The Case for a Procedural Due Process Limitation on the Zoning Referendum:  
*City of Eastlake* Revisited

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The historical reluctance of the federal courts to intervene in local land use matters continues to retard development of constitutional protections, both substantive and procedural, against harms inflicted on individuals in the formulation and administration of local zoning policies. Since the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*¹, local governments have possessed the recognized constitutional authority to enact zoning ordinances² and to modify them in accordance with changing cir-

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¹ 272 U.S. 365 (1926). *Euclid* upheld the constitutional validity of comprehensive zoning regulation.

² Comprehensive zoning has been the principal tool of land use control at the municipal level for more than 50 years. It consists of the division of the whole territory into districts, and the imposition of restrictions upon the use of land in such districts. . . . Zoning regulations are drafted and enacted by the legislative authority, and they may be enforced by municipal action. They permit a municipality to apply constant and consistent pressure upon landowners to the end that land use will be guided by the community plan and the public interest.


By segregating potentially incompatible land uses, zoning originally was intended to anticipate private nuisance disputes through the sagacious use of public controls. R. Babcock, The Zoning Game 4 (1966) [hereinafter cited as The Zoning Game]. For an authoritative history of early zoning, see E. Bassett, Zoning: The Laws, Administration, and Court Decisions During the First Twenty Years (1936).

Government-imposed land use controls are intended, *inter alia*, to reduce fire and health hazards, to ensure that certain amenities such as low population density are preserved, and to reduce the harmful effects of industrial activities by excluding them from residential areas. In a perfect market system having no transaction costs, zoning would theoretically be unnecessary; externalities generated by each activity would be adjusted relative to other
cumstances. The substantive due process standard set forth in *Euclid* requires only that zoning regulations bear "a reasonable relationship to the community health, safety, morality, or general welfare." A presumption of reasonableness, validity, and constitutionality enshrouds local zoning enactments. If the reasonableness of the ordinance is fairly debatable, it will be upheld.

The tendency of zoning to exclude people from residential areas on the basis of economic and family status was recognized fifty years ago by the trial judge in *Euclid*, who found that "in the last analysis the result to be accomplished is to classify the population and segregate them according to their income or situation in life." As Richard Babcock explains, the amenity-related purposes of zoning, desirable in themselves, often lead to exclusionary results:

It is frequently charged and often apparent that local zoning practices on the fringes of metropolitan areas are designed to keep out the distasteful aspects of urbanization while permitting access to its fruits. These practices create exclusionary conditions directly in conflict with goals of social mobility and economic opportunity.

The substantive due process requirements of the fourteenth amendment do not prevent municipalities from indirectly encouraging or inducing racial segregation through exclusionary zoning practices in residential areas. Judicial review in the federal courts is limited to consideration of the purposes of the zoning regulation and not of its effects. Two constitutional doctrines have been used to challenge municipal zoning on the basis of its exclusionary effects rather than its purposes: the right to travel and equal protection of the laws. Absent rather blatant discriminatory practices, however, these constitutional rules provide little support for attacks on exclusionary zoning in federal courts. Recent decisions by the Supreme Court and the lower federal courts indicate that imminent expansion of these doctrines to control subtle exclusionary practices is quite unlikely. Therefore, primary respons-activities through the pricing mechanism. The social costs of activities would be optimally allocated. For a brief discussion of welfare economics analysis, see the seminal article by Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). See also Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation"* Law, 80 HARV. L. REV. 1165, 1242-56 (1967); Siegan, *Nonzoning in Houston*, 13 J. L. & ECON. 71 (1970); Henke, *Judicial Review of Local Governmental Administrative Decisions in California*, 10 U.S.F.L. REV. 361, 367-70 (1976).

5. IA C. ANTIEAU, supra note 1, § 7.20, at 7-28 to -29.
7. THE ZONING GAME, supra note 2, at 107-08.
8. Decisions such as Kennedy Park Homes v. City of Lackawanna [436 F. 2d 108 (2d Cir. 1970)], Daily v. Lawton [425 F.2d 1037 (10th Cir. 1970)], Norwalk CORE v. Norwalk Redevelopment Agency [395 F.2d 920 (2d Cir. 1968)], SASSO v. Union City [424 F.2d 291, 1 ERC 1223 (9th Cir. 1970)], and Park View Heights Corp. v. City of...
sibility rests with the state legislatures and courts to develop and implement adequate controls. 9

The reluctance of the federal courts to engage in expansive use of the right to travel and equal protection doctrines in connection with exclusionary zoning is explicable largely as a function of the same pressures which preserve Euclid as a viable constitutional rule. The roots of the deferential judicial posture taken in Euclid run deep into fundamental problems of judicial competence and federalism. These problems continue to frustrate attempts to subject local zoning practices to greater scrutiny in the federal courts through the use of the right to travel and equal protection doctrines.

Given the multitude of competing interests concerned with local decisions, a court’s lack of expertise relative to that of the local zoning board, and the often complex nature of land use issues, it is not surprising that even the most progressive courts, both federal and state, are reluctant to upset the legislative trade-offs made by the local zoning authority. 10 Euclid’s “rational basis” analysis permits a court to defer to municipal zoning legislation without delving into questions such as whether twenty-foot setbacks are

Black Jack [467 F.2d 1208 (8th Cir. 1972)] seemed to portend a swelling wave of exclusionary zoning litigation in the federal courts.

To the dismay of the plaintiffs however, and certainly the relief of many municipal attorneys, the experience of the last three years lends support to the conclusion that the federal courts have ventured about as far into the reform of land use law as they are likely to go for some time.


9. The trend in Congress, in contrast to the federal judiciary, is toward greater federal involvement in local land use planning. Although Congress recently failed to pass a Land Use Policy and Planning Act, S. 268, 93d Cong. 1st Sess., the “quiet federalization” of land use controls has begun. Professor Hagman explains:

Quiet because pollution was the primary target of much of the law and the impact on land use was initially scarcely realized, the series [of acts] involved “federalization” because the federal government for the first time began rather direct regulation of land use. Prior thereto the federal government had a major influence on land use through its own projects. And through grants it cajoled or bribed subnational governments to regulate land use but any discussion of federal control of land use in a strict sense would have been a very short story.


10. In one Georgia case, for example, it was conceded that judges “are incapable, for want of information and facilities, of properly zoning property.” Tuggle v. Manning, 224 Ga. 29, 35, 159 S.E.2d 703, 707 (1968) (dissenting opinion). See generally A. BICKEL, THE LEAST DANGEROUS BRANCH 208-21 (1962); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 YALE L.J. 1205 (1970); Brest, Palmer v. Thompson: an Approach to the Problem of Unconstitutional Motive, 1971 SUP. CT. REV. 95. For a political scientist’s view of the relationship between the courts and the various branches of local government, see K. DOLBEARE, TRIAL COURTS IN URBAN POLITICS (1967).
preferable to fifteen-foot setbacks or whether one-acre minimum lot-size is preferable to one-half-acre minimum lot-size. Rarely will a court substitute its own judgment as to the "health, safety, morality, or general welfare" of the community for that of the zoning authority.11

Plaintiffs must overcome the standing hurdle before the substantive issues raised in exclusionary zoning cases will be confronted by the federal courts. Plaintiffs must prove a "demonstrable particularized injury" and allege a sufficient personal stake in the outcome of the controversy to show that invocation of federal court jurisdiction is warranted.12 The complaint must indicate that the injury is indeed fairly attributable to the defendant's acts or omissions,13 and must show that the plaintiffs arguably are within the zone of interests protected by the statute or constitutional guarantee in question.14 Standing requirements, particularly those imposed by prudential considerations rather than by constitutional constraints, can be used by the federal courts to avoid deciding upon the claims of a wide variety of plaintiffs.14a The federal courts' reluctance to become involved with the complex issues raised in exclusionary zoning challenges arguably is responsible for the application of rigorous standing requirements in exclusionary zoning cases.14b However, a recent Supreme Court opinion—although using the language of cases which had denied standing—did acknowledge one plaintiff's standing to attack allegedly exclusionary zoning.14c In so doing,

12. See Warth v. Seldin, 422 U.S. 490 (1975), affirming the district court's dismissal of the complaint for lack of standing.
14. See Constr. Indus. Ass'n of Sonoma County v. Petaluma, 522 F.2d 897, 8 ERC 1001 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976). The circuit court, reversing on the merits, held that the plaintiffs were not within the zone of interests protected by the right to travel guarantee, but allowed standing to challenge the plan as a violation of plaintiffs' due process rights. When confronted by a due process challenge, federal courts almost always will defer to the local legislative scheme. See discussion in Part I infra.
14a. In Warth the exclusionary practices of the town of Penfield, New York were challenged by various organizations and individuals located in nearby Rochester. The plaintiffs included the following: 1) a non-profit, public interest corporation operating for the purpose of alerting citizens to problems of social concern; 2) individual property owners, residents of Rochester, who alleged that Penfield's exclusionary practices caused an increase in their property tax rates; 3) minority individuals owning property and paying property taxes, who worked in Rochester but lived outside that city; 4) minority individuals with low and moderate incomes resident in Rochester; 5) an association of construction firms operating in the Rochester area; and 6) a non-profit New York corporation formed by public and private organizations interested in housing problems, one of which alleged that it had actively attempted to develop moderate income housing in the area. All of these plaintiffs were held to lack standing to sue.
14b. See Justice Brennan's dissent in Warth for the argument that "the [majority] opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the merits." 422 U.S. at 520.
14c. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). In Arlington Heights, the MHDC applied for rezoning of a particular parcel, on which it wished to build low and moderate income housing. While the Court denied MHDC standing to press the claims of third persons affected by the zoning change, the Court did grant
the Court has increased the likelihood that a federal court will consider the merits of an exclusionary zoning challenge, at least in those instances where a plaintiff is denied access to a particular parcel of property. 14d

Federal courts are also restrained by concern, growing out of the policies of the federal system itself, that they should not unduly intrude on the province of sensitive local policy questions through the application of constitutional doctrine to zoning practices. As Professor Wechsler points out, "the prime function envisaged for judicial review—in relation to federalism—was the maintenance of national supremacy against nullification or usurpation by the individual states, the national government having no part in their composition or their councils."15 One of the basic premises in the formation of the Constitution was the preservation of the states "as separate sources of authority and organs of administration."16 "In the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights."17 Thus, dynamic tension was built into the federal union, manifested in part by various standards of judicial review which test the urgency of state interests offered in justification of prima facie constitutional violations. Since these standards finally are pronounced by the Supreme Court, itself a federal court, and are enforced concurrently by state and federal courts, they reflect the evolving dynamics of federalism. Therefore, precisely because expansive application of the right to travel and equal protection doctrines might clear an undesirably broad path through otherwise admittedly valid local regulations, the federal courts have refused to apply the right to travel and equal protection doctrines to invalidate many instances of exclusionary zoning.

The federal courts need not be hampered by these federalism and judicial competence problems with regard to procedural due process controls on local zoning. Judicial prescription of rules governing procedural fairness does not necessitate involvement in complex questions of policy; the federal courts need only guarantee that local policies will be formulated and applied in conformity with reasonable procedural safeguards.18

Until recently, procedural claims relating to zoning changes largely were ignored by the courts, both state and federal. In the last decade,
however, state courts have demonstrated increasing sophistication in their review of the procedures followed by a local zoning body when considering zoning changes. In particular, several state courts have recognized that the use of the referendum on zoning changes could nullify the procedural safeguards normally imposed to protect parties asserting their interests before a local zoning body. Irrelevant factors, which theoretically do not affect the local zoning board's decision, may determine the result of a referendum election; in some cases the voters may even act upon discriminatory motives. A readily administrable rule now operates in several states which, as a matter of procedural fairness, bars the use of the referendum on those zoning changes which are determinative primarily of the rights of individual property owners and not predominated by community-wide policy questions.

Recently, in City of Eastlake v. Forest City Enterprises, Inc., the Supreme Court heard the challenge of a land developer who argued that the use of a zoning referendum following the decision of the municipal zoning authority to allow the requested use of its property was in violation of procedural due process. Extolling the virtues of popular democracy embodied in the referendum, a majority of the Court rejected the developer's constitutional claim. Showing little sensitivity to the potential procedural unfairness, the Court extended its laissez-faire approach from the substantive to the procedural side of zoning. Thus, City of Eastlake is consistent with the Court's general unwillingness to become involved actively in reviewing the nation's zoning practices.

Justice Stevens' dissenting opinion in City of Eastlake, however, significantly departed from the traditional pattern. Drawing on innovations of several progressive states, he argued for a constitutional limitation on the use of the referendum. Briefly stated, he would bar the referendum where

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19. See note 124 infra and accompanying text.
19a. See text accompanying notes 173-181 infra.
20. See cases cited in note 173 infra.
23. Since Euclid, the Court has decided only seven cases involving zoning: Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Belle Terre v. Boraas, 416 U.S. 1, 6 ERC 1417 (1974); Warth v. Seldin, 422 U.S. 490 (1975); City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Moore v. City of East Cleveland, 97 S.Ct. 1932 (1977). Of these cases, only Moore invalidated a local zoning scheme. In that case, a higher standard of scrutiny was used by the Court, on the substantive due process ground that the ordinance undertook unduly intrusive regulation of the family.
the proposed zoning change is, in essence, private litigation in relation to a specific parcel of land.

This Article assesses existing substantive and procedural controls on zoning and the referendum, and argues that Justice Stevens' approach, with some refinement, would be a desirable step in the evolution of procedural due process protections. The first half of the Article examines the historical reluctance of the federal courts to entertain substantive attacks on zoning practices with exclusionary effects, focusing on federalism and judicial competence as the major barriers to federal court intervention. Part II argues that the barriers inhibiting judicial activism on substantive zoning issues should not similarly restrict the federal courts in formulating procedural controls on the use of the zoning referendum.

I

CHALLENGES TO EXCLUSIONARY LAND USE PRACTICES: THE FEDERAL AND STATE RESPONSE

Cases challenging exclusionary zoning based on the equal protection and due process clauses of the fifth and fourteenth amendments are decided under the two-tier approach developed by the Supreme Court.24 If the zoning ordinance affects a fundamental right, such as the right to vote, or involves a suspect classification, such as race, the burden of proof placed by the court on the local government can be met only by a showing that the regulation necessarily promotes a compelling state interest and that no less onerous alternative is available to the government in reaching its objective.25 Absent a fundamental interest or suspect classification, the burden of proof rests on the party attacking the validity of the law to show that it is not rationally related to a legitimate government objective. A clear dichotomy emerges: few regulations will withstand strict scrutiny, and few will be overturned under a rational basis standard.

The crux of the exclusionary zoning problem, aside from isolated instances of demonstrable racial discrimination,26 lies in the present structure of state government; states cede to municipalities the power to pursue self-interested land use policies that affect outsiders without requiring local governments to take such effects into consideration when formulating their policies.


25. Only in very few cases has governmental activity been upheld under this standard. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944), involving internment of Asian-Americans during World War II.

With control exercised by local jurisdictions, rather than regions or states, municipalities can maintain restrictive practices that affect persons outside their jurisdictions but preclude these people from any political process that might induce the municipality from taking these external effects into consideration when establishing their land-use policies.  

In several states a substantive due process standard is emerging which prevents local governments from ignoring so freely the welfare of persons living in the surrounding region; unlike the test formulated in *Euclid*, the standard applied in these cases more closely scrutinizes whether the community has provided sufficiently for various regional needs. The "strictness" of this standard of judicial review falls somewhere between the rational basis and compelling interests tests under the fifth and fourteenth amendments. Whether the intricate details of this new approach ultimately are supplied by judicial decision or by legislative enactment, the recognition of some of the unique problems of exclusionary zoning represents a substantial improvement over the past. Many years of experimentation by the states likely will precede any serious consideration of the incorporation of this heightened substantive due process standard into federal constitutional law. However, in time the federal courts may follow the lead of the states, as has occurred in other areas of constitutional law.

Nevertheless, attacks on exclusionary zoning brought in the federal courts continue to be brought under the equal protection clause and the right

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28. See cases cited in note 97 infra.
29. Justice Brandeis has admonished:
To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

30. For example, the exclusionary rule was held not to be applicable to the states via the fourteenth amendment in *Wolf v. Colorado*, 338 U.S. 25 (1949), at a time when 31 states rejected the ruling in *Weeks v. United States*, 232 U.S. 383 (1914), barring the use in a federal prosecution of evidence illegally seized by federal officers. Twelve years after *Wolf*, the Court reversed its position. *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Mapp*, the Court emphasized the fact that despite *Wolf* more than half of the states passing on the use of the exclusionary rule in the interim had wholly or partially adopted the *Weeks* rule: "The experience of California (referring to *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955)) that . . . other remedies have been worthless and futile is buttressed by the experience of other states." 367 U.S. at 652. The history of the constitutional right to counsel in criminal prosecutions followed a similar pattern. *Gideon v. Wainwright*, 372 U.S. 335 (1963), rejected the case-by-case approach set forth in *Betts v. Brady*, 316 U.S. 455 (1942). Instead, the Court found that the right to counsel should attach in every state as well as federal prosecution: "Florida, supported by two other states, has asked that *Betts* be left intact. Twenty-two states, as friends of the Court, argue that *Betts* was ‘an anachronism when handed down’ and that it should now be overruled. We agree."

372 U.S. at 345.
to travel doctrine. Section A of this Part analyzes the response of the federal courts to these challenges to exclusionary zoning. Section B examines the development of a new substantive due process rule in the state courts and the unlikely prospect of its imminent adoption by the federal courts.

A. Constitutional Challenges to Exclusionary Zoning: The Federal Response

1. The Right to Travel

An elusive constitutional doctrine of uncertain heritage, the so-called "right to travel" has not been warmly received by the federal courts when used to challenge zoning practices. In essence, the right to travel is a protection against governmental restraint on an individual's physical mobility. In recent cases the right to travel has been recognized as a liberty guaranteed by the due process and equal protection clauses of the fifth and fourteenth amendments, although none have held that the right to travel gives rise to the level of strict scrutiny afforded other fundamental personal rights. The doctrine has been used successfully to attack various state durational residency requirements, municipal durational residency require-

31. The source in the text of the Constitution for the right to travel is not certain. The Articles of Confederation provided that the citizens of each state should have "free ingress and egress to and from any other state." Articles of Confederation art. IV. There is no express provision to that effect in the Constitution. Various judicial decisions have relied on the privileges and immunities clause (U.S. CONST. art. IV, § 2), Toomer v. Witsell, 334 U.S. 385 (1948), the commerce clause (U.S. CONST. art. I, § 8), Edwards v. California, 314 U.S. 160 (1941), the structure and relationship inherent in the federal union, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867), and the due process and equal protection clauses of the fifth and fourteenth amendments, Aptheker v. Secretary of State, 378 U.S. 500 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969). For a concise discussion of the nature and origin of the right to travel doctrine, see Note, supra note 26.

32. The classic statement upon which the doctrine is based was made by Chief Justice Taney in the Passenger Cases:

Well, if the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states. 48 U.S. (7 How.) 283, 492 (1849). Commentators have argued that the doctrine should encompass the right to "enter and abide" in communities within each state. BABCOCK & BOSSELMAN, supra note 27, at 36 (citing ALOI & GOLDBERG, RACIAL AND ECONOMIC EXCLUSIONARY ZONING 9, 24). See also Hagman, Urban Planning and Development—Race and Poverty—Past, Present, and Future, 1971 UTAH L. REV. 46, 65.


34. See, e.g., Starns v. Malkerson, 326 F. Supp. (D. Minn. 1970), aff'd, 401 U.S. 985 (1971) (distinguishing Shapiro v. Thompson on the ground that a durational residency requirement for in-state tuition, unlike that for welfare, applies both to the rich and the poor, and it does not involve so crucial an interest as the "necessities of life").

ments upon which access to federally-assisted public housing is conditioned, and the denial of passports by the federal government.

The right to travel was one prong of an attack on a zoning ordinance in a case recently before the United States Supreme Court, Village of Belle Terre v. Boraas. Although the right to travel challenge was summarily dismissed by the Supreme Court in its decision, the facts of that case illustrate the administrative problems raised by the use of the right to travel doctrine in a zoning context.

In Belle Terre, the challenged village ordinance restricted land use to single family dwellings, thereby excluding boarding and lodging houses, fraternity houses, and other multiple family dwellings. The ordinance excluded from the definition of “family” cohabitation by more than two persons unrelated by adoption, blood, or marriage. The village’s attempt to enforce the ordinance against six students living together in violation of the single family restriction prompted a suit to declare the ordinance unconstitutional. The complaint alleged denials of the right of privacy, freedom of association, and equal protection, in addition to the right to travel.

The Court of Appeals for the Second Circuit, reversing the district court, granted a preliminary injunction against enforcement of the ordinance. The Second Circuit found that no rational basis supported the village’s special treatment of persons not related by consanguinity or marriage and concluded that the ordinance violated equal protection. However, Justice Douglas, speaking for the majority of the Supreme Court, disagreed, and expressed his belief that, “The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”

36. See, e.g., Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970) (two year residency requirement for access to public housing unconstitutional); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971), cert. denied, 449 U.S. 863 (1971) (five year residency requirement for admission to public housing violates equal protection). Thus, despite the Supreme Court’s uncertain position on the imposition of burdens on intrastate migrants, the lower federal courts have shown an inclination to refuse to give effect to significantly burdensome regulations. See Comment, The Right to Travel: Another Constitutional Standard For Local Land Use Regulations?, 39 U. CHI. L. REV. 612, 628 (1972).

37. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958) (dictum) (citizen cannot be deprived of right to travel abroad without due process); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (fifth amendment guarantee of liberty abridged where Communist organization members were not allowed to travel outside Western Hemisphere). But cf. Zemel v. Rusk, 381 U.S. 1 (1965) (where associational rights are threatened and national security is at stake, travel to Cuba may be curtailed).

38. 416 U.S. 1, 6 ERC 1417 (1974).


40. 416 U.S. at 9, 6 ERC at 1419. For an insightful critique of the decision and the Court’s general lack of sensitivity to zoning issues, see Williams & Doughty, Studies in Legal Realism: Mount Laurel, Belle Terre and Berman, 29 Rutgers L. Rev. 73, 77 (1976).
The facts of Belle Terre illustrate a number of difficult administrative questions that would be presented by the application of the right to travel doctrine to zoning cases. How much must the challenged ordinance impede settlement in the community in order to violate the Constitution? Should other local ordinances encouraging outsiders to settle in the area be considered? Must the ordinance make it impossible for the plaintiff to settle anywhere in the community, or must it merely prevent settlement in a particular neighborhood? One might also ask how the community’s amenity-related concerns should be weighed against the interests of outsiders excluded by the ordinance. How far can the community go in the direction of bolstering “family values” without infringing on the rights of those who enjoy differing life-styles? Finally, since nearly every zoning ordinance restricts development below market demand, how could a court make a principled distinction between a minimally restrictive ordinance and a highly restrictive ordinance if they both impinge on the constitutional right to travel? The Court avoided most of these questions by refusing to find a violation of the right to travel.

Construction Industry Association of Sonoma County v. City of Petaluma demonstrates the potential use of the right to travel doctrine in controlling the methods by which communities can possibly limit future growth. Fighting an incoming tide of urban population growth, the city adopted an official development policy in 1971. The preamble of the policy stated the purpose of the “Petaluma Plan”: “In order to protect its small town character and surrounding open spaces, it shall be the policy of the City to control its future rate and distribution of growth.” Under the Plan, construction of new housing units was limited to a percentage of the...
demographic and market demand in relation to a base year and an "urban extension line" was created to limit the spread of new development.45

The federal district court, relying on several Supreme Court decisions involving the "fundamental" right to travel,46 determined that the city had no compelling interest in limiting "natural population growth" and enjoined implementation of the Plan. In so doing, the district court broke sharply with the traditional deference of the federal courts to local zoning practices.47 The court made extensive findings of fact relating to the regional need for housing and the city's ability to bear additional residential building, and then designated Petaluma a "growth center" capable of absorbing new residents in the San Francisco region.48 Rejecting the city's proffered justifications for the plan, namely, inadequate water supply, insufficient sewage facilities, and an interest in limiting population growth within its boundaries, the court refused to defer to the city, based on its conclusion that the Plan violated nonresidents' right to travel.49 Regional needs, said the court, should prevail over local self-interest; the only permissible control on the community's growth should be market demand.50

The district court's decision pressed, if it did not exceed, traditional limitations on the role of the federal courts. Couched in the findings of fact were numerous conclusions regarding the necessity of accommodating regional housing needs, the selection and scope of the region in question, and the definition and description of a growth center.51 In addition, the court's

45. A summary of the Plan appears id. at 576-77.
46. Id. at 588. None of the cases cited involved zoning. On the contrary, the court relied on non-zoning cases where the Supreme Court had used the compelling interest test, all of which involved fundamental rights in addition to the right to travel. Id. at 581-84.
47. One writer concluded:
In the general welfare and zoning context, Petaluma is unique; the court broke both with traditional deference to local zoning power and with minimal examination of a plan's conformity with the comprehensive plan. The court subordinated the luxuries of a municipality to the pressing needs of a region by examining the substance and long-range effects of the comprehensive plan. The major import of the opinion is its potential effect on the consideration of no-growth ordinances by other courts. Petaluma's problem was not unique, and other municipalities may attempt to solve the problem with the same type of zoning plan. If the lower court decision in Petaluma has any pervasive influence on judicial treatment of these plans, then that influence will be reflected in the decision of other courts to engage in the detailed analysis of the effects of the zoning plans before them.
49. Id. at 581, 583.
50. Id. at 586, 587.
51. See Note, supra note 47, conjecturing that
the structure of the opinion and the reliance on nontraditional inputs (market demand for housing, statistical projection of housing shortages, growth center theory, threshold housing, etc.) indicate that the court may have been more concerned with the result of the litigation than with the strict integrity of the legal reasoning. While the right to travel is clearly implicated in this case, the court uses the right to bootstrap a factual result.
conclusions contradicted the city's legislative judgment as to the city's ability to meet water and sewage treatment demands. The court made fundamental policy decisions that would dramatically redirect the course of urban/suburban development, unchecked by democratic controls and unguided by full public debate concerning alternative means of reaching the desired results. In so doing, the court broke with traditional notions of the judicial role and placed itself in the center of local debate on the fact finding and administrative issues of city planning and zoning administration.

The court of appeals disagreed with this aggressive judicial position and reversed the district court. In order to fully dispose of the case on appeal, the court of appeals considered the plaintiffs' personal claims that the Plan was arbitrary and thus violative of their due process rights and that the Plan posed an unreasonable restraint on interstate commerce. Although it acknowledged the existence of "injury in fact" sufficient to support standing for constitutional purposes, the court dismissed the right to travel challenge on the basis that the plaintiff Association and landowners within the city failed the "zone of interest" test which ordinarily prevents complainants from asserting the legal rights of third parties. In dictum, the court of appeals refused to accept the concept of the regional general welfare under the substantive due process doctrine. The court wrote: "[T]he concept

Id. at 235 n.93. See also Note, The Right to Travel and Community Growth Controls, 12 HARV. J. LEGIS. 244 (1975).

52. 522 F.2d 897, 8 ERC 1001 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).
53. Id. at 905-09, 8 ERC at 1005-09.
54. Standing for the purposes of article III, section 2 of the Constitution depends on the presence of a "case or controversy." The plaintiff Association suffered a loss in dues as a result of the Plan, because Sonoma County builders contribute dues in a sum proportionate to the volume of their business in the area. The plaintiff landowners were injured or threatened with injury by the Plan's adverse effect on the value and marketability of their land for residential uses. Thus, the court was satisfied that plaintiffs had a sufficient "personal stake in the outcome" of the case to ensure that the constitutional prerequisite was fulfilled. 522 F.2d at 903-04, 8 ERC at 1004.
55. Id. at 904, 8 ERC at 1004-05. The court responded in accordance with the Supreme Court's recent movement to make standing requirements more restrictive. Use of the "prudential" branch of the standing doctrine has been encouraged. See, e.g., Ass'n of Data Processing Service Org's v. Camp, 397 U.S. 150 (1970); Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 42 (1976); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). See text accompanying notes 12-14d supra.

As a practical matter it is unlikely that "outsiders"—meaning persons seeking to move into the community—will come forward with a right to travel argument. When growth limitations are imposed, typically the land prices and rental values escalate. Those unable to afford the inflated costs are unlikely to choose to incur litigation expenses. Professor Williams describes these persons as "third party nonbeneficiaries," meaning "third parties in land use conflicts, who rarely appear in the case law—but whose interests may in fact sometimes be affected more severely than either the landowners' or the neighbors']." 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 2.02, at 74 (1975). But see Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977) (ruling in an equal protection context that a black (1) who works in the village but who lives 20 miles away, and (2) who probably would move to the village in the event that the housing project in question is built, adequately averred an "actionable causal relationship" between zoning practices and his asserted injury).
of the public welfare was sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace." The court thus deferred to the city's definition of the general welfare embodied in its zoning ordinances. As such, its opinion reflects the general reluctance of federal courts to become embroiled in the administrative difficulties presented by a right to travel challenge in the zoning context, rather than a doctrinal decision that the right to travel has no application in the context of land use regulation.

2. **Equal Protection: Intentional and De Facto Discrimination**

The equal protection doctrine prohibits state action that discriminates among classes of persons or property without sufficient justification, either intentionally (de jure discrimination) or by reason of its unintentional effects (de facto discrimination). De jure discrimination occurs in three forms: (1) explicit discrimination appearing on the face of a statute; (2) intentionally discriminatory application of a statute nondiscriminatory on its face; and (3) adoption of a statute, nondiscriminatory on its face, pursuant to a discriminatory legislative purpose or motive. The degree of judicial scrutiny in equal protection cases depends on whether the alleged discrimination is de jure or de facto. Because strict application of the equality principle embodied in the equal protection doctrine could seriously impede legitimate governmental objectives, de facto discrimination—in the absence of improper intent or motive—generally receives less rigorous judicial scrutiny than de jure discrimination. Furthermore, the degree of judicial scrutiny varies according to the criteria upon which the allegedly improper classification is based. In zoning cases, equal protection challenges have raised issues involving both racial and wealth-based classifications. Since these two

56. 522 F.2d at 908-09, 8 ERC at 1009.
57. The concept of state action has been the subject of extensive discourse. See generally W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1382-1432 (4th ed. 1975); Quinn, State Action: A Pathology and a Proposed Cure, 64 CALIF. L. REV. 146 (1976). One commentator suggests that, with respect to exclusionary zoning, "[w]hat is at issue is a governmental act that strongly reinforces the social propensity to form tight little islands of residential exclusivity." Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 STAN. L. REV. 767, 791 (1969). At least since Shelley v. Kraemer, 334 U.S. 1 (1948), courts have been cognizant of this complex aspect of residential segregation:

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

classifications have different ranks in the hierarchy of constitutionally protected interests, they are discussed separately in the subsections below.

a. Racial discrimination

Racial discrimination claims trigger the strictest judicial scrutiny of any classification under the equal protection doctrine. Yet, the federal judiciary clings to its tradition of non-intervention in local zoning schemes even when the schemes have racially discriminatory effects.

The easiest case in which equal protection is invoked to invalidate racial discrimination is where the improper classification appears on the face of a written law. Hunter v. Erickson, while not a zoning case, illustrates the facility of judicial review when the alleged infirmity does not require extensive factual proof relating to unwritten local policies. A fair housing ordinance, enacted in 1964 by the city of Akron, Ohio, subsequently was repealed in a city-wide referendum amending the city charter. The Supreme Court did not find the repeal objectionable, but found the amendment to the charter itself invalid. The amendment provided that any future ordinance intended to regulate the transfer of interests in real property "on the basis of race, color, religion, national origin or ancestry" must obtain majority approval by the city's electorate prior to taking effect. Certain minorities would suffer an unreasonable burden, the Court decided, because the amendment singled them out although there was not a compelling municipal interest that justified their special treatment. Under the ordinance, other minorities, such as those affected by "housing discrimination on sexual or political grounds, or [discrimination] against those with children or dogs, [or against] tenants seeking more heat or better maintenance from landlords," would escape this burden. By analyzing the problem in these formalistic terms—measuring the potential effect of the ordinance against its possible justifications—the court need not delve into the actual intricacies


60. See note 8 supra.
62. Id. at 390 n.5.
63. Id. at 387 (quoting Akron City Charter).
64. Id. at 391.
of local policy. The formal application of legal reasoning predominates over factual controversy.

When an ordinance which is valid on its face has disproportionate racial effects, a violation of equal protection is not easily proved. Substantial disagreement over the proper standard of review has prevailed among the lower federal courts. Some courts were of the opinion that facially valid housing and zoning ordinances with a disproportionately heavy impact on racial minorities should be invalidated even without a showing of improper motive, unless a compelling municipal interest can be shown. Other courts employed this rigorous compelling interest test only if a showing of discriminatory effect was accompanied by proof of an improper motive on the part of the zoning board or the electorate. The Supreme Court recently restricted the use of the discriminatory effects test in an employment discrimination case. In Village of Arlington Heights v. Metropolitan Housing Development Corp. the Court also restricted its use in cases challenging housing and zoning regulations:

[Official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.]

Arlington Heights holds that the purpose of the official action must be considered along with its impact. Factors that courts are instructed to evaluate in determining the purposes of official actions include the following: (1) the historical background of the official decision; (2) the "specific sequence of events leading up to the challenged decision;" (3) the extent of departure from the normal procedural sequence or substantive considerations; and (4) the legislative and administrative records of the decision.

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67. Washington v. Davis, 426 U.S. 229 (1976) (verbal skills test used to screen prospective police recruits held valid despite a showing that the test excluded a disproportionately high number of black applicants). See Brest, supra note 42, at 24-25 (1976).


69. Id. at 264-65 (citation omitted).

70. The Court indicated in passing that earlier cases such as Palmer v. Thompson, 403 U.S. 217 (1971), and Wright v. Council of the City of Emporia, 407 U.S. 451 (1972), should not be read so broadly as to undercut the motive requirement. 429 U.S. at 265.
making body.\textsuperscript{71} Consistent with this approach, the Court in \textit{Arlington Heights} found that although the village's denial of the requested rezoning "arguably" fell more heavily on racial minorities, its action was not tainted by discriminatory purpose and was therefore a valid exercise of municipal authority.

The improper motivation approach will not serve as a strict control on discriminatory land use practices for at least two reasons. First, a discriminatory purpose in the enactment of zoning legislation is nearly impossible to prove, since the record of a legislative body, if one exists, rarely evinces clear intent.\textsuperscript{72} The record usually contains numerous, often contradictory, statements relating to the problem on which legislation is proposed.\textsuperscript{73} No record even exists where legislation is enacted by initiative or struck down by referendum. In \textit{Southern Alameda Spanish Speaking Organization v. Union City}, the Ninth Circuit conceded the practical impossibility of inquiry into the motives of the voters who nullified by referendum a zoning change which would have allowed the construction of housing likely to be inhabited by low-income Mexican-Americans.\textsuperscript{74} Since courts cannot probe and weigh the motives of voters or legislators, the failure to adopt the disproportionate effects test will result in virtually no judicial controls on racially motivated referenda.\textsuperscript{75}

\textsuperscript{71} Id. at 267.
\textsuperscript{72} In \textit{Arlington Heights}, the Court conceded:

\textit{Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.}

\textsuperscript{73} 429 U.S. at 265. For a full discussion of the evidentiary sources by which racially discriminatory intent or purpose may be detected, see Hogue, \textit{Eastlake and Arlington Heights: New Hurdles in Regulating Urban Land Use?}, 28 CASE W. RES. L. REV. 41, 74 (1977); Note, \textit{supra} note 14d, at 803.
\textsuperscript{74} Again in \textit{Arlington Heights}, the Court recognized that, "ever since Fletcher v. Peck, judicial inquiry into legislative or executive motivation represents a substantial intrusion into the workings of other branches of government." 429 U.S. at 268.
\textsuperscript{75} 444 F.2d 291 (9th Cir. 1970) (SASSO). Consequently, the court felt compelled to concede that it was no more likely that the referendum was based on racial than on environmental grounds. "If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise." 442 F.2d at 295.

\textsuperscript{75} The Court has acknowledged its agreement with the SASSO decision in relation to its characterization of the referendum generally. In City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976), the Court cited SASSO approvingly. \textit{Id.} at 678. Professor Hagman, in a discussion of SASSO and Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), notes:

\textit{Thus, despite the realities, and despite the embarrassment to the credibility of a judicial system which will not invalidate governmental acts that clearly would not be passed except for racial motivation, courts may not invalidate racially motivated acts leading to the exclusion, separation, or removal of housing for the poor and minority groups.}

Second, very rarely will a historical or comparative analysis of a zoning ordinance produce evidence clear enough to allow a court to infer discriminatory intent; the standard set by *Arlington Heights* for the inference of discriminatory intent will place courts in only a slightly less deferential posture than the "generous *Euclid* test." 76 The historical background of the zoning ordinance, the sequence of events leading up to the decision, and any significant departures from the normal procedural sequence or substantive considerations, are to be considered by the court in focusing on the question of discriminatory purpose. However, unless the community's land use practices previously conformed to a clear pattern, the court will likely find it extremely difficult to discern whether an improper purpose existed in a given case. To exemplify the need to look for substantive departures, the *Arlington Heights* opinion cites *Dailey v. City of Lawton.* 77 There the plaintiffs proposed to build low-income housing on the site of a former school they acquired for the purpose of development. The city refused to rezone the parcel to accommodate residential use, despite the fact that all the surrounding area was zoned for such residential use. In addition, both the present and former planning directors for the city testified that there was no reason "from a zoning standpoint" why the residential classification should not be allowed. Based on this and other evidence, the Tenth Circuit found improper racial motivation and invalidated the city's act of refusal to rezone. 78 The examination of intent, absent a fairly clear showing of no legitimate zoning purpose, quickly will involve the courts in the policy questions they have sought to avoid since *Euclid.*

The courts have shown a reluctance to involve themselves in difficult policy questions presented by equal protection challenges based on evidence that legislation has racially disproportionate effects. Under *Arlington Heights*, the equal protection doctrine apparently will not bar de facto discrimination, absent a showing of a clear pattern of executive or administrative discrimination, like that found in *Gomillion v. Lightfoot* 79 and *Yick Wo v. Hopkins,* 80 where the evidentiary inquiry was "relatively easy." 81 In a footnote, the Court attributed the recognition of the often "limited probative value" of disproportionate impact to the need to acknowledge the "heterogeneity" of the nation's population. 82 This language reflects the problems courts have in reconciling the egalitarian norm embodied in the

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76. 429 U.S. at 263. See text accompanying notes 10-11 supra.
77. 425 F.2d 1037 (10th Cir. 1970).
78. Id. at 1040.
79. 364 U.S. 339 (1960) (adjustment of boundaries changing the shape of the city from a square to a 28-sided figure and thereby excluding all but four or five black voters from participating in city elections was sufficient to show a violation of the fifteenth amendment).
80. 118 U.S. 356 (1886) (discriminatory administration of city ordinance against racial minority violative of fourteenth amendment).
81. 429 U.S. at 266.
82. Id. at 266 n.15. See Jefferson v. Hackney, 406 U.S. 535 (1972).
equal protection doctrine with the separation of powers norm embodied in the standards implementing the substantive due process doctrine. In each case where the norms conflict, the court must determine where to place the risk of error. A very strict equal protection doctrine would tend to paralyze the executive and legislative branches of government; if each action were carefully tested for its disproportionate impact on minorities, few, if any, would be given effect. On the other hand, the failure to hold local governments accountable for those regulations which produce disproportionate effects may result in judicial affirmation of discriminatory zoning legislation. The present standard, as articulated in *Arlington Heights*, favors local autonomy and makes the equal protection doctrine of limited usefulness in challenges to exclusionary zoning.

b. Wealth-based discrimination

Americans tolerate "dollar discrimination" more readily than discrimination based on race, ethnicity, or national origin. This is reflected in judicial decisions holding that wealth is not a suspect classification. One reason for this greater tolerance is the contrast between the immutability of racial characteristics and our assumptions about socio-economic mobility; the perceived potential for economic advancement legitimizes our acceptance of differentials in wealth. Wealth-based discrimination pervades residential zoning regulation because there is commonly a direct correlation between amenity-oriented land use restrictions and increased cost of housing. Discrimination between "rich" and "poor" by governmental units involved in land use policies generally is barred. However, the precise formula by which this branch of the equal protection doctrine is applied remains unclear.

The leading case in this area is *James v. Valtierra*. In *Valtierra* the Supreme Court upheld a state constitutional amendment providing that no

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84. *See Note, Exclusionary Zoning and Equal Protection*, 84 Harv. L. Rev. 1645, 1651 (1971). Moreover, the right of access to housing has not achieved the status of a "fundamental right." Lindsey v. Normet, 405 U.S. 56, 74 (1972) (upholding Oregon's summary eviction procedures).
86. BABCOCK & BOSSELMAN, *supra* note 27, at 5-7 (1973). Norman Williams notes in his criticism of the Supreme Court's opinion in *Belle Terre* the fact that the Court "accepted with marked equanimity the proposition that the normal effect of zoning would be to reduce the value of property." Williams & Doughty, *supra* note 40, at 78-79.
87. In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court said: Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored.
low-rent public housing could be developed unless approved by referendum in the community. Distinguishing Hunter v. Erickson on the ground that the instant amendment did not classify on the basis of race, the court found no violation of equal protection. The fact that "the building of federally financed low-cost housing entail[ed] costs to the local community" was a reason for permitting the mandatory referendum. There was no discrimination, the Court explained, since proponents of low-income housing were not singled out for mandatory referenda; under state law, proponents of municipal annexations, local government long-term bond issuance, and state constitutional amendments must also overcome this obstacle.

Whether or not the Court will adopt a motive requirement in this area similar to the Arlington Heights rule remains to be seen. If a showing of an economic exclusionary motive is required in the future, equal protection challenges to wealth-based discrimination will be hampered by the same limitations on judicial inquiry recognized in Arlington Heights. It is not likely that the Court would apply a less deferential standard of review to wealth-based as compared to racial discrimination. There is historically a substantial interrelation between racial stigmatization and economic disadvantage. Thus, a more liberal interpretation of the equal protection doctrine in wealth-based discrimination cases would have the unlikely result of opening an avenue of attack on exclusionary zoning that the courts have already blocked in the race discrimination cases.

B. The State Response: A Movement Toward Regionalism

State legislatures and courts increasingly are becoming accustomed to solving problems at the state and regional levels that once were left to county and municipal governments. The way is open for a re-evaluation of

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89. See text accompanying notes 61-65 supra.
90. 402 U.S. at 143 n.4.
91. Id. at 142.
93. Babcock and Bosselman point out the practical nature of the problem in relation to exclusionary referenda:

Whatever interpretation future courts may choose to give Valtierra may be less important than its immediate effect, which, as Professor George Lefcoe has pointed out, has been to discourage developers of both public housing and other subsidized housing from seeking sites outside existing areas of minority concentration. The threat of a referendum chills all but the most determined developer.

BABCOCK & BOSSELMAN, supra note 27, at 35. Professor Lefcoe's analysis appears in Lefcoe, From Capitol Hill: The Impact of Civil Rights Litigation on HUD Policy, 4 URB. L. AW. 112, 118 (1972).
94. The phenomenon is eloquently described as follows:

This country is in the midst of a revolution in the way we regulate the use of our land. It is a peaceful revolution, conducted entirely within the law. It is a quiet revolution, and its supporters include both conservatives and liberals. It is a disorganized revolution, with no central cadre of leaders, but it is a revolution nonetheless.
the proper scope of municipal authority. To be sure, tradition—when coupled with vested economic, political, and social interests—militates against restructuring local government. However, as awareness of the supra-local consequences of urban subdivision and zoning decisions increases, so does the need to develop a coherent theory of government that includes within the decision-making process outsiders significantly affected by municipal policies. States are becoming aware that a definition of the general welfare, from which the zoning authority is derived, should include a consideration of the regional impacts of local land use decisions.

In several states, municipalities are required by recent judicial decisions to take into account regional concerns in formulating and administering their zoning laws. Experience in these states indicates that, absent a regional land use authority which coordinates the activities of the numerous communities in the region, neither the courts nor the communities themselves are well-equipped to define equitably the "general welfare." Perhaps through continuing experimentation workable standards will emerge by which the interests of the region and the interests of the community properly can be balanced.

The following discussion briefly considers the trend toward regionalism in zoning under state law, focusing on the innovative approach of the New Jersey Supreme Court, now widely noted for its decision in Southern Burlington County NAACP v. Township of Mount Laurel.

The ancien régime being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.

The tools of the revolution are new laws taking a wide variety of forms but each sharing a common theme—the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land.

F. Bosseman & D. Callies, The Quiet Revolution in Land Use Control, A Report to the Council on Environmental Quality 1 (1971). See also 5 N. Williams, supra note 55, § 160.01.


I. The Fair Share Approach: Mount Laurel

In Mount Laurel, plaintiffs attacked the township’s system of land use regulation on the ground that it unlawfully excluded low- and moderate-income families from the municipality. The ordinance in question permitted only single family detached dwellings in residential areas and was restrictive in its minimum lot area, lot frontage, and building size requirements.

The crux of the Mount Laurel decision is that each municipality must bear its “fair share” of the regional burden of providing housing for low- and moderate-income residents. Several legal rationales were available to the New Jersey Supreme Court in reaching this result.\textsuperscript{99} The court chose to rest its decision on an expansive redefinition of the “general welfare,” the basis for exercise of the police power under the state constitution’s due process clause.\textsuperscript{100} The opinion emphasized that these standards “may be more demanding than those of the federal Constitution.”\textsuperscript{101} It is incumbent on each municipality, the court reasoned, to comport with “substantive due process and equal protection”\textsuperscript{102} in exercising its zoning authority. Whereas Euclid commanded broad deference to municipal autonomy in zoning matters, Mount Laurel began with the proposition that “when regulation does have a substantial external impact, the welfare of the state’s citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.”\textsuperscript{103} Thus, under Mount Laurel, municipalities have the power to regulate land use only to the extent that the benefits and burdens of the regulation are fairly apportioned with respect to the region’s

\footnotesize{\textit{Approaches}, 4 Fordham Urb. L.J. 147 (1975); Mallach, Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation, 6 Rutgers-Camden L.J. 653 (1975); Rose, Exclusionary Zoning and Managed Growth: Some Unresolved Issues, 6 Rutgers-Camden L.J. 689 (1975).}

\footnotesize{99. Professor Williams suggests six possible rationales: (1) equal protection, as a rule under the Federal Constitution; (2) equal protection, as a rule under the state constitution; (3) general welfare, as a constitutional basis of the state’s police power; (4) general welfare, as a requirement set forth in the zoning enabling act; (5) the notion of a “balanced community,” whatever that might mean; and (6) the right to travel and to choose a place of residence, under the federal and state constitutions.}

\footnotesize{Williams & Doughty, supra note 40, at 97.}

\footnotesize{100. See text accompanying note 3 supra.}

\footnotesize{101. 67 N.J. at 174, 336 A.2d at 725.}

\footnotesize{102. Id.}

\footnotesize{103. Id. In order that outsiders affected by municipal housing policies may effectively assert their interests, the New Jersey high court held that standing in the state’s courts should be available to: (1) former residents who had been forced to move elsewhere, for lack of suitable housing in cases similar to Mount Laurel; and (2) nonresidents living in substandard central-city housing in the region, who desired to move to such a municipality. Williams & Doughty, supra note 40, at 99. Standing in the federal courts is determined by a much stricter standard. See text accompanying notes 12-14a, 52-55 supra. For a discussion of standing under the Model Land Development Code, suggesting that the Code should follow the federal rule of standing, see Note, Standing to Sue Under The Model Land Development Code, 9 U. Mich. J. L. Ref. 639 (1976). See also Williams & Doughty, supra note 40, at 98-99.}
residents. Because the court chose to rest the decision solely on state constitutional grounds, the result was made "review-proof." 104

Justice Hall carefully restricted the decision's scope. He explicitly limited the opinion to economic rather than racial discrimination. 105 Thus, Mount Laurel does not require municipalities to zone for racial balance except insofar as racial balance incidentally may result from economic integration. Mount Laurel was further circumscribed by limiting its application to "developing municipalities," not "central cities, inner built-up suburbs, [or] remote rural townships." 106 Developing municipalities such as Mount Laurel are required—if they choose to exercise their planning and zoning powers—to allow for housing capable of absorbing a fair share of the region's low- and moderate-income inhabitants. 107

2. Beyond Mount Laurel

Mount Laurel has stirred considerable controversy among lawyers, legal scholars, and planners. It has provoked an outpouring of speculation concerning its ultimate import and some criticism concerning its theoretical underpinnings. 108 As state courts and legislatures move toward regionalism in land use, the Mount Laurel decision undoubtedly will figure into the calculus. But there is reason to believe that the fair share approach will not be adopted in other jurisdictions without some alteration. 109 A summary discussion of several of the difficult questions unanswered by Mount Laurel illustrates the administrative problems which arise when the judiciary becomes involved in matters traditionally delegated to the political branches.

104. See text accompanying note 216 infra.
105. 67 N.J. at 159, 336 A.2d at 717.
106. Williams & Doughty, supra note 40, at 96. In practical terms, the court determined that Mount Laurel was located in a region including everything within a twenty-mile radius of downtown Camden, New Jersey, the urban center nearest Mount Laurel.
107. Thus, fiscal zoning, sometimes defined as the pursuit of "good ratables," fell from grace:

This policy of land use regulation for a fiscal end derives from New Jersey's tax structure, which has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality's children. The latter expense is much the largest, so, basically, the fewer the school children, the lower the tax rate. Sizeable industrial and commercial ratables are eagerly sought, and homes and the lots on which they are situate are required to be large enough, through minimum lot sizes and minimum floor areas, to have substantial value in order to produce greater tax revenues to meet school costs. Large families who cannot afford to buy large houses and must live in cheaper rental accommodations are definitely not wanted, so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing for those of lesser income.

67 N.J. at 171, 336 A.2d at 723.
108. See sources cited in note 98 supra.
Norman Williams, whose influence helped to shape the *Mount Laurel* decision, points out three major problems. First, the state courts, like the federal courts, lack expertise that would enable them to define a "region." Justice Hall observed that the definition will vary from case to case. Several commentators argue that such a case-by-case approach is unsatisfactory because it fails to impose clear standards by which municipal governments (and developers) can measure their land use practices.

A second problem that is equally beyond judicial competence is the definition of a "fair share." *Mount Laurel* charges municipalities with the duty of zoning vacant, viable, nonresidential land in fair proportion to the regional need for low- and moderate-income housing. One commentator points out several ambiguities inherent in this requirement:

First, there is an enormous gulf of choice lurking under the phrase, "vacant, viable, nonresidential land." Suppose, for instance, that there is a great deal of land thought viable for industry, but very little for housing. Suppose, on the contrary, exactly the opposite. And, even more to the point, just exactly what is vacant and viable land? Are we to exclude land which is of ecological significance? How is a court to determine ecological significance? Are we to exclude that land which is in bona fide agricultural use?

If a municipality's zoning scheme comes under judicial review, the court will be called upon to balance the regional versus local needs for residential, industrial, agricultural, and open space land. The tradeoffs among subjective interests and policies which will determine the fair share suggest that policymaking in this area might be better administered by the legislature than the courts.

A third problem is whether municipalities can be required to take affirmative action beyond the enactment of accommodative zoning laws to encourage the construction of low- and moderate-cost housing. State and federal assistance will be needed if local governments are expected to provide subsidized housing and break the cycle of zoning for fiscal pur-

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113. The case did not explicitly hold that municipalities such as *Mount Laurel* must take affirmative action to bear their fair share of the regional need. Williams & Doughty, *supra* note 40, at 106. On the issue of affirmative action in education, see Bakke v. Regents of University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 97 S. Ct. 1098 (1977) (invalidating special admissions program to state medical school). *Contra*, Burns, *supra* note 85, at 197 (arguing for affirmative action).
poses. If the judiciary is to be the prime mover behind economic integration, serious role problems will confront the courts:

For instance, can a court order a municipality to make application to appropriate state and federal agencies for housing subsidy funds? Can it "freeze" the grant of permits for construction of higher-income dwellings until the lower-income need has been satisfied, or require builders to include an income mix in any project? The gravity of these problems has induced critics to propose alternatives to *Mount Laurel*.

Professor Payne, for example, argues that an expanded version of the "delegation doctrine" would overcome the nonrepresentation problems of municipal zoning and also more effectively stimulate the private market to provide low- and moderate-income housing. He proposes that the state supreme court invalidate the state's zoning enabling act on the ground that it "improperly delegates to local decision-making matters that are demonstrably regional in concern." The state legislature then would revise the enabling act so as to redelegate matters of "regional concern" to newly formed regional planning bodies. To ensure that these bodies act in accordance with the fair share mandate, the legislature would promulgate detailed standards. Thus, the courts would be relieved of the more complex issues engendered by *Mount Laurel*; they would simply police the regional bodies in their implementation of the legislative standards.

114. 67 N.J. at 170 n.8, 188 n.21, 336 A.2d at 722 n.8, 732 n.21; Ackerman, *supra* note 98, at 36.
116. See note 96 *supra*.
118. Professor Payne uses the delegation approach to demonstrate the impropriety of the present allocation of regional decisions to sub-regional governments. "The defect thus detected, it could be readily cured . . . by a 'shared' delegation to newly created regional bodies, with a pass-through to municipalities of such residual powers as have only local impact." *Id.* at 860.
120. A new twist was added to the controversy in *Mount Laurel* when, on November 3, 1976, the following question was submitted by referendum to the voters of Mount Laurel: "Shall the ordinance, passed by the Mount Laurel Township Council under court order, amending the Mount Laurel zoning ordinance to provide low- and moderate-income housing be stricken from the zoning ordinance by this referendum as petitioned by the people of Mount Laurel?" The referendum passed, 4,420 to 885. *29 Land Use L. & Zoning Dig.* 2 (No. 1, 1977). However, the referendum is of questionable validity in light of New Jersey's newly enacted Municipal Land Use Law. Effective August 1, 1976, the act provides that "No ordinance and no amendment or revision to any zoning ordinance shall be submitted to or adopted by initiative or referendum." N.J. STAT. ANN. § 40:55D-62b (West Supp. 1977).
(2) designate issues appropriately subject to popular vote at the regional level, should the state establish regional voting procedures.

Judicial redefinition of the general welfare which would require consideration of regional needs presents serious problems of judicial competence at both the state and federal levels. If the deferential standard of *Euclid* were no longer applicable, courts would face a vast array of competing interests and would be called upon to make complex value judgments and political and policy decisions. The additional consideration of federal-state relations increases the difficulties faced in formulating standards and remedies in the complex area of the regional general welfare. These serious federalism problems, discussed earlier in connection with right to travel and equal protection cases, compound the judicial administration problems of the regionalism movement. Heavy-handed federal intervention in this area—although highly unlikely as a practical matter—could upset the gradual institutionalization of regionalism in local land use control under state law.

II

A PROPOSED CONSTITUTIONAL LIMITATION ON REFERENDUM ZONING

Part I of this Article has identified problems of judicial competence and federalism as major factors contributing to the failure of federal courts to support constitutional challenges to exclusionary zoning and to the reluctance of federal courts to intervene in substantive matters of local zoning. In Part II, the Article focuses on the procedures by which zoning laws are enacted and amended. Fair rules of procedure theoretically should be "neutral" as to the substantive issues at stake. However, to the extent that the application of procedural constraints hinders or prevents the arbitrary or otherwise impermissible exercise of power, substantive outcomes may be affected.

121. *See, e.g.*, text accompanying notes 47-51 *supra*.


> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. . . . And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws.

*Id.* at 108.

123. In *McNabb v. United States*, 318 U.S. 332 (1943), the Supreme Court said that ""[t]he history of liberty has largely been the history of observance of procedural safeguards."

*Id.* at 347. Professor Anderson explains: "To a larger degree than is common in the enactment
In recent years, state courts have demonstrated a renewed interest in controlling zoning procedures. The inherent adaptability of the concept of procedural due process has contributed to the surge of judicial activism at the state level. Responding to the changes begun in the courts, several state legislatures have revamped local zoning procedures.

On the other hand, the federal courts have been no more active with respect to procedural challenges in the zoning realm than with respect to the substantive challenges discussed in Part I. The Supreme Court’s decision in City of Eastlake v. Forest City Enterprises, Inc. exemplifies the reluctance of the federal courts to involve themselves in the procedural aspects of zoning. In the preceding sections of this Article, explanations for federal court inactivity in substantive zoning matters have been suggested. This inactivity may be attributable to the lack of standards for judicial review that are at once judicially administrable and not unduly intrusive on state and local authority.

Part II of the Article argues that the federal courts could enforce effectively a procedural standard similar to that offered by Justice Stevens in his City of Eastlake dissent without dealing with the complex problems of judicial administration and federalism presented by the enforcement of a new substantive standard. Justice Stevens took the position that procedural due process should prevent the use of referenda on zoning changes primarily affecting the rights of an isolated landowner and not involving fundamental policy decisions affecting the entire community. To the contrary, in these and enforcement of regulatory ordinances, the public interest in the outcome of zoning disputes is protected by procedural requirements.”

See, e.g., Roseta v. County of Washington, 254 Or. 161, 458 P.2d 405 (1969) (absence of written findings by board that rezoning was consistent with comprehensive plan amounted to “spot zoning” and therefore was invalid); B.J.M. Urban Development Corp. v. Fayette County Zoning Hearing Board, 1 Pa. Commw. Ct. 534, 275 A.2d 714 (1971) (remand to zoning board appropriate where no findings of facts were made in conjunction with grant of variance); Schelley v. Zoning Bd. of Adjustment, 8 Pa. Commw. Ct. 169, 302 A.2d 526 (1973) (where no transcript of board proceedings was made, court remanded to the board, requiring a stenographic record transcript and findings and conclusions); Ford v. Baltimore County, 268 Md. 176, 300 A.2d 204 (1973) (no “hearing” had occurred where witness comment sheets were used in lieu of actual testimony before board); Kizer v. Beck, 30 Colo. App. 569, 496 P.2d 1062 (1972) (on review of transcript of hearing and evidence then presented, decision of board upheld); Miller v. City of Albuquerque, 89 N.M. 563, 554 P.2d 665 (1976) (zoning body must follow normal procedural requirements when making zoning changes on its own initiative; failure to comport with procedure violates due process rights of property owners affected by change); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972) (objective fairness of zoning changes alone is not enough; actions of the zoning body must also have an appearance of fairness).


instances the desirability of protecting the justifiable expectation of the landowner that the public determination regarding the use of his or her property will be made according to the merits of the issue outweighs the limited value of public participation in the decision.

Section A discusses the contributions of several state courts to the development of procedural controls on zoning and the referendum. Against this backdrop, the Court's decision in *City of Eastlake* is considered in Section B. Finally, Section C concerns the prospect of federal court administration of a procedural due process rule similar to that suggested by Justice Stevens.

A. Zoning Procedure and the Referendum

1. Procedural Due Process Constraints on the Board of Adjustment

The constraints governing the enactment and administration of land use regulations begin with the constitutional mandate that no state "shall deprive any person of . . . property without due process of law." Although this guarantee of procedural due process applies to the activities of the zoning board of adjustment in the adoption of changes in the community's zoning scheme, it does not apply uniformly to all such actions taken

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127. U.S. CONST. amend. XIV, § 1. The concept of procedural due process is a "historical product," Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922), "based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history." Solesbee v. Balkcom, 339 U.S. 9, 16, reh'g denied, 339 U.S. 926 (1950) (Frankfurter, J., dissenting). A flexible standard is applied once it is determined that the constitutional guarantee attaches: "Does [the practice in question] violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" Hebert v. Lousiana, 272 U.S. 312, 316 (1926).

128. Inspired by the Standard State Zoning Enabling Act (SZEA), most local ordinances establish a board of adjustment, sometimes also referred to as a board of review or board of appeal. Advisory Comm. on Zoning, U.S. Dep't of Commerce, A Standard Zoning Enabling Act (rev. ed. 1926). The SZEA is reprinted in T. Metzenbaum, The Law of Zoning 303-07 (1930); 3 C. Rathkoff, Law of Zoning and Planning 100-1 to -6 (3d ed. 1956); Model Land Development Code, Tent. Draft No. 1, at 210 (1968). The board of adjustment serves several related functions. First, it is a "safety valve" which permits substantial justice to be done in the face of the literal meaning of the ordinance. 2 R. Anderson, supra note 2, § 13.09. The board also serves a gap-filling function, plugging the inevitable holes in the ordinance which the draftsmen originally did not anticipate. The Zoning Game, supra note 2, at 130-31. Another notion, expressed since the earliest days of zoning, is that the board protects the constitutionality of the ordinance by giving relief from undue hardship. 2 R. Anderson, supra note 2, § 13.11. Finally, the board is charged with initially construing the ordinance by applying its collective expertise to problems the courts would rather avoid. Id. § 13.12; 1A C. Antieau, supra note 1, § 7.139.

129. Notwithstanding the cases decided by several state courts that sometimes are cited as holding that due process does not apply to the board's activities because the board exercises the police power, e.g., Prescott v. Pierce, 130 Misc. 63, 223 N.Y.S. 609 (Sup. Ct. 1927); VanDeventer v. Terry, 241 Ind. 378, 172 N.E. 2d 674 (1961), the overwhelming majority view is that in certain circumstances due process must be accorded to persons affected by the board's decisions. See, e.g., Masters v. Pruce, 290 Ala. 56, 274 So. 2d 33 (1973); City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); San Diego Building Contractors v. City
by the board. In the absence of an articulated federal procedural due process standard, the states have imposed their own procedural requirements on zoning boards of adjustment. In "adjudicatory" (or "quasi-judicial") actions, in most cases where the issue has been decided, parties exceptionally affected by the proposal must receive notice and have an opportunity to be heard prior to the board's final determination of the


In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court established a flexible yet demanding requirement of "notice reasonably calculated, under all the circumstances, to apprise interested parties" of the pendency of "judicial hearings in civil matters." Id. at 314. But the California state courts, for example, have not regularly applied this standard to nonlegislative zoning hearings. D. HAGMAN, CALIFORNIA ZONING PRACTICE § 10.47 (1969). The state courts do not uniformly require notice in adjudicatory proceedings, but, generally speaking, notice is required in most states to parties specially affected, either as a matter of constitutional law or statutory interpretation. See, e.g., Boggs v. Zoning Board of Review, 107 R.I. 80, 264 A.2d 923 (1970) (building permit should not have been granted because notice failed to comply with statute); Rhodes v. City of Homestead, 248 So. 2d 674 (Fla. App. 1971) (plaintiff need not show personalized injury where city issued special use permit without notice or hearing); Henke, supra note 2, at 374.

Public notice, often accompanied by personal service, is a prerequisite to most official acts by the board. Notice is a jurisdictional requirement, satisfied only if given in a manner sufficient to apprise the interested parties of the proposed action and allow them an adequate opportunity to prepare as well as attend relevant meetings. The definition of "parties" varies widely from state to state. Often the local zoning board is required to give notice to the owners of property which is located within a stated distance from the parcel in question, as well as to nominal opponents in the cause. 3 R. ANDERSON, supra note 2, § 16.19; IA C. ANTIEAU, supra note 1, § 7.137; 5 MCQUILLAN, MUNICIPAL CORPORATIONS § 25.251 (3d rev. ed. 1965).

Courts are generally less tolerant of informality and failure to comply with statutory requirements is required. Statutory notice and hearing requirements are regarded as mandatory.

The tolerance of informality which is reflected in the judicial decisions which relate to the pleadings, rules of evidence, and other aspects of board procedure, are less evident where notice and hearing are involved. These are regarded as essential ingredients of administrative justice, and substantial or even literal compliance with requirements is required. Statutory notice and hearing requirements are regarded as mandatory.

3 R. ANDERSON, supra note 2, § 16.17, at 199.

In a line of cases beginning with Goldberg v. Kelly [397 U.S. 254 (1970)], the Supreme Court has held that the right to a hearing before deprivation of a governmental benefit is determined by weighing not only the magnitude of the public interest affected, but also the usefulness of a hearing in the decisionmaking process and the burden to the government of providing a hearing.

Comment, The Initiative and Referendum's Use in Zoning, 64 CALIF. L. REV. 74, 93 (1976). The statutory power of the board to grant relief usually is conditioned on the provision of a fair public hearing. 3 R. ANDERSON, supra note 2, § 16.24; IA C. ANTIEAU, supra note 1, § 7.137; 5 MCQUILLAN, supra note 130, § 25.251.

Traditionally, the hearing is not conducted in conformity with the rules of evidence or other judicial procedures. 3 R. ANDERSON, supra note 2, § 16.01, at 171. Adjudicatory acts of the board of adjustment commonly are subject to judicial review in order to determine if there is "competent and substantial evidence" in the record to support the challenged conclusion of the board. 1A C. ANTIEAU, supra note 1, §§ 7.19 (legislative acts), 7.127 (variances), 7.132 (special use permits).
issue. On the other hand, where a "legislative" action is concerned, the Constitution does not compel notice or a hearing.

The distinction between adjudicatory and legislative actions derives from certain theoretical postulates concerning the relative importance of the interests of individuals principally affected by the proposed zoning change as compared with the interests of the general public. All members of the community are more or less equally affected in matters of a legislative nature; therefore, individuals must rely on political institutions to fairly determine their rights. Justice Holmes explained:

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Conversely, in adjudicatory actions, expediency yields to the need for closer examination of special circumstances. Because an adjudicatory act focuses on individuals in specific situations, the hearing serves the purpose of bringing before the board persons with first-hand observations bearing on the pertinent issues. The board's exposure to opposing arguments and its attendant opportunity to inquire directly of the parties is intended to sharpen its ultimate decision.

If the record is sketchy and incomplete, review will be difficult. It may be necessary, at considerable cost to the litigants, and loss of time to both litigants and court, to remand the case to the board for further action, or to receive evidence on the judicial level to supplement the record. If the record is complete and articulate, the court can decide the issues with dispatch. Accordingly, judicial rules have been developed which require that the board of adjustment construct a record which meets at least the minimum needs of judicial review.


132. Londoner v. Denver, 210 U.S. 373 (1908) (prior oral hearing compelled and mere submission of written objections held insufficient where property owners sought to contest valuation of their property by the city).

133. Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (plaintiff-taxpayers held to have no right to prior hearing as a matter of due process where the board increased the percentage of market value to be considered in calculating property taxes).

134. Richard Babcock explains that:

The freedom from accountability of the municipal governing body may be tolerable in those cases where the legislature is engaged in legislating but it makes no sense where the legislature is dispensing or refusing to dispense special grants. When the local legislature acts to pass general laws applicable generally it is performing its traditional role and it is entitled to be free from those strictures we place upon an agency that is charged with granting or denying special privileges to particular persons. When the municipal legislature crosses over into the role of hearing and passing on individual petitions in adversary proceedings it should be required to meet the same procedural standards we expect from a traditional administrative agency.

The Zoning Game, supra note 2, at 158.

In accordance with Euclid’s deference to local policy decisions, legislative acts of the zoning board usually are afforded a presumption of validity that can be overturned only by substantial evidence to the contrary. One commentator explains:

Since the legislative process is highly visible, and since legislative action has a broad based impact, it should be self-remedying at the polls.\footnote{137} Adjudicatory decisions, affecting only a very narrow segment of society, theoretically are more prone to the influence of impermissible considerations and bias. Social, economic, and political minorities are not protected from the tyranny of the majority where the impact of the decision falls primarily on a small class of individuals. For these reasons, the Anglo-American legal system uses courts rather than public meetings to decide civil and criminal cases. Applying principles established in these areas to the decisions of zoning boards, a growing number of decisions in state courts have required the board to take testimony under oath, to allow cross-examination of witnesses, and to prepare a complete record of the hearing accompanied by findings of fact and conclusions of law.\footnote{138} These more stringent procedural requirements ensure greater fidelity to permissible substantive considerations and minimize the potential for bias.

Observers familiar with local zoning practices repeatedly have disparaged the procedural unfairness that transpires despite these controls.\footnote{139}

\footnote{136} See text accompanying note 11 \textit{supra}. "Where there is any doubt as to the reasonableness of a zoning ordinance, all doubts will be resolved in favor of the validity of the ordinance. If the reasonableness of the ordinance is fairly debatable, it will be upheld." IA C. \textit{Anteau}, \textit{supra} note 1, § 7-20, at 7-28 to -29. \textit{See, e.g.}, City of Miami Beach \textit{v.} Weisen, 86 So. 2d 442 (Fla. 1956); Eckes \textit{v.} Bd. of Zoning Appeals, 209 Md. 432, 121 A.2d 249 (1956); Thomas \textit{v.} City of Bedford, 11 N.Y.2d 428, 184 N.E.2d 285 (1962); Partain \textit{v.} Brooklyn, 101 Ohio App. 279, 133 N.E.2d 616 (1956).

\footnote{137} Comment, \textit{Zoning Amendments—The Product of Judicial or Quasi Judicial Action}, 33 \textit{Ohio St. L.J.} 130, 131-32.

\footnote{138} \textit{See Comment, supra} note 137, at 140-41; K. \textit{Davis}, \textit{Administrative Law Text} § 7.03 (3d ed. 1972); \textit{Comment, supra} note 131; Booth, \textit{supra} note 124; Frelich, \textit{Fasano v. Board of County Commissioners of Washington County: Is Rezoning an Administrative or Legislative Function?}, \textit{6 Urb. Law.}, at vii (1974).

\footnote{139} A blue ribbon presidential commission commented on the discretionary aspects of zoning administration:

The “wait and see” approach to regulations represents a change in the administrative procedure applied to proposed development. In place of the older “self-executing” regulations, the approach contemplates \textit{discretionary} public review of development proposals shortly before development occurs. In essence, the traditional administrative process in zoning is giving way to the more general standards and administrative discretion traditional in subdivision regulations. The developer proposes, and the municipality disposes. Sometimes the process is guided by useful plans and standards, but often not. \textit{Increasing reliance on discretionary review} may well represent a more fundamental change in land use regulations than any changes in substantive requirements.

\textit{National Comm’n on Urban Problems, Building the American City}, H.R. Doc. No. 34, 91st Cong., 1st Sess. 206 (1968) (emphasis added). Similarly, one writer argues that “zoning has conceptually ceased to be a plan for the future but has become a system for rules for handing
The heart of the problem is the underinclusiveness of the adjudicatory category, resulting from the use of a rather formalistic test to distinguish the two types of actions:

The traditional view in zoning law has been that the enactment of an original zoning ordinance and any amendments thereto by a local governing body is a "legislative" act, as contrasted with the granting of a "special exception" or "variance" by the zoning board of appeals (or board of adjustment), which is an "administrative" or "quasi-judicial" act.140

Because many amendments to the zoning ordinance essentially are indistinguishable from special exceptions and variances, in that certain individuals and parcels of land are exceptionally affected, parties similarly situated receive differing treatment depending on the formal categorization of the board's action. California is an example of a state that observes the traditional distinction between zoning amendments and use permits. Even when a zoning amendment concerns only one parcel of land, form prevails over substance; on judicial review the court assumes the deferential posture associated with legislative decisions.141

Dissatisfied with this categorical approach, commentators have suggested reformulating the test for the applicability of procedural safeguards. One proposal, offered by Professor Davis and adopted by several courts,142 focuses not on the type of proceeding but on the type of facts presented at the proceeding. Under this test, one would inquire whether the facts upon which the board's decision will rest relate to community policies or merely to the parties before the board. Provision for a hearing, cross-examination of adverse parties, and a formal record is appropriate, Professor Davis argues, when the latter type of facts is predominantly in issue.

A third and somewhat different test has been emerging in recent state court decisions. This test takes a functional approach,

[i]nvolving a determination of whether [the] action produces a general rule or policy which is applicable to an open class of individuals, interests, or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations.

If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial.\textsuperscript{143}

The leading case applying this test is \textit{Fasano v. Board of County Commissioners}.\textsuperscript{144} In \textit{Fasano}, the Oregon Supreme Court ruled that an amendment to the county zoning ordinance affecting thirty-two acres of land was a "quasi-judicial" act, giving rise to panoply of procedural safeguards.\textsuperscript{145} By way of dictum, the court spelled out these procedural rights:

Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed.\textsuperscript{146}

Under this rule, adjudicatory actions which were previously classified as legislative now largely assimilate the characteristics of a judicial hearing.

The Model Land Development Code adopts an approach essentially in line with \textit{Fasano}. It prescribes detailed procedural safeguards for "non-legislative," as distinguished from more informal "legislative-type," hearings.\textsuperscript{147} Under section 2-312(1), "special amendments" to the development plan require nonlegislative hearings.\textsuperscript{148} Such amendments include changes:

1. "limited in effect to a single parcel or to several parcels under related ownership;"\textsuperscript{149}
2. "applicable to an area of [50] acres or less;"\textsuperscript{150} or
3. permitting "development specified in a previously adopted ordinance as permissible upon stated criteria after approval by the local governing

\textsuperscript{143}. Comment, supra note 137, at 137.
\textsuperscript{144}. 264 Or. 574, 507 P.2d 23 (1973).
\textsuperscript{146}. 264 Or. at 588, 507 P.2d at 30.
\textsuperscript{147}. The Code distinguishes between amendments of general applicability, MODEL LAND DEVELOPMENT CODE § 2-311 (1976), and "special amendments." Id. § 2-312. The latter are subject to stricter procedural safeguards than the former. In fact, the official commentary to § 2-312 quotes extensively from \textit{Fasano}.

In non-legislative hearings, notice must be published and given individually to specified parties, id. § 2-304(2); testimony at the hearing is under oath or affirmation, id. § 2-304(6); parties have the opportunity to present evidence, argument, direct and cross-examination on all relevant issues, id. § 2-304(7); a full record by "any appropriate means" is required, id. § 2-304(8); ex parte communications and on-site inspections by hearing officers are restricted, § 2-304(9); and written findings of fact and conclusions, "together with the reasons therefore," must be issued, id. § 2-304(12).

"Hearings held by legislative bodies are not subject to any special procedural standards. Thus the Code does not require any change in the procedures used by local legislative bodies to adopt legislation." Id. § 2-305, Comment.

\textsuperscript{148}. See note 147 supra. The criteria by which the local development board shall decide whether or not to adopt special amendments are set forth at id. §§ 2-312(2)(a)-(d).
\textsuperscript{149}. Id. § 2-312(1)(a).
\textsuperscript{150}. Id. § 2-312(1)(b).
The disjunctive construction of section 2-312(1) indicates that a special amendment situation exists when any one of the three qualifying clauses is applicable. Unlike the formal test commonly applied, the Code’s test treats some amendments like traditional variances and special uses and other amendments like traditional legislative actions. And unlike Professor Davis’ test, the Code focuses not on the type of facts presented to the board, but on objective criteria functionally related to determining whether the proposed action poses a community-wide policy question or predominantly affects the rights of specific individuals in a specific situation.

2. **Constraints on the Use of the Referendum**

Typical of the political reforms born in the early twentieth century, the referendum was conceived as a check on representative government.

The Progressive movement of the early twentieth century was disdainful of legislatures and legislators. [Reformers] considered them purchaseable, greedy, and dominated by political bosses and ruthless machines which sought to exploit the public for the benefit of the monopolists, railroads, and industrial empires. With legislative channels blocked and public officials deaf to the demands of the voters, the ills of democracy could only be cured by more democracy—by letting the people legislate directly rather than indirectly.

Several layers of legal authority govern the conduct of the local referendum. The state constitution may either allow or disallow the power of referendum. When the referendum is either expressly or impliedly reserved to the people, its use often is restricted or qualified by statute. Furthermore, the local government charter or document of similar import commonly designates those matters which are subject to referral. The local electorate in many municipalities may vote on, *inter alia*, municipal bond measures, property tax adjustments, and annexations.

There are two types of referenda: one mandatory and the other optional. In the case of mandatory referenda, certain designated actions of
the legislative body do not become effective until voter approval is obtained. Optional referenda may be placed on the ballot at the request of the legislative body or by public petition, calling in either case for a vote on an existing law.\(^{158}\)

As a matter of state law in most jurisdictions where the referendum is allowed, "'administrative'" actions\(^{159}\) undertaken by a government body such as the zoning board are exempt from referral to the people; "'legislative'" actions are, however, fair game for the ballot.\(^{160}\) The exemption of administrative matters from the referendum grows out of the recognized need of local governments to engage in their ordinary business with some degree of insulation from the disruptive effects of public participation.\(^{161}\)

One commentator, arguing for an expansive view of the "'legislative'" category, adopts the traditional notion that the adjudicative-legislative distinction "'is designed to protect the procedural rights of individuals, while the administrative-legislative distinction attempts to protect government from 'unwarranted harassment' or 'disruption'" by the referendum process.'\(^{162}\)

Denial of the referendum in administrative actions reflects an often unspoken policy assumption that the need for efficient government outweighs the added value of public participation.\(^{163}\)

\(^{158}\) Mitau, supra note 153, at 90.

\(^{159}\) Some commentators have scrupulously differentiated between the terms "'administrative'" and "'adjudicatory,'" using the former term only when discussing whether the referendum is available in a given situation, and using the latter term only when discussing whether heightened procedural guarantees should attach in connection with actions of the board of adjustment. Other commentators have used the terms interchangeably. Compare Comment, supra note 131, at 94 with Comment, supra note 137, at 134, the former differentiating the terms and the latter using them interchangeably. See also Henke, supra note 2, at 376; Cunningham, supra note 140, at 1347 (both using the terms interchangeably).

\(^{160}\) Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956) (seminal case on this question; city ordinance changing zoning classification of particular parcel of land from residential to business use is an administrative act and not subject to the referendum); Duran v. Cassidy, 28 Cal. App. 3d 574, 104 Cal. Rptr. 793 (1972) (city council's decision to develop a park at airport held to be legislative declaration of public purpose and hence subject to popular vote); Myers v. Schiering, 27 Ohio St.2d 11, 271 N.E. 2d 864 (1971) (passage of city council resolution granting a permit for operation of sanitary land fill, pursuant to existing zoning regulation, is an administrative act not subject to referral); Cuprowski v. Jersey City, 101 N.J. Super. 15, 242 A.2d 873 (1968) (city budget not a legislative matter and thus not proper subject for referendum); West v. City of Portage, 392 Mich. 458, 221 N.W.2d 313 (1974) (amendment of zoning ordinance in regard to particular property not a legislative act and not subject to referendum); 5 McQuillan, supra note 130, § 16.55, § 16.57 n.68; Comment, supra note 131, at 94.

\(^{161}\) Suspension of the challenged ordinance pending the outcome of the referendum is disrupting. McQuillan, supra note 130, § 16.55 n.70; I C. Antieau, supra note 1, § 4.36: See also Jackson v. Denver Producing and Refining Co., 96 F.2d 457 (10th Cir. 1938); Note, Limitations on Initiative and Referendum, 3 Stan. L. Rev. 497, 504 (1951).

\(^{162}\) Comment, supra note 131, at 92.

\(^{163}\) For the argument favoring expansive use of the referendum, see 1 C. Antieau, supra note 1, § 4.34, at 4-65. Antieau there remarks:

It is suggested that the traditional "'test'" [administrative/legislative] be abolished, and all municipal ordinances be exposed to the referendum unless the statute or charter authorizing referendum clearly provides for applicable exceptions. Where the referen-
The effects of the referendum on the individual landowners who appear before the zoning board rarely have been discussed in cases barring referral of administrative actions. In a relatively old case, *Kelley v. John*, the Nebraska Supreme Court stated that "[t]he crucial test for determining that which is legislative from that which is administrative or executive is whether the action taken was one making a law, or executing or administering a law already in existence." By this rather vague standard, the court in *Kelley* barred an optional referendum requested by public petition on the issue of a proposal for rezoning ten contiguous parcels of land from residential to commercial use. The court concluded:

In the case at bar the city council has sought to fit the property here involved into a master plan which it believes properly should be classified as business property. If its action may be nullified by a referendum, then the comprehensive master plan becomes a nullity and every change of classification of property made by the city council will be subject to the whims of the electors without regard to the master plan. *Kelley*’s extremely protective attitude toward the master plan long has delighted city planners, but the case and others like it only incidentally consider the effects of the referendum on individual property owners.

Some state courts have responded affirmatively to the argument that allowing the referendum on adjudicatory-type decisions engenders horizontal inequity; inconsistent decisions in similar cases will frequently occur because individual voters are not restrained by institutional checks on their consistency. In *Township of Sparta v. Spillane*, the New Jersey Supreme Court refused to permit referral of amendments to a zoning plan because the procedural regularity enforced at the planning board level would be rendered ineffectual. "We are not satisfied," the court said, "that the publicity which might accompany the referendum campaign and the exposure and discussion of the issues generated thereby justify disregarding these procedural requirements." A New York Supreme Court, in a similar case, noted that its insistence on strict compliance with board procedures, on the one hand, "would exalt form over substance" if, on the other hand, it subsequently allowed a referendum on the question.

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164. 162 Neb. 319, 321, 75 N.W.2d 713, 715 (1956).
165. *Id.* at 324, 75 N.W.2d at 716.
166. See 1 C. Antieau, supra note 1, § 7.161.
168. 312 A.2d at 158.
B. A Proposed Constitutional Limitation on the Referendum

1. The Need for a Unitary Standard

Individuals exceptionally affected by local zoning changes may receive incongruous treatment to the extent that heightened due process standards required in proceedings before the local board of adjustment are not accompanied by prohibitions against the use of the referendum. In adjudicatory proceedings, due process—particularly in jurisdictions following a Fasano-type rule—requires the board of adjustment to conduct its affairs with regard to proposed zoning changes somewhat more like a court of law than a legislative body; landowners, neighbors, and other interested parties increasingly assume the posture of litigants, concerning themselves with confronting and cross-examining witnesses, making a record, and perfecting an appeal. Where the very same zoning changes are subject to the referendum, the procedural safeguards at the board of adjustment ultimately provide no safety at all. The voters—few of whom are intimately acquainted with the facts or well-versed in the complexities of zoning—exercise their will in the secrecy of the voting booth, the basis of their decision shielded from review. The stringent procedural guarantees required under a Fasano standard potentially are reduced to a meaningless ritual, in that the public may nullify the board’s determination on criteria wholly unrelated to the matters within the board’s discretion. A unitary standard—one which determines both when heightened procedural due process guarantees attach in proceedings before the board of adjustment and when the referendum is impermissible—would avoid this incongruity of treatment.

Under a unitary standard, courts would focus not on the referendum’s possible interference with governmental efficiency but rather on the issue raised in procedural due process cases: is the proposed land use change more a matter of community-wide policy or more an issue concerning specific individuals in a specific situation? One of California’s codified maxims of jurisprudence aptly conveys the logic of a unitary standard: “Where the reason is the same, the rule should be the same.”170 The “reasons” for the legislative-administrative and legislative-adjudicatory distinctions essentially are the same.171 In each case, the rights of individuals directly affected by zoning changes conflict with the public interest in preserving the city’s basic zoning plan. And in each case, despite their differences, the resolution of the conflict should be the same. For the sake of clarity in terminology, “administrative” and “adjudicatory” labels should be collapsed into the single term “nonlegislative”;172 the appropriate dichotomy should be legislative-nonlegislative. In the discussion which follows, the legislative-non-

171. See note 159 supra.
172. This approach is suggested in Comment, 29 LAND USE L. & ZONING DIG. 54 (1977).
legislative distinction will be used interchangeably with the legislative-
adjudicatory and legislative-administrative distinctions.

Several states, perhaps unwittingly, have adopted such a unitary
standard.\textsuperscript{173} For example, in \textit{West v. City of Portage}\textsuperscript{174} the Michigan Supreme
Court relied on \textit{Fasano}\textsuperscript{175} in barring a city-wide referendum on the rezoning
of 150 acres of land from single family to community business, multiple
family, and office service classifications. The court quoted at length from
Professor Frelich's commentary\textsuperscript{176} on \textit{Fasano}:

There can be no dispute that the original passage of comprehensive
plans and zoning ordinances is a legislative function since these
actions are classified as general policy decisions which apply to the
entire community. However, a zoning amendment may be differ-
entiated on the basis that such a determination is narrowly confined
to a particular piece of property and the use will generally affect only
a small number of people, thus approximating an administrative
exercise.\textsuperscript{177}

Thus, the Michigan court used the \textit{Fasano} test, originally formulated to
determine whether heightened procedural due process applied, to decide
whether the referendum was available. Nowhere in its opinion did the court
acknowledge its own novel use of the \textit{Fasano} standard.

The Washington Supreme Court more directly addressed the issue of a
unitary standard in \textit{Leonard v. City of Bothell}.\textsuperscript{178} The dispute arose over a
landowner's request for rezoning of a 141-acre lot from agricultural to
commercial use to accommodate the construction of a regional shopping
center. Between the city planning commission and the city council, 37
public meetings and 10 public hearings were held concerning the proposed
change. Upon final passage of the rezoning by the city council and the later
refusal of the city clerk to certify a petition calling for referral of the issue to
the city's electorate, a group of city residents filed a complaint seeking to
compel the referendum election. In affirming the trial court's denial of the
writ of mandamus, the supreme court relied equally on cases employing the

\textsuperscript{173} See, e.g., \textit{City of Scottsdale v. Superior Court}, 103 Ariz. 204, 439 P.2d 290 (1968),
374-75 (Colo. 1975) (rezoning ordinance is a quasi-judicial function); \textit{Forman v. Eagle Thrifty
Drugs \& Markets, Inc.}, 89 Nev. 533, 516 P.2d 1234 (1973) (reclassification of particular areas is
not referable); \textit{Allison v. Washington County}, 24 Or. App. 571, 548 P.2d 188 (1976) (action “is
considered quasi-judicial where it applies a general rule to a specific interest, such as a zoning
change affecting a single piece of property, a variance, or a conditional use permit”).

\textsuperscript{174} 392 Mich. 458, 221 N.W.2d 303 (1974).

\textsuperscript{175} 264 Or. 574, 507 P.2d 23 (1973). See text accompanying notes 144-146 \textit{supra}.

\textsuperscript{176} Frelich, \textit{supra} note 138.

\textsuperscript{177} Id. at ix, quoted in 392 Mich. at 469, 221 N.W.2d at 308.

\textsuperscript{178} 87 Wash. 2d 847, 557 P.2d 1306 (1976). Although it noted that technically \textit{Leonard
raised issues likely to be moot, the court followed its policy of rendering an opinion notwithstanding possible mootness where the case involved “matters of substantial public interest” likely to recur in the future. 557 P.2d at 1308.
legislative-adjudicatory distinction and cases employing the legislative-administrative distinction.\textsuperscript{179} The court concluded:

Amendments to the zoning code or rezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community. [The city] planning commission and the city council normally possess the necessary expertise to make these difficult decisions . . . . In this case, the city had before it an environmental impact statement which covers 160 pages, 6 appendices, and 102 comment letters received in response to the draft statement. In a referendum election, the voters may not have an adequate opportunity to read the environmental impact statement or any other relevant information concerning the proposed land use change.\textsuperscript{180}

Moreover, the court noted in Leonard that the public voiced its position on the proposal in numerous public meetings and hearings and in an advisory ballot by which the proposal was approved prior to its final adoption.\textsuperscript{181}

The use of a unitary standard protects the landowner's justifiable expectation that the informed and expert judgment of the zoning body will not be overturned by public vote. Developers and their opponents will have but one bite of the apple, but predictability will be enhanced; the developer will no longer face the uncertain possibility of the referendum once the board recommends approval of the proposed change. The public retains ample control, direct and indirect, over important land use decisions. Leonard demonstrates that in nonlegislative actions, hearings, meetings, and even advisory ballots can serve effectively the purpose of sharpening the board's sense of public opinion. On any legislative matter, the public still may hold binding referenda. The public ultimately can protect its interest, of course, by voting on wholesale revisions of the municipality's comprehensive plan. Thus, on policies of broad application—where planning expertise should yield to judgment of the public—a direct vote remains available. The more stringent judicial review of nonlegislative matters, discussed earlier, additionally insures that the board acts within the parameters of permissible discretion.

2. City of Eastlake: Exaltation of the Referendum

City of Eastlake v. Forest City Enterprises, Inc.\textsuperscript{182} raised the issue of whether the federal Constitution barred the use of the referendum when applied to zoning amendments.

\textsuperscript{179} 557 P.2d at 1308-11.
\textsuperscript{180} 557 P.2d at 1311.
\textsuperscript{181} \textit{Id}.
\textsuperscript{182} 426 U.S. 668 (1976).
a. The facts

Forest City Enterprises, a real estate developer, acquired an eight-acre parcel of land in Eastlake, Ohio, zoned at the time of acquisition for light industrial use. The developer sought to build a multi-family high-rise apartment building on the site. On May 18, 1971, the developer applied to the Eastlake Planning Commission for a rezoning of its property. The application was approved by the Commission and on December 28, 1971, the Eastlake City Council amended the city's comprehensive zoning ordinance to permit the proposed use.

During the pendency of the developer's application for rezoning, an initiative measure was placed on the city ballot, providing for mandatory referenda on all zoning changes. On November 2, 1971, the measure was passed, adding the mandatory referendum to the city charter. In April of 1972, the developer's application to the Planning Commission for parking and yard approval—a prerequisite to obtaining a building permit—was denied. The Commission based its denial of the application for parking and yard approval on the developer's failure to refer its rezoning proposal to the city's voters. Unsuccessful in its effort to obtain exemption from the mandatory referendum on the ground that the provision should not apply to changes requested prior to the amendment of the city charter, the developer submitted its proposed zoning change to a city-wide vote. After failing to obtain the requisite 55 percent voter approval, the developer brought a declaratory judgment action in state court seeking to have the election declared invalid.

b. Disposition of the case in the Ohio courts

The complaint alleged that three aspects of the city's mandatory plebiscite violated due process:

1) the assessment of election costs attributable to the referendum to the party applying for the zoning change;
2) the requirement of supermajority (55 percent) approval; and
3) the requirement of voter approval itself.

The trial court ruled the election cost provision unconstitutional but otherwise upheld the validity of the challenged city charter provisions. The Ohio Court of Appeals affirmed.

The only issue appealed to the Ohio Supreme Court concerned the third alleged infirmity, the basic requirement of voter approval. Reversing the decision below, the court invalidated the referendum provision on due process grounds. The court applied a rather novel delegation theory to

183. The city charter requires, in pertinent part, 55% voter approval in a city-wide election of "any change to the existing land uses or any change whatsoever to any ordinance [regulating land use]." EASTLAKE, OHIO CHARTER, art. VIII, § 3 (1971).

184. 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975). The court could have decided the case as a matter of state constitutional law. Under the Ohio Constitution, "[t]he initiative and referen-
reach this result. Relying heavily on *Washington ex rel. Seattle Title Trust Co. v. Roberge*,185 *Thomas Cusack Co. v. City of Chicago*,186 and *Eubank v. City of Richmond*,187 the court found that although the rezoning in question was an appropriate legislative act to be undertaken by the city, the absence of rational standards accompanying the "delegation" of the final decision to the people resulted in an arbitrary exercise of that power.

The court reasoned that individuals immediately interested in the zoning change were not adequately protected against the "potentially arbitrary and unreasonable whims of the voting public."188 *James v. Valtierra*189 was distinguished on the ground that it involved a matter of "community-wide-policy-making." Despite its denomination as a "legislative act," the present zoning change, like most, "involve[s] hardships affecting individual parcels of property, which must be alleviated to preserve the constitutional validity of the [zoning] ordinance."190

Justice Stern concurred in the decision but based his opinion on equal protection grounds. He stated:

There can be little doubt of the true purpose of Eastlake's charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. The charter provision was apparently adopted specifically, to prevent multi-family housing, and indeed was adopted while Forest City's application for rezoning to permit a multi-family housing project was pending before the City Planning Commission and City Council . . . . Any zoning change, regardless of how minor, and regardless of its approval by the Planning Commission and the City Council, must be approved by a city-wide referendum . . . .

dum are . . . reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action." Ohio Const. art. II, § 1 f (emphasis added). Thus, the court could have invalidated the Eastlake Charter provision on the ground that it applies to "any" zoning change; nonlegislative changes are not excluded by this provision. The court avoided this result by construing the Charter provision so as to apply only to legislative actions of the municipal authority.

Subsequent to the decision by the United States Supreme Court, the developer filed an extraordinary motion in the Ohio Supreme Court pressing state constitutional grounds. The motion was dismissed on procedural grounds and the court expressly refused to consider state due process grounds asserted by the developer in its motion. Forest City Enterprises v. City of Eastlake, 48 Ohio St. 2d 47, 356 N.E.2d 499 (1976).

In 1976, a proposal to simplify the referendum and initiative procedures under the Ohio Constitution was defeated by popular vote. 29 LAND USE L. & ZONING DIG. 33 (1977).

185. 278 U.S. 116 (1928) (holding a neighborhood consent requirement as a condition to use of property for a philanthropic home to be a violation of due process, due to an unlawful delegation of legislative authority).

186. 242 U.S. 526 (1917) (upholding a neighborhood consent requirement with respect to the erection of any billboard or sign in residential areas).

187. 226 U.S. 137 (1912) (delegation to neighborhoods of legislative authority with respect to the setting of building lines held violative of due process).

188. 41 Ohio St. 2d at 195, 324 N.E.2d at 746.


190. 41 Ohio St. 2d at 197, 324 N.E.2d at 747. See note 128 supra.
There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.

[A] law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest [in the outcome], goes beyond any reasonable public purpose.\(^{191}\)

This pointed concurrence was provoked by the exclusionary overtones of the charter amendment.\(^{192}\)

c. \textit{The Supreme Court decision}

Chief Justice Burger, writing for a majority of the Supreme Court,\(^{193}\) framed the principal question quite narrowly: "Whether a city charter provision requiring proposed land use changes to be ratified by 55% of the voters violates the due process rights of a landowner who applies for a zoning change."\(^{194}\) Accepting the Ohio Supreme Court's characterization of the proposed rezoning as legislative in nature, the Court upheld the city's referendum provision. Furthermore, because the Ohio Constitution guarantees the referendum to its citizens,\(^{195}\) the Court concluded that the "referendum cannot . . . be characterized as a delegation of legislative power."\(^{196}\) This instance of "popular democracy" was characterized as a simple reservation of veto power over the enactments of representative bodies.

Chief Justice Burger touted the referendum as "a classic demonstration of 'devotion to democracy.'"\(^{197}\) Reliance on the \textit{Eubank} and \textit{Roberge} cases was found to be misplaced;\(^{198}\) the distinction between these cases and

\(^{191}\) \textit{Id.} at 199-200, 324 N.E.2d at 748-49.

\(^{192}\) On the exclusionary potential of the referendum, see text accompanying notes 61-64, 88-91 \textit{supra}.

\(^{193}\) City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976). Joining the Chief Justice were Justices Stewart, White, Marshall, Blackmun, and Rehnquist. Two dissenting opinions were entered, one by Justice Powell and one by Justice Stevens (joined by Justice Brennan).

\(^{194}\) \textit{Id.} at 670.

\(^{195}\) \textit{See} note 184 \textit{supra}.

\(^{196}\) 426 U.S. at 672.

\(^{197}\) \textit{Id.} at 678.

\(^{198}\) \textit{Id.} at 677-78. Although there was some authority under several rather dated cases decided in other jurisdictions, \textit{e.g.}, Galindo v. Walter, 8 Cal. App. 234, 96 P.2d 505 (1908); Hathaway v. City of Oneonta, 148 Misc. 695, 266 N.Y.S. 237 (Sup. Ct. 1933), the delegation doctrine could not in its present state support the Ohio Supreme Court's decision. \textit{See generally} Booth, \textit{supra} note 124. The \textit{Eubank}, \textit{Roberge}, and \textit{Cusack} line of cases, see text accompanying notes 185-187, did not involve a city-wide referendum but rather the delegation of authority to groups of neighbors. One commentator explains: Even where the initiative and referendum power are legislatively created, and thus describable as a delegation of power by the legislature, the \textit{Eubank} line of cases is inapposite. The exercise of a veto power by a handful of property owners, perhaps motivated by personal economic interest, would not seem equivalent to a city-wide
the city-wide referendum in question was explained: "The thread common to both [Eubank and Roberge] is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a narrow segment of the community, not to the people at large." \(^{199}\) In a footnote, the majority asserted that the availability of administrative relief from undue hardship saved the procedure at issue from infirmity. \(^{200}\) However, by deferring to the classification of the rezoning sought by Forest City Enterprises as legislative, the Court avoided deciding whether and at what point a state's failure to provide administrative relief would violate due process. \(^{201}\)

In his dissenting opinion, Justice Stevens took a broader view of the case, framing the critical issues as follows:

(1) whether the procedure which a city employs in deciding to grant or deny a property owner's request for a change in the zoning of his property must comply with the Due Process Clause of the Fourteenth Amendment; and (2) if so, whether the procedure employed by the City of Eastlake is fundamentally fair. \(^{202}\)

Citing Fasano, \(^{203}\) he concluded that the city-wide referendum as applied to the zoning change proposed was "manifestly unreasonable" and a denial of fundamental fairness. \(^{204}\) Justice Stevens emphasized the rights of property owners rather than the city's interest in freedom from interference in the conduct of its affairs. Interested parties are entitled to fair procedure, meaning "a reasonable opportunity to have their dispute resolved on the vote by citizens who collectively probably have no more pecuniary interest in the matter than the locality's zoning officials."

Comment, supra note 131, at 99. Therefore, at best this line of cases could supply support for the decision only by analogy. The Ohio Supreme Court either failed to recognize the distinction or fell short of expressly drawing the analogy. For a discussion of the Eubank, Cusack and Roberge trilogy, see Hogue, supra note 72, at 46.

199. 426 U.S. at 677.

200. Id. at 679 n.13. The footnote does not squarely address the problem posed by the superimposition of the referendum on the grant of administrative relief from the zoning ordinance.

201. The "legislative" classification of the zoning change requested by Forest City Enterprises derives from the Ohio Supreme Court's adherence to a formalistic standard for classifying zoning activities. See Hilltop Realty v. South Euclid, 110 Ohio App. 535, 164 N.E.2d 180 (1960), cited in 426 U.S. at 674. Had the Court chosen the Fasano approach, the zoning change quite possibly would have been deemed nonlegislative.

202. 426 U.S. at 680.

203. 264 Or. 574, 507 P.2d 23 (1973). See text accompanying notes 144-146 supra.

204. 426 U.S. at 694. He pointed out:

We might rule in favor of the city on the theory that the referendum requirement did not deprive respondent of any interest in property and therefore the Due Process Clause is wholly inapplicable. After all, when respondent bought this property it was zoned for light industrial use and it still retains that classification. The Court does not adopt any such rationale; nor indeed does the city even advance that argument. On the contrary, throughout this litigation everyone has assumed, without discussing the problem, that the Due Process Clause does apply.

Id. at 680-81.
merits by reference to articulable rules.”^205 Therefore, if a dispute turns on the conflicting rights of specific individuals in a specific situation, “it is elementary that the decisionmaker must be impartial and qualified to understand and to apply the controlling rules.”^206

Justice Stevens argued that under the majority’s approach, individual rights are litigated by popular vote. He adopted an interest-oriented balancing test similar to Fasano’s functional test. The rezoning dispute was characterized by Stevens as a three-sided controversy, in which the interests of the property owner, his “neighbors,” and the “public interest in preserving the city’s basic zoning plan” potentially conflict. The test was thus applied:

If the [public interest] aspect of the controversy were predominant, the referendum would be an acceptable procedure. On the other hand, when the record indicates without contradiction that there is no threat to the general public interest in preserving the city’s plan—as it does in this case, since respondent’s proposal was approved by both the Planning Commission and the City Council and there has been no allegation that the use of this eight-acre parcel for apartments rather than light industry would adversely affect the community or raise any policy issue of citywide concern—I think the case should be treated as one in which it is essential that the private property owner be given a fair opportunity to have his claim determined on its merits.^207

Since Eastlake’s charter provides for no explicit exemption from the referendum, Justice Stevens would have refused to give effect to the entire referendum provision.

The division between the majority opinion and Stevens’ dissent in City of Eastlake can be viewed as a function of the relative willingness of the various justices to engage in “legal realism” in reviewing zoning practices.^208 Differences in judicial orientation might also explain the varying approaches to exclusionary zoning seen in the Eastlake opinions.

The majority opinion falls into what Professor Williams calls the “third stage” of judicial orientation with respect to developers’ rights.^210 He characterizes the prevalent attitude in this stage as “faith in local autonomy”: “During this period, the courts have given great respect to decision[s] on zoning by various local agencies—by local governing bodies on districting, by local boards on variances, etc.; and not many distinctions have been made between different types of zoning regulations and policies.”^211 Under the majority view in City of Eastlake, “popular demo-

^205. Id. at 692-93.
^206. Id. at 693.
^207. Id. at 693-94.
^208. See Williams & Doughty, supra note 40, at 73.
^210. 1 N. Williams, supra note 55, § 5.04, at 107.
^211. Id. § 5.04, at 105.
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"cracy" is pitted against a rather weak opponent, the developer demanding expanded procedural due process. The constitutional issue is submerged by reason of the Court's faith in local government.

Justice Stevens' dissenting opinion discloses his greater skepticism of this blind, or at best myopic, faith. He is willing to delve into the operational problems engendered by the multi-level exercise of public controls on land use. The opinion falls into Professor Williams' "fourth period."

The fourth period reflects a sadder and wiser mood. It is recognized that many restrictions on developers' property rights are needed in the modern world, to prevent development which will really harm neighbors or the environment generally. But it is also recognized that local land use restrictions may also serve a non-legitimate purpose, or indeed sometimes no real purpose at all—that is, they may be exclusionary in intent and/or effect, or merely the product of a quite parochial vision, or sometimes unduly harsh with little compensatory public benefit—or merely inept.

Justice Stevens' creative application of the principles expressed in *Fasano* represents a substantial break from the trusting deference to local zoning determinations typically exhibited by the Court. However, Justice Stevens did not expressly acknowledge the fact that, in utilizing *Fasano* to bar the referendum, he would in effect be adopting a unitary standard. If the *Eastlake* procedural due process issue is relitigated, counsel might argue that the Court should adopt the rationale forwarded by Justice Stevens but also should acknowledge expressly the adoption of a unitary standard. The following section speculates on the role of the federal courts in administering a procedural due process bar on the zoning referendum.

**C. Administration in the Federal Courts**

Adoption of a constitutional bar on the zoning referendum would expand the opportunity for federal question zoning litigation in the federal courts. Whether litigants in fact would resort to the federal system would depend on the relative advantages of other enforcement mechanisms, principally the state courts. Assuming that the federal courts were charged with

212. *Id.* § 5.05, at 110.


214. To reduce the potential load in the courts and provide greater expertise and uniformity of result, the states might establish special administrative appellate boards. Under the Model Land Development Code, for example, an order of the local zoning authority which involves issues of substantial state-wide impact can be appealed to the State Land Adjudicatory Board. *MODEL LAND DEVELOPMENT CODE* § 9-110 (1976). This allows an authoritative determination even with respect to certain non-legislative actions, if for instance, the proposal would affect an area of unique environmental importance or threaten to upset existing regional pedestrian or vehicular traffic patterns. *Id.* §§ 3-312(2), 7-402. The Code also provides that, in the court's discretion, judicial proceedings may be stayed pending action by the State Board.
enforcing the constitutional bar, administrative concerns would be important in the evolution of an operative standard.

In developing a new procedural standard, friction between state and federal governments could be minimized by an acknowledgment of the significant role states could play in the implementation of the new standard. The "interstitial" nature of federal law——including the Constitution——often allows the states to maintain local practices suited to peculiar local needs. For example, where there is an "adequate and independent state ground" supporting a procedural default in a state court proceeding, review by the United States Supreme Court is denied if the state procedure affords minimal due process. Federal administration of a constitutionalized Fasano standard similarly might reserve to the states the primary policy-type decisions. Whereas one state might wish to bar the referendum altogether, another state might elect to follow the exact contours of the constitutional standard. Both procedures presumably would be valid. A federal court would determine only whether the standard selected by the state afforded minimal due process. Thus, the court would evaluate whether, in light of evolving notions of fundamental fairness, the state's "legislative-administrative" distinction sufficiently guarantees that the referendum will not nullify the presumably informed determination of the local zoning board on matters where specific individuals in specific situations are exceptionally affected by zoning changes. Although the court would take account of peculiar local circumstances, it would not undertake a task nearly as difficult as redefining the "general welfare," as is required under the substantive challenges discussed in Part I. By employing a

Id. § 9-112(4). This policy of exhaustion of administrative remedies would further alleviate the burden on the courts by allowing them to depend on the expertise and sophistication of the Board. Id. § 9-112, Comment.

215. The relation between state and federal law stems from fundamental notions concerning the allocation of law-making power in a federal union of autonomous states:

Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as is necessary for the special purpose. Congress acts, in short, against the background of the corpus juris of the states in much the same way that a state legislature acts against the background of the common law, assumed to be governing unless changed by legislation.

HART & WECHSLER, supra note 17, at 470-71. See Evans v. Newton, 382 U.S. 296 (1966), for a dramatic illustration of the primacy of state law even in the face of serious constitutional questions.


217. See text accompanying notes 116-121 supra.

218. See text accompanying notes 1-11 supra.
unitary standard, the federal courts could readily tap the wealth of experience accumulated in adjudication in the state courts of the applicability of due process to board proceedings.

Judicial review under the Fasano functional standard would allow the federal courts to defer to controlling state adjudication classifying zoning actions as legislative or nonlegislative, except insofar as the state courts avoid their constitutional responsibility. Accordingly, land-wealthy states might choose a 100-acre point of division between legislative and nonlegislative actions, whereas a relatively land-poor state justifiably might select a 40-acre rule. The present prohibition of zoning referenda on "administrative" actions under state law indicates acceptance of limitations on popular sovereignty, which could be extended to cover actions defined under a unitary standard. At the margin, the federal courts likely would defer to state choice of a cutoff.

The record of the states in controlling the referendum is mixed. Some states, e.g., Oregon, Washington, Colorado, Nevada, and Michigan, have demonstrated a sophisticated grasp of the problem. Many other jurisdictions show little immediate promise of a change in outlook. However, it would not be unprecedented for the Supreme Court to seize on a trend in the adoption of a new constitutional standard. Those states on the trailing end of the spectrum would need only minimally to comply with the new standard. Like technology-forcing, "process-forcing" may meet with some recalcitrance. Notwithstanding the sensitivity of local residents to federal meddling in substantive policy matters, acquiescence should be more readily forthcoming with respect to a substance-neutral rule of process.

CONCLUSION

Based on the belief that the cure for the ills of representative democracy is more democracy, the referendum until recently was thought acceptable

219. See text accompanying notes 170-172 supra.
220. The supremacy clause of the Constitution specifically addresses the responsibility of state judges: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby," U.S. Const. art. VI.
221. The rule need not be mechanically formulated in terms of acreage, but could profitably be modeled after the proposed standard in Model Land Development Code § 2-312(1) (1976).
222. See text accompanying note 159 supra.
223. See text accompanying notes 170-181 supra.
224. "In determining whether due process of law is violated in procedural matters, the Supreme Court has given weight to what was the prevailing practice in the states." 1 C. Antieau, Modern Constitutional Law § 5:117, at 396 (1969). See Leland v. Oregon, 343 U.S. 790, 798 (1951). See also Solesbee v. Balkcom, 339 U.S. 9 (1950) (Frankfurter, J., dissenting); note 127 supra.
when applied to most proposed changes in zoning. A veto power reposed in
the electorate and exercised with respect to particular issues operates as a
check on official misconduct. Furthermore, this device could—if exercised
with some regularity—temper the practices of those representatives adher-
ing to a "Burkean" model of representation.\(^2\) However, the referendum
does have a propensity for abuse, absent carefully drawn limitations on its
exercise.

In a nation dedicated to meritocratic ideals it is important that the
institutions of government facilitate rather than hinder the eradication of
private racial and wealth-based discrimination.\(^2\) Land use controls osten-
sibly used to preserve urban amenities, on the contrary, repeatedly have
frustrated the attempts of actors in the private sector to bring low- and
moderate-income housing into middle- and upper-income residential areas.
Litigation in the federal courts challenging exclusionary zoning on substan-
tive due process and equal protection grounds will cure only the more
blatant discriminatory practices, largely because stricter application of exist-
ing constitutional doctrines would raise serious problems of judicial compe-
tence and federalism.

Momentum is building among the state courts to devise legal tools to
control these practices and thereby break the cyclical pattern of discrimina-
tion. New concern is expressed for regional planning; local parochialism
increasingly falls into disrepute. As the new regionalism takes hold, the
referendum at the local level will require serious re-examination lest it be
allowed to undermine the achievements of regional planning. State ex-
perimentation may in the future lead the way to the development of new
constitutional doctrines that will limit more adeptly exclusionary zoning.

Under a government based on the consent and confidence of the
governed, the multiplication of public controls on private activity requires
renewed vigilance to ensure that fundamental notions of fairness are scrupu-
lously observed in the conduct of government. Thus, as land use controls are

\(^2\) Political scientists associate Edmund Burke with one end of the spectrum of theories
of representation: "Burke wanted the representative to serve the constituency’s interest but not
its will, and the extent to which the representative should be compelled by electoral sanctions to
follow the ‘mandate’ of his constituents has been at the heart of the ensuing controversy for a
century and a half." Miller & Stokes, Constituency Influence in Congress, 57 AM. POLITICAL
Sci. REV. 45 (1963). At the opposite extreme is the so-called "instructed delegate" model which
assumes that the public official acts on an issue-specific mandate from his or her constituents.
Id. See generally J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT ch. V (1875).

\(^2\) The accommodation of majority rule with the goal of maintaining the fluidity of
minority groups was a central concern of the Founding Fathers. Alexander Hamilton succinctly
framed the issue: “Give all the power to the many, they will oppress the few. Give all the power
to the few, they will oppress the many.” THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON
THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION
AT PHILADELPHIA, IN 1787, TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, ETC.,
V. 203 (J. Eliot ed. 1941). See also R. DAHL, A PREFACE TO DEMOCRATIC THEORY 7 (1956).
imposed in greater number and from higher levels of governmental authority, the need grows for rational and even-handed administration.

Although the zoning referendum is limited under the law of many states in order to allow for the more expedient operation of government, very few states have recognized the procedural unfairness suffered by the "litigants" contesting nonlegislative zoning changes which are subject to referral. By allowing the referendum only with respect to zoning changes predominantly concerned with questions of public policy—legislative questions—two consequences follow. First, the litigants are guaranteed a determination on the merits of the particular case where nonlegislative changes in zoning are proposed. Second, the public interest in deciding issues of general concern is protected against being irrevocably determined incident to the adjudication of private disputes. The interests of the public and the individual are thus properly balanced. Common sense and the need for judicial adminis-

trability suggest that the courts should apply a unitary standard to determine:
(1) whether heightened procedural rights attach in proceedings before the local board of adjustment; and (2) whether the proposed change in zoning should be subject to the referendum.

In his dissenting opinion in City of Eastlake, Justice Stevens stated that procedural due process should bar the referendum in such nonlegislative matters. This constitutional rule could be enforced by the federal courts without involving them in the complex questions of policy which limit the expansive use of existing substantive constitutional rules relating to exclusionary zoning. Moreover, enforcement of this procedural rule would entail minimal federal encroachment on local and state authority in land use issues. Although a majority of the Supreme Court remains devout in its faith in local autonomy, Justice Stevens' opinion offers hope that in the future the Court will evaluate more critically at least the procedural side of zoning and the referendum.