ZONING AND THE REFERENDUM: CONVERGING POWERS, CONFLICTING PROCESSES

INTRODUCTION

Situated on the outskirts of Cleveland, Ohio, are the suburban communities of Euclid and Eastlake. In 1926, Euclid's zoning ordinance became the focus of *Village of Euclid v. Ambler Realty Co.*,[1] a landmark Supreme Court decision in which zoning[2] was held to be constitutional. Fifty years later, and three miles further east on Lake Shore Boulevard,[3] Eastlake became the focus of another major zoning decision, *City of Eastlake v. Forest City Enterprises, Inc.*[4] In that decision, the Supreme Court held that communities could require referenda[5] on certain zoning changes.

The judicial route from *Euclid* to *Eastlake* was consistent in at least one respect: both decisions upheld the power of a community to control changes in the use of private property. *Euclid* permitted local legislators and appointive zoning specialists to devise, administer, and change a plan for land-use[6] controls, while *Eastlake* permitted a community's voters to exercise a veto over changes in that plan.

In proceeding from *Euclid* to *Eastlake*, though, the Court effected a subtle but important change in the constitutional constraints on zoning law. In much the same way that a street keeps its name in a new community even while it changes width and direction, so the Court continues to measure zoning by a public interest standard while permitting communities to broaden that standard to include a new value: popular control[7] of zoning decisions.

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1. 272 U.S. 365 (1926).

2. "Zoning" will be used in this Note as a shorthand for "comprehensive zoning" or "*Euclid*ean zoning," the system of land-use restrictions described in the text accompanying notes 34-36 *infra*.

3. U.S. DEP'T OF INTERIOR, U.S. GEOLOGICAL SURVEY (1970). *Compare* East Cleveland Topographic Quadrant in *id. with* Eastlake Topographic Quadrant in *id.*

4. 426 U.S. 668 (1976).

5. A common definition of the referendum is offered by the California state constitution: "The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." CAL. CONST. art. 2, § 9, cl. a (West 1977).

Another form of legislation by the voters, often associated with the referendum, is the initiative. "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." *Id.* art. 2, § 8, cl. a (West 1977).

6. "Land-use" controls or legislation will be used broadly in this Note to encompass actions by officials or the voters which affect the use of property. This category will include zoning, property assessments, fair housing legislation, and public housing policies.

7. "Popular control" or "popular decision-making" will be used to mean direct democracy, described in note 94 *infra*.

The nature of this change depends, in part, on one's vision of zoning. Popular control is appealing to citizens who see zoning as a series of compromises by public officials which tend to favor real estate developers.[8] From this perspective, a mandatory zoning referendum is valued because it enables voters to nullify the zoning decisions of public officials. To the zoning applicant or planner, though, popular control is ominous.[9] This latter group sees zoning as a power which is carefully defined by substantive and procedural constraints. In their view, a referendum nullifies these constraints, thereby promoting results which are unfair to the zoning applicant and inconsistent with the community's zoning pattern.

This Note will be guided by two premises. First, there is a fundamental tension between the zoning and referendum processes. Second, the referendum can, and should, be modified to account for this tension and thereby serve as a useful means for making zoning decisions.

The tension between the zoning and referendum processes will be analyzed in three stages. In Section I, the origins and early development of zoning and the referendum will be examined. This section will begin with a description of the substantive and procedural constraints which shaped the development of zoning and conclude with a review of the referendum's historical antecedents, in which popular law-making was unchecked except for occasional judicial review. In Section II, this Note will consider past judicial attempts to resolve the tension between zoning and the referendum. Limits on the zoning referendum by state courts will be analyzed; differences in the Supreme Court's treatment of various neighborhood preference requirements and mandatory referenda will be noted. In Section III, this Note will reevaluate the tension between zoning and the referendum and propose statutory changes to reduce this tension. This section will begin with a narrower conception of the referendum power than the one presented in *Eastlake* and a more flexible vision of contemporary land-use regulation and will conclude with a model for changes in state referendum laws which will make the referendum a more sensitive device for making zoning decisions.

I
SOURCES OF TENSION: THE ORIGINAL PATTERN OF ZONING AND THE HISTORY OF DIRECT DEMOCRACY

A. Zoning: Power Within a Structure of Constraints

The fabric of American zoning was woven from diverse strands. Several of the land-use purposes which underlay zoning—safety, enhanced property values, and planned development in particular—were drawn from various Anglo-American sources. The common law of nuisance had long provided authority for enjoining the hazardous and offensive use of particular properties.[10] Advancing beyond this ad hoc approach, American cities in the late eighteenth

8. *See* Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 76-77 & n.19 (1976) [hereinafter cited as Comment, *Use in Zoning*].

9. *See* Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819, 831-44 (1977) [hereinafter cited as Note, *Proper Use*].

10. 1 R. ANDERSON, AMERICAN LAW OF ZONING, § 3.03 (2d ed. 1976). *See* text accompanying note 73 *infra*. *See also* Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854 (1973).

century prohibited the construction of wooden buildings within certain districts.[11] This legislation provided an early precedent for the planned exclusion of an entire class of unsafe buildings from large urban areas. The planning impulse broadened near the end of the nineteenth century. American residential developers used restrictive covenants to exclude incompatible uses and enhance the value of nearby properties;[12] English planners advocated "conscious control" of the size of towns.[13] During the same era, German cities developed the "zone system," which provided a model for dividing communities into land-use districts.[14]

Zoning was also shaped by the philosophy of the Progressives, a political reform movement prominent in the first quarter of the twentieth century. Active in both the Republican and Democratic parties, the Progressives expressed the desire of middle class professionals and businessmen to rid government of corruption and inefficiency.[15] The Progressive impulse to improve American government and society was expressed in at least two features of zoning. The role of appointed planners and administrators in zoning[16] mirrored three related values of Progressivism: a rejection of the conventional urban politics of control by interest groups,[17] an advocacy of efficiency,[18] and a new faith in government by impartial experts.[19] The objectives of adequate space, air, light, and quiet in zoning[20] reflected a new awareness of the importance of the human environment,[21] previously expressed in the settlement house[22] and City Beautiful[23] movements.

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11. *See* Respublica v. Duquet, 2 Yeates 492 (Pa. 1799) (upholding municipal prohibition of wooden buildings within the fire limits area of Philadelphia).

12. 1 R. ANDERSON, *supra* note 10, § 3.04; S. WARNER, JR., STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870-1900, at 122 (1962).

13. S. TOLL, ZONED AMERICAN 127-28 (1969) (quoting E. HOWARD, GARDEN CITIES OF TOMORROW (1902)).

14. *Id.* at 124, 128-30. *See* Howe, *The German and the American City*, 49 SCRIBNER'S 485-92 (1911) for a contemporary comparison of city planning approaches by a noted American urban planner and reformer.

15. R. HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 133-34, 257 (1955).

16. *See* text accompanying notes 37-40 *infra*.

17. *See generally* R. HOFSTADTER, *supra* note 15, at 257. In practice, though, zoning decisions have often been influenced by interest groups. *See, e.g.*, S. MAKIELSKI, JR., THE POLITICS OF ZONING 132-77 *passim* (1966). *Cf.* Annot., 10 A.L.R.3d 694 (1966) (disqualification of zoning officials for conflict of interest).

18. *See* Swan, *Does Your City Keep its Gas Range in the Parlor and its Piano in the Kitchen?* 22 AM. CITY 339 (1920); Loewenstein & McGrath, *The Planning Imperative in America's Future*, 405 ANNALS 15, 16-17 (1973); *cf. Efficiency in City Planning*, 8 AM. CITY 139 (1913); Ford, *Chambers of Commerce and City Planning*, 10 AM. CITY 448, 449 (1914) (efficiency objective in city planning). *See also* S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959).

19. *See generally* note 81 *infra*. One example of the new faith was the city manager form of government. *See* R. HOFSTADTER, *supra* note 15, at 268 n.8.

20. *See* text accompanying note 32 *infra*.

21. *See* Adams, *Efficient Industry and Wholesome Housing True Aims of Zoning*, 24 AM. CITY 287 (1921).

22. *See* A. DAVIS, SPEARHEADS FOR REFORM: THE SOCIAL SETTLEMENTS AND THE PROGRESSIVE MOVEMENT, 1890-1914 (1976). *See also* R. LUBOVE, THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1890-1917 (1963).

23. *See* E. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE, 1870-1900, at 174-76 (1974).

Comprehensive zoning originated[24] in New York City in 1916[25] and soon developed in other cities.[26] In 1926, the national importance of zoning as a planning device was implicitly recognized with the drafting of a Standard Zoning Enabling Act by the Commerce Department.[27]

1. The Standard Enabling Act

a. Community Power to Regulate Land Use—The Standard Enabling Act defines purposes, objectives, and powers[28] which have become characteristic of the zoning process.[29] The purpose of zoning is stated in general police power terms:[30] promotion of the health, safety, morals, or general welfare of the community.[31] In addition to these general purposes, zoning regulations are designed to achieve specific objectives: reducing traffic, preventing overcrowding, and providing adequate light and air.[32] In detailing these objectives, the Act in effect recognizes the scarcity of certain resources—air, light, living space, and quiet—and the need to regulate land use in order to maximize those resources.[33]

To promote the purposes of zoning, a local legislature may divide the community into districts and enact a uniform[34] set of height, area, and use[35]

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24. A simpler form of land-use regulation, in which a city was divided into a residential and commercial district with different building height restrictions, preceded comprehensive zoning. One such regulation was upheld in Welch v. Swasey, 214 U.S. 91 (1909).

Land-use regulations by several California cities, dating back to 1885, were considered by some observers to be a precursor of zoning. The first zoning ordinance was probably one enacted by Los Angeles in 1909. *See* Whitnall, *History of Zoning*, 155 ANNALS (pt. 2) 1, 8-11 (1931); Pollard, *Outline of the Law of Zoning in the United States*, 155 ANNALS (pt. 2) 15, 19-20, 22-23 (1931); 4 N. WILLIAMS, AMERICAN LAND PLANNING LAW §§ 84.06-.08 (1974).

25. Early interest in zoning as a device for preserving the status quo was evident in its New York City origins. Zoning was instituted there at the urging of local merchants, who sought to preserve Fifth Avenue as a retail shopping district, free of factories and other facilities likely to repel shoppers. *See* S. TOLL, *supra* note 13, at 174-82.

26. *Id.* at 187, 194.

27. ADVISORY COMMITTEE ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) [hereinafter cited as STANDARD ENABLING ACT]. Text of Act, without footnotes, is reprinted in 4 R. ANDERSON, AMERICAN LAW OF ZONING § 30.01 (2d ed. 1977).

28. STANDARD ENABLING ACT, *supra* note 27, §§ 1-3.

29. 1 N. WILLIAMS, *supra* note 24, §§ 18.04, .06, .07. The Standard Enabling Act has been adopted by every state at some time and is presently retained by forty-seven states. *Id.* § 18.01 at 355.

30. *See* STANDARD ENABLING ACT, *supra* note 27, § 3 n.21. In its narrower sense, the police power means the power of a state or its subdivisions to regulate on behalf of the public health, safety, and morals; in its broader sense, the police power is not limited to specific objects and encompasses the entire scope of state authority. Dakota Cent. Tel. Co. v. South Dakota *ex rel.* Payne, 250 U.S. 163, 186 (1919). *See* Berman v. Parker, 348 U.S. 26, 32 (1954); E. FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 3 (1904).

31. STANDARD ENABLING ACT, *supra* note 27, § 1.

32. STANDARD ENABLING ACT, *supra* note 27, § 3. These objectives provide the basic rationale for minimum setback, minimum lot size, and maximum building height regulations. *See, e.g.*, McGlasson Builders, Inc. v. Tompkins, 203 N.Y.S.2d 633, 636 (Sup. Ct. 1960); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

33. The appropriateness of using zoning to maximize these resources was reaffirmed in Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

34. Spot zoning, the practice of determining permissible uses by administrative discretion rather than by a prior plan marking uniform use districts, has been found unconstitutional and ultra vires.

regulations for buildings, other structures, and land in each district.[36] The local legislature also appoints two agencies to draft and administer the details of these regulations: a zoning commission (which may be a pre-existing city planning commission)[37] and a board of adjustment.[38] The zoning commission recommends district boundaries and appropriate regulations to the local legislative body.[39] The board of adjustment hears and decides appeals from administrative zoning decisions and, if authorized by the local legislature, may grant relief from the zoning ordinance in the form of variances or special exceptions for particular properties.[40]

b. Substantive and Procedural Constraints—Exercise of the zoning power by the local legislature and the board of adjustment is governed by the substantive constraint of a comprehensive plan[41] and the procedural constraint of public hearings before government agencies.[42]

Zoning regulations are to be made "in accordance with a comprehensive plan."[43] This undefined phrase has been given various interpretations by the courts. Some courts have construed the comprehensive plan requirement to mean that a zoning ordinance must cover a large part of a community; other courts have concluded that a zoning ordinance must relate to future as well as present needs.[44] These opinions have been criticized for requiring that a zoning ordinance be all-inclusive instead of requiring that there be a separate comprehensive plan to guide zoning.[45] According to this criticism, a comprehensive plan goes beyond comprehensive zoning by establishing a long-term policy as to the relationships and space needs of various land uses. Viewed in this way, the comprehensive plan defines an independent standard which ensures that zoning regulations will be reasonable.[46]

See Rockhill v. Township of Chesterfield, 23 N.J. 117, 128 A.2d 473 (1957); Annot., 51 A.L.R.2d 263 (1957).

35. Use restrictions may also be invalidated if found unduly burdensome on the property owner. *See, e.g.*, Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954).

36. STANDARD ENABLING ACT, *supra* note 27, § 2.

The Standard Enabling Act delineates two other dimensions of the zoning power: its priority and enforcement. In the event of a conflict between zoning regulations and other statutes or ordinances, the more rigorous land-use restrictions apply. *Id.* § 9. A community is empowered to enforce its zoning regulations by civil action and criminal penalties. *Id.* § 8. In addition to fines, a community could do the following until conditions were remedied: arrest and imprison the offender, halt construction, prevent occupancy, and evict. *Id.* § 8 n.46. *See* 4 R. ANDERSON, AMERICAN LAW OF ZONING, chs. 27-29 (2d ed. 1977).

37. STANDARD ENABLING ACT, *supra* note 27, § 6.

38. *Id.* § 7.

39. *Id.* § 6.

40. *Id.* § 7.

41. *Id.* § 3.

42. *Id.* §§ 6, 7.

43. *Id.* § 3. The comprehensive plan applies to amendments and special exceptions under the zoning ordinance as well as to the initial drafting of the ordinance. *See* Annot., 40 A.L.R.3d 372 (1971). *But see* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 931-44 (1976) (divided case law as to whether the comprehensive plan is mandatory or merely advisory).

44. Haar, *"In Accordance With a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1162, 1172 (1955).

45. *Id.* at 1172-73.

46. *Id.* at 1173-75. *See* Sullivan & Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URBAN L. ANN. 33, 45-52 (1975).

The requirement of public hearings for making zoning decisions is also designed to promote rational results. The Standard Enabling Act prescribes procedures for three types of zoning decisions: enacting the ordinance; rezoning, *i.e.*, amending the ordinance to change the zoning classification of particular areas; and granting variances or special exceptions from the zoning classification of particular properties.[47]

The Act prescribes slightly different procedures for the enactment and amendment of a zoning ordinance by the local legislature. The enactment of zoning must be preceded by a lengthy process of disclosure and debate. The zoning commission is required to prepare a preliminary report, hold a public hearing, and prepare a final report for the local legislature.[48] The local legislature must then give notice to the public and hold its own public hearing.[49] A rezoning amendment does not require comprehensive study by the zoning commission,[50] but it must be preceded by public notice and a public hearing before the local legislature.[51]

Like the zoning decisions of the local legislature, the granting of variances and special exceptions by the board of adjustment must be preceded by public notice and a public hearing.[52] In addition, decisions of the board are subject to judicial review. Such review is facilitated by several provisions:[53] a broad conception of standing to sue,[54] a requirement that the board reveal the grounds for its decision when requested to do so by a court,[55] and an imposition of costs on the board if it has acted with gross negligence, bad faith, or malice.

By establishing a deliberative setting, the public hearing provisions promote zoning decisions which are fair to zoning applicants, responsive to the

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47. The enactment and amendment of a zoning ordinance will generally be labelled as "legislative" in this Note, given the broad scope of these decisions in most instances and the legislature's role in making them. By contrast, the granting of variances and special exceptions, decisions of a narrow scope by an appointed agency, will be termed "administrative." See judicial treatment of this distinction in text accompanying notes 179-87 *infra*.

48. STANDARD ENABLING ACT, *supra* note 27, § 6.

49. *Id.* § 4 & n.29.

50. *Id.* § 6 n.43.

51. *Id.* § 5, § 6 n.43. *See* Annot., 96 A.L.R.2d 449 (1964) (notice requirements for zoning ordinances).

52. STANDARD ENABLING ACT, *supra* note 27, § 7.

53. *Id.* § 7.

54. Under this broad statutory standing provision, even nonresidents who did not own property in a community could challenge zoning decisions by the community, if the decisions had an adverse impact outside the community. *See* Township of River Vale v. Town of Orangetown, 403 F.2d 684, 685-86 (2d Cir. 1968) (adjacent municipality has standing). *See generally* Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 MICH. L. REV. 1070 (1966).

It has become more difficult, though, for nonresidents to challenge zoning ordinances under the Constitution, because of the Supreme Court's increasingly narrow conception of standing under article III. *See* Warth v. Seldin, 422 U.S. 490, 503-09, 514-16 (1975) (potential in-migrants, nonresident taxpayers, and builders lack standing to challenge the constitutionality of exclusionary zoning). *See generally* Note, *Standing to Challenge Exclusionary Land Use Control Devices in Federal Courts After* Warth v. Seldin, 49 STAN. L. REV. 323 (1977).

55. A local legislature also must articulate uniform rules, if it acts on administrative zoning changes. *See* In re Clements' Appeal, 2 Ohio App. 2d 201, 207 N.E.2d 573, 580-81 (1965) (variances); Central Management Co. v. Town Board of Oyster Bay, 47 Misc. 2d 385, 262 N.Y.S.2d 728, *passim*, *aff'd* 24 App. Div. 881, 264 N.Y.S.2d 1011 (1965) (special exceptions).

interests of other property owners,[56] and consistent with the policy of rational land use embodied in the comprehensive plan.

The combined effect of the zoning powers and procedures under the Standard Enabling Act is to control change in the pattern of land use in a community. Provisions for changing a zoning ordinance[57] are intended to prevent zoning from becoming a "strait-jacket" which would harm rather than benefit the community,[58] without disturbing the "stability" which is essential to zoning.[59] Under the Act, zoning is to be firm but flexible, systematic but fair to particular property owners, farsighted but responsive to the immediate concerns of local residents.

2. Euclid: *Zoning and the Due Process Clause*

The first decade of comprehensive zoning culminated in a Supreme Court decision which upheld its constitutionality. In *Village of Euclid v. Ambler Realty Co.*,[60] the Court was confronted with a clearcut clash of land-use objectives.

The village of Euclid was comprised largely of farm land and unimproved property.[61] The village enacted a zoning ordinance which barred industrial uses from certain districts,[62] one of which included much of the plaintiff's property.[63] This selective exclusion of industrial uses served two purposes. Restriction of industry would benefit the entire village by controlling the course of industrial development from the neighboring city of Cleveland.[64] In addition, the selective exclusion of industry would preserve the residential character of the affected districts.[65]

The plaintiff owned a tract of sixty-eight acres, bounded east and west by residential properties and north and south by a railroad and a highway.[66] As a real estate developer with property in the path of industrial development, plaintiff had an interest in promoting that development.[67]

Alleging that Euclid's zoning restrictions reduced the market value of its property by 75 percent, plaintiff sought an injunction in federal district court.[68] The district court struck down Euclid's ordinance, holding that it deprived plain-

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56. Even the zoning commission, an unelected body, is conceived to be a group of "representative citizens" who will "secur[e] that participation in and through understanding of the zoning ordinance which will insure its acceptance by the people." Accordingly, the zoning commission should confer "in all parts of the city with all classes of interests" in preparing a zoning ordinance. STANDARD ENABLING ACT, *supra* note 27, § 6 n.39.

Another provision which accords some weight to public opinion is the requirement that zoning changes which have prompted a protest by the owners of 20% or more of the affected or nearby property be approved by a three-fourths majority of the local legislature. *Id.* § 5 & n.31.

57. *Id.* § 5.
58. *Id.* § 5 n.30.
59. *Id.* § 5 n.31.
60. 272 U.S. 365 (1926).
61. *Id.* at 379.
62. *Id.* at 389-90.
63. *Id.* at 382.
64. *See id.* at 389.
65. *See id.* at 391-94.
66. *Id.* at 379.
67. *Id.* at 384-85.
68. *Id.* at 384, 395.

tiff of its property without due process.[69] The court found that the ordinance was a confiscatory taking,[70] as it deprived plaintiff of the normal use of its property with the only compensation being the unlikely prospect that the plaintiff would benefit from zoning restrictions on the property of other owners.[71]

The Supreme Court reversed, upholding the constitutionality of Euclid's ordinance.[72] The majority opinion by Justice Sutherland upheld zoning as a logical extension of the police power. At a minimum, the police power enables a community to exercise some control over land use. Thus, by analogy to the law of nuisance, a community could proscribe buildings which were unsafe or offensive "in connection with the circumstances and the locality."[73] A community could go further: it could also exclude safe or inoffensive industries in order to assure the exclusion of nuisances.[74] Finally, a community could exclude all businesses, retail stores, and apartment houses from residential districts.[75] This last exclusion was justified by a traditional police power argument: excluding apartment houses and other intensive land uses would reduce the dangers and noise of heavy traffic and the unsafe, unhealthy, and unpleasant impact of tall, tightly-packed buildings.[76] Reflecting an anti-apartment bias which has become characteristic of suburban zoning,[77] Justice Sutherland observed that an apartment building in an area of private homes is often "a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district . . . followed by others . . . until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed."[78]

In upholding the extensive property regulation imposed by zoning, the Supreme Court veered sharply from the substantive due process route it usually pursued against other economic regulations during the first third of the twentieth century.[79] Justice Sutherland himself was a strong proponent of protecting economic activity from government regulation.[80] Zoning was probably upheld,[81] despite its restriction on individual property owners, because it was

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69. Ambler Realty Co. v. Village of Euclid, 297 F. 307 (N.D. Ohio 1924).

70. *Id.* at 317.

71. *Id.* at 315.

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

73. *Id.* at 387-88. As the Court suggested in one analogy, "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." *Id.* at 388.

74. *Id.* at 388-89.

75. *Id.* at 389. Single-family residence districts were contemplated by the drafters of the Standard Enabling Act at § 1 n.12 ("density of population").

76. 272 U.S. at 391-95.

77. *See generally* Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963).

78. 272 U.S. at 394.

79. *See, e.g.*, G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 548-83 (9th ed. 1975); W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY, 1889-1932, at 36-37, 243-44, 294-95 (1969).

80. *See* Adkins v. Children's Hospital, 261 U.S. 525 (1923); J. PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE *passim* (1951).

81. One reason which the Court offered for its acceptance of zoning was the careful and thorough reports on zoning prepared by commissions and experts. 272 U.S. at 394. In most cases involving economic regulation, though, particularly regulation of labor contracts and commercial activity, the Court was not receptive to factual reports. *See, e.g.*, Adkins v. Children's Hospital,

perceived as both beneficial and necessary: it enhanced rather than diminished property values[82] and it was a necessary response to the pressure on land use resulting from overpopulation.[83]

While upholding zoning in principle, the Court stated that particular zoning ordinances could be invalidated if found to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[84] The *Euclid* opinion suggested two applications of the "general welfare" standard. A zoning ordinance might be found unconstitutional where local circumstances, including the degree of urbanization and the character of nearby properties, made a particular zoning restriction unreasonable.[85] In addition, a community's zoning power might be superceded by regional needs.[86]

In its early zoning decisions after *Euclid*, the Supreme Court required that a zoning ordinance satisfy the due process clause in two ways. In *Nectow v. City of Cambridge*,[87] the Court applied the substantive test of *Euclid*: a zoning ordinance must substantially promote certain police power objectives.[88] In addition, under *Washington* ex rel. *Seattle Title Trust Co. v. Roberge*,[89] the ordinance must be applied according to procedures prescribed by the legislature and subject to administrative or judicial review.[90]

By the late 1920's, the present statutory form and constitutionality of zoning were established. Under most state enabling acts and the holding in *Euclid*, a community could regulate the use of all property within its boundaries by establishing use districts and imposing related restrictions on the height and size of buildings. The enabling acts also imposed constraints on this power: zoning regulations must be consistent with the community's comprehensive plan and must be preceded by public notice and hearings. The due process holdings in *Euclid*, *Nectow*, and *Roberge* imposed similar substantive and procedural constraints on zoning. These early judicial opinions established a pattern of federal deference toward local zoning decisions which continued for nearly fifty years. After *Roberge*, the Supreme Court did not decide another zoning case until 1974[91] and did not strike down a zoning regulation until 1977.[92]

B. The Growth of Direct Democracy in America

Like zoning, the referendum evolved from diverse sources. As a device for review of legislation by the voters, the American referendum combined the form of the Swiss referendum with the democratic spirit of two American institutions, the New England town meeting and the local option law.

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261 U.S. 525, 560 (1923). *Contra*, Muller v. Oregon, 208 U.S. 412, 419-21 (1903) (accepting factual report, commonly known as a "Brandeis brief").

82. *See* J. PASCHAL, *supra* note 80, at 127. *Contra*, text accompanying note 71 *supra*.

83. *See* 272 U.S. at 388; J. PASCHAL, *supra* note 80, at 127.

84. 272 U.S. at 395.

85. *See id.* at 387-88 (dictum).

86. *See id.* at 389 (dictum).

87. 277 U.S. 183 (1928).

88. *Id.* at 188.

89. 278 U.S. 116 (1928).

90. *Id.* at 121-22.

91. 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 4.01, at 4-2 (4th ed. 1975) (referring to Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)).

92. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

Unlike zoning, though, the referendum emerged from past models with very few statutory constraints.[93] The town meeting and the local option left a divided legacy: the absence of checks on the popular will made the legislative process more efficient, but less fair. Direct democracy[94] not only promoted the expression of the majority will on general political legislation, but also permitted oppression of minorities and the imposition of a particular set of social or moral values. The history of direct democracy is permeated with this tension between effecting the will of the majority and protecting the rights of the minority.

1. An Early Contrast: The Town Meeting and Madisonian Theory

As a model of democracy,[95] the New England town meeting is limited by the patterns of conformity and consensus which characterized its electorate, the small towns of colonial New England. Votes at a meeting tended to be unanimous[96] and subtle social pressure was exerted to dampen or control dissension among the voters.[97] The town meeting was not a forum for conflicting opinions, but rather a place for ratifying prior understandings.[98] Much like zoning referenda in many suburbs,[99] town meetings expressed the will of an electorate shaped by tight exclusionary controls on the admission of new residents.[100] As one historian observed, the effectiveness of the town meeting was

93. Very few substantive constraints have been imposed on the referendum. The most common substantive constraint has been the exclusion of certain legislative subjects. *See, e.g.*, note 5 *supra*; OHIO GEN. CODE ANN. §§ 4227-2, -3 (Page 1926) (current version at OHIO REV. CODE ANN. §§ 731.29, .30 (Page 1972)) (scope of the petition referendum). Similarly, the mandatory referendum has been subject to very few procedural constraints, aside from rules relating to the preparation and distribution of ballot pamphlets. *See, e.g.*, CAL. GEN. LAWS act 3651, § 1, cl. 16 (Deering 1923) (current version at CAL. ELEC. CODE §§ 5011-5015 (West 1977)); OR. REV. STAT. § 254.130 (1975). Initiatives and petition referenda have been subject to additional procedural requirements, particularly with regard to the circulation and validation of petitions. *See, e.g.*, CAL. GEN. LAWS act 3651, § 1, cls. 1-6 (Deering 1923) (current version at CAL. ELEC. CODE §§ 4050-4053, 4056 (West 1977)); OHIO GEN. CODE ANN. §§ 4227-4 to -13 (Page 1926) (current version at OHIO REV. CODE ANN. §§ 731.28, .29, .31, .32 (Page 1976)).

94. "Direct democracy" will be used in this Note as a shorthand for the making or applying of public policy by some process which aggregates the individual preferences of the citizenry. This term will encompass various devices for popular decision-making, including: the town meeting, the local option, the initiative and referendum, and the neighborhood preference requirement.

95. *See, e.g.*, THE INITIATIVE, REFERENDUM AND RECALL 1, 24 (W. Munro ed. 1912) [hereinafter cited as Munro]; Roosevelt, *Nationalism and Popular Rule* in Munro, 52, 63. As one astute observer of American institutions noted:

> Town-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.

1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55 (H. Reeve trans. 1835) (Schocken Books ed. 1961).

96. Zuckerman, *The Social Context of Democracy in Massachusetts*, 25 WM. & MARY Q. (3d Ser.) 523, 540 (1968) [hereinafter cited as Zuckerman, *Social Context*].

97. M. ZUCKERMAN, PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY 182 (1970) [hereinafter cited as PEACEABLE KINGDOMS].

98. Zuckerman, *Social Context*, *supra* note 96, at 539.

99. *See* note 341 *infra*.

100. Zuckerman, *Social Context*, *supra* note 96, at 538-39; Larabee, *New England Town Meeting*, 25 AM. ARCHIVIST 165, 166 (1962).

grounded not in democratic theory, but in the shared religion, ethnicity, and ideals of its participants.[101]

The town meeting did advance popular decision-making by setting a precedent for community voting on public issues with the secure anonymity of a secret ballot.[102] For the most part, though, the democratic virtues of the town meeting were shaped by the unique characteristics of colonial New England towns. In particular, the town meeting was marked by a sensitivity to minority rights and an emphasis on public debate. The consensus politics of the town meeting included an important corollary: mutual respect among the residents of a town bred a distaste for temporary or oppressive majorities.[103] Moreover, the agenda of a town meeting was the subject of prior public notice and informal discussion, a practice which fostered a large turnout of informed voters.[104]

Early American leaders were wary of direct democracy, however, particularly when considering its application beyond the limits of small towns. In advocating ratification of the Constitution, James Madison used direct democracy as an example of how a strong interest group could create an oppressive majority. Unlike a legislature, where every decision is the product of countervailing interest groups,[105] participants in a pure democracy are free to ignore groups or individuals whose interests are not immediately at issue:

> [A] pure Democracy, by which I mean a Society consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies . . . have ever been found incompatible with personal security, or the rights of property.[106]

2. *Local Option Laws*

A new form of direct democracy began to emerge in the 1840's. Several state legislatures began to handle certain controversial issues, notably liquor licensing, by enacting "local option" laws, which could take effect in counties or towns only after receiving the approval of local voters.[107]

The development of the local option law reflected the influence of different political and social movements. As a mode of popular decision-making, the local option vote was an outgrowth of expanded suffrage[108] and increased polit-

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101. P. SMITH, AS A CITY UPON A HILL: THE TOWN IN AMERICAN HISTORY 110 (1966).

102. PEACEABLE KINGDOMS, *supra* note 97, at 177.

103. Zuckerman, *Social Context*, *supra* note 96, at 541-43.

104. PEACEABLE KINGDOMS, *supra* note 97, at 158, 160-61.

105. *See* THE FEDERALIST No. 10, at 59 (J. Cooke ed. 1961) (J. Madison); *id.* No. 51, at 350 (A. Hamilton).

106. *Id.* No. 10, at 61.

107. *See* E. OBERHOLTZER, THE REFERENDUM IN AMERICA 286-91 (2d ed. 1911). Another device frequently employed by cautious state politicians to enact controversial legislation was the constitutional amendment. *See* Oberholtzer, *Law-Making by Popular Vote*, 2 ANNALS 324, 333-39 (1891).

108. *See* E. PESSEN, JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS 157 (1969).

ical participation during the Jacksonian era.[109] As a means of restricting the consumption of liquor, though, the local option vote also embodied the desire of people in contemporary moral and religious movements[110] to control or set an example for a society strained by mounting immigration and by growing economic and social mobility.[111] Thus, the local option demonstrated a basic tension in direct democracy between enhancing the political power of the average voter and undercutting the social status of assertive minority groups.

Although most nineteenth-century local option laws were upheld,[112] a number of state judges held that a local option vote on liquor licensing was an unconstitutional delegation of power.[113] Opinions in these cases conveyed a judicial anxiety about the capricious, oppressive, and irrational character of popular voting on economic and moral regulations. In *Rice v. Foster*,[114] direct democracy was sharply criticized. Pure democracy was seen as the "worst species of tyranny and despotism," because it expressed "the ever varying will of an irresponsible multitude"[115] and undermined the constitutional safeguards of individual rights.[116] Given the wide range of public opinion and the influence of demagogues, the *Rice* court reasoned, local option voters are almost certain to vote capriciously:

> There is scarcely a case, where much diversity of sentiment exists, and the people are excited and agitated by the arts and influence of demagogues, that will not be referred to a popular vote. The frequent and unnecessary recurrence of popular elections, always demoralizing in their effects, are among the worst evils that can befal [*sic*] a republican government; and the legislation depending upon them, must be as variable, as the passions of the multitude.[117]

In *Ex parte Wall*,[118] the California Supreme Court noted some structural flaws in the local option. Unlike the town meeting, the local option lacked the procedural constraints and provision for public discussion which were necessary to create a deliberative setting.[119] Given its nondeliberative character, the local option was an improper means of enacting legislation.[120] The lack of public discussion was compounded, in the court's view, by the use of the secret ballot in local option votes. While the secret ballot shields voters from undue influ-

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109. *See* R. McCormick, The Second American Party System: Party Formation in the Jacksonian Era 350-51 (1966).

110. *See generally* Griffin, *Religious Benevolence as Social Control, 1815-1860*, 44 Miss. Valley Hist. Rev. 423 (1957).

111. *See* J. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement 44-57 (1963). *Cf.* J. Timberlake, Prohibition and the Progressive Movement, 1900-1920, at 151-55 (1963) (local option laws as an instrument of reform and social control during the Progressive era).

112. Courts were particularly deferential toward local option laws which involved governmental structure or expenditures, for example, free public schools and public subscription in the stock of canal companies. *See* E. Oberholtzer, *supra* note 107, at 318-21, 323.

113. *Id.* at 318-23.

114. 4 Del. (4 Harr.) 479 (1847).

115. *Id.* at 489.

116. *Id.* at 486.

117. *Id.* at 498.

118. 48 Cal. 279 (1874).

119. *Id.* at 319, 321-22.

120. *See id.* at 322.

ence, it may also insulate voters from public debate.[121] Unchallenged and uninstructed, such voters are likely to vote irrationally.[122]

3. Black Exclusion Votes

Another nineteenth-century application of direct democracy was particularly oppressive toward racial minorities. Following the earlier example of voters and legislators in several Northern states and territories,[123] voters in the territories of Kansas[124] and Oregon[125] overwhelmingly approved constitutional or statutory provisions which excluded free blacks from settling or required a heavy bond with the same effect.

As a democratic, but discriminatory, device, the black exclusion vote was similar to some contemporary uses of the referendum. Like the mandatory referendum on all municipal ordinances against racial discrimination in housing,[126] the black exclusion vote excluded certain racial minorities in order to preserve the uniform racial and cultural character of the electorate. Moreover, like a mandatory referendum against public housing for the poor,[127] the black exclusion vote, by excluding old and weak ex-slaves,[128] shielded the electorate from the potential fiscal burden of poor in-migrants.

4. Adoption of the Swiss Initiative and Referendum

While the local option law was emerging in the United States, the Swiss were developing several modes of direct local legislation,[129] including the initiative and optional and compulsory referenda.[130] In the 1890's, the Swiss system of direct legislation gained adherents in the United States,[131] particularly from two politically discontented groups, labor and the Populist Party.[132] Under the leadership of the Populists, South Dakota in 1898 became the first state to incorporate the Swiss initiative and referendum into a state constitution.[133] By 1911, ten states had joined South Dakota in adopting the initiative and referendum.[134]

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121. As the court saw the problem, in a local option election "[voters] vote secretly, and without consultation with the rest of the voters; who are actuated by motives which need not be publicly avowed, or controlled by reasons the weakness of which could be exposed by a public discussion." *Id.* at 322-23.

122. *See id.*

123. *See* L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860, at 70 & nn.13-14 (1961).

124. *See* E. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 111-12 (1967).

125. *Id.* at 85-93.

126. *See generally* Hunter v. Erickson, 393 U.S. 385 (1969).

127. *See generally* James v. Valtierra, 402 U.S. 137 (1971).

128. L. LITWACK, *supra* note 123, at 67. Northern voters were also concerned about economic competition with free blacks, who were usually paid lower wages. *Id.* at 161.

129. "Direct legislation" will be used in this Note to refer to the common features of the initiative and referendum, defined in note 5 *supra*.

130. *See* Rappard, *The Initiative, Referendum, and Recall in Switzerland*, 43 ANNALS 110, 130-35 (1912). The legislative referendum was first adopted in a Swiss canton in 1831, the legislative initiative was imposed on all cantons by the federal constitution in 1848. *Id.* at 131, 132.

131. *Id.* at 114-25.

132. *Id.* at 122-24.

133. *Id.* at 124.

134. Munro, *supra* note 95, at 9.

Compared to labor and the Populists, the Progressives were more critical of direct legislation. Many Progressives saw the initiative and referendum as a means of freeing politics from control by special interests.[135] In the eyes of rural Progressives, direct legislation performed an additional function: overcoming the power of experts and bureaucrats in state government.[136] Many urban professionals and businessmen in the Progressive movement, however, believed that government needed the order and organization which experts and civil servants provided.[137] Accordingly, they reacted to direct legislation devices with caution and distrust. In a speech to the Progressive Party convention in 1912, Theodore Roosevelt declared that implementation of direct democracy was the key issue of the Progressive movement, but added the qualification that it should not be used "wantonly or frequently . . . indiscriminately and promiscuously."[138] Many businessmen asserted that use of public votes to enact legislation was irrational and unfair: "We have faith in popular opinion . . . when it is instructed, sober, moral, true. But we have no faith in popular opinion when it is rash, passionate, unjust, prejudiced and ignorant."[139] In general, businessmen doubted that direct legislation would adequately reflect the wisdom of "better" citizens, presumably those who were affluent and well-educated.[140] By contrast, a leading theorist of Progressivism was concerned that the initiative and referendum tended to enact the values of the minority of voters who were politically active and aware.[141]

In part, the divided response of leading Progressives to the growing use of the initiative and referendum reflected differences of opinion as to the proper structure of democratic government which dated back to Madison.[142] To some observers, the growth of direct legislation marked the flowering of democracy; to others, the initiative and referendum were like an uncontrollable weed, encroaching on the proper sphere of legislators and choking off unpopular individuals and groups.

II
JUDICIAL ATTEMPTS TO RESOLVE THE TENSIONS BETWEEN LAND-USE REGULATION AND DIRECT DEMOCRACY

Apprehension about the potential evils of direct democracy persisted beyond the Progressive era. Concern for a rational legislative process and for the

135. *See* R. HOFSTADTER, *supra* note 15, at 261. *But cf.* W. CROUCH, J. BOLLENS & S. SCOTT, CALIFORNIA GOVERNMENT AND POLITICS 108-13 (5th ed. 1972) (interest group influences in contemporary referendum campaigns).

Support for the initiative and referendum power by two leaders of the Progressive era is expressed in articles in Munro, *supra* note 95: Roosevelt, *Nationalism and Popular Rule*, at 56 *passim*; Wilson, *The Issues of Reform*, at 69, 87.

136. G. MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900-12, at 82 (1958).

137. *See* R. WIEBE, THE SEARCH FOR ORDER: 1877-1920, at 153-54, 168-70 (1967).

138. G. KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916, at 196-98 (1963).

139. R. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT 181 (1962) (quoting N.A.M. PROCEEDINGS, 1912, at 71-101).

140. *Id.* at 181.

141. H. CROLY, PROGRESSIVE DEMOCRACY 306-08 (1915). *Cf.* Clubb & Traugott, *National Patterns of Referenda Voting: The 1968 Election*, in PEOPLE AND POLITICS IN URBAN SOCIETY 145-46, 167 (H. Hahn ed. 1972) (overrepresentation of affluent, well-educated voters in present-day referenda).

142. *See* text accompanying notes 105-06 *supra*.

fair treatment of individuals and minorities was frequently aired in litigation against direct land-use legislation. In a growing number of cases, courts determined the rationality and fairness of direct legislation in the context of zoning.

Two basic tensions mark the combination of zoning and direct legislation. First, each defines the public interest, and reform of the legislative process,[143] in different terms. In the words of one court, direct zoning legislation involves a conflict of "the philosophy of comprehensive zoning planned by a panel of experts and adopted by elected and appointed officials, against the philosophy of a wider participation and choice in municipal affairs."[144] Second, zoning and direct legislation accord a different weight to the principle of majority rule. While the concept of direct legislation is pervaded by this principle, zoning law imposes constraints on majority rule which are designed to protect the rights and interests of individual property owners and minorities.[145]

The tensions related to planning and minority rights often interact. Challenges to direct zoning legislation which are based on the effect of popular participation on the comprehensive plan often resonate with the impact of majority rule on the rights of zoning applicants and affected minorities. By accommodating land uses which are unpopular in addition to being different, the comprehensive plan is "comprehensive" not only in terms of rational planning, but also in terms of governmental fairness.[146]

Judicial response to the tensions in popular regulation of land use evolved gradually. Early Supreme Court opinions on this aspect of local government were particularly cautious. The Court took refuge in the political question doctrine to avoid a decision on the constitutionality of the initiative and referendum.[147] In early decisions on the constitutionality of requiring neighborhood consent or waiver for certain land uses, the Court was more critical, but hardly clearer. In those cases, the Court evinced a distrust of both land-use regulation, at least where no nuisance was involved,[148] and popular decisionmaking, at least where the decisions were delegated to the neighbors of an affected property owner.[149] In more recent years, courts have been more explicit in defining the statutory and constitutional limits of land-use regulation by the voters. During the past two decades, state courts have invalidated referenda and initiatives on quasi-administrative and quasi-judicial zoning decisions, viewing such decisions as affecting interests which were too particularized or private to come within the scope of the legislative power.[150] The

143. *See* text accompanying notes 19, 136 *supra*.

144. Township of Sparta v. Spillane, 125 N.J. Super. 519, 524, 312 A.2d 154, 156 (Super Ct., App. Div. 1973).

145. *See* text accompanying notes 41-56 *supra*.

146. As the New York Court of Appeals observed in Udell v. Haas, a leading non-referendum zoning case:

> The thought behind the [comprehensive plan] requirement is that consideration must be given to the needs of the community as a whole. In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority *or even the majority of the community*.

21 N.Y.2d 463, 469, 235 N.E.2d 897, 900, 288 N.Y.S.2d 888, 893 (1968) (emphasis added).

147. *See* text accompanying notes 159-60 *infra*.

148. *See* text accompanying notes 168-70 *infra*.

149. *See* text accompanying note 167 *infra*.

150. *See* text accompanying notes 178-97 *infra*.

Supreme Court has remained largely uncritical of the referendum power, according land-use referenda the same degree of deference accorded to other subjects and modes of legislation.[151] In its most explicit ruling against a land-use referendum, the Court invalidated a mandatory housing referendum because it was clearly motivated by racial discrimination.[152]

A. The Constitutionality of Direct Legislation and Neighborhood Preference Requirements

The constitutionality of direct legislation was established by state courts in the early 1900's. In *Kadderly v. Portland*[153] and In re *Pfahler*,[154] state courts upheld the taxing and regulating of land use by a local initiative vote. In each case, an ordinance was upheld[155] against a challenge that direct enactment by the voters violated the constitutional guarantee of a republican form of government.[156] The *Pfahler* court also rejected contentions that the initiative and referendum power created a conflicting legislative authority[157] and unconstitutionally delegated legislative authority.[158] In *Kiernan v. Portland*,[159] the Supreme Court avoided the issue, holding that the propriety of local voters exercising legislative powers was a political question, unsuitable for resolution by the Court.[160]

The Court examined another form of popular decision-making in three cases: *Eubank v. City of Richmond*,[161] *Thomas Cusack Co. v. City of Chicago*[162] and *Washington* ex rel. *Seattle Title Trust Co. v. Roberge*.[163] Each case involved a local ordinance which required neighborhood consent for the setting or lifting of certain land-use restrictions. In *Eubank*, the establishment of a building line required a written request from two-thirds of the property owners on a block;[164] in *Cusack*, lifting a prohibition on billboards in residential blocks required the written consent of the owners of most of the property frontage on the block;[165] in *Roberge*, establishment of an old age home, although permitted by a zoning ordinance, required the written consent of the owners of two-thirds of the property within 400 feet of the proposed home.[166]

In both *Eubank* and *Roberge*, the ordinances were struck down because they delegated power without defining standards which would prevent its exercise for reasons which were arbitrary, capricious, or limited to the narrow in-

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151. *See* text accompanying notes 238-40 *infra*.
152. *See* text accompanying note 207 *infra*.
153. 44 Or. 118, 74 P. 710 (1903) (upholding property assessments for street improvements).
154. 150 Cal. 71, 88 P. 270 (1906) (upholding direct legislation prohibiting slaughterhouses).
155. 44 Or. at 144-45, 74 P. at 719-20; 150 Cal. at 71-79, 88 P. at 273-74.
156. U.S. CONST. art. IV, § 4.
157. 150 Cal. at 82-84, 88 P. at 275-76.
158. *Id.* at 86-88, 88 P. at 277.
159. 223 U.S. 151 (1912).
160. *Id.* at 163-64. *Cf.* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150-51 (1912) (upholding initiative and referendum power of state voters).
161. 226 U.S. 137 (1912).
162. 242 U.S. 526 (1917).
163. 278 U.S. 116 (1928).
164. 226 U.S. at 141.
165. 242 U.S. at 527-28.
166. 278 U.S. at 118.

terests of a group of neighbors.[167] The billboard ordinance in *Cusack* was upheld despite its lack of standards. The *Cusack* Court reasoned that conditioning the erection of offensive structures on the consent of nearby property owners merely extended the logic of similar requirements for the establishment of offensive businesses, notably, saloons and garages.[168]

Aged but still respected,[169] this trio of opinions has passed through several decades to become one of the most frequently dusted curios of American land use law. The current relevance of these opinions as a source of procedural standards is undercut by their underlying substantive judgments. All three opinions, including *Roberge*, are pervaded by a pre-*Euclid*ean conception of the police power. In this conception, property restrictions for the purpose of physical planning are considered to be outside the scope of the police power,[170] while restrictions with vaguely moral purposes are upheld.[171] Nonetheless, for over forty years, these three opinions were the only Supreme Court precedents on the role of popular choice in land-use control.[172]

B. State Court Decisions on the Initiative and Referendum as Devices for Making Zoning Changes

Although zoning and direct legislation were found constitutional when considered separately, the combination of the two became a source of continuing litigation in state courts. Three challenges were commonly raised. Direct zoning legislation was frequently attacked as violating the procedural constraints of state zoning enabling acts, by depriving zoning applicants of their right to a hearing.[173] Direct zoning legislation was also challenged, under state constitutions, as an unlawful delegation of legislative power to the voters.[174] Another constitutional challenge to direct zoning legislation was that it was an improper means for making adjudicative[175] or administrative[176] decisions.

1. Determining the Proper Delegation of Legislative Power

The *Roberge* opinion, with its criticism of the standardless delegation of zoning decisions from the local legislature to the voters, served as a point of departure for subsequent state court decisions on zoning by direct legislation. Some courts upheld local initiatives and referenda on zoning changes, distinguishing *Roberge* on the basis that it only proscribed exercise of the zoning power by a mere neighborhood, not by the community at large.[177] Other courts

167. 226 U.S. at 143-44; 278 U.S. at 121-22.

168. 242 U.S. at 530.

169. *See, e.g.*, Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 191-96, 324 N.E.2d 742, 744-46 (1975), *rev'd*, 426 U.S. 688 (1976).

170. 226 U.S. at 144 (building lines).

171. 242 U.S. at 529-30 (billboard restrictions).

172. *See generally* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-79 & n.12 (1976) (discussing *Eubank*, *Roberge*, *Cusack* and James v. Valtierra, 402 U.S. 137 (1971)).

173. *See* City of Scottsdale v. Superior Court, 103 Ariz. 204, 207, 439 P.2d 290, 293 (1968); Hurst v. City of Burlingame, 207 Cal. 134, 142, 277 P. 308, 312 (1929).

174. *See* Comment, *Use in Zoning*, *supra* note 8, at 97-100.

175. *Id.* at 88-92.

176. *Id.* at 93-97.

177. *See, e.g.*, Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 294 (9th Cir. 1970).

criticized popular voting on zoning changes as an unlawful delegation of power. In this reading of *Roberge*, popular decision-making, because it lacked standards for its exercise, deprived zoning applicants of property without due process.[178]

2. Distinguishing Between Legislative and Non-Legislative Zoning Changes

Courts have also characterized certain zoning changes as administrative or adjudicatory and therefore outside the substantive scope of the initiative and referendum, which have been treated as strictly legislative devices.

The classic statement of the distinction between administrative and legislative zoning functions was made by the Nebraska Supreme Court in *Kelley v. John*:[179]

> The determination as to whether or not a city desires to embark upon a policy of zoning for the purpose of regulating and restricting the construction and use of buildings within fixed areas is a legislative matter subject to referendum. But when such policy has been determined, the changing of such areas, or the granting of exceptions, are committed to the mayor and council as administrative matters in order to secure the uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance.[180]

The *Kelley* court found that popular voting on zoning changes was inappropriate on two grounds: zoning amendments or special exceptions for particular properties are too insignificant to affect a city-wide electorate and yet important enough to undermine a city's comprehensive zoning.[181] In reaching this somewhat contradictory conclusion, the court probably relied on the implicit premise that a zoning ordinance and its accompanying procedures are more sensitive than a city's voters to the impact and interrelationship of small-scale land-use changes.

The functional distinction drawn in *Kelley* has been sharply criticized,[182] particularly after several jurisdictions stretched the "administrative" label to cover the rezoning of particular areas.[183] Indeed, the Nebraska Supreme Court itself later rejected the legislative/administrative dichotomy, holding in *Hoover v. Carpenter*[184] that the applicability of the referendum power to a legislative question depends on the requirements of the referendum statute and on the particular facts involved.[185] In place of labels, the *Hoover* court devised a balancing test with six factors. Although *Hoover* was not a zoning case, four of

178. *See* City of Scottsdale v. Superior Court, 103 Ariz. 204, 207, 439 P.2d 290, 293 (1968); Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 195-96, 324 N.E.2d 742, 746 (1975), *rev'd*, 426 U.S. 688 (1976).

179. 162 Neb. 319, 75 N.W.2d 713 (1956).

180. *Id.* at 324, 75 N.W.2d at 716. *See* Bird v. Sorenson, 16 Utah 2d 1, 2, 394 P.2d 808, 808 (1964).

181. 162 Neb. at 323, 75 N.W.2d at 716.

182. *See* Comment, *Use in Zoning*, *supra* note 8, at 94-97.

183. *See, e.g.*, Forman v. Eagle Thrifty Drugs and Markets, Inc., 89 Nev. 533, 537-38, 516 P.2d 1234, 1237 (1973); Bird v. Sorenson, 16 Utah 2d 1, 2, 394 P.2d 808, 808 (1964).

184. 188 Neb. 405, 197 N.W.2d 11 (1972).

185. *Id.* at 407, 197 N.W.2d at 13 (denying referendum on electric rates), *modifying* Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956).

the factors would be useful in determining the propriety of popular voting on zoning changes: the number of the voters affected by the change, the statutory authority of the review board, the need for expertise to determine the reasonableness of the change, and the fairness of granting or denying a referendum.[186] Significantly, the *Hoover* court found that the mere fact that a change affected many voters was insufficient to warrant a referendum.[187]

Surveying a different boundary on legislative functions, some courts have marked off a line between "adjudicatory"[188] and "legislative" activity. Several courts, recognizing that local legislatures often perform "administrative, quasi-judicial, or judicial" tasks,[189] have defined certain zoning changes to be "an adjudication between the rights sought by the proponent and those claimed by the opponents of the zoning change."[190] Even when important public policies are at stake in such a zoning change, the adjudication of rights is likely to have "a far greater impact on one group of citizens than on the public generally."[191] As defined by one court, "legislative" action is the formulation of a general rule or policy for "an open class of individuals, interests, or situations," while "judicial" action is the application of such a rule or policy to "specific individuals, interests, or situations."[192] As with the "administrative" label,[193] the "adjudicatory" designation has been placed on the rezoning of a particular property,[194] traditionally viewed as a "legislative" function.[195] By characterizing certain changes as "adjudicatory" and therefore not subject to a referendum vote, courts have reinforced the procedural rights of property owners affected by a proposed zoning change.[196] Unlike the enactment of a zoning ordinance, an adjudicatory zoning change must not only be substantively reasonable, but must also be fairly decided.[197]

In effect, applying the "adjudicatory" label to a zoning change affords a common law equivalent of procedural due process to affected property owners, much as the "administrative" label provides a common law equivalent of the constitutional constraints on delegation of a legislature's power. The "adjudicatory" and "administrative" labels both restricted the voters' use of direct legislation in zoning matters: the former by insuring that an affected property owner would receive a public hearing, the latter by protecting local legislatures from encroachment.[198]

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186. 188 Neb. at 407-08, 197 N.W.2d at 13.

187. *Id.* at 408, 197 N.W.2d at 13.

188. Courts and commentators have used "adjudicatory" and "adjudicative" interchangeably to describe a governmental decision which affects private rights or interests and is based on a particular set of facts. *See, e.g.*, Comment, *Use in Zoning*, *supra* note 8, at 88 & n.96.

189. Fasano v. Bd. of County Comm'rs, 264 Or. 574, 580, 507 P.2d 23, 26 (1973) (quoting Ward v. Village of Skokie, 26 Ill. 2d 415, 424, 186 N.E.2d 529, 533 (1962) (concurring opinion)).

190. Fleming v. City of Tacoma, 81 Wash. 2d 292, 298-99, 502 P.2d 327, 331 (1972).

191. *Id.*

192. 264 Or. at 581, 507 P.2d at 27 (quoting Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L. J. 130, 137 (1972)).

193. *See* note 183 *supra*.

194. 81 Wash. 2d at 298-99, 502 P.2d at 331.

195. *See, e.g.*, Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341 (1975).

196. *See* Comment, *Use in Zoning*, *supra* note 8, at 90.

197. 81 Wash. 2d at 298-99, 502 P.2d at 331.

198. *See* Comment, *Use in Zoning*, *supra* note 8, at 94.

C. *Mandatory Housing Referenda and Minority Groups: Open Markets and a Tight Fisc*

Beginning in 1967, the Supreme Court determined the constitutionality of direct legislation which had a discriminatory impact on racial or economic minorities. In a series of three cases—*Reitman v. Mulkey*,[199] *Hunter v. Erickson*,[200] and *James v. Valtierra*—[201] the Court was confronted by the classic tension in direct legislation: how to implement the will of the majority while protecting minority rights.[202]

In all three cases, the Court examined popularly enacted laws which prohibited or burdened certain types of housing legislation. In *Reitman* and *Hunter*, two opinions authored by Justice White, the Court invalidated direct legislation which was aimed against future fair housing laws. *Reitman* involved an amendment to the California constitution, adopted by a popular initiative, which declared that the state would not limit any person's right to decline to sell, lease, or rent his residential property to anyone he chose.[203] *Hunter* dealt with an amendment to the city charter of Akron, Ohio, adopted after approval by a referendum, which required that present and future ordinances barring racial, religious, and ethnic discrimination in housing be approved by a majority of city voters.[204] In *James*, the Court again examined a provision of the California constitution adopted by the initiative. In this case, however, the amendment required that the development, construction, or acquisition of public housing projects be preceded by approval by a referendum vote of the affected community or county.[205] This provision was upheld by the Court in an opinion by Justice Black, the only Justice to dissent in *Hunter*.

Reitman and *Hunter* are significant in the evolution of referendum law because the Court applied the same method of analysis and substantive standards to popularly enacted laws which have been applied to enactments by a legislature. In *Reitman*, the Court accepted the state court's inquiry into the content of a popularly enacted constitutional amendment and the context of its enactment.[206] Thus, judicial inquiry into the history and intent of a popularly enacted law is not automatically barred by the fact that the initiative and referendum process produce a less explicit record than the record produced by hearings and debates in a legislature. *Hunter* expanded the definition of proscribed discrimination to encompass legislation, including the imposition of a mandatory referendum, which hindered efforts against racial discrimination.[207] Read together, *Reitman* and *Hunter* support the proposition that enactment by a popular vote does not diminish the unconstitutionality of racially discriminatory legislation.[208]

The hard line which the Court took against discriminatory housing legisla-

199. 387 U.S. 369 (1967).
200. 393 U.S. 385 (1969).
201. 402 U.S. 137 (1971).
202. *See* text accompanying notes 105-06 *supra*.
203. 387 U.S. at 371 & n.2.
204. 393 U.S. at 387.
205. 402 U.S. at 139 & n.2.
206. 387 U.S. at 373-76.
207. 393 U.S. at 390-93.
208. *See* 387 U.S. at 377; 393 U.S. at 391.

tion in *Reitman* and *Hunter* softened in *James*. The *James* opinion offered several reasons for the change. First, unlike its counterpart in *Hunter*, the mandatory referendum in *James* was racially neutral on its face and was not accompanied by evidence of a racially discriminatory intent.[209] Moreover, a mandatory referendum does not deny equal protection to low-income persons seeking public housing if, as in California, other groups are hindered by required referenda.[210] Indeed, mandatory referenda serve a legitimate governmental purpose: they insure that citizens will have a "voice" in the making of public policy.[211] In the context of public housing, a referendum requirement enables the voters of a community to be heard on decisions which are likely to influence the future of local development and which may increase the need for public services while reducing taxable property.[212]

The opinions in *Hunter* and *James* suggest that communities may exercise considerable discretion in the choice of subjects for a mandatory referendum. Read broadly, the two opinions support the principle that a mandatory referendum law which burdens some classes but not others will still satisfy the equal protection clause if it is racially neutral, on its face and by intent, and conceivably promotes the fiscal or economic health of a community.

This composite picture, however, did not address the constitutional implications of enacting a mandatory referendum law which would apply to zoning decisions. The justification for mandatory referenda in *James*, promotion of a community's economic and fiscal future, is less convincing when a referendum requirement burdens the use of private, rather than public, property. In addition, *Hunter* and *James* did not consider two questions which distinguished zoning from other subjects suitable for a referendum vote. First, do zoning applicants, unlike other classes burdened by required referenda, have a constitutional right to a legislative hearing? Second, would this right be abridged if the referendum displaced the legislature as the ultimate legislative authority on zoning changes? These gray areas in the opinions by Justices Black and White formed the constitutional backdrop for the Court's examination of a mandatory referendum provision in the city charter of Eastlake, Ohio.

D. Eastlake: *Rezoning by Referendum*

The relationship between the zoning and referendum powers was not considered by the Supreme Court until 1976. In *City of Eastlake v. Forest City Enterprises*,[213] the Court held that communities could require referenda on rezoning requests.

Under an amendment to the city charter of Eastlake, all changes in land use[214] approved by the planning commission and the city council had to be

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209. 402 U.S. at 140-41.

210. *Id.* at 142. As Justice Marshall noted, however, the referendum requirement did not apply to the provision of public housing for other groups, including the aged, veterans, state employees, and middle-income persons. *Id.* at 144 (dissenting opinion).

211. *See id.* at 141. As Justice Black observed in a broad dictum, "[p]rovisions for referendums [*sic*] demonstrate devotion to democracy, not to bias, discrimination or prejudice." *Id.*

212. *See id.* at 143.

213. 426 U.S. 668 (1976).

214. The charter amendment required referendum approval of the amendment or enactment of "any ordinance referring to other regulations controlling the development of land and the selling or

ratified by a 55 percent vote in a referendum.[215] A property owner seeking a land-use change was obligated to assume all costs of the referendum[216] and to refrain, in the event of defeat, from raising the issue again within the following year.[217]

Plaintiff, a builder of middle-income and luxury apartments,[218] applied for a rezoning of its eight-acre property from industrial to multi-family high-rise use.[219] Eastlake's planning commission approved the application and the city council amended the zoning ordinance to permit the requested use. While the city council was considering the rezoning request, the city's voters approved the charter amendment which required referenda on land-use changes.[220] Plaintiff's subsequent request for approval of parking and lot plans, a prerequisite for a construction permit, was denied by the planning commission because the rezoning had not been submitted to the city's voters. The city council's rezoning action was then submitted to a city-wide vote and failed to receive the necessary 55 percent vote.[221] Plaintiff then[222] sought a declaratory judgment in state court that the new charter provision was a denial of due process[223] and an unconstitutional delegation of legislative power to the people.[224]

1. The State Court Opinion

The Ohio Supreme Court, reversing two lower courts, declared Eastlake's referendum requirement invalid on two grounds. As a legislative device, the referendum can not be required for administrative land-use changes.[225] Moreover, as applied to legislative land-use changes, the referendum denies due process to affected property owners. The court based this conclusion on the referendum's lack of standards.[226] On this point, the court relied on the three neighborhood preference cases,[227] concluding that the consent requirements in *Eubank* and *Roberge* had been struck down because their failure to

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leasing or rental of parkways, playgrounds, or other city lands or real property, or for the widening, narrowing, re-locating, vacating, or changing the use of any public street, avenue, boulevard, or alley. . . ." EASTLAKE, OHIO, CHARTER art. VIII, § 3 (amended 1971), *quoted in* 426 U.S. at 686 n.8.

215. 426 U.S. at 670 & n.1.

216. *Id.* at 686 n.8. This provision was invalidated by the trial court and was not litigated before the state supreme court. Accordingly, the issue was not presented to the Supreme Court. *Id.* at 671 n.3.

217. *Id.* at 686 n.8.

218. Amicus Brief for Cities of Euclid, Kirtland, Willoughby Hills, and Willowick, Ohio (urging reversal) at 2, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

219. Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 187, 324 N.E.2d 740, 742 (1975).

220. The trial court held that the charter amendment applied to plaintiff despite its timing. This ruling was not appealed. 426 U.S.at 671 n.2.

221. 41 Ohio St. 2d at 188, 324 N.E.2d at 742.

222. *Id. Contra* 426 U.S. at 671 (stating, without comment, that plaintiff filed suit *before* the referendum was held).

223. 41 Ohio St. 2d at 188, 324 N.E.2d at 742.

224. 426 U.S. at 671.

225. 41 Ohio St. 2d at 191, 324 N.E.2d at 743-44.

226. *Id.* at 191-96, 324 N.E.2d at 744-46.

227. *See* text accompanying notes 161-72 *supra*.

define standards which would prevent an arbitrary or capricious impact on other property owners amounted to an unconstitutional delegation of power.[228] The mandatory referendum in *James* was distinguished from Eastlake's requirement in terms of substantive scope. The court reasoned that low-rent public housing involved questions of public spending and tax revenue similar to those dealt with in other referenda. By contrast, most zoning changes involve small properties and have no community-wide impact.[229]

2. The Supreme Court Opinions: The Two Roads in Eastlake

The Supreme Court reversed the Ohio decision. The majority opinion by Chief Justice Burger held that a referendum requirement, as applied to rezoning and other legislative zoning decisions, does not violate the due process rights of a property owner who seeks a zoning change.[230]

a. The Majority's Route: The Referendum is a Power to Legislate Without Hearings and With Minimal Substantive Constraints—The Court held that Eastlake's mandatory referendum was not subject to a requirement of articulated standards. Such a requirement applied only to regulatory agencies, to ensure that their exercise of delegated legislative power is in accordance with the legislative intent behind the delegation.[231] The requirement does not apply to referenda, because the referendum is not a delegation of legislative power, but rather a power reserved to the people to divert matters from the legislature and to legislate *en masse*, as in town meetings.[232] A referendum violates due process only by producing arbitrary results, not by merely permitting them.[233] This holding is significant, for its emphasis on the results of a referendum might free mandatory referenda from the procedural due process requirements of prior notice and hearing.

This implication is reinforced by the majority's discussion of the zoning aspects of a mandatory referendum. Despite the procedural requirements of most state zoning enabling acts,[234] and briefs contending that these requirements created an expectation of procedural due process,[235] the majority was silent on the issue of procedural due process in zoning. Limiting its discussion of zoning law to *Euclid* and *Roberge*,[236] the majority found that the only due process requirement applicable to a legislative zoning decision was a substantive one: a zoning restriction is invalid only if it is arbitrary and unreasonable, having no relationship to the police power.[237]

This deference to the referendum power extended to substantive constraints in another respect. The *Eastlake* majority implied that a local mandatory referendum may be applied to any subject within the legislative power of the local city council.[238] Applying the rationale of *James*, the majority con-

228. 41 Ohio St. 2d at 191-96, 324 N.E.2d at 744-46.
229. *See id.* at 196-97, 324 N.E.2d at 747.
230. 426 U.S. at 679.
231. *Id.* at 675.
232. *Id.* at 672-73, 675.
233. *See id.* at 675-77.
234. *See* note 29 and text accompanying notes 48-51 *supra*.
235. *See* Amicus Brief of Nat'l Ass'n of Home Builders, *et al.* (urging affirmance), at 8-11.
236. 426 U.S. at 676-78.
237. *Id.* at 676.
238. *See id.* at 673-74, 678.

cluded that the rezoning sought by the plaintiff was an appropriate subject for a referendum because the rezoning would probably increase the need for services, including schools, police and fire protection, and decrease the amount of land available for future industrial development.[239] In effect, the majority treats rezoning referenda the same as referenda on other legislative subjects: the only substantive prerequisite is there be some "likely" impact on community-wide interests.[240]

b. The Road Not Taken in Eastlake*: Zoning Requires Procedural Fairness and a Balancing of Private and Public Interests*—In an opinion joined by Justice Brennan, Justice Stevens contended that an applicant for a zoning change is entitled, under the due process clause, to have the requested zoning change evaluated by a fair procedure.[241] Justice Stevens supported this contention by linking zoning law and practice with the procedural implications of *Eubank* and *Roberge*. Under most zoning ordinances, including Eastlake's, there is a procedure for evaluating particular zoning changes and such changes are frequently granted.[242] In Justice Stevens' view, these facts prompt a zoning applicant to expect that his zoning request will be fairly considered[243] and warrant protection of this expectation under the due process clause.[244] Moreover, under *Eubank* and *Roberge*, municipal regulations which affect the use of a particular property must include procedures which recognize the due process rights of the owner.[245]

Under Justice Stevens' reading of state zoning cases, the right to fair procedures may be present even when the requested zoning change is a "legislative" one like rezoning.[246] Although often characterized as a "legislative" zoning decision, rezoning may largely involve a conflict between the zoning applicant and his neighbors.[247] Such a conflict is essentially private rather than public. Accordingly, the community's exercise of the zoning power is subject

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239. *Id.* at 673 & n.7, 678-79.

240. *See id.* at 673 n.7.

241. *Id.* at 682-83 (Stevens, J., dissenting). In a separate dissenting opinion, Justice Powell expressed a similar concern for procedural rights, focusing on the lack of fairness in denying a hearing to a zoning applicant who holds a small property. *Id.* at 680 (dissenting opinion).

242. *Id.* at 681-82 & n.3 (Stevens, J., dissenting).

243. *Id.* at 682 (Stevens, J., dissenting).

244. *Id.* at 682-83 (Stevens, J., dissenting).

245. *Id.* at 683 & n.5 (Stevens, J., dissenting).

Chief Justice Burger distinguished these cases, concluding that they applied only in situations where legislative power is delegated without standards to "a *narrow segment* of the community, not to the people at large." *Id.* at 677 (emphasis in the original). In contrast to a vague "neighborhood preference," a referendum is "the city itself legislating through its voters" to enact directly the voters' vision of how to serve the public interest. *Id.* at 685 (quoting Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 294 (9th Cir. 1970)).

This distinction between neighborhood and city-wide popular action skirts an important difference in the reasoning of *Eubank* and *Roberge*. The *Eubank* Court, guided by a pre-*Euclid*ean, laissez-faire vision of government, reacted against the arbitrary character of regulating land use by the "taste" of *any* group of citizens, whether they be immediate neighbors or the city at large. *See* 226 U.S. at 143-44. In contrast, the *Roberge* Court largely avoided mentioning neighborhood taste and instead relied on a critique of delegation without standards, review, or official duty. 278 U.S. at 122. Perhaps *Roberge* reflects the deference shown to neighborhood and taste in zoning. *See, e.g.*, Standard Enabling Act, *supra* note 27, § 3 & n.24, § 5.

246. 426 U.S. at 683-85 (Stevens, J., dissenting).

247. *See id.* at 692 (Stevens, J., dissenting).

to greater judicial scrutiny. The community must follow procedures which are fair in the sense of providing a reasonable opportunity to have the conflict resolved by an impartial party authorized and able to apply precise rules.[248]

Justice Stevens also highlighted a substantive constraint which the majority discussed only in passing: the nature and relative weight of the "public interest" which justifies a rezoning referendum. Unlike the *Eastlake* majority, Justice Stevens contended that zoning was materially different from other legislative subjects in the way in which the public interest is determined and weighed. The initial public interest in a rezoning proposal is to preserve the comprehensive plan.[249] Approval of a rezoning proposal by Eastlake's planning commission and city council amounted to a finding that the rezoning would serve the public interest.[250] If such a finding is to be reviewed by the voters, there must be evidence, greater than mere speculation,[251] that the approved rezoning would "adversely affect the community or raise any policy of city-wide concern."[252] This substitution of popular for official perceptions of the public interest also required a balancing of impacts. The approved rezoning request must pose a threat to the public interest which is greater than the conflict between the private interests of the rezoning applicant and his neighbors.[253]

Neither the majority nor the dissenting opinions in *Eastlake* resolve the tensions inherent in subjecting a rezoning to a referendum vote. In part, this is because the separate paths of prior zoning and referendum decisions virtually pass over each other in *Eastlake* without meeting. State court decisions which favor procedural fairness in zoning are cited in the dissenting opinion of Justice Stevens and ignored by the majority;[254] federal decisions which favor the principle of the referendum are cited by the majority and ignored or weakly distinguished by the dissenting Justices.[255] In addition, the focus of the *Eastlake* opinions is limited to the due process clause.[256] Rezoning by referendum may still be challenged, either under other provisions of the Constitution or under state law.

III
Toward a Resolution of the Tensions in Rezoning Referenda

A. Reexamining the Referendum Power

Before the referendum can be properly used as a device for making zoning decisions, the labels which have made political myths out of the virtues and vices of the referendum must be discarded. The *Eastlake* opinion provides a useful point of departure for this purpose. By rejecting the characterization of the referendum as a delegated power,[257] the Court advances referendum law.

248. *Id.* at 692-93 (Stevens, J., dissenting).
249. *See id.* at 693 (Stevens, J., dissenting).
250. *Id.* (Stevens, J., dissenting). *But see id.* at 675 n.10 (majority opinion).
251. *See id.* at 688 n.10 (Stevens, J., dissenting).
252. *See id.* at 693 (Stevens, J., dissenting).
253. *Id.* at 693-94 (Stevens, J., dissenting).
254. *Compare* text accompanying notes 234-37 *with* text accompanying notes 246-48 *supra*.
255. *Compare* note 245 *with* text accompanying note 245 *supra*.
256. *Compare* text accompanying notes 233, 237 *with* text accompanying notes 241-45 *supra*.
257. 426 U.S. at 672-73, 675.

The concept of the people delegating power to themselves is artificial and does little to further understanding of the referendum's abuses. In the process of removing one misleading label, though, *Eastlake* adds another. In treating the referendum as a power to legislate reserved by the people, the Court relies on assumptions about the fairness and efficacy of popular decision-making which should be examined more closely. As support for the efficacy of direct democracy, the *Eastlake* majority cites the constitutional validity of mandatory referenda on public housing[258] and the model of historic and contemporary town meetings.[259] In addition, voters are characterized as being at least as fair and rational as their legislators.[260]

This line of argument provides a weak rationale for rezoning referenda, since its vision of the referendum covers too broad a range of questions and does so with too little discrimination to satisfy the statutory constraints on zoning. As a preliminary step to revising the referendum for use in rezoning, the Note will analyze the pro-referendum arguments presented in *Eastlake*.

1. The Town Meeting Analogy

Confidence in the democratic and practical potential of the referendum has been partly based on the persisting image of an analogous institution, the town meeting.[261] Closer examination of this image, however, raises important questions about the referendum.

The traditional image of the town meeting as a democratic institution has been sharply questioned by several historians. While courts have focused on the act of mass voting characteristic of both the referendum and the town meeting,[262] several historians have highlighted the activity which preceded the voting.[263] This shift in focus to the pre-voting period has revealed defects in the town meeting analogy. On the one hand, the historical town meeting was largely effective because its participants, drawn from a closed, conformist society,[264] held similar values. On the other hand, unlike the referendum, the town meeting tempered this undemocratic influence with a tradition of prior discussion and respect for minority opinion.[265]

While the modern town meeting probably reflects a more open society than the colonial town, the town meeting is still questionable as a model of practical, democratic lawmaking by cities. The source on modern town meetings cited by the *Eastlake* majority noted that the strongest criticism of town meetings was that the public did not receive enough prior information about the

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258. *See* 426 U.S. at 673.

259. *Id.* at 672-73 & n.6.

260. *See id.* at 675 n.10.

261. *See, e.g., id.* at 672-73 & n.6. The Court cited one contemporary source on town meetings: Bryan, *Town Meeting Government Still Supported in Vermont*, 61 NAT. CIVIC REV. 348 (1972). This source is somewhat dubious. The article's primary finding, that town meetings are still strongly supported in Vermont, is limited by its factual base: survey responses from town officers and citizens who attended town meetings. *Id.* at 349. The author conceded this problem by noting the possibility that expanding the survey to include registered voters who did not attend town meetings might increase the negative response level. *Id.* at 351.

262. *See, e.g.*, 426 U.S. at 673.

263. *See* text accompanying notes 97-98, 100-01, 104 *supra*.

264. *See* text accompanying notes 96-101 *supra*.

265. *See* text accompanying notes 103-04 *supra*.

issues to be discussed.[266] This problem of inadequate information, noted in a study of town meetings in small towns,[267] is even more troublesome when the forum shifts to referenda in larger cities. Voters in mandatory referendum cities like Eastlake and Parma, Ohio, with respective populations of approximately 20,000 and 100,000,[268] are probably less aware of minor local issues than voters in small towns. Small cities like Eastlake and Parma are too big for effective face-to-face communication on minor public issues and often are too small to have a local radio or television station to present those issues with the same degree of detail and drama. This lack of prior discussion increases the potential for irrational and oppressive referendum results, including rezoning decisions which are contrary to a community's comprehensive plan and to the interests of zoning applicants who lack community-wide recognition.

2. Assumed Fiscal and Economic Impacts

According to the *Eastlake* majority, a referendum is an appropriate means of making public decisions which have conceivable[269] or probable[270] adverse fiscal and economic impacts on a community. In the majority's view, these impacts come within the scope of the legislative power and therefore may be subjected to a referendum. These judicial assumptions about adverse impacts are both too broad, when applied to all rezoning requests, and unnecessary, given the availability of judicially accepted methods for predicting fiscal impacts.

By assuming that rezonings have a negative fiscal impact, the *Eastlake* majority overextends the logic of *James v. Valtierra*. In *James*, the prospect of low-income housing presented a likely basis for assuming reduced tax revenue and increased need for municipal services.[271] In contrast, the fiscal impact of rezoning varies widely according to the type of rezoning requested. For example, construction of unattached housing tends to have the mixed impact of increasing public revenue and expenditures alike, while construction of apartments for the elderly, as planned by the respondent in *Eastlake*,[272] tends to produce a fiscal surplus.[273]

Judicial assumptions about negative fiscal impact are also unnecessary and contrary to a prior opinion of the Court. Models developed by the Urban Institute, for example, make it possible to predict the fiscal impact of land-use decisions.[274] Indeed, the Court itself has recognized the value of this mode of analysis. In a leading case on municipal annexation,[275] the Court ordered the

266. Bryan, *supra* note 261, at 350.

267. The largest town in the study had a population of 3,187; half the towns had fewer than 831 residents. *Id.* at 348.

268. 1 U.S. DEP'T OF COMMERCE, CENSUS BUREAU, CHARACTERISTICS OF THE POPULATION, part 37 (Ohio), at 30, 34 (1973) (population as of 1970); Brief for Respondent at 27, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (population as of 1970).

269. *See* 426 U.S. at 678-79 (quoting James v. Valtierra, 402 U.S. 137, 143 (1971)).

270. *See id.* at 673 n.7 (referring to James v. Valtierra, 402 U.S. at 143 n.4).

271. 402 U.S. at 143 n.4.

272. Note, *Proper Use*, *supra* note 9, at 826.

273. *See* T. MULLER, FISCAL IMPACTS OF LAND DEVELOPMENT 42 (Urb. Inst. 1975).

274. *See* T. MULLER, *supra* note 273.

275. City of Richmond v. United States, 422 U.S. 358 (1975).

district court to weigh the fiscal impacts of annexation,[276] as predicted in an Urban Institute study.[277] This annexation study employed an analytical scheme similar to the one later used in the Institute's study on the fiscal impact of land-use decisions.[278]

3. Comparison to a Legislature

Another argument for the referendum is that voters are as rational and fair as legislators. As the *Eastlake* Court observed, "[e]xcept as a legislative history informs an analysis of legislative action, there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters."[279] This sweeping dictum deserves closer scrutiny. The opinions of modern political analysts and state courts support a contrary argument, that referendum voting is inherently more irrational and oppressive toward individuals and minorities than is legislative voting.

Compared to a local legislature, a referendum vote is a blunt and blind instrument of community power. Unlike legislators, voters are usually limited to a choice between the absolute rejection and absolute acceptance of a particular proposal,[280] with no opportunity to choose related or competing land-use proposals.[281] Moreover, referendum voters are likely to know less about the issues, particularly in rezoning, where legislators are more likely than voters to be knowledgeable about the comprehensive plan and the arguments aired in public hearings. Finally, since referendum voters, unlike legislators, are accountable to no one, they need not balance the land-use interests of competing groups, even if those interests are known. Limited in discretion, vision, and accountability in these ways, referendum voters are poorly equipped and motivated to evaluate proposed zoning changes in a rational way.

The limited accountability and discretion of referendum voters also promotes oppressive and unfair results.[282] One factor is the secret ballot. While secrecy shields the voter from official pressures, it also insulates him from pressure by minorities and individuals.[283] This insulation is compounded by the single-issue focus of referendum proposals. Although a referendum may be an

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276. *Id.* at 377-78 & n.8.

277. T. MULLER & G. DAWSON, THE IMPACT OF ANNEXATION: A SECOND CASE STUDY IN RICHMOND, VIRGINIA (Urb. Inst. 1976).

278. *See* T. MULLER, *supra* note 273. *See also* T. MULLER, ECONOMIC IMPACTS OF LAND DEVELOPMENT (Urb. Inst. 1976); P. SCHAENMAN, USING AN IMPACT MEASUREMENT SYSTEM TO EVALUATE LAND DEVELOPMENT (Urb. Inst. 1976).

279. 426 U.S. at 675 n.10.

280. *See* Taschner v. City Council, 31 Cal. App. 3d 48, 64, 107 Cal. Rptr. 214, 227 (4th Dist. Ct. App. 1973).

281. *Cf.* Lowi, *Interest Groups and the Consent to Govern: Getting the People Out, for What?*, 413 ANNALS 86, 93 (1974) (general critique of electoral process).

282. *See* Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 AM. POL. SCI. REV. 124, 137 (1970); *cf.* Seeley, *The Public Referendum and Minority Group Legislation: Postscript to* Reitman v. Mulkey, 55 CORNELL L. REV. 881, 902 (1970) (potential for racial discrimination viewed as inherent in referendum process).

283. *See* text accompanying note 121 *supra*. With the enactment of open meeting and "sunshine" laws by every state and many local governments, N.Y. Times, Oct. 20, 1977, at B3, col. 1, the gap between legislative disclosure and electoral secrecy is likely to increase. *See generally* FLA. STAT. ANN. § 286.011 (West 1975); N.Y. PUB. OFF. LAW §§ 90-101 (McKinney Supp. 1976).

effective means of aggregating individual preferences on a particular issue, it is an inefficient means of weighing individual and group interests on a range of issues. By contrast, the participants in a legislative majority, being subject to public retribution and frequent realignment, are more likely than referendum voters to weigh the interests of a minority in a fair way.

B. Retracing the Limits of the Zoning Power

Zoning is different from other forms of local legislation: it is both more powerful and more constrained. Unlike most local laws, a zoning ordinance embodies considerable governmental control over private property. This control in turn is subject to considerable safeguards: the detailed procedural requirements of notice and public hearings and the substantive requirement of a comprehensive plan.[284]

A rezoning referendum provision like Eastlake's permits a community to exercise this zoning power without the accompanying constraints. As to the procedural safeguard of a public hearing, a mandatory referendum like Eastlake's offers a rezoning applicant no more access to the voters than that afforded by media coverage of the hearings before the planning commission and the city council.[285] In addition, *Eastlake* suggests that the only substantive constitutional constraint on a rezoning referendum is the general scope of a community's legislative power,[286] not the specific provisions of the comprehensive plan. Since rezoning involves "an extremely sensitive balance between individual rights and the public welfare,"[287] the virtual absence of constraints in most referendum laws[288] raises important questions of state zoning law.

1. Procedural Constraint: The Right to a Meaningful Public Hearing

One effect of *Eastlake* is to permit communities to alter the zoning balance so as to accord less weight to a zoning applicant's rights. By permitting a community to shift the ultimate power to enact a rezoning amendment from legislators to the electorate, the Court permits a significantly greater degree of uncertainty in the zoning process.

Although a referendum provision like Eastlake's requires that a rezoning applicant will be heard by planning experts and the local legislature, there is no assurance that a rezoning applicant will be heard by the ultimate decisionmakers, the electorate. Debate in a referendum campaign is unlikely to ensure that the applicant will be heard. Referendum debate is likely to be a matter of happenstance, depending on the extent of coverage by the local news media or the financial capability of the contending parties to publicize their positions.[289] Under these circumstances, the hearing which rezoning applicants receive in a referendum is likely to depend more on their ability to buy or attract publicity than on the validity of their arguments.

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284. *See* text accompanying notes 41-56 *supra*.
285. *See* text accompanying note 289 *infra*.
286. *See* 426 U.S. at 673-74, 678.
287. Fleming v. City of Tacoma, 81 Wash. 2d 292, 295, 502 P.2d 327, 329 (1972).
288. *See* note 93 *supra*.
289. *See* Taschner v. City Council, 31 Cal. App. 3d at 64, 107 Cal. Rptr. at 227 (4th Dist. Ct. App. 1973).

Rezoning requests which overcome public indifference often meet the further obstacle of an inherently hostile electorate. Such automatic hostility is contrary to the deliberative character of zoning. Indeed, some courts have invalidated zoning decisions made by officials in public hearings which were dominated by a hostile audience.[290]

The shift from a public hearing room to the community at large may warrant a more flexible procedure than that required under the due process clause. The larger size of the electorate and the deference which courts have accorded direct democracy argue for this flexibility. These factors, however, do not warrant a complete removal of the procedural constraints which have long accompanied the zoning power. Indeed, by forcing rezoning requests into a larger, more public forum, a mandatory referendum law lays the basis for two potential first amendment challenges, based on the zoning applicant's right to be heard and the public's right to know.

One effect of the shift to a larger forum is to force zoning applicants to rely on more extensive—and costly—means of communication. A rezoning referendum reduces a zoning applicant's right to a hearing from an opportunity to confront a zoning board or city council in person to the more remote possibility of buying or attracting publicity in newspapers and other community-wide information media. As applied to the zoning applicant who can not afford or attract such publicity, this broadening of the ultimate decision-making forum has the effect of limiting the applicant to less effective means of communication about his property. Such a restriction may infringe on the first amendment rights of the zoning applicant, potential supporters and opponents, and the community as a whole under the rationale of *Linmark Associates, Inc. v. Township of Willingboro*.[291] In *Linmark*, the Supreme Court invalidated a local ordinance which prohibited the posting of "For Sale" signs. The Court held that the ordinance violated the first amendment rights of homeowners by restricting their ability to communicate information about their property.[292] Newspaper advertising and other means of communication were inadequate alternatives to the proscribed means because they were more costly, "less likely to reach persons not deliberately seeking [the restricted] information," and possibly a "less effective media for communicating the message."[293] Like the advertising restriction in *Linmark*, a mandatory referendum law forces a zoning applicant to consider methods for communicating information about his property which are more costly and less effective than personally appearing before a zoning authority.

The shift to a larger forum might also endow the voters with rights which they would not have had, as nonparticipants, in the normal zoning process. A mandatory referendum might be deemed to make a rezoning application a "public issue," entitling voters to "uninhibited, robust, and wide-open" debate[294] on the application. Indeed, one court has reached a similar result by applying the provisions of a state open meeting law. In *Polillo v. Deane*,[295] the

290. *See* American University v. Prentiss, 113 F. Supp. 389, 392 (1953); Certain-Teed Products Corp. v. Paris Township, 351 Mich. 434, 446-48, 88 N.W.2d 705, 711-12 (1958).

291. 431 U.S. 85 (1977).

292. *Id.* at 96-97 (alternative holding).

293. *Id.* at 93.

294. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

295. 74 N.J. 562, 379 A.2d 211 (1977).

New Jersey Supreme Court invalidated a local referendum which approved a new city charter because local officials drafted the referendum proposal in secret.[296] The court held that strict compliance with the state's open meeting law was required[297] and criticized the practice of "popular Government without popular information, or the means of acquiring it."[298] As a remedy, the court held that the adoption of a referendum proposal must take place at a public meeting.[299] Such a meeting may be insufficient for a rezoning referendum. While the normal zoning hearing enables a zoning applicant and perhaps some public interest representatives to be heard, it is not enough to inform the absent public. If an intensely public issue like a new city charter requires a public meeting before a referendum can be held, then a less conspicuous issue like rezoning requires a greater degree of publicity once it is forced into the electoral arena.

The first amendment and the policy of full disclosure and debate behind the open meeting laws provide a rationale for state legislation to ensure that a zoning applicant will have a meaningful opportunity to reach the referendum electorate. One approach would be to reduce the scale of popular decisionmaking so as to retain its effectiveness as an alternative, nonofficial authority while being less restrictive of effective expression by zoning applicants. For example, the forum provided by a community planning board[300] or public advisory committee[301] is more receptive than the traditional zoning process to popular input without depriving zoning applicants of the opportunity to be heard.[302] Advisory referenda[303] and public surveys[304] offer less of a hearing for zoning applicants, but permit an ample opportunity for challenging the results when the local legislature holds hearings. Another approach would be to preserve the veto power of the referendum, but impose constraints which would promote greater communication between the zoning applicant and the community and focus popular interest on zoning changes with a significant impact.[305]

2. *Substantive Constraints and Post-*Euclid*ean Land-Use Regulation*

The *Eastlake* opinion permits communities to alter the zoning balance in another way, by allowing the voters to substitute their perception of the public interest for that of the local legislature on requests to amend the zoning ordinance.[306] *Eastlake* treats the referendum as one more means, despite its

296. *Id.* at 580, 379 A.2d at 220.

297. *Id.* at 577-78, 379 A.2d at 218-19.

298. *Id.* at 571, 379 A.2d at 215 (quoting 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910)).

299. *Id.* at 580, 379 A.2d at 220.

300. *See* Note, *Community Participation and Reform of the Zoning Process in New York City*, 9 COLUM. J. L. & SOC. PROB. 575, 593-600 (1973). *See also* N. ROSENBAUM, CITIZEN INVOLVEMENT IN LAND USE GOVERNANCE: ISSUES AND METHODS 35-37 (Urb. Inst. 1976).

301. *See* N. ROSENBAUM, *supra* note 300, at 50-54.

302. Community planning boards have had a mixed record, however, as a device for preventing zoning compromises. One example is New York City, where community boards have differed in their ability to prompt real estate developers to shift from exerting private influence with public officials to publicly seeking the support of local residents. *Compare* N.Y. Times, Oct. 19, 1977, at B1, col. 1 *with* N.Y. Times, Sept. 25, 1977, § 8, at 1, col. 3.

303. *See* N. ROSENBAUM, *supra* note 300, at 61-62.

304. *See id.* at 59-61.

305. *See* text accompanying notes 333-42 *infra*.

306. *See* 426 U.S. at 678-79.

lack of internal constraints,[307] of determining the public interest in a rezoning request. This judicial deference allows the zoning process to change from public to popular regulation of private property. This change is subtle, but significant. The popular will in a rezoning referendum is too narrowly focused: it is a temporary majority on a particular land-use proposal. In contrast, the public interest in a rezoning request, as embodied in the comprehensive plan,[308] lies in a rational balancing[309] of the long-term land-use objectives of all groups in a community.

Recent trends in land-use regulation have increased the importance and complexity of this balancing process. Particularly significant are the growing scope of land-use regulations and the growing flexibility of the regulatory process.[310]

Land-use regulation has expanded beyond *Euclid*ean zoning. It now encompasses a wider range of land-use objectives and restrictions.[311] Its environmental objectives have broadened from the Standard Enabling Act objectives of reduced traffic and overcrowding[312] and a *Euclid*ean animus toward intensive land uses[313] to include the protection of fragile natural environments like wetlands and coastal areas.[314] For these new environmental objectives, the traditional panoply of restrictions on the height, area, and use of buildings[315] is inadequate and more rigorous restrictions have become necessary.[316] Traditional building restrictions are also insufficient for the phased-growth programs of many communities. These programs have imposed a new set of official constraints on zoning applicants, the ability of local governments to extend public services to newly developed areas.[317]

The increased flexibility of the zoning process has been manifested in several contexts. Districting and spatial requirements have been relaxed in some suburban communities with the development of floating zones and Planned Unit Developments (PUDs). In a floating zone, the traditional use and spatial restrictions are specified, but district boundaries are left open until a property

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307. *See* note 93 *supra*.

308. *See* 426 U.S. at 693 (Stevens, J., dissenting).

309. *See* note 146 and text accompanying notes 45-46 *supra*. Another criticism of the mandatory rezoning referendum has been that it will discourage efficient land uses by creating costly delays. *See* Note, *Proper Use*, *supra* note 9, at 840-42. However, this may underestimate the ingenuity and determination of local governments. The main effect of a rezoning referendum requirement on efficient land uses may be that local officials will extract greater concessions from developers. In return, the officials can offer to develop voter support for the rezoning. *Cf. id.* at 839 (bargaining leverage created by the traditional procedural constraints in zoning).

310. *See generally* 2 J. JOHNSTON & G. JOHNSON, LAND USE CONTROL: CASES AND MATERIALS 1229-1339 (1977) (unpublished casebook in N.Y.U. School of Law Library).

311. *See* Mandelker, *supra* note 43, at 910-15.

312. *See* text accompanying note 32 *supra*.

313. *See* text accompanying notes 75-78 *supra*.

314. *See* Schoenbaum & Silliman, *Coastal Planning: The Designation and Management of Areas of Critical Environmental Concern*, 13 URB. L. ANN. 15-47 (1977); Sullivan & Kressel, *supra* note 46, at 60-63.

315. *See* text accompanying notes 34-36 *supra*.

316. *See* Schoenbaum & Silliman, *supra* note 314, at 31-32, 43-44.

317. *See, e.g.* Golden v. Planning Board of the Town of Ramapo, 38 N.Y.2d 359, 366, 383, 285 N.E.2d 291, 294-95, 304-05, 334 N.Y.S.2d 138, 142-43, 155-56, *appeal dismissed*, 409 U.S. 1003 (1972).

owner is granted a zoning amendment to create such a zone.[318] In a PUD, spatial requirements are relaxed, permitting an aggregating of open space in some areas of the PUD and more intensive development in other areas.[319] This apportioning of different types and intensities of land use requires great flexibility. Accordingly, one court reasoned, such land-use details should be resolved by the planning commission when a developer applies for a PUD, rather than be fixed in advance by the local legislative body.[320] A similar spatial flexibility has emerged in urban zoning. Many cities grant "bonuses," in the form of increased floor area ratios, to builders who provide specified amenities, including plazas and rapid transit access.[321] Some cities permit the owner of a highly restricted property to transfer the development rights for that property to a less restricted property.[322]

The combination of more restrictions and greater flexibility in land-use regulation requires that substantive constraints like the comprehensive plan become more complex. As land-use regulation moves further away from purely local objectives and mapped uses, the comprehensive plan must be more responsive to state and federal land-use objectives and provide an independent standard for granting off-site relief from severe but necessary land-use restrictions.

The broader substantive scope of post-*Euclid*ean land-use controls also has the effect of limiting the potential legislative authority of the local referendum. First, many of the new land-use objectives, particularly environmental protection[323] and low-income housing,[324] are promoted by state and federal legislation. Enforcement of this supralocal legislation either pre-empts local legislative authority[325] or makes land use an area of concurrent jurisdiction.[326] Thus, state and federal land-use legislation would either bar a local referendum or reduce it from a final to an intermediate legislative verdict. Second, some post-*Euclid*ean land-use controls, for example, landmark preservation laws, impose a greater burden on some property owners without the *Euclid*ean *quid pro quo* of enhanced property values.[327] Relief from such a burden, like the granting of a variance for special hardship, requires a particularized response. As a

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318. *See* Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963); Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552 (1961).

319. *See generally* Symposium, *Planned Unit Development*, 114 U. PA. L. REV. 1 (1965); Annot., *Planned Unit, Cluster, or Greenbelt Zoning*, 43 A.L.R.3d 888 (1972).

320. Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 638-40, 241 A.2d 81, 87-88 (1968).

321. *See* Svirsky, *San Francisco: The Downtown Development Bonus System*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES 143-46 (N. Marcus & M. Groves ed. 1970).

322. *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 590-91 (1972). *See generally* THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION (J. Rose ed. 1975).

323. *See* Mandelker, *supra* note 43, at 915-18; Sullivan & Kressel, *supra* note 46, at 54-57, 60-62.

324. *See* MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West Supp. 1976).

325. *See* Sullivan & Kressel, *supra* note 46, at 53-54.

326. *Cf. id.* at 50-61, 66 (state participation with communities in certain areas of land-use regulation).

327. *Compare* Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 329-30, 366 N.E.2d 1271, 1274, 397 N.Y.S.2d 914, 917 (1977) *with* text accompanying note 82 *supra*.

device for general legislation, a referendum would be inappropriate when applied to rezoning requests which also involved post-*Euclid*ean regulations.[328]

C. *Reshaping the Referendum into a Rezoning Device: Broader Rights and a Narrower Scope*

If properly qualified by state legislation and case law, the referendum may become a useful means of making rezoning decisions. Constraints on the referendum should be shaped by two general considerations. First, a rezoning referendum law should minimize the potential evils of direct democracy, notably, decisions by uninformed voters[329] and decisions on matters which have too small a public impact to justify a public vote.[330] Second, a referendum law should reflect statutory and constitutional constraints which are applicable to zoning decisions. An important key to promoting fairness and rationality in the rezoning referendum is to provide safeguards for interests which are either much smaller or much larger than those of the local electorate. In particular, a rezoning referendum law should protect the rights of the small-scale property holder and recognize the authority of state and federal land-use controls.

1. Promoting Public Communication and Disclosure: The Ballot Pamphlet

Communities with a mandatory zoning referendum law should be required to provide some degree of free publicity to rezoning applicants and their opponents. This procedural requirement would be consistent with the Standard Enabling Act provisions for public hearings on zoning changes,[331] the first amendment implications of *Linmark*,[332] and a growing recognition of the public's right to know about governmental decisions.[333]

To provide a minimum of public communication and disclosure, communities should be required to mail all registered voters a pamphlet containing brief statements by the rezoning applicant, the planning commission, and an impartially selected opponent of the proposed rezoning.[334] Communities might

328. *See also* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 687 & n.9 (1976).

329. *See* text accompanying notes 121-22, 266-68 *supra*.

330. *See* text accompanying notes 181, 246-48 *supra*.

331. *See* text accompanying notes 49-51, 56 *supra*.

332. *See* text accompanying notes 291-93 *supra*.

333. *See* text accompanying notes 295-99 *supra*.

334. *See generally* OR. REV. STAT. § 254.130 (1975); CAL. ELEC. CODE §§ 5011-5015 (West 1977).

It has been argued that because ballot pamphlets might not be read, there would be no hearing. Comment, *Voter Zoning: Direct Legislation and Municipal Planning*, 1969 L. & SOC. ORDER 453, 460 n.34 [hereinafter cited as Comment, *Voter Zoning*], *quoted in* Note, *Proper Use*, *supra* note 9, at 833 n.86. While this argument offers a classic criticism of the referendum process, *see* text accompanying note 289 *supra*, its application to the ballot pamphlet rests on a faulty foundation. First, it relies on a tenuous analogy to three cases in which zoning decisions were invalidated because one of the decision-makers had been absent from the prior public hearing. Moreover, in two of the three cases the absent decision-maker later cast a vote which was necessary to make the disputed decision. *See* Watson v. Howard, 138 Conn. 464, 86 A.2d 67 (1952) (invalidated decision was made by one vote margin); Sesnovich v. Board of Appeal, 313 Mass. 393, 47 N.E.2d 943 (1943) (invalidated decision required a unanimous vote). Finally, in each of the three cases, the court found that the disputed hearings were "quasi-judicial." 138 Conn. at 466, 86 A.2d at 69; 313 Mass. at 397, 47 N.E.2d at 945; Koslow v. Board of Zoning Appeals, 19 Conn. Supp. 303, 306, 112 A.2d 513, 515 (C.P. 1955). When a referendum is used to make a legislative zoning decision, the more flexible procedural standard of a "legislative" hearing should apply. *See generally* Comment, *Voter Zoning*, 458-59.

also be required to prepare statements of the likely fiscal impact of each rezoning proposal submitted to a referendum.[335] In addition to informing the voters, the arguments in ballot pamphlets[336] and the fiscal impact statements[337] would provide a record for judicial review.

2. Recognizing Private and Supralocal Interests

a. The Minimum Property Threshold—Referenda on rezoning should be permitted only for properties which exceed a certain size. This limitation would serve both the small-scale property holder and the public. By narrowing the scope of the referendum to larger properties, the threshold requirement relieves those property holders who are less likely to attract or afford community-wide publicity.[338] The focus on larger properties also makes it more likely that referendum voters will be interested and informed with regard to a proposed rezoning.[339] A minimum property threshold would make the rezoning referendum fairer and more efficient: the threshold would tend to remove the poorer applicants and the more obscure proposals from the referendum process.

This threshold requirement can be qualified in two respects to avoid being characterized as arbitrary. Referenda by petition on the rezoning of properties below the threshold might be permitted. In effect, where a property is smaller than the threshold, there is a presumption against a community-wide public interest in the rezoning,[340] which can be rebutted by obtaining signatures on a petition.

The threshold requirement can also be refined to reflect the relative size of a particular property. A mandatory referendum should be triggered by zoning changes which affect a specified percentage or absolute amount, whichever is less, of the community's land area or constructed floor area. While the percentage threshold is more sensitive to community-wide interests, the acreage or floor area threshold may be more appropriate in large cities in which a zoning change can have a significant impact on nearby properties without being large enough to affect the entire city.

b. Varying the Threshold to Promote Land-Use Objectives—A referendum statute can have different thresholds, depending on the qualitative character of a zoning change. Thus, a lower threshold might be set for disfavored changes, for example, changing the use of vacant land zoned for recreational use. Referenda on the rezoning of smaller properties might also be required to change the zoning from single-family to multiple-unit housing. Such a threshold

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335. *Cf.* CAL. GOV'T CODE § 88003 (West 1976) (ballot pamphlet to include impartial estimate of the impact of any statewide initiative or referendum proposal on the costs of local government).

336. *See* Note, *Proper Use*, *supra* note 9, at 849.

337. *See generally* text accompanying notes 275-78 *supra*.

338. *See* text accompanying note 289 *supra*.

339. *See also* POLITICAL BEHAVIOR AND PUBLIC ISSUES IN OHIO 116 (J. Gargan & J. Coke ed. 1972) (proposal to increase the level of county and school district indebtedness which could be incurred without a referendum vote).

The level of voter turnout has been suggested as another indicator of whether there is city-wide interest in the referendum proposal. *See* Note, *Proper Use*, *supra* note 9, at 848. The sources of a high referendum turnout are too diverse, though, *cf.* Clubb & Traugott, *supra* note 141, at 153-59 (state referendum voting patterns), to form a rational basis for presumptions about the geographic extent of voter interest.

340. *Cf.* Note, *Proper Use*, *supra* note 9, at 845 (proposal for requiring petitions for all rezoning referenda). *See also id.* at 845-46 (planning implications of petition referenda).

would be designed to discourage rezonings which increase a community's need for services out of proportion to the size of the affected property.[341]

Higher thresholds can be set on preferred land-use changes. Thus, rezoning to provide apartments for the elderly might be encouraged because they are a disadvantaged group whose new housing is not likely to increase the community's fiscal burden.[342] Limiting referenda to larger properties might also be appropriate for land-use changes which promote regional or state objectives. One example is a change from light industry to housing in a community which has a healthy economy and a work force which consists largely of long-distance commuters.

CONCLUSION

The rezoning referendum embodies a basic tension between conflicting processes for making governmental decisions. The zoning process promotes fairness and rationality by imposing various procedural and substantive constraints. The public hearing requirements of zoning promote the fair consideration of land-use requests; the comprehensive plan guides a rational pattern of diverse land uses. By contrast, the referendum permits direct majority rule, unfettered by procedural requirements and the bargaining and compromise characteristic of most legislatures.

Neither zoning nor the referendum, however, is secure from abuse. The diversity and flexibility which characterize zoning create an opportunity for the exercise of political influence. The unfettered character of the referendum permits decisions which are irrational because of inadequate information and unfair because of the limited accountability of the voters.

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341. This qualitative threshold might result in racial and economic exclusion by making housing too costly for low-income members of racial minority groups. Indeed, this discriminatory effect is suggested by the circumstances of the *Eastlake* case. Although situated near Cleveland, a city whose population was 37% black, only one of Eastlake's 19,644 inhabitants in 1970 was black. 1 U.S. DEP'T OF COMMERCE, CENSUS BUREAU, CHARACTERISTICS OF THE POPULATION, part 37 (Ohio), at 30, 34 (1973). This racial disparity can not be explained by a low turnover of population. During the 1960's, the population of Cleveland declined from 876,000 to 750,903, a drop of 14%, while the population of Eastlake increased by 58%. *Id.* The combination of an exodus of whites from Cleveland and significant population growth in a largely white suburb like Eastlake may reflect the impact of exclusionary zoning by Eastlake. Similarly, in the twenty suburbs of Cleveland which had mandatory zoning referenda or filed amicus briefs supporting Eastlake, little over 0.5% of the population was black, despite an increase of 25% in population during the 1960's. *Id.* at tables 16, 23, 27; Brief for Respondent at 27, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). *See* Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d at 200-01, 324 N.E.2d at 748-49 (Stern, J., concurring).

The current prospect for successfully challenging the mandatory rezoning referendum because of its exclusionary impact is not promising, though. In a recent exclusionary zoning case, the Supreme Court has imposed a heavy burden of proof of racially discriminatory intent, not just discriminatory impact. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977). Moreover, as *James* demonstrates, the Court has not been receptive to the contention that mandatory referenda which exclude the poor are unconstitutional. *See also* text accompanying note 210 *supra*. A few states have acted against exclusionary zoning. *See* text accompanying note 324 *supra*. In most jurisdictions, however, the most effective strategy against exclusionary rezoning referenda may be to enact minimum property thresholds and to challenge the fairness or rationality of a particular referendum on the basis of statutory zoning constraints and substantive due process.

342. *See* text accompanying notes 272-73 *supra*.

Statutory provisions for the rezoning referendum should synthesize the virtues of zoning and the referendum. If the two devices are combined properly, the strengths of each will compensate for the defects of the other. The ready availability of a referendum will deter or correct the exercise of undue influence on the making of rezoning decisions; ballot pamphlets and a minimum property requirement will reduce the possibility of irrational or unfair referendum results.

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