooklyn: Restrictive Measures That Have Practically Stopped This Class of Construction."⁸⁴

Despite official disclaimers to the contrary, restricting such construction was precisely what proponents of the measure had hoped. In its official report, the Tenement House Commission sought to allay fears: "Tenement house reform would not be practical which went so far as to put a stop to building new tenement houses. Nor would it be practical if it compelled such extensive changes in old tenements that owners would turn them to other uses."⁸⁵

Yet the thrust of the reforms was to discourage the continuation of the "tenement evil" and to encourage more expensive apartment buildings and, ideally, single-family homes.⁸⁶ Another part of the report, *Small Homes for Working Men*, left no doubt what impact the new law was hoped to have on future land use:

Following the development of transportation facilities and the bringing of cheap land areas within time limits, there will be a gradually increasing dispersion of the smaller wage-earning population into the outlying boroughs. *If the tendency to erect tenements in these districts is checked in time*, such a development will create a demand for small houses.⁸⁷

The private utterances of the reformers left no mistake that they

of work. See N.Y. Times, May 8, 1904, at 18, cols. 1-3; see generally N.Y. Times, Mar. 12, 1905, Real Estate Supplement.

81. Brooklyn Daily Eagle, Apr. 7, 1901, at 6, col. 1. "No tenements to rent at \$15 and \$18 monthly could be built under its provisions in Brooklyn," declared the speaker of the South Brooklyn Board of Trade delegation. Brooklyn Daily Eagle, Apr. 10, 1901, at 3, col. 5.

82. Brooklyn Daily Eagle, Apr. 7, 1901, at 6, col. 1. (The "[n]ew tenement act is stoutly opposed.")

83. Brooklyn Daily Eagle, Apr. 10, 1901 at 3, col. 5.

84. Brooklyn Daily Eagle, Jan. 5, 1902, at 1, col. 1.

85. 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 7.

86. The architects' plans that the commission offered as proof that new-law tenements could be "commercially successful" contemplated not traditional tenements, but middle-class apartment buildings. *Id.* at 58-66, 63 (one exception).

87. Cargill, *Small Houses for Working Men*, in 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 331, 353 ("Conclusions") (emphasis added).

harbored wistful dreams of erasing the dreaded tenement from the urban landscape. "I suppose," remarked the architect of the new law, Lawrence Veiller, "that there is hardly one of those who have worked for many years in the congested quarters of our large cities who has not at one time or another desired that the city might be purified by fire, and that whole sections might be thus destroyed."⁸⁸ It was a melodramatic way of calling attention to what he considered the real solution to the housing problem: the dispersal of the teeming multitudes from crowded tenements to single-family homes in the countryside and suburbs.⁸⁹ Other reformers, too, hailed the 1901 law as an end to the traditional tenement. "The double-decker is doomed, and the twenty-five-foot lot has had its day," crowed Jacob Riis.⁹⁰ "We are at last in a fair way to make the slum unprofitable, and that is the only way to make it go."⁹¹

The regulations contained in the Tenement House Act required an enormous expenditure of money — an estimated eight to nine million dollars just for replacing the school sinks. The issue was thus reduced to the most basic question in takings jurisprudence: who pays? The municipal government, already burdened with debt for massive public works projects, was a most reluctant candidate.⁹² To the reformers, the obvious constituency to bear the burden was the group that profited from the tenements. "Reform can only be brought about through the pockets of the landlords," declared Ernest Flagg, architect and consultant to the commission.⁹³ "Naturally, the pocket nerve of these

88. Veiller, *The Housing Problem in American Cities*, 25 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 46, 47 (1905).

89. *Id.* at 265-66. See also Case, *Hidden Social Agendas and Housing Standards: The New York Tenement House Code of 1901*, 8 HOUSING AND SOCIETY 3, 14 (1981) (bias in favor of single-family home).

90. J. RIIS, *THE BATTLE WITH THE SLUM* 85 (1902). "Double decker" was a popular nickname for the tenement. Riis was the journalist who, more than any other writer, aroused public support for housing reform. See J. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* (1890).

91. J. RIIS, *THE BATTLE WITH THE SLUM* 85 (1902).

92. For the financial condition of its turn-of-the-century government, see E. DURAND, *THE FINANCES OF NEW YORK CITY* (1898). The city was burdened with an unaccustomed level of debt to pay for the vast public-works infrastructure recently undertaken — a new Croton water system, sewers, bridges, schools, hospitals, and other urban institutions. The commission did not even consider that, as in England, the city should provide decent housing for the poor. See Dauton, *Cities of Homes and Cities of Tenements: British and American Comparison, 1870-1914*, 14 J. URB. HIST. 283 (1988). "So vast a project could not be seriously contemplated." 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 44.

93. E. Flagg, *The New York Tenement-House Evil and Its Cure*, Scribners Magazine, July 1894, at 117.

owners was painfully hit," Veiller observed.⁹⁴ In his opinion, however, "speculative builders" made such obscene profits they could well afford to bear the expense.⁹⁵

Newspapers further backed the reformers. The *Brooklyn Daily Eagle* speculated that tenement operators did not like the new law because the mandated changes would cut into their profits; not content with 10 or 15 percent return, they wanted 30 percent.⁹⁶ Branding opponents of the law "malcontents," the *New York Times* editorialized "[t]hat the owners of the old rookeries, with their dark, unventilated rooms, would object to spending a few dollars to make their houses fit for human habitation is not surprising."⁹⁷ If one blamed the landlords for the deplorable conditions existing in the tenement houses, then it was an easy next step to hold them financially responsible for remedying the situation.⁹⁸

Tenement landlords and builders objected vehemently to having to bear the cost of the law; the city, they contended, ought to shoulder at least part of the expense. It was "ridiculous," charged tenement developer Charles Bueck, "that the law should force them into philanthropy toward their tenants."⁹⁹

It was at this juncture in the political saga that Katie Moeschen received her order. The tenement owners and builders had the case they wanted: a test case involving conscientious owners who, although merely ordered to comply with the new regulations, were essentially deprived of the use of their property.

III. *Moeschen* In Trial Court

The United Real Estate Owners Association (Association), a coalition of tenement owners, builders; and speculators, began patient preparations for a test case as soon as the Tenement House Act was passed. Its leaders did not want just any case, but one that would lead

94. Veiller, *Reminiscences* 50 (Columbia University Oral History Project 1949) [hereinafter *Reminiscences*].

95. Veiller, *The Speculative Building of Tenement Houses*, in 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 367.

96. Editorial, *Tenement Law is Right*, *Brooklyn Daily Eagle*, Sept. 3, 1901, at 4, col. 3. The *Eagle* gave extensive coverage to the opposition to the law but supported it editorially.

97. *N.Y. Times*, Oct. 20, 1901, at 6, col. 3.

98. Landlords, naturally enough, blamed tenants for slums. See, e.g., *Tenement Reform: The Tenant More in Need of Attention than the House*, *Real Estate Record*, Apr. 28, 1900, at 717, col. 2.

99. *Real Estate Record*, Oct. 5, 1901, at 406. See also *Tenement House Law Violently Attacked*, *N.Y. Times*, Sept. 13, 1901, at 12, col. 2; *Brooklyn Daily Eagle*, Apr. 7, 1901, at 6, col. 1; *Brooklyn Daily Eagle*, Apr. 10, 1901, at 3, col. 5.

the court to endorse their contention that the new law was a "spoliation and confiscation" of property.¹⁰⁰ The coalition needed a case that would turn on an actual taking of property; they had to challenge not just an order that imposed some duty on an owner (such as lighting a hallway), but one that effectively destroyed the owner's use of the property.¹⁰¹ The Association also wanted a litigant who would present New York City's tenement owners in the most favorable light, a defendant who could come before the bar of justice as more victim than villain.¹⁰²

For these purposes, *Moeschen* was ideal. The organization could not have found an action that was more literally a taking; the Tenement House Department's order called for the actual destruction of an owner's property, albeit a modest outbuilding. Nor could it have found a more sympathetic defendant than Katie Moeschen, a thrifty, industrious housewife who, with her plumber husband, had worked hard to achieve the security of a small piece of property. She was precisely the sort of person the United Real Estate Owners Association strove to have associated in the public mind with tenement ownership — one of thousands of ordinary New Yorkers, "many themselves poor, their all invested in this property, struggling to get a little income out of it, on whom this law falls most heavily."¹⁰³

100. A mass meeting of property owners first raised the cry of "spoliation and confiscation" in September 1901. See N.Y. Times, Sept. 13, 1901, at 12, col. 2 (statement of Gustav Scholer, president of West Side Real Estate Owners Association); Brief of Plaintiff in Error at 10, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

101. The United Real Estate Owners had settled on this strategy less than three months after passage of the Act. See Real Estate Record, July 6, 1901, at 2.

102. Anyone who doubted that the right sort of litigant could make a difference had only to look to the two leading tenement cases of that time. In *re Jacobs*, 98 N.Y. 98 (1887); *Health Dep't of the City of N.Y. v. The Rector, Church Wardens and Vestrymen of Trinity Church*, 145 N.Y. 32 (1895). In *Jacobs*, which overturned a law banning the manufacture of cigars in tenements, the city could not make its case stick because the defendant ran a clean, orderly home business that bore no resemblance to the sweatshops the law sought to shut down. Theodore Roosevelt, who had helped secure passage of the Act, blamed the city for accepting such an atypical situation for a test case. The decision, he wrote in 1913, "completely blocked tenement house reform legislation in New York for a score of years and hampers it to this day." T. ROOSEVELT, *THEODORE ROOSEVELT: AN AUTOBIOGRAPHY* 81 (1913).

But in *Rector*, a case that upheld an 1887 law requiring running water in tenements, the city was fortunate in having Trinity Church as a defendant. See 1887 N.Y. LAWS 84, amending 1882 N.Y. LAWS 410, § 663. It was difficult for the wealthiest corporate landowner in New York City to present itself in court as unable to afford running water for its tenants — not that its vestrymen failed to try: "The expense of making such improvements would be great," objected treasurer S.V.R. Cruger, who also testified that the tenants were so ignorant and irresponsible they would only wreck indoor plumbing. N.Y. Times, Dec. 8, 1894, at 3, col. 6.

103. Real Estate Record, Oct. 5, 1901, at 406. That the typical United Real Estate

For the Corporation Counsel of the City of New York, *Moeschen* came as a godsend. Another case it had been litigating for the Tenement House Department since August of 1901 had just died on the vine in the appellate division, dismissed on technical grounds in March of 1903 without reaching any of the city's carefully crafted constitutional arguments.¹⁰⁴ A scant month later, the *Moeschen* affair gave the city an opportunity to get back into court quickly with a case practically guaranteed to turn on the constitutional issues. The fact that it was the property owners' "dream case" gave pause to no one. Veiller, speaking for Tenement House Commissioner Robert W. DeForest, pronounced the department "glad" that the landlords had brought "this kind of case, with all conditions favorable to them."¹⁰⁵ Nor was Corporation Counsel George C. Rives particularly concerned; the stronger the landlords' case, the more thoroughly its defeat by his office would lay to rest the constitutional question.¹⁰⁶

By early May, both sides had agreed to use the case as a test of section 100 of the Tenement House Act (Section 100) and to carry the appeal, if possible, all the way to the United States Supreme Court. The chief counsel for the United Real Estate Owners Association, Adolph Bloch, met with Matthew Fleming, Assistant Corporation Counsel in charge of tenement affairs, to discuss how they would manage the case. Bloch, who had built a practice in property law by helping to organize the Association, was eager at age 30 to litigate his first important appeals case.¹⁰⁷ Recruited from private practice by Rives to head his new tenement house bureau, the 38 year-old Fleming felt himself growing stale sitting at a desk and relished the prospect of a trial.¹⁰⁸

Owner was more apt to be a speculative builder or a well-to-do investor goes without saying.

104. Involving five separate properties sold by builder Seagrism, it was decided as *Signell v. Wallace*, 35 Misc. 656, 72 N.Y.S. 348 (Sup. Ct., Special Term 1901). The court ruled that due to the date of the building permit, the structure — even though built well after passage of the Tenement House Act — did not come under jurisdiction of the Tenement House Department as a "new-law" tenement. For the circumstances giving rise to the case, see *Real Estate Record*, Aug. 24, 1901, at 235; *Real Estate Record*, Aug. 31, 1901, at 262; for the city's disappointment at its dismissal, see *Real Estate Record*, Mar. 21, 1903, at 545, col. 2.

105. Reminiscences, *supra* note 94, at 52.

106. A view made explicit by the assistant in charge of the case, Matthew C. Fleming, in *Real Estate Record*, July 4, 1903, at 4.

107. For a sketch of Bloch's life, see 37 NATIONAL CYCLOPEDIA AMERICAN OF BIOGRAPHY 216. Bloch (1873-1948) went on to serve as attorney for several large chain stores, buying and leasing property across the country. He founded the Tulip Cup Company and made his fortune in 1929 when it merged into the Lily-Tulip Cup Corp.

108. Fleming (1865-1946) would serve in two state posts before the decade was over.

At their first meeting, the two lawyers established an easy rapport and had no trouble reaching an agreement on the conduct of the case. They agreed to stipulate a number of basic facts: that the property complied with all laws in effect before the Act, that the previous owner had installed the school sink under an order of the Board of Health, that it was properly flushed at least daily but would be dangerous to health if not, that there were between 8,000 and 9,000 other school sinks subject to the same order, and that the value of the Moesch property was \$16,500.¹⁰⁹ By agreeing to these facts, they pared the case down to its basic constitutional issue: was the regulation in question a legitimate exercise of the state's police power as delegated to the city, or did it constitute a "taking" of property that could only be done under power of eminent domain?

The first step was to bring the case to trial in Manhattan's Seventh District Municipal Court, which had jurisdiction over the part of the city in which the Moesch property was located. Justice Herman Joseph agreed to clear two days on his June calendar so they could present the case in detail. It was at this point, however, that the case took an unusual twist for the city. One likely explanation is that the Seventh District was a stronghold of Tammany, whose city administration in 1901 had opposed the Tenement House Act in Albany and very nearly defeated it.¹¹⁰ Ousted from power by Low's "Fusion" ticket in the 1902 election, Tammany remained unreconciled to the new law and resented the efforts of "do-gooders" to implement it. Fearing *Moeschen* would become a political hot potato, Judge Joseph, who entertained ambitions for higher judicial office, was placed in an awkward position. If he found in favor of the Tenement House Department, he would face the wrath of his Tammany backers. If, on the other hand, he upheld the property owners, he would be swimming against the rising tide of public sentiment in favor of reform. Joseph hit on a novel expedient as a way of dodging the bullet: he would submit the question of whether the law was constitutional to a jury.¹¹¹

He then went on to found Osborn, Fleming and Whittlesey and become general counsel of such major corporations as Phelps Dodge and St. Joseph Lead Co. N.Y. Times, Feb. 20, 1946, at 25, col. 6 (details from obituary).

109. For an account of the conference between Bloch and Fleming, see Real Estate Record, June 20, 1903, at 1223. The stipulations are summarized in Brief of Plaintiff in Error at 11, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93) ("Admissions of Record").

110. For the maneuverings of both sides in the contest in the legislature, see LUBOVE, *supra* note 26, at 125-26; Reminiscence, *supra* note 94, at 21-26.

111. Although speculative, this is the most likely explanation of Joseph's most unusual

Fleming was flabbergasted. He had intended that the case be decided solely as a question of law and, having stipulated to the facts, had not even expected a jury trial. It was, he protested to the *Real Estate Record*, "the first time in the history of litigation that a judge had ever submitted to a jury of six property holders the question of the reasonableness of this police statute of the State."¹¹² Considering that the law was now going to be decided by a Tammany jury of property-owners, he foresaw his case going up in smoke. There was considerable consternation in the Tenement House Department; the judge's action was, at the very least, "an extraordinary procedure."¹¹³ But, in the end, Fleming decided to proceed with the trial and, if worse came to worst, use the charge to the jury as grounds for appeal.¹¹⁴

It was, then, a most unusual trial that got underway on June 19, 1903, when a jury of six members was sworn in and began hearing *Tenement House Department v. Moeschén*. After Fleming's *pro forma* motion for a directed verdict was denied, Bloch entered the defendant's answers to the complaint brought against her. Although he offered seven answers in all, the heart of the defense was that the regulation under which Moeschén was being prosecuted violated both section 6, article I of the New York Constitution, and section 1 of the fourteenth amendment of the United States Constitution, which applied the fifth amendment to the states.¹¹⁵ Bloch declared the regulation violated both the guarantee of due process and the prohibition against taking property without compensation. The regulation, he charged, sought "to deprive this defendant of her property without due process of law and without making due and adequate compensation therefor, and . . . direct[ed] the taking of private property not for public use" ¹¹⁶ It constituted "a confiscation and spoliation of

action, differing somewhat from Veiller's gossipy account. *Reminiscences*, *supra* note 94, at 54 (Veiller additionally assumes Joseph was fearful of being reversed).

112. *Real Estate Record*, July 4, 1903, at 3.

113. *Reminiscences*, *supra* note 94, at 54.

114. See *Trial Record* at 170-72, *Tenement House Dep't v. Moeschén*, 179 N.Y. 325, 72 N.E. 231 (Fleming's objection), *aff'd without opinion*, 203 U.S. 583 (1906).

115. Among these answers was the claim that the Act, framed as one applying to all cities of the first class — i.e., New York City and Buffalo — was in fact a special city law applying to New York City and passed illegally without its approval. It was, in addition, *ex post facto* in its application to existing properties; it denied equal protection by applying only to tenement houses and only to cities of the first class; and (a somewhat specious objection) it applied to tenement *houses* and not to something in their yards. See *Trial Record* at 10-11, *Tenement House Dep't v. Moeschén*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

116. *Trial Record* at 11, *Tenement House Dep't v. Moeschén*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

this defendant's property" by imposing on it conditions the owner could not reasonably comply with.¹¹⁷

When the case moved into the presentation of evidence, it took another curious turn. Because he continued to maintain that no evidence should be admitted in a case that was solely a question of law, Fleming had to contrive to introduce his without ceding the point. He did so by attempting to have the evidence of his case presented only as rebuttal to evidence presented, over his objection, by the defendant.¹¹⁸ In a sense, he reversed the usual roles of plaintiff and defendant. He introduced the only evidence he contended was admissible — a diagram of a typical school sink — and formally rested his case.¹¹⁹ He had, of course, an extensive case prepared, but from that point on he presented it in the guise of reluctant rebuttal to "inadmissible" defendant's evidence. The drawback to this strategy, aside from sheer awkwardness, was that it ceded initiative to the defendant's attorney, who took advantage of it.

Bloch began by calling as his first witness the defendant's husband, plumber Louis Moeschen. According to Moeschen,¹²⁰ the house had been built in 1871, and shortly before they bought it in 1893 the owner had been compelled by the Board of Health to remove an old-fashioned privy vault and replace it with the school sink now in the yard. Because the property, now valued at \$16,500, had mortgages against it of \$13,000, the improvements ordered by the city would substantially wipe out the Moeschen family's equity — without good reason. This particular school sink, as described in proud detail by Louis Moeschen, was a model sanitary appliance. He had added features of his own design, including deflectors and perforated cleansing pipes, that rendered it completely odorless and inoffensive. In addition, his wife took meticulous care of its cleanliness and completely flushed it of its contents at least once a day. A school sink *might* be dangerous to health if not properly tended, he conceded, but certainly not this one. Or, as Bloch summed it up, "[o]ur point is the Legislature cannot take our property away simply because it may become

117. *Id.*

118. Brief of Defendant in Error at 5, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

119. Trial Record at 20a-20b, *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

120. Louis Moeschen testified as owner, although title was in his wife's name. Trial Record at 26, *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

that way."¹²¹

Bloch buttressed Moeschén's testimony with that of several experts, who testified to the exemplary sanitary condition of the Moeschén's school sink and the difficulty, if not impossibility, of replacing it with anything superior. Plumber John Mitchell pointed out that water closets could not be put into the yard without freezing.¹²² They would have to go indoors, but how? George Christian, a builder who had put up over three thousand tenements, testified he could find no way of fitting water closets into the Moeschén house without losing the use and, needless to say, the rental of some of its rooms.¹²³ Bloch introduced a floor plan of the property as it was¹²⁴ and then offered four architects' drawings that attempted to add the required two bathrooms to each floor.¹²⁵ There was clearly no satisfactory way to do so. The property was a typical "railroad" tenement, its floor plan a narrow rectangle into which was squeezed two side-by-side apartments each having one room fronting on the street, and two other apartments similarly overlooking the rear. It lacked even the dubious amenity of later "dumbbell" tenements, an airshaft that gave interior rooms a breath of stale air and a faint glimmer of light. It was a design that left no satisfactory way to add two water closets per floor; they either interfered with existing windows, required the sacrifice of a room, or vented directly into living space.

Given no workable alternative, keeping the school sinks in the yard seemed to make sense, not only architecturally but medically. Dr. Henry Freeman, a physician with an extensive practice in the tenement district, declared, "I think the farther away a water closet from a tenement house is the better it is for the inhabitants."¹²⁶ The average tenement dweller was too careless about "personal cleanliness"¹²⁷ to be trusted with indoor toilets.¹²⁸ Dr. Frederick H. Dillingham, a former Board of Health inspector, provided testimony that was particularly damaging to the city. He had personally inspected the Moeschén school sink and found it not only clean and sanitary but

121. *Id.* at 29, 26-32 (Moeschen's testimony), 22a-22b (diagram and photograph of the Moeschén school sink).

122. *Id.* at 33.

123. *Id.* at 61-70.

124. *See id.* at 20c (Defendant's Exhibits A and B).

125. *See id.* at 22c-22e, 42a (Defendant's Exhibits F, G, H, and I).

126. *Id.* at 166.

127. An echo of *Rector*. 145 N.Y. 32, 39 N.E. 833 (1895). *See supra* note 101; *see also* Trial Record at 166, *Tenement House Dep't v. Moeschén*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

128. Trial Record at 165-66, *Tenement House Dep't v. Moeschén*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

preferable to any other system.¹²⁹ Adding water closets inside would only reduce overall light and ventilation and make the tenants more susceptible to disease. Changing from outdoor school sinks to indoor toilets would, strictly from a health standpoint, be counterproductive. "I think you are going to lose more than you gain," he concluded. "That school sink in the yard under the present conditions is better than having the closets [indoors]."¹³⁰

Fleming, however, was able to partially reverse the damage caused by Dillingham when, on cross-examination, he forced the doctor to confess he had seen in his inspections many school sinks which were in deplorable condition. They were not, Dillingham was eventually brought to admit, as a class better than indoor water closets. "My reputation is worth too much to go on record that way," he said, retracting any impression he may have left in favor of school sinks. He had been talking only about "this house and the conditions that exist there."¹³¹

It was a crucial distinction for Fleming, who sought to base his case on the hazards to public health of school sinks in general, no matter how clean a rare exception such as this one might be. To this end, he presented his own experts in rebuttal. Fleming called as his first witness Albert Webster, a civil engineer who lectured on sanitary science at Cornell Medical College. Webster painted a horrendous picture of the health hazards to the city of thousands of school sinks coated with fecal matter, ventilating contaminated air to nearby houses, and susceptible of "back-siphoning" their liquid contents into pipes supplying drinking water. "And we know," emphasized Webster, "that fecal matter is the carrier of infection."¹³²

While the jurors were mulling that over, Fleming called Charles B. Ball, a civil engineer and buildings inspector. Ball had examined at random over 500 school sinks in New York City and had concluded that it would be "a decided advantage to the health of the city" if they were replaced forthwith with water closets.¹³³ Fleming used him to make the main point he wanted to bring out. "Do you consider the presence of school sinks, as they exist today in New York City, a menace to the public health?" he asked. "I do," Ball said firmly.¹³⁴ The impact of his testimony was lessened, however, when on cross-

129. *Id.* at 37-39.

130. *Id.* at 42, 37-42.

131. *Id.* at 53, 50-55.

132. *Id.* at 85, 79-92.

133. *Id.* at 107.

134. *Id.*

examination he admitted he also inspected around 200 tenements that had indoor water closets and had frequently found them obstructed and unsanitary. Bloch thus scored an important point: while there was practically no way that a school sink could become obstructed, keeping individual water closets in working order took a vigilance beyond that of most landlords.¹³⁵

But Fleming recovered the momentum of his argument by calling Tenement House Department photographer Virgil Randall. The success of the reform movement owed much to the graphic pictures taken by photojournalists, and Fleming intended to make the same sort of use in court.¹³⁶ He had discovered Randall's unique oeuvre by happenstance while nosing around the Tenement House Department for information he could use in *Moeschen*. Randall, who was often left waiting around outside when he went on rounds with inspectors, whiled away the time snapping whatever caught his eye — which, he volunteered to Fleming, was quite often school sinks. Randall figured he had observed around 1,000 to 1,200 school sinks from tenement rooftops and at least 300 close-up; thumbing through his files, he estimated he had 200 or so photographs of them.¹³⁷

Randall also had, if one can judge from his testimony, nearly total recall of their circumstances. Fleming, who had culled from his trove eighteen pictures for use as evidence, directed Randall's attention to two of them. Plaintiff's Exhibits 10 and 11 were close-up and long-range views showing a school sink behind a typical tenement house, in a narrow yard flanked by two neighboring buildings with open windows. The doors to the four compartments of the school sink were ajar, and a number of large wooden vats sat open to the air nearby.¹³⁸

Q [Fleming]: You have seen the photograph of the school sink at 342 East 11th Street. What did you see in the window near the school sink at 342 East 11th Street?

A [Randall]: There is a macaroni factory and an ice cream factory about twenty feet away from the school sink. I saw an ice cream factory; the ice cream was packed within two or three feet of the school sink; the macaroni was hanging within four or five feet of it, and it was a warm day and there were flies going from the school sink to the macaroni.

135. *Id.* at 115.

136. For the influence of this "critical asset to reform purposes," see P. HALES, *SILVER CITIES: THE PHOTOGRAPHY OF URBANIZATION, 1839-1915*, at 250, 163-276 (1984).

137. Trial Record at 130, 135, *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

138. *Id.* at 130a, 130b.

Q: Is that an extraordinary condition at all or are there a great many of these?

[Defendant objected and the objection was overruled.]

A: Not at all extraordinary.¹³⁹

Randall went on to reminisce about how he had seen “a great many” other pasta factories, dairies, bakeries, sweatshops, and the like in close proximity to school sinks. He recalled 146 Attorney Street,¹⁴⁰ in whose yard 22 pupils from the yeshiva next door took recess and played hide-and-seek in compartments of the school sink, and 59-61 East Houston Street,¹⁴¹ where the school sink was at the bottom of an enclosed 10-by-14-foot air shaft onto which 36 kitchen and bedroom windows opened.¹⁴² Pictures of each premises were passed among the jury as his testimony continued. The cumulative effect of eighteen photographs and Randall’s recollection of each was devastating, all the more so when he explained that they had been taken of “ordinary” school sinks, entirely at random. Bloch subjected him to a withering cross-examination, but failed to shake the imperturbable photographer; if anything, the interrogation reinforced the impression that the pictures were representative of school sinks in general.

Q [Bloch]: You mean to say that you found the conditions portrayed in these different photographs received and marked in evidence, to be those that prevail uniformly, or on the average, in all the places you photographed?

A [Randall]: [I]t is an average; many were much worse and many are better; it is about the average.¹⁴³

It was all downhill from there. Fleming called other witnesses and Bloch cross-examined them, but nothing could match the impact of Randall’s damning photographs. Fleming sensed that the evidence of his case had carried the day even as he asked, at the end of the trial, for a directed verdict on grounds that none should have been admitted.¹⁴⁴

The closing motions of both counsel were predictable. Bloch reiterated the constitutional points offered earlier; his evidence had shown that the regulation was an unreasonable exaction that took the defendant’s property without promoting the public health. The regula-

139. *Id.* at 134.

140. *Id.* at 132f, 132g (Plaintiff’s Exhibits 13 and 14).

141. *Id.* at 134d (Plaintiff’s Exhibit 18).

142. *Id.* at 134-35.

143. *Id.* at 137.

144. *Id.* at 170-71.

tion required a compliance that was impossible and would involve an unreasonable outlay of money in even attempting. The expense involved was not warranted by any measure — the value of the property, the value of the defendant's equity in it, or the nature of the work required. The police power had already been adequately exercised when the Board of Health ordered the school sink installed; the state could not now order it destroyed "without the making of due, proper or adequate compensation to the defendant."¹⁴⁵

In his closing motions, in addition to denying the propriety of admitting evidence, Fleming argued heatedly against submitting a question of law to the jury. "[E]ven admitting that evidence is admissible (which I do not admit)," he declared, "the question of the constitutionality of the Act has got to be decided by the Judge and not by the jury."¹⁴⁶ But Judge Herman denied his motion, and the two got into a tangled exchange. The constitutional question, as Herman saw it, turned on the reasonableness of this law as an exercise of the police power, and the jury, not he, was the proper party to determine this. "[T]he interests are vast," he explained "and I do not feel that sitting here in a local Court I, in the first instance, with a jury empanelled, should determine a law unconstitutional."¹⁴⁷ Nonplussed, Fleming protested: "There is no question here except the constitutionality of the act and its reasonableness, and a question of that kind cannot be submitted to the judgment of six men." "I will submit it as a question of fact to the six men," Herman replied. "I am going to submit the question to the jury irrespective of the law."¹⁴⁸

As it turned out, however, it should have been the defendant's counsel who objected to submitting the question of law to the jury. The judge's charge to the jury cut Bloch's case off at the knees. The only question members had to consider, Herman said, was whether the regulation calling for removal of the school sink was reasonable and necessary.¹⁴⁹ Under the police power, the legislature had the authority to pass laws preserving the public health, and if this law were enacted within that power and accomplished that end, it should be upheld. An owner had no unlimited right over his property but had to use it subject to regulation for the benefit of all. "There has been some talk here of the Government or the legislature taking away the property of its citizens," Herman lectured the jury. "That brings me

145. *Id.* at 175, 173-75.

146. *Id.* at 171.

147. *Id.* at 172.

148. *Id.*

149. *Id.* at 176.

to the subject of Eminent Domain. That is entirely different from the power under which the law under discussion was enacted."¹⁵⁰ There was a vast difference (which Herman did not quite make clear) between "the right of the Government under its police power to deprive an owner of his property" and the same right under eminent domain. Eminent domain related to the power of the government to take property and appropriate it to public use by paying compensation to the owner; the police power, on the other hand, was the power to make "wholesome and reasonable" laws for the good of society. "In other words," said Herman, "we are not at all concerned with the right of Eminent Domain, and it does not in any way concern this case."¹⁵¹

Having disposed of Bloch's takings argument, Herman moved on to the question of the reasonableness of a statute under the police power: "A law passed, gentlemen, as this law has been passed by the legislature, is presumed as a matter of law to be reasonable."¹⁵² They were not to decide reasonableness as applied to a specific case but "from the entire surroundings." They should consider "tuberculosis, dysentery, typhoid, [and] diphtheria," he said. "You should determine it from that standpoint, for if the legislature acting reasonably, acting for the benefit of the masses, was right in making the law, that ends all further discussion."¹⁵³

And so it did. With Randall's photographs burned into their memories and the judge's charge ringing in their ears, the jurors took little time in returning judgment for the plaintiff.¹⁵⁴ It was an important victory for the city. Ordinarily, it would not have mattered greatly which side won the trial phase, which was essentially a springboard to propel the legal question into the appellate courts where it would be properly decided. Both sides had made a satisfactory record for appeal and would go on to argue substantive questions of law in their appellate briefs. Yet the city's cause had been given an undeniable boost by the results in the trial court. It was both an important psychological victory — the city had taken on its opponent's best, and won — and a moral one as well. As a jubilant Fleming told the *Real Estate Record*, "I think . . . that having taken this, probably the cleanest sink that could be found in New York, in good condition in a large yard, and a style of sink that once upon a time had been ordered by the Board of Health, and having obtained the verdict of the jury,

150. *Id.* at 177.

151. *Id.* at 177-78.

152. *Id.* at 178.

153. *Id.* at 179.

154. *Id.* at 183.

that in their opinion the law requiring the removal of such a structure is reasonable, makes our position morally and legally very much stronger."¹⁵⁵

Although Fleming continued to maintain that the question of law should not have gone to the jury at all, the fact that it did gave the decision such impact. It was (although the term had not been invented yet) an important indication of what the social vision¹⁵⁶ of the time was with regard to the delicate balance between the state's valid exercise of its police power and an owner's rights in private property. The legislature had passed, over the objection at the time of New York City, a controversial piece of legislation that imposed on property owners alone the cost of social improvement. The strongest case that these property owners could find had now been heard by a jury of their peers, six property owners drawn from a ward that was a stronghold of the city administration that had opposed the legislation. The jury had been charged with the novel responsibility of deciding not just the facts but the reasonableness of the law itself. That this particular jury had declared the law constitutional spoke of a social vision much less in thrall to the sanctity of private property than one might expect of the "Lochner-era."

Their decision, in fact, both reflected and reinforced a sea of change already taking place in public opinion about the Tenement House Act.¹⁵⁷ Realty interests were finding that the law, in operation, was not nearly as bad as their fears about it had been. Owners who grumbled at being forced to spend money on improvements discovered they could get higher rents.¹⁵⁸ Larger builders were learning that higher standards paid off in better profits; smaller builders, shaken out of the industry, were written off as victims of progress.¹⁵⁹ The influential *Real Estate Record* had gradually come around to grudging acceptance of tenement reform — the new law "paid"¹⁶⁰ — and it reported the *Moeschen* decision with remarkable equanimity.¹⁶¹ Rather than waxing indignant over the verdict, it took the occasion to inform its readers that their rights carried with them responsibilities

155. *Real Estate Record*, July 4, 1903, at 4.

156. *See supra* note 22 and accompanying text.

157. *See, e.g., The Tenement Law is Right*, *Brooklyn Daily Eagle*, Sept. 3, 1901, at 4, col. 3; *Brooklyn Daily Eagle*, Feb. 21, 1902, at 4, col. 3 (citing "the privilege of possession"); *Achieving the Impossible*, *N.Y. Tribune*, Oct. 30, 1903, at 10, col. 3.

158. *Real Estate Record*, Mar. 7, 1903, at 430.

159. *Real Estate Record*, Feb. 14, 1903, at 290.

160. *Id.* It had proved, said the *Journal*, "a sane, moderate, workable reform."

161. *Real Estate Record*, July 4, 1903, at 3-4.

to society, commending to them part of Judge Herman's charge to the jury:

A citizen has not absolute right over his property, but holds his right subject to control and regulation for the benefit of the masses. The rights of property, like all other ordinary rights, are subject to such reasonable limits of their enjoyment as will prevent them from being injurious, and to such reasonable restraint and regulation as are established by law.¹⁶²

In addition to the *Real Estate Record*, the decision was reported with general approbation by the general press. The *New York Times*, the *New York Tribune*, the *World*, the *Brooklyn Daily Eagle*, and the *Standard-Union* all carried approving editorials on the jury's decision.¹⁶³ The *World* called it "the most important issue now in the courts to thousands of city residents,"¹⁶⁴ and the *New York Times* declared that with the decision the city had "taken another long step toward civilization."¹⁶⁵ There is a sense, in reading these, that they fit the temper of the time; they did not exhort so much as they described, with matter-of-fact approval, what had happened in municipal court. *Charities*, the organ of the reform movement, caught the tenor of the prevailing public mood by entitling its report on the trial, "The Reasonableness of Common Decency."¹⁶⁶ It is a phrase descriptive of the social vision implicit in the jury's decision: the simple decency of one human to another was measure enough to find the Tenement House Act reasonable and constitutional.

IV. *Moeschen* On Appeal

Moeschen was an expedition into what a contemporary observer termed "the 'dark continent' of our jurisprudence" — that imprecisely defined province of government known as the police power.¹⁶⁷ While most judges and lawyers recognized its general features, few could locate with any assurance its exact boundaries. This quality was practically inherent in the nature of the power itself. "This power is, and must be from its very nature, incapable of any very exact definition," declared the Supreme Court in the 1873 *Slaughterhouse*

162. *Id.* at 4 (paraphrasing T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 573 (2d ed. 1871)).

163. *Charities*, July 4, 1903, at 2, col. 1.

164. *Charities*, July 4, 1903, at 2, col. 2.

165. *Id.*

166. *Id.* at 1, col. 1.

167. J. BURGESS, 2 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 136 (1896).

cases.¹⁶⁸ Blackstone had defined “the public police” so generally — “the due regulation and domestic order of the kingdom”¹⁶⁹ — as to make it practically synonymous with domestic governance itself, and American law of the nineteenth century had by and large adopted this sense of the term.¹⁷⁰

The working American definition of the police power was that given by Massachusetts Chief Justice Lemuel Shaw in 1851: “the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances . . . not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.”¹⁷¹ It was a definition that made the police power tantamount to the power to govern — but at a time when government itself had a limited role. Accordingly, this definition did not admit of much scope to the police power. It was not until government ventured out of its accustomed sphere to cope with the social and economic problems of the late 1800s and early 1900s that the police power began to reach into controversial areas.¹⁷²

The reach of the police power extended, according to another popular definition, to “the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.”¹⁷³ The question in a changing society was, how far did this protection reach? And what happened when the protection of health conflicted with protection of property? How did one balance a threat to the public health against an interference with the sanctity of private property? Could property owners be forced to bear the financial burden of social reform, or did imposing the cost on them amount to a taking of property that required compensation?

The appeal of *Moeschen* dramatized a wider struggle taking place between two camps holding competing visions of the proper role of government and of the police power: one urging stringent limitations on its exercise, and the other pressing instead for a wider scope of action. The briefs of counsel in this case are expositions that distill the most cogent arguments of these two schools of thought regarding takings and the police power. Although it is an oversimplification to

168. 83 U.S. (16 Wall.) 36, 62 (1872).

169. 4 W. BLACKSTONE COMMENTARIES *162.

170. See *infra* note 171 and accompanying text.

171. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851).

172. See B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: PART II, THE RIGHTS OF PROPERTY §§ 272-73, 37-44 (1965) [hereinafter SCHWARTZ].

173. *Thorpe v. Rutland & B.R. Co.*, 27 Vt. 140, 149 (1854).

assert, as did Simeon Baldwin, that the development of the law is "the adoption by the judge of what is proposed at the bar,"¹⁷⁴ in *Moeschen* that is very nearly the case. The judicial opinions do not so much state the law as they pull it from the briefs of counsel, and it is for that reason that these briefs are worth examining at some length.

Before doing so, however, it should be noted that there were some changes and additions among counsel. Bloch added his law partner, William L. Mathot, on the brief, and brought Louis Marshall, who had recently won an important takings case,¹⁷⁵ to help in the Court of Appeals argument. As for the city, Fleming left office when the Rives administration ended in December of 1904.¹⁷⁶ By that time, however, the case had already been assumed by the senior assistant in charge of appeals, Theodore Connoly, who personally wrote the brief and argued the case before the New York Court of Appeals and the United States Supreme Court.¹⁷⁷

A. The Briefs of Counsel: Plaintiff¹⁷⁸

"The single question which we are to determine," declared the appellate division, "is whether that portion of the [t]enement [h]ouse [a]ct . . . which requires that for present school sinks in tenements there shall be substituted another and different system of sewerage, is or is not constitutional."¹⁷⁹ The court was adamant in professing a lack of interest in the facts of the case, insisting these had been settled in trial court.¹⁸⁰ But, as the briefs of counsel make plain, the facts of the case were inseparable from the constitutional question. Whether

174. B. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT* op. 1 (1942) (quoting Simeon Baldwin).

175. *People ex rel. McPike v. Van De Carr*, 178 N.Y. 425, 74 N.E. 965 (1904).

176. *N.Y. Times*, Dec. 10, 1903, at 2, col. 5. Fleming was one of several assistants who announced their return to private practice after Democrat George B. McClellan won the mayoralty and announced plans to replace Corporation Counsel George Rives with John J. Delany.

177. For the work of the appeals division of the Corporation Counsel's office, see *NEW YORK CITY LAW DEPARTMENT, 1902 ANNUAL REPORT* xvii; *1906 ANNUAL REPORT* xliii. By the early 1900s, the division routinely handled over 200 appeals yearly, with its head taking personal charge of the more important ones. From this poorly paid municipal post Connoly, in blissful anonymity, argued and won more appellate cases than any other lawyer of his day. See *Memorial of Theodore Connolly*, in *THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MEMORIALS* 193 (1914).

178. The text is that of the brief used in the U.S. Supreme Court, in which the case is titled *Moeschen v. Tenement House Dep't*; thus, "plaintiff" in the briefs refers to Moeschen (Plaintiff in Error) and "defendant" to the Tenement House Department (Defendant in Error).

179. 89 A.D. 526, 529, 85 N.Y.S. 704, 706 (1st Dep't 1904).

180. See 41 Misc. 446, 450, 85 N.Y.S. 19, 21 (N.Y. Sup. Ct. 1903); see also *Moeschen*, 89 A.D. at 528-29, 85 N.Y.S. at 705-06.

Section 100 was constitutional or not depended on which facts one chose as relevant, and which facts were relevant depended in turn on one's understanding of the law.

In the plaintiff's brief, Bloch laid the ground carefully for the constitutional arguments he intended to make. He began by restating the facts of the case, emphasizing the points scored in the record on Moeschén's side. The Board of Health itself had ordered the Moeschén school sink installed.¹⁸¹ "Experts of the highest standing," — Drs. Dillingham, Vedder, Tracy, and Roberts — considered it "the best system . . . far preferable to water closets in the house."¹⁸² The "highest Board of Health officials," including one called as a witness by the city itself,¹⁸³ had endorsed the merits of school sinks for the tenement class.¹⁸⁴ The only four methods of complying with the order were not only prohibitively expensive but unworkable and, in fact, far more unsanitary than the school sinks themselves.¹⁸⁵ With a school sink the owner could be held accountable for proper sanitation, whereas with water closets sanitary facilities would move indoors and out of sight. Control would shift from the owner or his janitor to the tenants themselves, "probably fifty or more, and wholly irresponsible," with consequences that could easily be imagined: "in the house . . . ten miniature school sinks."¹⁸⁶

And for what reason would control shift? Here, fact began to shade almost imperceptibly into law. Bloch argued that the objections to school sinks concerned matters that could be "very easily remedied,"¹⁸⁷ either by minor repairs or by proper maintenance.¹⁸⁸ There was no need for Section 100 of the Tenement House Act, for the Department had ample power under Section 1341-b of the 1897 Greater New York Charter (Section 1341-b) to regulate school sinks.¹⁸⁹ This provision of the charter specified that if "in the opinion

181. Brief of Plaintiff in Error at 13, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

182. See Trial Record at 154-56, *Tenement House Dep't v. Moeschén*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

183. That official was Charles F. Roberts. See Trial Record at 154-56, *Tenement House Dep't v. Moeschén*, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

184. Brief of Plaintiff in Error at 15, 17-19, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

185. *Id.* at 16-21.

186. *Id.* at 22 (emphasis in the original).

187. *Id.* at 20.

188. *Id.*

189. *Id.* at 6-8. Section 1176 of the 1897 Greater New York Charter gave the Board of Health certain powers to remedy health hazards in tenements. 1897 N.Y. LAWS 419. Sections 1340 and 1341-b of the amended 1901 Greater New York Charter transferred

of the department" anything in or about about a tenement, including its plumbing and sewerage, was dangerous to health, the department should declare the thing a public nuisance and order it "purified, cleansed, disinfected, removed, altered, repaired or improved."¹⁹⁰ No words in the Tenement House Act had repealed this provision, and the legislature had even clarified it with an amendment passed in 1903.¹⁹¹

Bloch was not simply pointing to a seeming contradiction in the law between Section 1341-b and Section 100 of the Tenement House Act.¹⁹² His point, instead, was that Section 1341-b was a legitimate exercise of the police power in a way that Section 100 was not: it was explicitly linked to the suppression of public nuisances. In specifying that the item complained of be declared a nuisance, it was "declaratory of the common law."¹⁹³ Section 100, on the other hand, by failing to require the same, was not.

By insisting on a nuisance justification for an exercise of the police power, Bloch grounded his case in a late nineteenth-century view of the police power that took a dim view of direct government action. As epitomized in the writings of Christopher Tiedeman, this view held that "the police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil-law maxim, *sic utere tuo, ut alienum non laedas* ("Use your own property in such manner as not to injure that of another")."¹⁹⁴ The police power was limited to enforcing this traditional maxim of nuisance law, and did not extend to authorizing direct government action. It made the state not a player but a referee, unable to initiate action of its own accord, but charged with enforcing the rules of fair play on those in the game. This negative view of the police power did not so much empower the government as restrain it.¹⁹⁵ The Tenement House Department could intervene and compel owners to clean up school sinks that had become noxious to others,

these powers to the newly created Tenement House Department. 1901 N.Y. LAWS 564, as amended by 1903 N.Y. LAWS 139.

190. Section 1341-b, Greater New York Charter.

191. 1903 N.Y. LAWS 179, § 56.

192. One might well argue (although Connolly did not bother to do so) that Section 100 was passed because school sinks required special attention beyond that addressed to plumbing in general by Section 1341-b. See 1903 N.Y. LAWS 139, § 100.

193. Brief of Plaintiff in Error at 7, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

194. C. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 4 (1886).

195. See SCHWARTZ, *supra* note 172.

but it could not order their wholesale destruction and replacement regardless of condition, on some untested theory that another system might be better. To do so would, Bloch warned darkly, "*make the citizen the plaything of the sovereign, subject him to its whims and EN-ABLE IT TO EXPERIMENT WITH ALL NEW FANGLED FADS, IDEAS, SCHEMES OR DREAMS AT HIS EXPENSE.*"¹⁹⁶

If Section 100 was not a proper exercise of the police power because it was ungrounded in nuisance law, then what was it? In Bloch's view, it only could be a taking of property that could be accomplished only under the power of eminent domain. "The school sink on the plaintiff's premises which she is directed to remove . . . is property, which the defendant is seeking to 'take' without compensation to her for the loss suffered and injury done by such removal and incidental destruction," he argued. "For that reason the [A]ct upon which the defendant proceeds offends the Federal Constitution."¹⁹⁷

The school sink was indisputably property within the meaning of the Due Process Clause, and the Tenement House Act in question sought to destroy not only this one piece of property but approximately 9,000 just like it, an overall government taking of nearly \$1,600,000.¹⁹⁸ "We are not now dealing with *regulation* of the use of property, but with the *prohibition* of its use and its *compulsory destruction*," declared Bloch. "We are not considering the power of the legislature to deal with nuisances, by due process of law, or by the abatement of structures which by reason of the nature of their use, have become public nuisances."¹⁹⁹ Instead, the law was ordering the destruction of property on speculation that it *might*, by misuse, imperil the public health, and it was putting the burden of loss on the owner alone.²⁰⁰

"The exercise of such authority under the conditions stated is not predicated upon the police power, but on that of eminent domain," Bloch argued, citing in support John Lewis' *Treatise on Eminent Do-*

196. Brief of Plaintiff in Error at 59, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93) (emphasis in the original).

197. *Id.* at 27. Bloch noted that the fifth and fourteenth amendments are "to the effect" that private property shall not be taken for public use without just compensation. *Id.* at 28. The fourteenth amendment does not have a takings clause as such, but by the time of *Moeschen* it was settled law that its due process clause applied the fifth amendment takings prohibition to the states. *See supra* note 1.

198. Brief of Plaintiff in Error at 28, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

199. *Id.* at 35-36.

200. *Id.* at 36.

*main.*²⁰¹ The treatise conceded that an owner had to submit to legislative restraints on property uses that harmed the public; such was "a regulation, and not a taking," an exercise of the police power and not of eminent domain. But, the treatise went on:

the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.²⁰²

Bloch reeled off a long line of cases showing the courts applying this principle to ill-advised excursions beyond the police power. After the Illinois legislature had granted a charter to a cemetery and later passed a law making further burials on adjacent land impossible, the state supreme court held that it could not do so without compensation. A cemetery "is very far from being a nuisance *per se*."²⁰³ And, closer to home, when New York City sought to shut down a \$500,000 garbage rendering plant in Jamaica Bay, the state supreme court held it could not do so without compensating the owner — again, on grounds its operation had not been shown a nuisance.²⁰⁴ Legislation that went beyond ending a noxious use without just compensation had a dubious constitutional basis. When, for instance, Louisiana claimed authority under the police power to abrogate a company's chartered right to supply water to New Orleans, the federal circuit court held (in words that seemed particularly apropos to *Moeschen*) that

when, in the exercise of the police power, private property, or private or vested rights must be taken for public use . . . looking to the amelioration and benefit of the public health, manners, or morals,

201. 1 LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES (2d ed. 1888).

202. *Id.* at § 6, at 15, *quoted in* Brief of Plaintiff in Error at 36-37, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

203. *Lake View v. Rose Hill Cemetery Company*, 70 Ill. 191, 196 (1873), *cited in* Brief of Plaintiff in Error at 38, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93). The *Moeschen* defense could have countered, although it did not, with a New York case more on point: *Brick Presbyterian Church v. Mayor*, 5 Cow. 538 (1826), holding that, in the interest of public health, the city could forbid further burials on property it had once granted to the church for exclusive use as a cemetery.

204. *New York Sanitary Utilization Co. v. Dep't of Pub. Health*, 32 Misc. 577, 67 N.Y.S. 324 (N.Y. Sup. Ct. 1900), *cited in* Brief of Plaintiff in Error at 35, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93). Bloch did not mention that even while holding the law a violation of due process. The court noted, "[o]f course it cannot be claimed that such destruction of the property of the plaintiff is a *taking* of property within the meaning of the constitution." 32 Misc. at 582, 67 N.Y.S. at 328 (emphasis added), *cited in* Brief of Plaintiff in Error at 35, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

such private property or private rights of property must be entitled to the protection given by the constitution of the United States declaring, 'nor shall private property be taken for public use without just compensation,' . . .²⁰⁵

Bloch was concerned that the court's ruling be one that would apply broadly to all tenement owners represented by the United Real Estate Owners Association, not just to the admittedly exceptional Moeschens. Thus he did not simply relate the razing of the Moeschens' school sink to the 1871 *Pumpelly* doctrine that destruction or "irreparable injury" of a property could constitute a taking even though the owner retained legal title.²⁰⁶ Bloch went on, instead, to argue a more general type of taking as well, one that would apply to all tenement owners. In forcing alterations that imposed heavy financial burdens on Moeschens and that rendered her property less profitable, Section 100 was, in Bloch's words, "an unreasonable, improper and unfair exaction, and is in fact and effect a confiscation and spoliation of the defendant's [sic] property."²⁰⁷ Bloch cited several cases in support of this contention, beginning with the 1856 *Wynehamer v. People*,²⁰⁸ in which the New York Court of Appeals held that a state liquor prohibition law unconstitutionally deprived a saloon keeper of his property whether the state physically "took" it or not. Justice Comstock declared, "[w]hen a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation. . . ."²⁰⁹ Although the force of *Wynehamer* had been considerably weakened by a later and opposite United States Supreme Court holding in *Mugler v. Kansas*,²¹⁰ it was still a useful precedent for the doctrine that exercises of the police power do not override constitu-

205. *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.*, 14 F. 194 (C.C.E.D. La. 1882), *aff'd*, 120 U.S. 64 (1887), *cited in* Brief of Plaintiff in Error at 40-41, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

206. 80 U.S. (13 Wall.) 166, 178 (1871), *cited in* Brief of Plaintiff in Error at 47, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93). *Pumpelly* was the origin of what would subsequently be called the "physical invasion test" of a taking; in this case the "taking" was a flooding of the owner's land by a dam authorized by the state. 80 U.S. (13 Wall.) at 180, *cited in* Brief of Plaintiff in Error at 47, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

207. 80 U.S. (13 Wall.) at 179-80, *cited in* Brief of Plaintiff in Error at 47, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

208. 13 N.Y. 378 (1856), *cited in* Brief of Plaintiff at Error at 30, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

209. 13 N.Y. at 398, *cited in* Brief of Plaintiff in Error at 30, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

210. 123 U.S. 623 (1887) (Kansas prohibition law held to be a valid exercise of the police power).

tional guarantees of property rights. As recently as 1904, the New York Court of Appeals had cited *Wynehamer* in the case of *People ex rel. McPike v. Van De Carr*,²¹¹ voiding a part of a state law making illegal any commercial use of the American or New York flags. The court held that inasmuch as it applied to articles already manufactured at the time of its passage, the law "destroy[ed] existing property rights" and thus violated the due process and takings clauses of the New York State Constitution.²¹²

The applicability of *McPike* to already existing tenement houses and their school sinks seemed obvious to Bloch, but he found even more at point the 1885 tenement house case, *Matter of Jacobs*.²¹³ It was a case with striking similarities to *Moeschen*. Finding tenement families living in squalid home sweatshops, the legislature, as a health measure, had forbidden home cigarmaking. The law was challenged by a test case brought by a plaintiff who was to cigarmaking what Katie Moeschen was to household sanitation. In an opinion buttressed by reference to *Wynehamer*, the Court of Appeals saw no relation between the cigarmaking ban and the health of tenement residents, and issued a stinging warning that the legislature could not violate the Constitution under some vague notion it was acting within the police power:

Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health.²¹⁴

But how were the courts to know a legitimate exercise of the police power when they saw one? Bloch saw it as a fairly simple task. The ends toward which the police power could be exercised were few in number: "the preservation of the public health, morals and safety."²¹⁵

211. 178 N.Y. 425, 70 N.E. 965 (1904).

212. *Id.* at 428, 70 N.E. at 966, cited in Brief of Plaintiff in Error at 28, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

213. 98 N.Y. 98 (1885), cited in Brief of Plaintiff in Error at 78-79, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

214. 98 N.Y. at 110, quoted in Brief of Plaintiff in Error at 78-79, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

215. Brief of Plaintiff in Error at 72, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93). Bloch chose the ends employed in *Lawton v. Steele*, 152 U.S. 133, 136 (1893), in preference to an increasingly accepted version that added the words "public interests." The Supreme Court adopted the expanded formula in *Manigault v.*

The court should first determine whether the act in question had been passed to further one of these goals, and in doing so should look beyond the face of the law to its substance. As Justice Harlan had cautioned in *Mugler v. Kansas*, a police power statute must have a "real or substantial relation" to its objects, not simply purport to have one.²¹⁶ The courts must scrutinize not just the purpose of the act but the means by which it intended to accomplish its ends. In the words of Rufus Peckham (now, fortuitously, sitting on the Supreme Court on *Moeschen*), there must be "some fair, just and reasonable connection" between the act and its ends.²¹⁷

In short, the means by which the act was carried out had to be connected to its ends, and these ends had to be related to the public health, morals or safety. The classic test of a police power statute, which Bloch commended to the court, was that of *Lawton v. Steele*: "first, that the interest of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of this purpose, and not unduly oppressive upon individuals."²¹⁸

Using these criteria, the inordinate amount of attention Bloch had given to establishing the facts of *Moeschen* begins to make sense. One could lay the facts of the case alongside the requirements of *Lawton* and argue that Section 100 did not fit the measure of a legitimate police power enactment. Although the Act had the avowed end of protecting the public health, Bloch claimed that the "expressed desire" of its author, the Tenement House Commission, was "to persuade the tenement house [sic] dweller to abandon his home and remove to the suburbs."²¹⁹ It was a speculative argument that Bloch did not pursue far, sensing it would be more fruitful to attack the Act itself rather than its murkier motives. He argued that even conceding an aim of protecting the public health, Section 100 lacked both the substance and the means to accomplish that object. It was wrong in substance because the record showed that indoor toilets did not offer any superior protection to the public health.²²⁰ "[E]xperience has

Springs, 199 U.S. 473, 481 (1905). For a discussion of the expansion of the formula, see SCHWARTZ, *supra* note 172, at 31-32.

216. 123 U.S. at 661.

217. *People v. Gillson*, 109 N.Y. 389, 403 (1888), quoted in Brief of Plaintiff in Error at 78-79, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

218. 152 U.S. 133, 137 (1894), cited in Brief of Plaintiff in Error at 75, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

219. *Id.* at 87 (emphasis in original).

220. Brief of Plaintiff in Error at 84-85, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

shown that there is no article which more readily gets out of order than this same 'self-flushing', 'automatic' water closet," Bloch asserted.²²¹ Incapable of being supervised, indoor toilets speedily became filthy and stopped up, venting noxious odors into living space and overflowing into the halls. Considering the control they offered over the sanitary practices of the poor, school sinks were far preferable.²²² The experts he had called had all testified to their superiority over water closets in tenement houses, and the Tenement House Department's own experts had not tried to deny that squeezing indoor toilets into the Moeschen tenement would impair the residents' health, hygiene, and morality: "*The reason is obvious — THE OBJECTIONS ARE UNANSWERABLE.*"²²³

Bloch suggested that the Tenement House Act addressed the wrong cause — the facility rather than its user. "In the case at bar the whole case turns on this aspect," he argued, "not on the inherently unsanitary nature of school sinks but on the proposition that they are less sanitary than water closets, while THE EVIDENCE SHOWS THAT THE WHOLE MATTER DEPENDS UPON THE PERSONAL CLEANLINESS OF THE ONE USING THE STRUCTURE."²²⁴ He found it "*a strange coincidence*" that the commission that had recommended the Tenement House Act had reported that the spread of disease was due largely to the personal habits of the dwellers and not to the buildings.²²⁵ "[W]hile one may lead a horse to water one cannot make it drink," he stated piously. Cleanliness was "largely a matter of education, and, like all other things, the subject of evolution." Once tenement dwellers improved their physical and financial well-being, they would begin to appreciate cleanliness, and the school sink would disappear of itself.²²⁶

Bloch pointed out that the proper exercise of the police power had never been held to go beyond "protecting" the public health to "promoting" it. And certainly neither this court nor any other was ready, he declared, to lay down "the communistic proposition" that the legislature might "at the expense of certain of the citizens" improve the

221. *Id.*

222. *Id.* at 17-18.

223. *Id.* at 19.

224. *Id.* at 88 (emphasis added).

225. At least this is the interpretation Bloch placed on its finding that death rates varied by the type of population (Jewish or Italian) rather than by the condition of the building. See 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 54-55, cited in Brief of Plaintiff in Error at 80-81, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93) (emphasis in original).

226. Brief of Plaintiff in Error at 85, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

health of others.²²⁷ There was little doubt in Bloch's mind that Section 100 would, in the sense of the *Lawton* criteria, be "unduly oppressive" to individuals. It would place an unconscionable burden (\$7 million to \$27 million) on tenement owners; families would lose their life's savings, and "widows and orphans" left penniless.²²⁸ In this particular case, the equity the Moeschens had in their property would be wiped out. And all, Bloch lamented, because "a number of theorists and faddists" had persuaded the legislature to launch an ill-advised social experiment that would harm much more than it would help.²²⁹

If the Tenement House Act were validated, where would such experimentation end? What might the crackpots seize on next? Almost anything could become the target of a government ban: "[a] sewing machine might be said to have a debilitating effect upon those using it. A cooking range might cause conflagrations. A piano, it might be argued has nerve-consuming properties; the use of an elevator a tendency to interfere with the development of the flexor and extensor muscles."²³⁰ And lest these seem too far-fetched, Bloch could point to a contemporary case in point: the "bake shop case," *Lochner v. People*²³¹ — as an example of government intervention carried to "an absurd length."²³²

"REASONABLENESS IS THE CORNER-STONE OF THE LAW, WHICH, IF IT IS TO ENDURE, MUST BE FOUNDED UPON THE DICTATES OF RIGHT, REASON, NATURAL JUSTICE AND COMMON SENSE," proclaimed Bloch in grandiloquent capitals.²³³ The reasonableness of the exercise of the police power against Katie Moeschens's school sink had to be measured against past regulations of tenement houses. The courts had in the main applied rigid standards in weighing the reasonableness of tenement legislation. As the court in *Jacobs* exclaimed, "[i]t cannot be perceived how the cigar maker is to be improved in his health or his morals by forcing him from his home and its hallowed associations . . . to ply his trade elsewhere What possible relation can cigar

227. *Id.* at 89.

228. *Id.* at 82.

229. *Id.*

230. *Id.* at 32.

231. 198 U.S. 45 (1905).

232. Brief of Plaintiff in Error at 32, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93). An intervention, Bloch did not have to point out, that had been struck down by the same court hearing *Moeschen*.

233. *Id.* at 73.

making in any building have to the health of the general public?"²³⁴ In *Fire Department v. Gilmour*, the court had taken an equally skeptical view of the fire department's arbitrary order that a tenement owner stop storing wooden boxes in his back yard.²³⁵ And in *Health Department v. Dassori*,²³⁶ the court had decided, in reviewing an order for the removal of certain rear tenements, that it was the tenants themselves and not the structures that ought to be condemned.²³⁷

The leading tenement case, *Health Department v. Rector of Trinity Church*,²³⁸ was a landmark case upholding the right of the state to regulate tenement houses. Bloch not only distinguished it from *Moeschen* but contrived to pull from it points in support of his arguments. As Bloch read it, "all that was involved in the case was whether it was reasonable to require the owner to expend one hundred (\$100) dollars so as to furnish a supply of water to his tenants on each floor."²³⁹ The court in *Rector* had emphasized that the case did not, as in *Moeschen*, test an assumed right to destroy noxious property without compensation.²⁴⁰ The law in question had merely imposed an "addition or improvement" to an owner's property, and at modest cost. It did not, as Section 100 did, involve the destruction of lawful property or an expense approaching that required of the Moeschens. Even so, Bloch pointed out, the court had been divided and had felt compelled to issue an elaborate opinion justifying its decision.²⁴¹

In fact, *Rector* could be read as a caution against the kind of legislation enacted in the Tenement House Act.²⁴² The opinion, like that written by Justice Peckham in *People v. Gillson*,²⁴³ went to considerable pains to describe the limits of the police power, as if to demon-

234. 98 N.Y. 98, 113 (1895).

235. 149 N.Y. 453, 44 N.E. 177 (1896), cited in Brief of Defendant in Error at 55-56, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93). Bloch did not mention that the decision specified it would not have been unreasonable had the legislature enacted a general regulation forbidding such storage.

236. 159 N.Y. 245, 54 N.E. 13 (1899).

237. *Id.* at 250, 54 N.E. at 14.

238. 145 N.Y. 32, 39 N.E. 833 (1895).

239. Brief of Plaintiff in Error at 92, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

240. *Id.* at 47.

241. *Id.* at 52.

242. Inexplicably, Bloch did not cite Justice Peckham's answer to "learned counsel's" question of where tenement house legislation was to stop. "Is there to be a bath room and water closet to each room and every closet to be a model of the very latest improvement? To which I should answer, certainly not. That would be so clearly unreasonable that no court in my belief could be found which would uphold such legislation, and it seems to me equally clear that no legislature could be found that would enact it." 145 N.Y. at 50, 39 N.E. at 839.

243. *People v. Gillson*, 109 N.Y. 389, 17 N.E. 343 (1888).

strate that in this case the court had not ventured beyond them.²⁴⁴ And Justice Peckham made it very plain that the legislature did not have the right, even under the police power, to achieve social benefits by imposing substantial costs on property owners. The legislature could require certain improvements to be made in existing houses at the owner's expense so that the public health and safety could be guarded. But the cost must be reasonable, both in relation to what the Act hoped to accomplish and in relation to the financial burden on the owner.

If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges.²⁴⁵

"Can there be any doubt in the light of that opinion," Bloch asked rhetorically, "what the decision of the Court would have been if the expenditure had been nineteen to thirty times that amount, and had actually presented the grave question there intimated as to the destruction of property without compensation?"²⁴⁶

Bloch concluded by summing up his main points. The school sink was not a nuisance needing abatement; it was lawful property at the time Section 100 was passed, and its destruction would therefore violate constitutional guarantees of property.²⁴⁷ He alluded to two lesser points he had made as well: limited to tenement houses in cities of the first class (New York City and Buffalo), the Tenement House Act was class legislation and therefore void, and Section 100 was additionally invalid as an *ex post facto* law.²⁴⁸ But his main point was that the law, as an attempted exercise of the police power, had failed the test of reasonableness. The burden imposed upon the property owner was unreasonable, both in relation to the value of the property and to the owner's equity. He ended by reminding the court, once again, of the relevance of the facts of the case:

The facts presented in the record show that there is no necessity for

244. 145 N.Y. at 39-42, 39 N.E. at 835-36.

245. *Id.* at 41-42, 39 N.E. at 836, cited in Brief of Plaintiff in Error at 93, *Moeschen v. Tenement Housing Dep't*, 203 U.S. 583 (1906) (No. 93).

246. Brief of Plaintiff in Error at 92-93, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

247. *Id.* at 99.

248. *Id.* at 99-100. Bloch had argued these points at 56-70.

the change; that even the most serious objections against school sinks are not inherent but solely the result of defective or faulty construction, which can be repaired at a very slight expense, and [by] power to compel which is now vested in the city authorities.²⁴⁹

B. Briefs of Counsel: Defendant

Connoly's brief for the Tenement House Department presented the case in an entirely different light. His vision was that of an expanded police power in keeping with the expanding role of government in the new century. At a time when government was struggling against a flood of social and economic problems, Connoly argued that it was increasingly anachronistic to expect that the police power should be confined to a narrow stream of public nuisance law. Connoly came from the law department of a great city, where urban problems had been pressing against the limits of the police power since the early gunpowder²⁵⁰ and cemetery²⁵¹ cases. The expansion of the police power in late nineteenth century America owed less to Midwestern grangers and prohibitionists than to the mayors, aldermen, and department heads of its cities. Hampered by charters that had not foreseen this level of difficulties, the bureaucrats and politicians seized on delegations of the state's police power to justify all manner of intervention into the lives of the citizenry.²⁵² By the time of *Moeschen*, the term "police power" in municipal law had become a catch-all legal justification for doing a great many things. John W. Burgess' memorable characterization of the power — "the convenient repository of everything for which our juristic classification can find no other place"²⁵³ — aptly describes its treatment in the standard text of municipal law, John F. Dillon's *Law of Municipal Corporations*:

Many of the powers most generally exercised by municipalities are derived from what is known as the *police power* of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like. . . . Laws and ordinances relating to the comfort, health, convenience, good order, and gen-

249. *Id.* at 100 (the "power to compel" being Section 1341-b of the Charter).

250. *See* *Mayor of New York v. Ordrenan*, 12 Johns. 122 (1815).

251. *See* *Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (1826); *Coates v. Mayor*, 7 Cow. 585 (1827).

252. *See* Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 858-66 (1973) (discussion of "Urbanization and the Rise of the Police Power").

253. J. BURGESS, *supra* note 167, at 136.

eral welfare of the inhabitants, are comprehensively styled, "Police Laws or Regulations."²⁵⁴

It was a vision of the police power whose motto was not *sic utere tuo* . . . , but *salus populi suprema est lex*: "The welfare of the people is the supreme law."²⁵⁵

In 1894, William Prentice, former counsel to the New York City Health Department, published a treatise in which he traced the origins of the police power to society's inherent right of self-defense,²⁵⁶ and also styled the "law of overruling necessity,"²⁵⁷ under which society had the right to take whatever measures were necessary to prevent the spread of fire, the ravages of pestilence, and other calamities.²⁵⁸ A narrow reading of this "law" confined it to instances of immediate emergency (demolishing buildings in the path of conflagration, for instance),²⁵⁹ but in the view of Prentice it logically extended to any genuine threat to "the welfare of the people," including the chronic health hazard implicit in crowded and unsanitary housing. Since 1867, the constitutionality of the city's power to regulate tenements had been so consistently upheld in the courts that it would seem the law "must be now well understood and settled, and that the only difficulties are in the administration."²⁶⁰ Given the origin of tenement legislation in a theory of law that justified the blowing up of buildings in the path of fire, razing a tenement owner's outdoor toilet did not seem unduly unreasonable.²⁶¹

As a lawyer for a city that habitually justified its actions in terms of a broad police power, Connolly saw *Moeschen* in quite different terms than did Bloch, and presented a case that in many ways was the mirror opposite of Bloch's. The facts that Bloch argued so passionately,

254. 1 J. DILLON, *LAW OF MUNICIPAL CORPORATIONS* § 93, at 209-10 (2d ed. 1873) (emphasis in original). Only in distinguishing it from eminent domain does Dillon characterize police power as the power "to restrain a private injurious use of property." *Id.* at 210.

255. *Id.* at 210. See BLACK'S LAW DICTIONARY 1340 (6th ed. 1990).

256. W. PRENTICE, *POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY* 4 (1894) (citing 4 W. BLACKSTONE COMMENTARIES *30, *161) [hereinafter PRENTICE].

257. *Id.* at 444-45 (credited to Potter's Dwarris).

258. See generally R. MOTT, *DUE PROCESS OF LAW* 344-49 & nn.42-47 (1926) [hereinafter MOTT].

259. *Russell v. Mayor of New York*, 2 Denio 461, 473-74 (1845); see also MOTT, *supra* note 258, at 345 n.43; 2 J. KENT, *COMMENTARIES ON AMERICAN LAW* 338-39 (4th ed. 1840).

260. PRENTICE, *supra* note 256, at 260. *In re Jacobs* apparently came under the "one or two" exceptions mentioned in passing, as contrary to the general thrust of a half dozen other cases he cited as typical.

261. *Russell v. Mayor of New York*, 2 Denio 461 (1845).

Connoly saw as irrelevant. The courts had to judge the law not against the Moeschen school sink but against school sinks in general. Fleming had correctly objected that the trial judge should not admit evidence, except to show the nature of school sinks as a type; but once he did and the jury returned a verdict against the owner, their finding of the facts became conclusive and binding, and the appeals courts could not consider them further.²⁶² The pertinent facts, those "of which the Court must take judicial cognizance,"²⁶³ were those that related to school sinks in general, and these Connoly proceeded to offer in abundance. This evidence was, in fact, crucial to his case. Otherwise, how could the court determine the reasonableness of the law?

Predictably, Connoly reprised the evidence presented by Fleming in municipal court, emphasizing, as did Bloch, the points scored by his side. Dr. Lee had pronounced the city's school sinks "detrimental," sanitary engineer Dewar had found them "dangerous to health," and Dr. Roberts had branded them "very injurious."²⁶⁴ All agreed water closets were far preferable from the standpoint of sanitation. Civil engineers Ball and Webster had enumerated several irremediable deficiencies inherent in the design of school sinks,²⁶⁵ "irrespective of the condition in which any particular one may happen to be kept."²⁶⁶ Both swore that school sinks greatly increased the risk of disease and should be promptly replaced in the interest of public health.²⁶⁷ As to disease itself, Dr. Dillingham had testified as an expert that typhoid, cholera, dysentery, and tuberculosis could all be transmitted by school sinks in unsanitary condition.²⁶⁸

What *was* the condition of New York City's school sinks? Was it that of Katie Moeschen's sparkling facility, or something quite different? Connoly appealed to the judges' common sense: "This case is a

262. Brief of Defendant in Error at 17-19, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93) (citing, among other cases, *Minneapolis & St. Louis R.R. Co. v. Minnesota*, 193 U.S. 53, 64 (1904); *Dower v. Richards*, 151 U.S. 658 (1894)). In addition, the unanimous affirmance by the Appellate Division prevented a review of the facts by the Court of Appeals. N.Y. CONST., art. VI, sec. 9.

263. Brief of Defendant in Error at 22, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93) (quoting *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888)).

264. Trial Record at 138-39, 152-54, 154-56, *Tenement House Dep't v. Moeschen*, 179 N.Y. 325, 72 N.E. 231 (1904) (Lee, Dewar, Roberts), *aff'd without opinion*, 203 U.S. 583 (1906).

265. *Id.* at 93-138 (Ball), 79-92 (Webster).

266. Brief for Defendant in Error at 14, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

267. *Id.* at 14-15.

268. Brief of Defendant in Error at 16, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

test case and it need not be said that the property owners have probably taken the best case which they had."²⁶⁹ To be sure, the other side had brought in witnesses praising the Moeschen school sink as a model of sanitary excellence, but the city's witnesses had countered with horror tales about other, more numerous school sinks, bringing the stench of their foulness into the courtroom. Unlike much of *Moeschen* — a case, groused Connoly, in which "each and every point . . . is controverted, alleged by one side and denied by the other" — this clash of testimony could not be considered a draw.²⁷⁰ It was the many against the one, the typical against the extraordinary. And there was, in addition, one important piece of uncontroverted testimony. Connoly made Virgil Randall's stark photographs a part of his brief. It was, to borrow a phrase coined by Norman Williams, "stomach jurisprudence"²⁷¹ with a vengeance. There, before the judges' eyes, the four doors of the school sink stand ajar; mere steps away, on the right, are a half-dozen open wooden tubs, a smear of ice cream visible on one in the foreground; on the left, racks of macaroni hang drying in open windows.²⁷² And in their ears (for Connoly had introduced copious extracts of his testimony), buzzed Randall's words: "[I]t was a warm day and there were flies going from the school sink to the macaroni."²⁷³ The hide-and-seek games of the Yeshiva boys at 146 Attorney Street, the girls in the sweatshop windows next to 107 Forsyth Street, the children sleeping on the fire escapes at 59-61 Houston Street — all were images calculated to stir postprandial unease in nine good gray men.

One could not come away from the evidence of the city's case without a queasy feeling that school sinks were indeed bad for the health. And the law quite clearly said that the state had not just a right but a duty to protect the health of its people. Connoly found particularly pertinent a passage from *Beer Company v. Massachusetts*:

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt

269. *Id.* at 25-26.

270. *Id.* at 8.

271. WILLIAMS II, *supra* note 37, at 85 (a shorthand characterization of legal realism as "stomach jurisprudence," defined as a court decision's depending "in large part on how the judge feels about the particular situation, in the light of various preconceptions and social attitudes").

272. Trial Record at op. 86, Tenement House Dep't v. Moeschen, 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd without opinion*, 203 U.S. 583 (1906).

273. Brief of Plaintiff in Error at 10, Moeschen v. Tenement House Dep't, 203 U.S. 583 (1906) (No. 93).

that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise.²⁷⁴

Connolly also noted that the contemporary vaccination case, *Jacobson v. Massachusetts*, pronounced it a "settled principle" that the police power embraced reasonable regulations for the protection of the public health and safety — the only proviso being that it not infringe upon any constitutional rights.²⁷⁵ And how was one to decide whether these rights had been infringed upon? If it was not obvious on the face of the statute, then one would look to the facts — but of which facts could the courts take "judicial cognizance?"²⁷⁶ And, for that matter, who was to be judge of the facts? Connolly cited a line of cases holding, in essence, that the courts had no business second-guessing the legislature, a body presumed to have had all the relevant facts at its disposal when it passed the law.²⁷⁷ "The knowledge and good faith of a legislature are not open to question," declared the Supreme Court in *United States v. Des Moines Co.*²⁷⁸ "It is conclusively presumed that a legislature acts with full knowledge and in good faith."²⁷⁹ A Michigan case called it a "manifest absurdity" for a court to determine from testimony in a case the constitutionality of a law, noting that, "the Legislature, in determining upon the passage of the law may make investigations which the courts cannot."²⁸⁰

274. 97 U.S. 25, 33 (1877) (upholding a Massachusetts prohibition law), cited in Brief of Defendant in Error at 20-21, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93). Connolly did not mention, and Bloch did not supply, two sentences preceding this passage, which might have affected its applicability to *Moeschen*: "We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case . . . was not in existence when the liquor law of Massachusetts was passed." 97 U.S. at 32-33.

275. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1904), cited in Brief of Defendant in Error at 21, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

276. Brief of Defendant in Error at 39, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

277. *E.g.*, *Powell v. Pennsylvania*, 127 U.S. 678, 678-85 (1887); *Atkin v. Kansas*, 191 U.S. 207, 223 (1903); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Holden v. Hardy*, 169 U.S. 366 (1897). See Brief of Defendant in Error at 20, 23-24, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

278. 142 U.S. 510, 544 (1892).

279. *Id.*

280. *People v. Smith*, 108 Mich. 527, 533, 66 N.W. 382, 533 (1896).

Even a source not notably friendly toward the police power, Cooley's *Constitutional Limitations*, declared that the constitutionality of a law resolves into "a question of power," and if the power is a one that the legislature arguably has (such as over health, safety, and morals), then "the courts are not at liberty to inquire into the proper exercise of the power."²⁸¹ Thus, the New York Court of Appeals held in *People ex rel. Kemmler v. Durston* that it was sufficient that the Legislature had decided that electrocution was a humane method of execution.²⁸² In the *Powell v. Pennsylvania*²⁸³ oleomargarine case, the same court held that "the legislative determination of those questions is conclusive upon the courts."²⁸⁴

Rector led Connoly to discuss how much weight the court should give to the expense of complying with the law. Bloch had argued that the court had found \$100 a reasonable expense but would have balked at the \$1,900 to \$3,000 that the Moeschens might have to spend.²⁸⁵ Not so, charged Connoly; the real measure was not the expense to the owner but the reasonableness of the expense in relation to the aim of the law. An expense that might be considered unreasonable for running water pipes to each floor would be "perfectly proper" for installing ten water closets to protect residents and the public against disease.²⁸⁶ He pointed out that the plaintiff proposed to test the possible expense by the false standard of her equity in the property, with results that would be "simply grotesque" because constitutionality would then vary with the underlying mortgage.²⁸⁷

Connoly returned again to the question of what sort of evidence the court could take into account, considering the presumption laid down in *Atkins v. Kansas* that legislative enactments be deemed as "embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."²⁸⁸ Aside from the language of the law itself, the only

281. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 257 (7th ed. 1903), cited in Brief for Defendant in Error at 23-24, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

282. *People ex rel. Kemmler v. Durston*, 119 N.Y. 569, 579 (1890); *writ of error denied*, 136 U.S. 436 (1890), cited in Brief for Defendant in Error at 26-27, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

283. 127 U.S. 678, 685 (1887).

284. *Id.*, cited in Brief for Defendant in Error at 27-28, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

285. *Id.* at 92-93.

286. *Id.* at 30.

287. *Id.* at 31-32.

288. 191 U.S. 207, 223 (1903).

evidence Connoly would admit was proper was that relating to school sinks in general; if that showed the law reasonably related to public health, then the Act was constitutional. Connoly saw *Moeschen* as a twin case to the contemporary *Gardner v. Michigan*,²⁸⁹ in which a man, prevented from hauling restaurant swill for his pigs, argued that Detroit's strict garbage hauling ordinance took his property without compensation.²⁹⁰ The court, with a notable lack of interest in the facts of his particular case, upheld the ordinance for its general benefit to the public health.

Within this framework, the facts that the Court could properly take into account were to be found, according to Connoly, in encyclopedias, reports of commissions, medical and scientific works, and the like. The use of sources other than case-law and treatises would later be so brilliantly exploited by Louis Brandeis that it became known as a "Brandeis brief," but Connoly and other lawyers in the Corporation Counsel's office had for some time been loading their briefs with material from outside the literature of law.²⁹¹ Now Connoly imported into his brief the authority of two standard public health texts, William Sedgwick's *Principles of Sanitary Science*²⁹² and John Simon's *Filth-Diseases and Their Prevention*.²⁹³ Both averred "filth" caused thousands of preventable deaths each year from typhoid, dysentery, diarrhea, diphtheria, and tuberculosis. And what could be filthier than privies and their close relative, the school sink? Simon campaigned vigorously for the adoption of water closets as an answer to the problem; they were clean, easy to maintain, and removed waste before it had a chance to become a source of contamination.²⁹⁴ In addition, Connoly referred the Court to "the last word on the sub-

289. 199 U.S. 325 (1905), *cited in* Brief of Defendant in Error at 37, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

290. *See infra* notes 343-47 and accompanying text.

291. For reference to the original "Brandeis brief," (Brief of Defendant in Error), *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), see J. JOHNSON, *AMERICAN LEGAL CULTURE, 1908-1940*, at 30-39 (1981) (the "strategic genius of Louis Brandeis"); L. PAPER, *BRANDEIS* 162-66 (1983). Unlike Connoly's trim presentation, the Brandeis "briefs" were notoriously prolix.

292. W. SEDGWICK, *PRINCIPLES OF SANITARY SCIENCE AND THE PUBLIC HEALTH* (1902), *cited in* Brief of Defendant in Error at 38, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

293. J. SIMON, *FILTH-DISEASES AND THEIR PREVENTION* (1st Am. Ed. 1876), *cited in* Brief of Defendant in Error at 38, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93) [hereinafter *SIMON*].

294. *SIMON*, *supra* note 293, at 43-44. Connoly conveniently ignored the author's opinion that indoor water closets were "not proper for the use of dirty and ignorant populations" and thus unsuitable for "the uncivilized quarters of towns." *Id.* at 75. Presumably Bloch had not read Simon.

ject," Dr. Walter S. Read's report on the spread of typhoid and dysentery in the Spanish-American War by flies — cousins, perhaps, to those chugging between the school sink and ice cream tubs at 342 East 11th Street.²⁹⁵

The evidence from such "scientific" authorities gave added weight to the leading cases on public health. It meant that in *Harrington v. Aldermen*, the Rhode Island court had quite correctly characterized privy vaults, which Connoly analogized to school sinks, as "a menace to comfort and health and a source of apprehension to the neighborhood," and thus deserving of regulation under the police power.²⁹⁶

The "germ theory" of disease supported *Commonwealth v. Roberts*, a Massachusetts case that upheld an ordinance outlawing privies and termed their contents "one of the most dangerous forms of sewage."²⁹⁷ And in *Rector*, Justice Peckham had explicitly linked his finding to scientific knowledge of the connection between "dirt, filth, nastiness" and disease.²⁹⁸

Both *Harrington* and *Roberts* were, to Connoly's way of thinking, almost perfect fits with the circumstances of *Moeschen*. In both, ordinances had been passed ordering the removal of privies, and the owners had refused. In *Harrington*, the owner claimed her vault was not a nuisance, since it was kept in such good order as to be no threat to health.²⁹⁹ In *Roberts*, the owner protested that the law was unconstitutional when applied to existing buildings, and, even assuming its constitutionality *arguendo*, the vault was sewer-connected and periodically flushed by rain water conducted from the roof.³⁰⁰ The courts, however, found these objections unconvincing. In *Roberts*, the court saw no reason to exempt this particular owner and declared, "[t]he authority of the Legislature to pass laws of this character is too well settled to be questioned."³⁰¹ The *Harrington* court upheld the ban against all privies "regardless of the manner in which they may

295. Brief of Defendant in Error at 39, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93). Connoly also, without quoting from them, directed the court's attention to such official reports and investigations of the tenement problem as the Report of the Council of Hygiene in 1866, the Report of the Commission of 1884, and the massive report of the Tenement House Commission of 1900. *See id.* at 42.

296. 20 R.I. 233, 240, 38 A. 1, 3 (1897), *cited in* Brief of Defendant in Error at 40-41, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

297. 155 Mass. 281, 282, 29 N.E. 522, 523 (1892).

298. 145 N.Y. at 49, 39 N.E. at 839, *cited in* Brief of Defendant in Error at 40, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

299. 20 R.I. at 236, 38 A. at 2.

300. 155 Mass. at 282, 29 N.E. at 523, *cited in* Brief of Defendant in Error at 47, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

301. *Id.*

chance to be kept" as a legitimate exercise of the police power.³⁰² It dismissed the owner's not-a-nuisance defense (that is, her claim that the state could not destroy presently harmless property on grounds it *might*, by misuse, become injurious in the future) and related the case, albeit without using the term, to the law of overruling necessity. Just as laws could ban *all* gunpowder even though it was not dangerous until some misuse, so it could ban all privies; the "menace and apprehension caused by their presence" was justification enough.³⁰³

These were particularly compelling precedents: Justice Peckham had in fact cited *Roberts* in his holding in *Rector*,³⁰⁴ Bloch could distinguish them from *Moeschen* only by a careful definition of the term "school sink"; the two cases quite properly upheld the regulation of privies, but school sinks were not privies.³⁰⁵ There was, unfortunately, no dictionary definition of a school sink, a hybrid that existed somewhere between a privy and a water closet. In Bloch's view the school sink's connection to plumbing made it a variety of water closet, but Connolly insisted it was "simply a privy connected with a sewer."³⁰⁶ In truth, it was a little of both, with the difference merely one of degree. But, as Holmes had said in *Rideout v. Knox*, "most differences are, when nicely analyzed."³⁰⁷ The degree to which a school sink was more like a privy or more like a water closet was a crucial distinction, and here Connolly argued that his evidence, particularly the photographs, had shown that "practically all the important sanitary objections to a privy apply with equal force to a school sink."³⁰⁸ If the court accepted this analogy of a school sink to a privy, it would have to apply the "settled law" of *Roberts* and *Harrington*.

The court would also have to dismiss Bloch's nuisance law defense. In general, Connolly ignored Bloch's elaborately argued nuisance theory of police power. Rather than a point-for-point refutation, he treated it as superseded by an expanded police power grounded in *salus populi*. Opposing counsel, he claimed, had "made the mistake" of treating this action as though it were brought to abate a single school sink for being a nuisance. It was instead a suit to recover a

302. 20 R.I. at 239, 38 A. at 3.

303. 20 R.I. at 239-40, 38 A. at 4, *cited in* Brief of Defendant in Error at 49, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

304. 145 N.Y. at 46, 39 N.E. at 838.

305. Brief of Plaintiff in Error at 83-85, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

306. Brief of Defendant in Error at 37-38, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

307. 148 Mass. 368, 372, 19 N.E. 390, 392 (1889).

308. Brief of Defendant in Error at 38, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

penalty for violating a general police power ordinance, and Moeschén's defense amounted to pleading for special treatment for *her* property — by law, not an allowable defense.³⁰⁹ He added as well an "even-if" argument. The Moeschén sink could not be defended even if the case were argued under the nuisance theory of police power, for within that body of jurisprudence it was settled law that a privy was *prima facie* a nuisance — and a school sink was, in essence, only a glorified privy.³¹⁰

Connolly ended his brief by reminding the court of the ample judicial precedent supporting an expanded police power in relation to tenement houses. Tenement houses were, within the meaning of *Matter of Paul*³¹¹ and *Budd v. New York*,³¹² devoted to a public use and deserving of special attention by the state. He concluded with a sober appeal to the court:

It appears by the record that there are in The City of New York 80,000 tenement houses. It would seem that this large class of buildings, all of a similar character and devoted to a similar use, inhabited by a class of the population which is peculiarly helpless and which peculiarly needs protection, might well be deemed to be affected with a public use so as to enlarge the powers of sanitary regulation by the State Government.³¹³

C. Opinions of the Appellate Courts

Although the decision of the New York Court of Appeals bears the greatest legal weight, its author, Judge Edward T. Bartlett, virtually adopted "the able opinion" of the appellate division, making that decision indispensable for understanding the later decision.³¹⁴ Presiding Judge Morgan J. O'Brien, who wrote the opinion for a unanimous

309. *Id.* at 55.

310. *Id.* at 38 (citing, in support, H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES § 512 (3d ed. 1893) [hereinafter WOOD]). *But see* WOOD, § 744, at 976 (A municipal corporation does not have authority to *prevent* nuisances nor to destroy "anything which was erected by lawful authority").

311. 94 N.Y. 497, 505 (1884), *cited in* Brief of Defendant in Error at 66, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

312. 143 U.S. 517, 538-39 (1892), *cited in* Brief of Defendant in Error at 66, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

313. Brief of Defendant in Error at 66, *Moeschen v. Tenement House Dep't*, 203 U.S. 583 (1906) (No. 93).

314. After the judgment by the trial court, the general term of the state supreme court granted an injunction against further use of the Moeschén school sink, staying its enforcement during appeal of the case. 41 Misc. 446, 450-51, 85 N.Y.S. 19, 22 (N.Y. Sup. Ct. 1903). The Appellate Division heard appeals of both the judgment and the injunction, and reported a single opinion covering both. 89 A.D. 526, 538, 85 N.Y.S. 704, 711 (1st Dep't 1904).

appellate division, had served a brief stint as corporation counsel³¹⁵ and was thus no stranger to the assumptions underlying Connolly's arguments. He immediately trimmed the question down to size:

If the Legislature has the authority under the police power, with which it is invested, to regulate the entire subject, then, unless the court can see that there has been such a gross and unreasonable exercise thereof as to render its action unconstitutional, we are powerless to intervene.³¹⁶

In his examination of the case, Judge O'Brien substantially adopted Connolly's version of the facts and the law. The only evidence he considered relevant was the report of the Tenement House Commission; that the report condemned school sinks as "simply indescribable" and recommended their replacement by water closets appeared to be sufficient proof for the Presiding Judge of the correctness of this course of action.³¹⁷ He specifically excluded any examination of the conflicting testimony of experts in the trial court as having no bearing on a question that was "not one of administration, but one of power."³¹⁸ In his opinion, the legislature had long exercised this power in improving tenement sanitation, and the Act simply "followed up prior enactments which, upon trial, proved insufficient" in protecting the public health.³¹⁹ Doing so was emphatically within the police power. In a passage that carried echoes of "overruling necessity," Judge O'Brien declared

For the prevention of contagion and disease and the suppression of a threatening danger to the public health, the most drastic requirements of the Legislature may, as a proper exercise of this power, be sanctioned, with the limitation merely that they are upon their face no more than reasonable, in view of the evil sought to be overcome.³²⁰

Judge O'Brien found the removal of school sinks eminently reasonable in view of the health hazard. *Roberts* and *Harrington* — so similar in their circumstances to *Moeschen* — seemed very much on point, and he quoted copiously from both.³²¹ He also relied heavily on *Rector*, particularly its holding that police regulations may disturb, without compensation, the enjoyment of individual rights without being

315. J. GREENER, A HISTORY OF THE OFFICE OF THE CORPORATION COUNSEL AND THE LAW DEPARTMENT OF THE CITY OF NEW YORK 33, 36-37 (3d ed. 1925).

316. 89 A.D. at 529, 85 N.Y.S. at 705.

317. *Id.* at 530, 85 N.Y.S. at 706.

318. *Id.* at 529, 85 N.Y.S. at 705.

319. *Id.* at 531, 85 N.Y.S. at 707.

320. *Id.*

321. *Id.* at 532-34, 85 N.Y.S. at 707-08.

unconstitutional: "The State, or its agent in enforcing its mandate, takes no property of the citizen when it simply directs the making of these improvements."³²² In light of these authorities, Section 100 was well within the police power of the state and had "in no way" violated the rights of Moeschén.³²³ The law had no other object than the preservation of public health through improved sanitary accommodations — improvements which a legislative commission had, after long investigation, deemed necessary. The court did not feel compelled to delve now into testimony on the matter, holding with *Fire Department of New York v. Gilmour*, that it was no longer "an open question" once the legislature had made its determination.³²⁴

Judge O'Brien concluded by noting that the court had not overlooked the claim that the Act was unreasonable in light of the financial burden it placed on the owner.³²⁵ The court sympathized with Katie Moeschén but could not let cost be the controlling factor in its deliberations.³²⁶ How could the courts determine constitutionality if each case turned on the financial situation of the individual? As far as the school sink law was concerned, the cost would be small to some and large to others; it could even, as in the case at bar, wipe out the owner's equity in the property. But the court simply could not allow cost to be the measure by which it decided the law.³²⁷

The Court of Appeals reviewed the case in November 1904 and, in a sparse nine-page opinion written by Judge Bartlett, adopted not just the opinion of the appellate division but the essence of Connolly's brief.³²⁸ The judges found Bloch's taking-without-compensation argument to be without merit, opining that *Wynehamer*, *Jacobs*, and "many other" cases he cited as precedent "clearly have no application to the present situation."³²⁹ Nor were the judges particularly swayed by the fact that the school sink had been installed by order of a previous board of health and that its replacement would work a financial hardship on the Moeschéns. "It is not the hardship of the individual case that determines the question," Bartlett wrote, "but rather the general scope and effect of the legislation as an exercise of the police

322. *Id.* at 534, 85 N.Y.S. at 709 (quoting *Rector*, 145 N.Y. at 43).

323. *Id.* at 535, 85 N.Y.S. at 709.

324. 149 N.Y. 453, 458, 44 N.E. 177, 179 (1896), cited in *Moeschen*, 89 A.D. at 536, 85 N.Y.S. at 710.

325. 89 A.D. at 538, 85 N.Y.S. at 711.

326. *Id.*

327. In fact, O'Brien noted, in cases like the one at bar, "we can conceive of instances where it might exceed the equity of the owner." *Id.* at 538.

328. 179 N.Y. 325, 72 N.E. 231 (1904).

329. *Id.* at 334, 72 N.E. at 233.

power in protecting health and promoting the welfare of the community at large."³³⁰ The single question at issue was whether the legislation was a lawful exercise of the police power, and the court thought it clearly was. In reaching this opinion, noted Bartlett, the court had been guided by "much important and persuasive evidence of which we are permitted to take judicial notice" — *i.e.*, the 1884 and 1901 reports of the Tenement House Commission introduced by Connolly.³³¹ The court devoted considerable attention to the findings and recommendations of these two reports. They offered, in Bartlett's opinion, persuasive evidence that the abolition first of the privy and then of the school sink "was an absolute necessity in the due protection of the public health in the city of New York."³³² The act under question in this case was in fact written by the commission of 1901.³³³ The court found ample precedent in *Roberts* and *Rector* to find this act a valid exercise of the police power,³³⁴ and referred as well to its recent decision in the vaccination case, *Matter of Viemeister*.³³⁵

The United States Supreme Court affirmed the holding without opinion,³³⁶ but it is not difficult to intuit the thinking of the Justices. The Court listed seven of its cases as authorities, all of which had been cited by Connolly and which, taken together, make its reasoning clear. *Boston Beer Company v. Massachusetts*,³³⁷ upholding a state liquor prohibition law, declared, "[i]f the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer."³³⁸ *Powell v. Pennsylvania*³³⁹ had upheld a law banning oleomargarine on the grounds that the state could, under the police power, pass laws to protect health and prevent fraud; they could not be held to infringe on liberty and property without its being shown the laws had no real relation to the objects expressed in their titles. Although the plaintiff had offered proof that *his* margarine was healthful and nutritious, the Court found the act justifiable because

330. *Id.* at 330, 72 N.E. at 232.

331. *Id.* at 331-32, 72 N.E. 232.

332. *Id.* at 332, 72 N.E. at 233.

333. *Id.*

334. *Id.* at 332-37, 72 N.E. at 233-34.

335. 179 N.Y. 235, 72 N.E. 231 (1904), *cited in Moeschen*, 89 A.D. at 533, 85 N.Y.S. at 707-08.

336. 203 U.S. 583 (1906).

337. 97 U.S. 25 (1877).

338. *Id.* at 32. Plaintiff, a brewer, had claimed an impairment of the obligation of contract in that he was doing business under a corporate charter granted by the state.

339. 127 U.S. 678 (1888).

most margarine was not. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt," the *Powell* court declared.³⁴⁰

As additional authority on the presumed validity of legislation, the Court offered *United States v. Des Moines Navigation and Railway Company*,³⁴¹ in which it declared that "the knowledge and good faith of a legislature are not open to question," and cited in support Cooley's *Constitutional Limitations*: "If evidence was required, it must be supposed that it was before the legislature when the act was passed."³⁴² By analogy to these three cases, it had to be presumed in *Moeschen* (absent convincing proof to the contrary) that the legislature had acted in full possession of the facts, and that its act, passed in legitimate furtherance of the public health, could not be overturned because of the hardship to one owner or the exemplary condition of her property.

Similarly, in *Gardner v. Michigan*,³⁴³ the Court had subordinated the rights of an individual garbage hauler to the general good of the community. Although the hauler had insisted the public health could have been guarded by regulating rather than banning his swill-hauling, the Court held that "the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case."³⁴⁴ In addition, in the *Jacobson v. Massachusetts* vaccination case,³⁴⁵ the Court had refused (as did the *Moeschen* courts) to go into all the conflicting testimony of experts, as being "no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease."³⁴⁶ Such was for the legislature to determine, and the Court should intervene only if its act had no real relation to its objects.³⁴⁷

The Court also cited *Holden v. Hardy*,³⁴⁸ offering an interesting insight into its thinking. In upholding Utah's eight-hour work day for miners, Justice Brown discussed at some length the changes that had taken place in the country, as well as in its laws, since the time of the

340. *Id.* at 684 (quoting *Sinking Fund Cases*, 99 U.S. 700, 718 (1878)).

341. 142 U.S. 510 (1891).

342. *Id.* at 544 (citing COOLEY, *CONSTITUTIONAL LIMITATIONS* 222 (5th ed. 1883) (also cited in COOLEY, *supra* note 281, at 257)).

343. 199 U.S. 325 (1905).

344. *Id.* at 333.

345. 197 U.S. 11 (1905).

346. *Id.* at 30.

347. *Id.* at 30-31.

348. 169 U.S. 366 (1898), *cited in* *Holden v. Harding*, 197 U.S. 17, 19 (1905).

writing of the Constitution. The law was "forced to adapt itself to new conditions of society," such as the evolving relationship between employers and their employees.³⁴⁹ This line of reasoning is readily extrapolated to tenement houses and their owners. Justice Brown noted that the police power had been "sparingly used" when America had been a simple agricultural country; there had been little occasion then for the protection of particular classes of the public. Many industrial changes had occurred since then, however. Not only had changes in mining necessitated new laws, as in *Holden*, but police regulations had become necessary in other areas as well. Among these he cited ordinances requiring fire escapes in large buildings, inspection of boilers, and safety regulations for factory machinery.³⁵⁰ In affirming *Moeschen*, the Supreme Court added to this list the regulation of sanitation in tenement housing, and in validating this section of the Tenement House Act, it sanctioned an intrusion upon property rights that would have been unthinkable a short time earlier.

V. Conclusion

Tenement House Department v. Moeschen was, if not a landmark case, certainly a landmark event in American law. Viewed narrowly, the holding in the case was hardly novel. The New York Court of Appeals had already held in *Rector* that the state, as a valid exercise of the police power, could regulate tenement houses and in doing so require owners to make reasonable improvements at their own expense.³⁵¹ The courts of Massachusetts and Rhode Island had found it within the scope of the police power for the state to require homeowners to replace privies with indoor toilets.³⁵² In a sense, all *Moeschen* did was to combine the two lines of cases and, by analogizing school sinks to privies, establish that tenement landlords could be compelled to furnish water closets for their tenants. It added the weight of a Supreme Court affirmation to what had been, up to then, scattered holdings of state courts.

In a broader sense, however, *Moeschen* did much more. To begin with, it established the constitutionality of a piece of legislation that was, for its time, "the most significant regulatory act in America's history of housing."³⁵³ The members of the United Real Estate Owners Association had chosen what they believed was their strongest

349. 169 U.S. at 387.

350. *Id.* at 392-93.

351. 145 N.Y. 32, 39 N.E. 833 (1895).

352. See *supra* notes 295-303 and accompanying text.

353. FORD, *supra* note 26, at 205 (1936).

case; they had challenged the law at what they felt was its most vulnerable point, Section 100, and with a defendant who was their best hope — a fastidious housekeeper with an impeccable school sink.³⁵⁴ Having lost this, their best case, they saw no point in another constitutional challenge.³⁵⁵ Although the decision applied only to Section 100 and the organization had no power to bind all tenement owners, there was never again a substantive challenge to the Tenement House Act.³⁵⁶

The Tenement House Act made an immediate impact on tenement housing. After a scant ten years in operation, the watchdog Charities Organizations Society marveled, “[t]he results achieved are so vast, and they have come in so short a time that the mind fails to completely grasp their full significance.”³⁵⁷ By 1913, over 7,000 disease-breeding school sinks and privies had been replaced by indoor toilets, and windows had opened more than 200,000 dark interior rooms to air and light. Despite the dire predictions of opponents of the law, during the same period builders erected 22,402 “new-law” buildings, containing 295,264 apartments housing one and one-half million people.³⁵⁸ By the time the Tenement House Department merged into a

354. See *supra* notes 100-03 and accompanying text.

355. In a post-mortem interview, Bloch could only suggest working through the legislative process. Real Estate Record, Dec. 1, 1906, at 901.

356. That is not to say there were no more lawsuits, for the tenement house bureau of the Corporation Counsel's office handled a massive amount of litigation. See *Review of the Work of the Corporation Counsel's Office*, in TENEMENT HOUSE DEPARTMENT, FOURTH REPORT (1908) through SIXTEENTH AND FINAL REPORT (1937). But the questions were ones of administration and not of substance — in the words of the 1908 report, “efforts . . . to find defects and loopholes in the Tenement House Law.” TENEMENT HOUSE DEPARTMENT, FOURTH REPORT 238 (1908). For example, did builders and owners of “high-class” apartments have to comply with a law directed at slum tenements? No, according to *Grimmer v. Tenement House Dep't*, 204 N.Y. 370, 97 N.E. 884 (1912); but, an amendment subsequently overcame the court's objections. 1912 N.Y. LAWS 13. Could an owner legalize a windowless bedroom by replacing an interior wall with a curtain and calling it an “alcove” of another room? No. See TENEMENT HOUSE DEPARTMENT, FOURTH REPORT 249-53 (1908). Had an owner been legally notified if a violation notice had only a stamped signature? Yes. *Tenement House Dep't v. Weil*, 76 Misc. 273, 134 N.Y.S. 1062 (1st Dep't 1913). And so on, for case after case, until there was “scarcely a word, a sentence, or a section” of the law not litigated. TENEMENT HOUSE DEPARTMENT, FOURTH REPORT 239 (1908). But no substantive challenge ensued until *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929), and then not as a challenge to tenement regulation itself but as a home-rule dispute between city and state. See *Richland, Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311 (1954). The Act stood, and — expanded into the Multiple Dwelling Law of 1929 — it underlies New York City housing law today. PLUNZ, *supra* note 70, at 47.

357. Charities Organizations Society of the City of New York, 31 ANNUAL REPORT 64 (1913) (dating the law's operation from its implementation in 1903).

358. *Id.* at 63-64 (citing Tenement House Department statistics). In 1930, the journal, *Municipal Sanitation*, declared that removal of school sinks and privies was responsible

new Department of Housing and Buildings in 1938, it had forced owners of the old tenements to improve sanitation, cut windows into interior rooms, provide fire escapes, light stairways and halls, clean up cellars and yards, and comply with stringent fire and safety codes.³⁵⁹ Between 1902 and 1920, the New York City death rate fell from 19.90 per thousand to 10.96; although other factors had their influence as well, substantial credit must go to the Tenement House Act.³⁶⁰ The act did not live up to the extravagant hopes of its advocates — it did not eradicate the slum nor provide decent homes to all who needed them — yet it did accomplish about all that could realistically be expected of a single piece of regulatory legislation.³⁶¹

Never billed as such, the Tenement House Act was nonetheless a highly effective land use control act. It told holders of undeveloped land that they could not build housing on it with the same density that had proved so profitable in older districts. Teeming blocks of 25-foot wide, five- or six-story tenements with four apartments per floor were, in effect, “zoned out” of rapidly developing areas of Brooklyn, Queens, the Bronx, Staten Island, and northern Manhattan. The notorious population density of the Lower East Side would not be replicated along the city’s growing periphery; Bay Ridge would not become Bombay, nor would Canarsie become Calcutta.³⁶² Economics

for most of the gains since 1900 in tenement health and sanitation. See Fink, *Advance of Sanitation in the Tenements of New York City*, MUNICIPAL SANITATION 493 (1930).

359. TENEMENT HOUSE DEPARTMENT, SIXTEENTH AND FINAL REPORT 18 & charts following (1937).

360. For a summary of declining death and infant mortality rates, see TENEMENT HOUSE DEPARTMENT, ELEVENTH REPORT 6-7 (1930), which concluded, on a self-congratulatory note, that “it must be apparent that the Tenement House Department contributed in no small measure to the result attained.” Contemporaries treated as obvious the link between tenement house reform and improved health, relying on anecdotal evidence or various correlations as proof. See, for instance, results of the 1919-34 statistical study demonstrating a markedly greater incidence of tuberculosis and meningitis deaths in old-law tenements compared to new-law ones. Yet at a time of striking advances in public health in general, it is difficult to sort out the effect of any one factor such as housing reform. L. POST, *THE CHALLENGE OF HOUSING* 150 (1938). See generally J. DUFFY, *A HISTORY OF PUBLIC HEALTH IN NEW YORK CITY: 1866-1966* (1974).

361. Housing reformers have historically moved from one enthusiasm to another. In the late 1800s they entertained great hopes that builders would forego all but token profit and, in a spirit of philanthropy, erect “model tenements.” Disillusioned with the results, they turned to legislation that would regulate the condition of tenement property. When this approach failed to solve all the problems of the slum, they put their faith in a succession of likely solutions — industrial “garden” cities, public housing, rent control, urban renewal, and, most recently, a variety of government subsidies. With a homeless population recently estimated at 100,000 it would seem that ultimate victory has eluded all efforts, suggesting that the problem all along has been one not so much of housing as of poverty. N.Y. Times, Feb. 23, 1991, at 28, col. 6.

362. By the turn of the century, Manhattan’s density had surpassed that of any Euro-

and the constraints of the law limited developers of new areas to housing of a less dense nature: one- and two-family houses, elevator flats, "garden" apartments with spacious courtyards, or new-law tenements with larger rooms and fewer apartments per floor. Developers simply could not profitably build the old dumbbell tenement within the design configurations allowed by the new law.³⁶³

As for the Lower East Side itself, the law ensured that its aging housing stock would not be replaced by anything approaching old densities. By 1938, approximately 24,000 old-law tenements had been demolished either by operation of the law or condemnation of land for public improvements.³⁶⁴ They were replaced either by less crowded apartment buildings and new-law tenements or by non-residential uses — commercial buildings, bridge approaches, schools, playgrounds, and other public uses.³⁶⁵ Between 1910 and 1940, the number of people living in the Lower East Side declined sixty-two per cent, and its population density fell more nearly in line with that of the rest of the city.³⁶⁶ Much of this change came through enforcement of the tenement house law, including that subsequently attributed to "market forces."³⁶⁷ These market forces were simply the economic manifestations of the tenement housing law — or, as the reformers intended, a way to "take the profit out of the slum."³⁶⁸ By making slum housing unprofitable to the builder and landlord, the Tenement House Act re-directed investment into upscale housing or other commercial uses of the land.³⁶⁹ The Act worked with the market rather than against it, accelerating trends already underway that identified better profits with better buildings.³⁷⁰

pean city, with certain wards of the Lower East Side teeming with more people per acre than the most populous cities of India. The nearest competitor to the eleventh ward's 986.4 persons per acre was the Koombarwara district of Bombay, with 759.66. See LUBOVE, *supra* note 26, at 94 (summarizing the findings of the Tenement House Committee of 1894).

363. PLUNZ, *supra* note 70, at 48-49.

364. L. POST, *THE CHALLENGE OF HOUSING* 117 (1938). In 1938, some 59,000 old-law tenements had been brought more or less into compliance with the law, and another 5,000 old-law tenements were still standing but unoccupied. *Id.* at 116.

365. See GRABLER, *HOUSING MARKET BEHAVIOR IN A DECLINING AREA: LONG-TERM CHANGES IN INVENTORY AND UTILIZATION OF HOUSING ON NEW YORK'S LOWER EAST SIDE* 15 (1952).

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*; see also *An Architect's Prediction: The Effects of the New Tenement House Law*, *Real Estate Record*, July 13, 1901, at 35. (The new law "will give a great impulse to a distribution which otherwise would have taken place much more slowly" — *i.e.*, accel-

Moreover, the Act had an influence that extended beyond New York City, for other cities had housing problems of their own and were closely watching the New York reform.³⁷¹ Once it survived court challenge, these cities used the New York statute as a model and pushed tenement house laws through their own state legislatures.³⁷² By 1910, New Jersey, Connecticut, Wisconsin, and Indiana had passed laws for their own cities modeled after the New York law.³⁷³ That same year, Veiller — author of the New York law — founded a nationwide movement for housing reform³⁷⁴ and adapted the New York law into a widely used guide, *A Model Tenement House Law*.³⁷⁵ By 1920, at least forty cities had secured legislation based on the New York law or Veiller's model, and municipal regulation of rental housing had become an accepted practice.³⁷⁶ The value of *Moeschen* is not so much that courts cited it as a precedent in upholding housing regulation (they in fact seldom had occasion),³⁷⁷ but that cities used the statute it validated as precedent for state legislation of their own. "We find that our judiciary are not the only branch of the government that relies on precedent," commented the secretary of the Indiana Housing Association in 1912.³⁷⁸ "Members of the legislature, in discussing a housing law will say, 'Has any other state a law like that? Do they regulate the same things?'"³⁷⁹ The fact that the New York law had been upheld by the nation's highest court not only reas-

eration of two-family houses in outer boroughs and a decline in tenement housing in lower Manhattan in favor of commercial uses.).

371. See Veiller, *Housing Conditions and Tenement Laws in Leading American Cities*, in 1 TENEMENT HOUSE PROBLEM, *supra* note 56, at 129.

372. See Ford, *The Enforcement of Housing Legislation*, 17 POL. SCI. Q. 549 (Dec. 1927). (New York tenement law "serves as a model for rest of country"). See also LUBOVE, *supra* note 26, at 145-46 (tracing "virtually all" state and local codes to Veiller and his New York law).

373. LUBOVE, *supra* note 26, at 145.

374. See Reminiscences, *supra* note 94, at 88-90; Veiller, *The National Housing Association*, 23 SURVEY 841 (1910).

375. VEILLER, *A MODEL TENEMENT HOUSE LAW* (1910).

376. LUBOVE, *supra* note 26, at 145. The explicit nature of the borrowing is shown in a single-sheet, oversized chart with a section-by-section comparison of the laws of nine states. WISCONSIN FREE LIBRARY COMMISSION, *TABULATED RESULTS OF OPERATION OF LAWS* (1914). See also MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION, *HOUSING LAWS: A SUMMARY OF THE MORE IMPORTANT PROVISIONS IN CITY AND STATE CODES* (1914) (covering nineteen city ordinances, ten state laws); VEILLER, *MODEL TENEMENT HOUSE LAW* (1910).

377. FRIEDMAN, *supra* note 26, at 37 (noting that "the number of cases was small, and the results . . . no comfort to opponents of the laws").

378. *Id.*

379. A. Bacon, *Regulation by Law*, in NATIONAL HOUSING ASSOCIATION, *HOUSING PROBLEMS IN AMERICA: PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON HOUSING* 47, 55 (1912).

sured these legislators, but also discouraged litigation over these laws. Of all the state tenement laws passed in its aftermath, few encountered any serious constitutional objections and only one — Wisconsin's — was overturned by the courts. Even then, it was speedily re-enacted after legislators remedied its flaws.³⁸⁰

The greatest usefulness of *Moeschen*, however, is the historical perspective it offers on the modern controversy over land use regulation and the takings issue. For one thing, it forces a correction of the modern perspective of the “*Lochner* era.” Critics who feel the courts are returning to it are provided a better notion of what that era really was all about — and certainly the *Moeschen* episode illuminates this history and is replete with parallels to the present situation in land use law. For its time, the tenement reform movement was every bit as radical and controversial as is today's land use reform. Like the environmentalists who are the driving force behind modern land use reform, the housing reformers typically were educated, civic-minded men and women of middle-class (or even upper-class) origins.³⁸¹ They sought to impose a reform not particularly desired by the masses it was intended to benefit; the tenants of the Lower East Side did not rally around the Tenement House Act any more than upstate New Yorkers cheered the Adirondack Park Act.³⁸² Its leaders had just as much difficulty being taken seriously by the press and the public as do those reformers of today. Turn-of-the-century reformers,

380. FRIEDMAN, *supra* note 26, at 36-37. Even while invalidating the statute in question in *Bonnett v. Vallier*, 136 Wis. 193 (1908), the Wisconsin court emphatically endorsed the principle of tenement regulation. *Id.* at 199.

381. The tenement reformers were a mix of middle-class professionals and upper-class philanthropists. Veiller, unique in that he made a career of reform, was a paid secretary to various organizations within the movement. The other middle-class members pursued tenement reform as a sideline to their primary professions, e.g., journalist Jacob Riis, civil engineer Albert Webster, sanitarian William H. Dewer, physician Hermann Mary Bigg, and clergyman W.T. Eltsing. But the success of the movement owed much to the efforts of wealthy New Yorkers who, individually and through their clubs, adopted tenement “uplift” as a charitable project. Among the more prominent were lawyer Robert DeFrost (chairman of the Tenement House Commission), Governor Theodore Roosevelt, architect and man-of-letters Isaac N.P. Phelps-Stokes, builder Elgin R.L. Gould, architects Ernest Flagg and Alfred T. White, and lawyer Paul Cravath. For a sampling of names, see 2 TENEMENT HOUSE PROBLEM, *supra* note 56, at 98, 99 (appendix listing commission members and witnesses at hearings). See also LUBOVE, *supra* note 26, at 119, 154-55.

382. The tenants were far less concerned than the reformers about sanitation, crowding, fresh air, sunlight, and the like; their main concern — how to pay the rent out of meager wages — actually pitted them against the reformers when they coped by “doubling up” or taking in boarders. To see the era through tenant eyes, see Joselit, *The Landlord as Czar*, in *THE TENANT MOVEMENT IN NEW YORK CITY, 1904-1984*, at 39-50 (R. Lawson ed. 1986).

who were regularly lampooned as “dudes,” “fancy-pants,” and (surely the ultimate put-down) “*man-millinery*,”³⁸³ bear more than passing resemblance to today’s “tree-huggers,” “eco-freaks,” and “techno-twits.”³⁸⁴ The tenement reformers faced the same wall of public hostility, indifference, and skepticism that frustrates land use reformers today. They had to convince a dubious public that it should act even though they could not absolutely *prove* the link between the slums and disease any more than environmentalists today can *prove* global warming.³⁸⁵

Yet even with inconclusive data, the evidence was considered convincing enough; the New York legislature passed the Tenement House Act of 1901, and the courts upheld it in *Moeschen*. It is the willingness of this “*Lochner* era” court to go out on such a wobbly limb and curtail hallowed property rights that makes *Moeschen* remarkable. The ease of decision in this case calls into question why we should use *Lochner* and not *Moeschen* as a symbol for the era. The two cases are, after all, quite similar. Both arose in the same state at the same time, and both were decided by the same appellate and Supreme Court justices. Both were fourteenth amendment challenges³⁸⁶ to social justice legislation — one, a test of tenement house regulation, the other, a test of a minimum hours law for bakery employees.³⁸⁷ Both asked the same question — was a given regulatory statute a legitimate exercise of the state police power? — and both depended for their answer on a “reasonableness” test that demanded a relation between the law and the health of the community.³⁸⁸

383. J. SPROAT, “THE BEST MEN”: LIBERAL REFORMERS IN THE GILDED AGE 57-59 (1968). An editorial cartoon of the day, ridiculing Corporation Counsel Rives’ new assistants as his “Office Kindergarten,” depicted a half-dozen monocled young fops peering in amazement at a map of Manhattan and drawing, “Bah Jove!” Anonymous, untitled, in FATHER KNICKERBOCKER ADRIFT: GREATER NEW YORK GOVERNMENT, 1902-1903, at 77 (1903) (pamphlet in New York Public Library permanent collection).

384. A. Lovins, *Techno-Twits and Eco-Freaks*, EARTHWORKS: TEN YEARS ON THE ENVIRONMENTAL FRONT 74-75 (M.L.V. Deventer ed. 1980).

385. Bacteriology then was in about the same state as climatology today. For details of the difficulties regarding such proof, see W. MCKIBBEN, THE END OF NATURE 20-23 (1989) [hereinafter MCKIBBEN].

386. *Lochner* applied the due process clause to the protection of freedom of contract, and *Moeschen* applied the fifth amendment takings prohibition to the states.

387. *Lochner* tested the constitutionality of a law limiting bakery employees to a 10-hour day. See 1897 N.Y. LAWS 415, § 110.

388. The literature on *Lochner* is voluminous and a detailed bibliography is beyond the scope of this article. The best source is the judicial record itself, both the case reports and the briefs of counsel. See *Lochner v. New York*, 73 A.D. 120, 76 N.Y.S. 396 (4th Dep’t 1902), *aff’d*, 177 N.Y. 145, 69 N.E. 373 (1904), *rev’d*, 198 U.S. 45 (1905). See also TRIBE, *supra* note 37, at 567-73; SCHWARTZ, *supra* note 172, § 276, at 53-58; Stephenson, *supra* note 17; Tarrow, *supra* note 17 (lengthy discussion of *Lochner*).

It is here that the similarity ends, for they were both argued and decided quite differently. *Moeschen* was an easy case, decided unanimously by each court that heard it, while *Lochner* — the quintessential “hard case” — was decided on every level by narrow divisions in the courts: 3-2 in the Appellate Division, 4-3 in the Court of Appeals, and 5-4 in the Supreme Court. The sticking point in both cases — the “reasonableness” of the law under the police power — was whether the statute bore a legitimate relation to health.³⁸⁹ Counsel for *Lochner* understood this perfectly and crammed his brief with citations to such authorities as Buck’s *Hygiene and Public Health*, articles in *The Lancet*, a “Special Sanitary Report on Bakeries,” Arlidge’s *Diseases of Occupations*, and the *Reference Manual of Medical Sciences*.³⁹⁰ The Attorney General of New York failed to do the same, frustrating what Justice Peckham hinted might otherwise have been the Court’s inclination. “This Court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones,” he noted, “and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature”³⁹¹ In this case, however, no valid reason had been given for applying these rules. Justice Peckham wrote, with barely concealed exasperation, that the “mere assertion” of a relation to public health was not reason enough for the Court. “In effect, [Justice] Peckham was ordering the Brandeis brief,” concludes his biographer, “and when it was presented three years later in *Muller v. Oregon*, he voted to sustain a similar ordinance applying to women.”³⁹² In fact, it was only a year after *Lochner* that Connolly presented in *Moeschen* the sort of justification Peckham wanted and got the reception he had hinted might be forthcoming. That he did so before a Court comprised of the same group of economic individualists suggests that Grier Stephenson, in “*Lochner* Revisited,” is right in speculating that a different argument might have won that case. “The hours limit for bakers,” he writes, “could have been accommodated within the tradition of economic individualism had the majority been prepared to

389. “The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker,” Justice Peckham wrote in his *Lochner* majority opinion. 198 U.S. at 57.

390. Brief of Plaintiff in Error at 20, *Lochner v. New York*, 198 U.S. 45 (1905) (No. 292).

391. 198 U.S. at 54.

392. W. DUKER, MR. JUSTICE RUFUS W. PECKHAM, THE POLICE POWER, AND THE INDIVIDUAL IN A CHANGING WORLD 58 (1980).

view the statute as an additional safeguard for workers in hazardous occupations."³⁹³

Moeschen seems far more typical of the court at this time than does *Lochner*, and fits into a growing body of revisionist scholarship suggesting that the "*Lochner*" era is far more complex than its stereotype as an "era of negation"³⁹⁴ or "discredited period of judicial intervention."³⁹⁵ This revisionism questions whether it is not an oversimplification to characterize the whole 1897-1937 court by one aberrant decision, and to impute to its members an ideological activism they did not put into play until the heyday of the "Four Horsemen"³⁹⁶ in the Taft court of the 1920s.³⁹⁷ An analysis of cases simply does not bear out the claim that "[b]eginning about 1890, it was a fortunate and relatively innocuous piece of reform legislation that was able to run the gantlet [sic] of the due process clause."³⁹⁸ This claim, based on a list compiled by Felix Frankfurter of 228 fourteenth amendment cases decided between 1890 and 1937 in which the Supreme Court invalidated state regulatory laws,³⁹⁹ is open to dispute. Although it is difficult to compare studies using differing time spans and criteria for case selections, a number of studies contradict Frankfurter's findings. In 1913, Charles Warren examined 560 "due process" and "equal protection" cases decided between 1887 and 1911 and found only two besides *Lochner* that overturned social reform legislation, leading him to conclude that the "alleged evil" in the high court was a "purely fancied one."⁴⁰⁰ A 1927 study found the court declaring only 13 out of 195 "police power" statutes unconstitutional between 1868 and 1920.⁴⁰¹ Stephenson's "*Lochner* Revisited" narrowed the focus to

393. Stephenson, *supra* note 17, at 238-39.

394. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 50 (1941).

395. GUNTHER, *supra* note 37, at 453.

396. Justices Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler.

397. See P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969*, at 41-67 (1972). See also A. BICKEL & B. SCHMIDT, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. IX: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921*, at 3-9 (1984). Taft's appointments of 1909-12 were based more on "soundness" than doctrinaire conservatism; "neither attitude nor doctrine was to harden for another decade." *Id.* at 5.

398. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 50 (1941).

399. F. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* App. I (1938).

400. Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913).

401. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L.

1898-1906 and found the court overturning only 47 out of 165 police power statutes, leading him to conclude there was "a widespread sufferance for most applications of the police power."⁴⁰²

Lochner, then, may be more an aberration than an archetype — a situation which raises the interesting question of how we are then to consider its supposed parallels in the 1987 "takings trilogy" of *First English*, *Nollan*, and *San Diego Gas*.⁴⁰³ Might these also prove to be aberrations rather than signals of a sharp rightward turn in land use jurisprudence? There are in fact some observers who think so. Although the general tenor of the initial reactions to the 1987 cases was gloomy,⁴⁰⁴ a few cautious evaluations have since raised the prospect that the impact of the cases may be less than the "tidal change" feared by land use proponents.⁴⁰⁵ Indeed, early reports suggest that the "loose cannon" fired by the Supreme Court has not, at least immediately, ignited the kind of "litigation explosion" foreseen by Justice Stevens.⁴⁰⁶ An early analysis of the first clutch of lower-court decisions since the 1987 cases fails to bear out his prediction. Of 111 land use cases, 62 were decided on their merits; of these, "takings" were found in only 14 and actual damages awarded in only two.⁴⁰⁷ Although *First English* opens the way for courts to declare a regulatory taking, it is difficult to do so given the strict criteria for establishing one; even *First English* itself, remanded to the California court, failed the test.⁴⁰⁸ Similarly, a land use regulation can pass the *Nollan* test if the state can demonstrate an adequate "nexus" between the regulation and the state's legitimate land use goals.⁴⁰⁹ The 1987 decisions may not, in the end, warrant the general panic they inspired, but

REV. 943, 945 n.11 (1927). An increase to 15 out of 53 cases from 1921 to 1927 suggested a possible new trend.

402. Stephenson, *supra* note 17, at 233-35.

403. See *supra* notes 6-11 and accompanying text.

404. See *supra* notes 1-11 and accompanying text.

405. J. Kayden, *Judges as Planners: Limited or General Partners?*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 223 (C. Haar & J. Kayden eds. 1989).

406. 482 U.S. at 341 (Stevens, J., dissenting).

407. Looper-Friedman, *supra* note 10, at 59-60. See also Lemon, Feinland & Diehl, *The First Applications of the Nollan Nexus Test: Observations and Comments*, 13 HARV. ENVTL. L. REV. 585 (1989).

408. Looper-Friedman, *supra* note 10, at n.25 (citing 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989)). The chances are remote that courts will be presented with many instances in which an owner is deprived of *all* uses of the property.

409. 483 U.S. at 837. The main impact of *Nollan* may be that this "nexus" must be justified by more precise standards than the previously "primitive" ones accepted by the courts. See Blackwell, *Overlay Zoning, Performance Standards, and Environmental Protection After Nollan*, 16 B.C. ENVTL. AFF. L. REV. 615, 643-44 (1989) [hereinafter Blackwell].

instead merit a more measured evaluation. "*First English* and *Nollan* do not represent nirvana for property owners," commented counsel for *First English*. "Neither are they nuclear winter for land-use regulation."⁴¹⁰ Some commentators "view the cases as not having a significant impact because they do not state any novel legal principles," notes Robert J. Blackwell.⁴¹¹ "These cases are also viewed as aberrations because it is rare for the often conservative Supreme Court to make any 'revolutionary' shifts in land use ideology."⁴¹²

One should not make too much of historical parallels; they are neither proof nor prophecy. Simply because one series of events is like another in some respects does not make them alike in all, nor do their similarities predict an outcome with any accuracy. They are, in the end, only analogies, but analogy is a useful tool of logic. The historical parallels that can be drawn between the *Lochner/Moeschen* era and our own do not offer easy answers so much as they raise hard questions. They force, at the very least, a recognition of the complexity of both eras. But the example of *Moeschen* does something else as well. It is one of the clearest looks we are apt to find into the origins of today's land use law. It is not enough simply to locate these origins in zoning law,⁴¹³ for zoning law itself is rooted in the police power concepts debated in the briefs of *Moeschen*. Tracing land use law to zoning law and then stopping does not get to its roots; the peculiar development of zoning law has obscured those roots and contributed to the confusion in land use law.

The original proponents of zoning claimed classic police power justifications of health and safety: restricting the heights of buildings would bring more light and air to the city's residents, and separating commercial and industrial uses from residential ones would make the streets safer for children.⁴¹⁴ The appellant's brief in *Euclid v. Ambler* cited "[t]he intimate relationship between Zoning and the Health, Safety and Welfare of the community,"⁴¹⁵ and the majority opinion treated it as a police power regulation "asserted for the public wel-

410. M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 739 (1988).

411. Blackwell, *supra* note 409, at 650.

412. Blackwell, *supra* note 409, at 650 (citing *California Lawyer*, Nov. 1987, at 28).

413. See *supra* notes 36-43 and accompanying text.

414. Such, at least, were the putative reasons. But the arrival of zoning in New York had more to do with the desire of its "carriage trade" merchants to halt the encroachment of the garment industry onto Fifth Avenue: "the needle trade workers are the flies that follow you from one pasture to another . . . leaving a trail of ruin, devastation, and bankruptcy up and down the length of the city." Address of J. Howes Burton to Fifth Avenue merchants in 1916, *quoted in* S. TOLL, *ZONED AMERICAN* 176-77 (1969).

415. Brief for Appellants at 48, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

fare.”⁴¹⁶ Yet it was an essentially negative view of the police power, one grounded in the thin and rocky soil of nuisance law — the same sort of negative police power with which Bloch had wanted to limit *Moeschen*. In his majority opinion in *Euclid*, Justice Sutherland drew an explicit connection between nuisance law and zoning regulations, even to citing the familiar *sic utere* formula.⁴¹⁷ His opinion located zoning squarely in the tradition of a negative police power; the government-as-referee was simply posting some new rules to protect real estate owners from those who would use their property in ways that would financially injure that of others. Over the years zoning has continued to justify itself in terms of health and safety, but in practice it has served more frankly economic purposes. It protects businessmen who do not want their shopping districts cheapened by factories, and homeowners who see home values threatened by apartment buildings in the neighborhood. For local governing bodies, it has too frequently been used as an economic (and at times antisocial) tool — a way for cities to increase their “ratables” (property uses that generate rather than consume revenue) and for residential suburbs to exclude the poor and the nonwhite with stratagems like minimum lot size.⁴¹⁸

Consequently, modern land use law — which dates from its adoption as a law school course in the 1960s and the return of the Supreme Court to land use cases in the 1970s — has to a large extent been severed from its roots. The health and safety considerations that powered zoning, at least theoretically in the beginning, have been deflated of meaning by decades of lip service that has hidden financial motives. The nuisance rationale that also theoretically justified zoning is not “a land use control in the modern sense” because it “is defined as a specific activity, and it must be shown to exist and actually cause some harm before a court will hear the case.”⁴¹⁹ To understand the origins of modern land use law, it is necessary to leapfrog past zoning law into turn-of-the-century police power jurisprudence and the debate, exemplified in *Moeschen*, between a negative “nuisance” basis and a positive “overruling necessity” basis.

416. 272 U.S. at 387.

417. “In solving doubts [about the validity of a zoning ordinance] the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew [sic].” *Id.*

418. Such exclusionary zoning has recently been challenged in *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (Mount Laurel I); *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II), and *Hills Dev. Co. v. Township of Bernards*, 103 N.J. 1, 503 A.2d 280 (1986) (Mount Laurel III).

419. W. FISCHER, *THE ECONOMICS OF ZONING LAWS* 27 (1985), quoted in Blackwell, *supra* note 409, at 627-28.

It is this latter basis, derived from society's inherent right to self-defense, that offers the most useful perspective, for the most urgent questions of land use law today are not ones of property but of health — the health not just of individuals or the public, but increasingly, that of the species and ultimately of life itself.⁴²⁰ One commentator even argues that the way we are using (or misusing) the land is bringing about an end to nature as we have known it, as a "wild and separate province, the world apart from man."⁴²¹ Mankind has committed "a Texas chainsaw massacre" on its wetlands,⁴²² polluted its water and air, depleted the protective ozone layer of the atmosphere, and possibly brought about a global warming of disastrous proportions.⁴²³ The effects on health are many-faceted and essentially incalculable; we are, in the words of one scientist, "insulting the atmospheric envelope faster than we are comprehending the effects of those insults."⁴²⁴ These health considerations transcend ideology and might furnish (just as similar ones did in *Moeschen*) a useful framework within which even conservative justices could view land use jurisprudence — for if *Moeschen* reminds us of anything, it is that economic ideology is not the only determinant of judicial decisions. To the extent land use law benefits from a "halo effect" from its association with environmentalism, the court (like that of *Moeschen*) should be able to operate within a larger social vision of which conservative economic ideology is only a part. Indeed, as one theorist argues, environmentalism is "neither left or right"⁴²⁵ but an entirely new world view that transcends the "distributional politics" of economic ideology.⁴²⁶

420. There is a vast apocalyptic literature on the subject. See, e.g., MCKIBBEN, *supra* note 385; J. SCHELL, *THE FATE OF THE EARTH* (1982); S. SCHNEIDER, *GLOBAL WARMING: ARE WE ENTERING THE GREENHOUSE CENTURY?* (1989) [hereinafter SCHNEIDER]. See also *ENVIRONMENTAL HEALTH* (P. Purdom ed. 2d ed. 1980); J. LEE, *THE ENVIRONMENT, PUBLIC HEALTH, AND HUMAN ECOLOGY: CONSIDERATIONS FOR ECONOMIC DEVELOPMENT* (1985).

421. MCKIBBEN, *supra* note 385, at 48.

422. *Id.* at 115 (quoting a 1988 New Jersey environmental panel).

423. SCHNEIDER, *supra* note 420.

424. *Id.* at 284.

425. R. PAEHLKE, *ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS* 3 (1989).

426. *Id.* at 7-8. Paehlke uses the phrase "world view" rather than "social vision," but means essentially the same thing, *i.e.*, "a set of political ideals, a world view both value laden and comprehensive." *Id.* at 5. He argues that instead of questioning how the growing economic pie should be divided between the classes, environmentalism questions the growing pie itself. Consequently, its adherents range all the way from conservatives like Paul Ehrlich, who would rein in population, to "monkey-wrenching" radicals like Edward Abbey, who would rein in technology.

The complaint is frequently heard of "confusion" on the high Court.⁴²⁷ We might more hopefully style it "openness" and be grateful for the absence of its alternative — rigidity. The quest for a "coherent takings doctrine" is an inherently endless one, likened to "*the lawyer's equivalent of the physicist's hunt for the quark.*"⁴²⁸ It is a search for a way in which government may protect both individual property rights and the health, safety, and welfare that is sometimes endangered by the property.⁴²⁹ In a given case the Court necessarily comes down more on one side than another, but as a whole, it attempts to steer a middle course — "justice" or "fairness"⁴³⁰ — between the two extremes. In the 1987 cases, the Court veered more onto the side of property rights, but it is premature to declare this a trend; instead, it may signal nothing more than a mid-course correction.⁴³¹ If it signals a return to anything, it may be hoped that it is to the *Moeschen* era.

427. Hippler, *supra* note 36, at 754 ("confusing and inconsistent decisions"); WILLIAMS II, *supra* note 37, at 116 ("a lot of confusion"); Sax I, *supra* note 36, at 37 ("a crazy-quilt pattern of Supreme Court doctrine" (citing Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63)).

428. C. HAAR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND 766 (3d ed. 1977).

429. For a discussion of this duality, see Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15, 59-69 (1983).

430. *Id.*

431. See Blackwell, *supra* note 409, at 649-50.

