Referendum Zoning: Legal Doctrine and Practice

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REFERENDUM ZONING:
LEGAL DOCTRINE AND PRACTICE

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I. Introduction

Local government law in the United States has developed several clearly defined patterns during the last century. Two of them—direct decisionmaking by plebiscite and localized land use control—are the subject of this Article. American legal policy regarding the public control of land use has vested power primarily in the hands of officials in the local levels of government. In the landmark case of Village of Euclid v. Ambler Realty, the Supreme Court of the United States sustained not only the general concept of police power regulation of land development but also the validity of regulatory systems founded upon zoning ordinances enacted by municipal legislative bodies.1 Once approved by the Euclid decision, municipal zoning of land soon became the predominant method of guiding the physical development of the community. Such a technique, drawn from a United States Department of Commerce model statute,2 characterizes zoning as primarily legislative in nature with limited provision made for the granting of administrative relief in situations of special hardship. This traditional conception of public land use control imparts significant decisionmaking power to elected governmental officials and public spirited citizens serving on boards of adjustment and zoning appeals. However, under this system of public regulation, direct citizen participation is circumscribed severely. The role of other interested citizens—both landowners and neighbors—generally is limited to the casting of votes for local elected officials and the

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2. The Standard State Zoning Enabling Act was prepared and distributed by the United States Department of Commerce during the early 1920's. 4 R. ANDERSON, AMERICAN LAW OF ZONING § 30.01 (2d ed. 1977). This model statute was adopted quickly in whole or in part by a large number of states in an effort to provide local governments with a specific source of delegated authority for zoning purposes. By 1925, the model act had been used by 19 states. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.2 (2d ed. 1976). This statutory framework was to influence greatly the structure of American land use control programs thereafter.
presentation of views at public hearings. As a result, the locally executed zoning system confers substantial land development control upon a small number of public servants. This structure of land use control continues into the present day.

Before zoning was adopted as the major method of regulating land use in the United States, many state legislatures had enacted constitutional and statutory provisions that encouraged direct citizen involvement in state and local political decisions. In many states, legislation empowered citizens both to initiate statutes and ordinances by direct vote and to review regularly enacted laws by referendum; popular control of major social issues was emphasized. This movement, prevalent at the turn of the century, received its impetus from a variety of sources. Foremost was an intention to check the unbridled power of what were perceived to be insensitive, incompetent or corrupt legislative bodies.

Shortly after the Euclid decision was handed down, state courts were presented with issues concerning the application of referenda requirements to zoning decisions. Even at this point, the incompatibility of the representative versus direct means of land use regulation was noticeable. Although it decided three related cases in the early part of the century, the Supreme Court finally reached the federal constitutional issues involved with making land use decisions by direct vote in the 1976 decision of City of Eastlake v. Forest City Enterprises. The Court found no federal due process deprivation in a municipal system that subjected all zoning changes to community ratification by referendum vote. Chief Justice Burger, writing for the majority, considered this practice unobjectionable because it constituted a local legislative decision by direct recourse to the electorate. The Chief Justice thought it inconceivable that such a procedure could be an improper delegation of legislative power given that the voters were the source of local legislative authority. By embracing this interpretation of referendum theory and by rejecting the pragmatic considerations raised by Justice Stevens in dissent, the majority endorsed a practice with the potential to overturn the conventional methods of regulating land development.

This Article examines the phenomenon of referendum zoning from the standpoint of both emerging legal doctrine and empirical analysis. Part II reviews the historical development of referenda and the

5. Id. at 680-94 (Stevens, J., dissenting).
Supreme Court's generally supportive view of plebiscite decision-making. Next, the *Eastlake* case is discussed, focusing upon the Supreme Court's rationale for upholding this form of direct policymaking. Part III evaluates the response of state courts on referendum zoning cases following the *Eastlake* opinion. Finally, part IV analyzes data concerning land use referenda in Cuyahoga County, Ohio, comparing actual experience with the judicial assumptions appearing in reported decisions. Conclusions then follow with respect to the desirability of incorporating referendum zoning as a feature of the municipal land use control system.

II. HISTORICAL DEVELOPMENT OF REFERENDA

A. The Development of the Plebiscite in America

American political development has produced a system of representative decisionmaking by popularly elected officials. Following the American Revolution, state and local governments followed the legislative model established on the federal level by the United States Constitution. The pervasive pattern of the nineteenth century was to centralize political power and the prerogative to make socially important decisions in the state legislatures. This fact, in part, is reflected by statutory construction rules that were devised to limit the freedom of action of municipal corporations. As the century progressed, however, the needs of the rapidly expanding urban areas required that cities be granted power to deal effectively with their emerging problems. This trend, coupled with the growing political power of the cities, aided the development of the home


Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the legislature, and subject to change, repeal, or total abolition at its will. They have no vested rights in their offices, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania.

Id. at 541, 49 A. at 352.

7. See 1 J. Dillon, *The Law of Municipal Corporations* § 89 (5th ed. 1911). Quoting Chief Justice Shaw of Massachusetts, Judge Dillon stated: "[Municipal corporations] can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association." Spaulding v. Lowell, 40 Mass. (23 Pick.) 71, 74 (1839).
rule doctrine, resulting in increased municipal self-determination.\(^8\) Yet as the nineteenth century drew to a close, the movement supporting the citizens’ right to decide important state and local issues by plebiscite rapidly grew in popularity.\(^9\)

The drafters of the United States Constitution made no explicit provision for democratic decisionmaking by direct vote.\(^10\) Although the Declaration of Independence recognized the source of government legitimacy to be the consent of the citizenry, there was a reluctance to create a “pure democracy.”\(^11\) The constitutional theorists expressed a fear that direct democracy—especially during a period of limited voting franchise—could lead to a tyranny of majoritarian rule.\(^12\) As a matter of federal law, the Constitution granted citizens a right to live under a republican form of government.\(^13\) Both Madison and Jefferson similarly construed the meaning of “republican”: a representational form of government in which the citizens directly elect officials to make individual legislative and executive judgments.\(^14\)

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8. See 2 E. McQuillin, supra note 6, § 9.08. The idea of local self-governance through home rule charters was initiated by an 1875 amendment to the Missouri Constitution. See Mo. Const. art. VI, § 19. For a list of states having constitutional provisions for home rule charters, see 1 E. McQuillin, The Law of Municipal Corporations § 3.21 (3d ed. 1979). See generally C. Rhyme, Municipal Law § 4-3 (1957).


10. In fact, most of the original state constitutions framed during the revolutionary period were not approved by referenda. Only in New Hampshire and Massachusetts did the citizens have an opportunity to vote directly on their state constitutions. See E. Oberholtzer, The Referendum in America 106-7 (1912).

11. In The Federalist, James Madison wrote:

[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 result 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 . . . .


12. Id.


14. In 1816, Jefferson defined the term “republic” in the following way:

Indeed, it must be acknowledged, that the term republican is of very vague application in every language . . . Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it
While direct voter decisionmaking was not incorporated into national political doctrine, it was a feature of local government as early as the seventeenth century. The New England town meeting frequently has been hailed as the forerunner of the local plebiscite.\textsuperscript{15} Another antecedent to the modern referendum was the adoption has in its composition more or less of this ingredient of the direct action of the citizens.

\textsuperscript{15} Wr\textit{t}ings of Th\textit{om}as Jeff\textit{erson} 19 (A. Lipscomb ed. 1904); \textit{see also} The Federalist No. 39 (J. Madison).

15. An early treatise on the law of municipal corporations described the New England town meeting as follows:

A New England town is the best modern representative of a pure democracy. All the qualified voters of the territory are members of the corporation, and meet at certain periods as a general assembly for the transaction of the business of the community. The representative system is not used, and each voter is entitled to participate personally in the work of government. The regular annual sessions are presided over by a moderator and are attended by the town officers, who render their accounts for the year and their estimates of the money required for the ensuing year. The meeting approves or disapproves of the action of its officers and elects their successors. The organization of the towns is not entirely uniform. The officers are commonly selectmen, a town clerk, a treasurer, a collector of taxes, assessor, a school committee, and such other minor officers as constables, library trustees and surveyors of highways. All the executive functions of local government are in the hands of these officials, governed largely by general statutes. The taxes for the payment of county expenses are apportioned by the counties, but are raised by the towns.


In City of Euclid v. Forest City Enter., Chief Justice Burger considered the town meeting, along with the idea of a referendum, to be "a means for direct political participation." 426 U.S. 668, 673 (1976). But the Chief Justice's description of the town meeting as "both a practical and symbolic part of our democratic processes," id., has evoked challenge by historians. Rather than reflecting true participatory democracy, the town meeting merits description not as a public forum for the resolution of conflicting social views and interests but instead as a community demonstration of consensus.

For example, Professor Michael Zuckerman notes that:

The town meeting had one prime purpose, and it was not the provision of a neutral battleground for the clash of contending parties or interest groups. In fact, nothing could have been more remote from the minds of men who repeatedly affirmed, to the very end of the provincial period, that "harmony and unanimity" were what "they most heartily wish to enjoy in all their public concerns."


The town meeting did not encourage spirited advocacy of interest among competing groups; decisions reached at the town meeting reflected the thoughts of a limited segment of homogenous citizens, those possessing the voting franchise. Colonial New England was largely of uniform racial, national and cultural characteristics. Its citizens were mostly white Anglo-Saxon Protestants with very few Germans, Irish, Scotch, Scotch-Irish, French Catholics, Blacks and Native Americans. See Zuckerman, supra, at 538.

Thus, colonial New England was not a pluralistic, democratic society in the current sense of the term. Given these differing social compositions and traditions, it is inappropriate to cite the New England town meeting as a model for direct democratic decisionmaking at the local level of government.
of state legislation that authorized local option laws. During the nineteenth century, state legislatures wishing to avoid divisive subjects, particularly those with both economic and moral repercussions, granted local governments the power to submit a limited range of questions to voters.16 Most commonly the local option principle was applied to the sale and consumption of alcoholic beverages.17 Other topics subject to this form of local control were community fencing rules, oyster harvesting methods, Sunday "blue laws" and the use of automated voting machines.18

As a precursor of general referendum and initiative power, the local option incurred the same criticism currently leveled at its modern-day descendant. In Rice v. Foster, decided in 1847, the Delaware Court of Errors and Appeals invalidated that state's local option liquor statute and described it as representing a policy that would "demolish the whole frame and texture of our republican form of government, and prostrate every thing to the worse species of tyranny and despotism, the ever varying will of an irresponsible multitude."19 Despite such early disapproval, this method of local decisionmaking continues into the twentieth century and applies to an increasingly broad range of activities.20

16. Local option schemes were used as a method of dealing with proposals "essentially of a disagreeable and vexing character." E. OBERHOLTZER, supra note 10, at 286. Oberholtzer neatly described the attitude of the authorizing legislature:

The legislature hesitates either to enact or to refuse to enact a certain measure.
It would be criticized by partisans no matter what policy it should adopt. The
legislators say then to the people: "We will refer this question to you. You elect
us and we represent you. In this matter we will submit the law directly to you
and if you are in favor of it you may pass it; if, however, you are opposed to
it you will reject it. In any case you cannot blame us."

Id. Described in this fashion, the local option principle represents an abdication of political responsibility for controversial subjects primarily affecting the local level. This form of limited power delegation merits comparison with a general policy of centralized state legislative authority. See O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW 75-77 (1982).

19. 4 Del. (4 Harr.) 479, 489 (1847). Compare Forest City Enter. v. City of Eastlake, 41 Ohio St. 2d 187, 196, 324 N.E.2d 740, 746 (1975) (Brown, J.) ("Due process of law requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government.")", rev'd, 426 U.S. 668 (1976).

20. O. REYNOLDS, supra note 16, at 91 n.18. One limitation on the local option method of state legislation has been the restriction in some state constitutions against special or local legislation. See 1 C. SANDS & H. LIBONATI, LOCAL GOVERNMENT LAW § 3.35 (1981). This position is contrary to the general rule upholding such legislation.
The development of the initiative and referendum devices as a widespread feature of local government law accelerated at the end of the nineteenth century. From the beginning of the union, states have adopted and amended their constitutions by the use of referenda. Interest in the use of referenda and initiatives for state and local legislative issues, however, has taken longer to develop. At the urging of the Populist and Progressive parties and the combined support of organized labor, a movement—intended to cleanse state politics of the control by political bosses and special interest groups—began in the 1890's to encourage the spread of direct local legislation.

In 1898, South Dakota became the first state to provide, by constitutional amendment, for statewide statutory initiatives and referenda. Within four years, Utah and Oregon followed suit. During the period from 1906 to 1918, nineteen more states joined these original three. As of 1978, thirty-nine states allow statutory referenda, and twenty-three permit state legislation by initiative.

21. Massachusetts (1777), New Hampshire (1779), Rhode Island (1788), Maine (1816), Mississippi (1817), Connecticut (1818) and Alabama (1819) employed constitutional referenda. See Comparative Study, supra note 9, at 68-69. Today all states except Delaware require referendum approval of constitutional modifications. Id. at 69.


The wellspring of this movement was not indigenous to the United States. The model for the American direct legislation movement was based on the Swiss experience, dating back to the Middle Ages. See E. Oberholtzer, supra note 10, at 100; Comment, Popular Vote, supra, at 177. Apparently the Swiss referendum was used as early as 1309. See L. Tallian, Direct Democracy: An Historical Analysis of the Initiative, Referendum, and Recall Process 10 (1977). However, there are other instances of direct group decision-making that are far more ancient. See Shafer, A Teutonic Institution Revived: The Referendum, 22 Yale L.J. 398, 398-400 (1913); Comment, Popular Vote, supra, at 176.

In Switzerland, direct votes were taken on both national constitutional subjects, such as the Second Helvetic Constitution, and local issues at the canton level. The Swiss theory of direct democratic action initially gained adherents from the western United States.

24. The constitutional amendment was passed by the South Dakota legislature in 1897 and was adopted by the citizens, one year later, by a vote of 23,816 to 16,483. The system allowed citizens to initiate state statutes and to review existing legislation. The amendment denied the governor veto power over the referendum or initiative result. See E. Oberholtzer, supra note 10, at 392-93. The first referendum was not conducted until 1908 when voters considered four issues: (1) a local option liquor law; (2) a bill to curb the practices of divorce lawyers; (3) a law prohibiting theatrical performances on Sunday; and (4) a bill prohibiting the killing of quail for five years. All were successful except the local option liquor law. Id. at 394.

25. Comparative Study, supra note 9, at 69.

26. Id. at 70.
Local government referenda are provided for in thirty-nine states\(^{27}\) and are used frequently. One estimate has placed the national total number of local referenda at ten to fifteen thousand annually.\(^{28}\) The subject matter of these referenda has varied, encompassing, for instance, tax and financing measures, fluoridation of municipal water supplies, anti-discrimination ordinances and school desegregation matters.\(^{29}\)

**B. The Supreme Court’s View of Referenda and Initiatives**

With the rise of direct legislation techniques at the state and local level of government, it was inevitable that the Supreme Court of the United States would be asked to consider challenges to their use. Cases involving referenda and initiatives, typically deciding questions of great public interest, may be categorized into three groups. The first involves early cases challenging referendum legislation, which presumably denies a republican form of government, as violative of the guarantee clause of the Constitution. The second group encompasses decisions examining the notion of voting rights in referendum elections. Finally, a third group contains an evaluation of the substantive outcomes resulting from the referenda.

1. The Guarantee Clause Cases

The initial surge of interest in local referenda occurred primarily in the western states at the end of the nineteenth century.\(^{30}\) Shortly after use of local referenda became an option, litigation arose challenging this method of lawmaking. In two cases originating in Oregon,\(^{31}\) and one in Ohio,\(^{32}\) the Supreme Court considered whether the federal guarantee clause\(^ {33}\) could prevent the direct exercise of legislative power by the citizens of a state.

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27. *Id.* at 71-72 (Table 4-2).
33. Article IV, § 4 of the Constitution, the guarantee clause, provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." U.S. CONST. art. IV, § 4.
In *Pacific States Telephone & Telegraph Co. v. Oregon*, the telephone company, Pacific States, challenged the right of Oregon voters to impose, by statewide initiative, a two percent tax on the gross revenues of the firm.\(^{34}\) Pacific States urged the Court to conclude that legislation by plebiscite was not a "Republican Form of Government" and therefore was unconstitutional. Representative democracy, under this theory, was the equivalent of republican government.

Speaking through Justice White, the Court refused to consider this argument, finding the claim to be nonjusticiable under the political question doctrine.\(^{35}\) *Pacific States Telephone & Telegraph* thereafter would stand for the proposition that the federal judiciary would not question the political organization of the states under the guarantee clause.\(^{36}\) Implicit in this holding and explicit in the *Eastlake* decision, sixty-four years later, was acceptance of the plebiscite as a valid exercise of legislative power.\(^{37}\)

\(^{34}\) This annual license fee was imposed in 1906, just four years after Oregon had amended its constitution to reserve initiative and referendum powers in its citizens. 223 U.S. 118, 133-34 (1912) (describing OR. CONST. art. IV, § 1).

\(^{35}\) Id. at 151. The determination of what constituted a republican form of government involves "political and governmental [issues] and [is] embraced within the scope of powers conferred upon Congress, and not therefore within the reach of judicial power." Id.

The Court referred to its earlier decision in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), in reaching this position. *Luther* arose from a controversy known as the Dorr's Rebellion of 1841, a brief and unsuccessful uprising in Rhode Island challenging the government established under the original colonial charter. Id. at 34-37. The case technically was a trespass action brought by one Martin Luther against Luther Borden and others after martial law had been declared. Luther, arrested in his house, asserted that the established government had been displaced and that Borden had no authority to enter his home. Id. at 34-35. The question before the Court was whether the federal judiciary could determine which of the two competing Rhode Island governments was the lawful authority at the time. Id. at 39-45.


\(^{36}\) Professor Bonfield has noted that:

Since 1912 ... the Supreme Court has consistently refused to entertain on the merits any suit seeking to enforce the guarantee clause. On the basis of *Pacific Telephone*, it has denounced all issues raised under the clause nonjusticiable. This without any full consideration of the justification for its action, or possible distinctions between the case before it and *Pacific Telephone and Telegraph*.

Bonfield, supra note 35, at 556.

\(^{37}\) Given the inefficacy of the guarantee clause to invalidate local plebiscites, it has been noted that "[i]nasmuch as the adoption of the initiative, referendum, and recall by many States some decades back appears not to have imperiled their standing with Con-
Pacific States Telephone & Telegraph was issued by the Court on the same day as Kiernan v. Portland, another Oregon case. In Kiernan, the Portland city council received an initiative petition requesting the construction of a bridge over the Willamette River; council subsequently submitted a charter amendment to the electorate. After voter endorsement but before any action was taken, Kiernan, a taxpayer, sued to enjoin the sale of the approved bonds designed to finance construction, claiming that the use of the initiative violated the guarantee clause. The Court, again speaking through Justice White, refused to invalidate the use of the local initiative, referring to "the necessary operation and effect of the opinion in Pacific States." The Court thus reaffirmed that it would not overturn state and local legislative determinations based upon guarantee clause challenges.

Finally, in Ohio ex rel. Davis v. Hildebrandt, the Supreme Court rebuffed a guarantee clause attack upon the Ohio system of congressional redistricting that required citizen approval, by statewide referendum, of the legislature's decision to redistrict. Davis claimed that the referendum fell outside the state's legislative power and that its use in redistricting measures violated article I, section 4 of the federal Constitution. Writing again for the Court, Justice White first deferred to the Supreme Court of Ohio's holding that the

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38. 223 U.S. 151 (1912).
39. Id. at 160 n.1.
40. Id. at 162-63.
41. Id. at 164.
42. Baker v. Carr, 369 U.S. 186, 217-29 (1962), once again discussed the justiciability doctrine, referring to the Pacific States line of cases with approval. Drawing from the Luther v. Borden precedent, Justice Brennan observed that one reason for the Court's reluctance to employ the guarantee clause as part of its judicial power was that the provision "is not a repository of judicially manageable standards which a court could utilize independently in order to identify a state's lawful government." Id. at 223. By refusing to delve into the meaning of the term "republican form of government," the Court effectively limited its power to rectify perceived imbalances of political power and organization at the state and local level of government. Baker v. Carr also had the effect of declaring the guarantee clause to be a standardless allocation of judicial power, unenforceable because of its potential breadth. Consequently, in this application, the nonjusticiability doctrine acts to restrain the Court.

43. 241 U.S. 565, 566 (1916). Under the Ohio Constitution, voters could call for a referendum concerning any state law by obtaining the signatures of 6% of the voters on a petition. Id.
44. Id. at 567. U.S. Const. art. I, § 4, cl. 1 provides in part: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."
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referendum was part of the state's legislative power; he then reiterated the Pacific States Telephone & Telegraph nonjusticiability theory and refused to disturb the Ohio redistricting scheme.

Although litigants persisted in raising the guarantee clause theory for a time, this constitutional doctrine clearly has lapsed into a dormant state. It is important to note that, as a reflection of the Supreme Court's attitude regarding the referendum and initiative, these cases reveal no antipathy towards the techniques themselves nor any hint that their use would constitute a denial of due process. The guarantee clause cases thus may be considered supportive of the referendum and initiative movement.

2. The Referendum and the Right to Vote

Once it is established that referenda and initiative decisionmaking is authorized by state law and does not violate the guarantee clause by creating a nonrepublican form of government, the focus then shifts to the issue of who can vote. As a general proposition, the Supreme Court has decreed that all citizens satisfying minimum age, residency or citizenship requirements are eligible to vote in both general elections for candidates and special elections for particular public issues. Some states, however, have attempted to limit the voting franchise in the latter class of elections.

45. 241 U.S. at 567-68.

46. See, e.g., Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937) (attack on state law regulating dairy industry); Cochran v. Louisiana Bd. of Educ., 281 U.S. 370, 374 (1930) (challenge to state tax that provided free school books); Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 79-80 (1930) (challenge to delegated power to create parks); Mountain Timber Co. v. Washington, 243 U.S. 219, 234-35 (1917) (challenge to state statute creating workmen's compensation program funded by mandatory contributions); O'Neill v. Leamer, 239 U.S. 244, 248 (1915) (review of Nebraska statute granting power to state court to organize and to manage drainage district); Marshall v. Dye, 231 U.S. 74, 79-80 (1913) (challenge to interpretation of Nebraska statute that would allow citizens to vote on proposed constitutional amendment).

47. See Carrington v. Rash, 380 U.S. 89, 91 (1965) (States have power "to establish, on a nondiscriminatory basis, and in accordance with the Constitution . . . qualifications for the exercise of the franchise.")


49. By way of background, the Supreme Court has recognized the fundamental constitutional importance of the right to vote. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). The Constitution, while acknowledging the role of the states in setting voting qualifica-
In *Kramer v. Union Free School District*, the Court considered a New York statute that limited voting in school district elections to those residents and their spouses who either owned or leased taxable property in the district, and to the parents or guardians of school children. New York considered its franchise restrictions necessary to restrict voting to those segments of the community that were "primarily interested" in school matters. Because Kramer was denied his fundamental right to vote, the Supreme Court reviewed the New York statute using the equal protection strict scrutiny analysis. The statutory voting limitation was invalidated because it did not select "interested" voters "with sufficient precision to justify denying appellant the franchise." Notably, *Kramer* did not conclude that all franchise restrictions were unconstitutional; rather, it forces state governments to meet a high standard of explanation when, by design, voting is limited to those persons most interested in or affected by a public decision.

*Cipriano v. City of Houma*, a companion case, presented the Court with a Louisiana statute that restricted the right to vote on the issuance of revenue bonds to those who owned taxable property. *Cipriano* brought a class action suit, on behalf of non-property-owners, claiming that this statute violated the equal protection clause of the fourteenth amendment. Louisiana asserted that property owners had a special interest in the bond referendum because the bonds were to finance municipally owned utilities, and because the quality of the utility service would affect property values. Analogizing to *Kramer*, the Court found the franchise restriction to be unconstitutional; there existed no compelling reason to limit voting rights to a specially interested class of people. Both property owners

55. *Cipriano*, 395 U.S. at 702-03.
56. *Cipriano*, 395 U.S. at 703 (mem.).
and non-owners used the city's utilities and paid the rates; thus, the Court reasoned that both had a common interest in the benefits and burdens of the system.\textsuperscript{58}

In its next judicial term the Supreme Court considered \textit{City of Phoenix v. Kolodziejski}, in which property-owner voting restrictions, as applied to the issuance of municipal general obligation bonds, were challenged.\textsuperscript{59} Arizona law provided that only real property taxpayers could vote in bond referenda.\textsuperscript{60} The city attempted to distinguish \textit{Cipriano} on the ground that \textit{general obligation} bonds were involved and that real property taxes serviced those securities.\textsuperscript{61} Justice White, writing for the majority, concluded that the difference in the interests of property owners and non-owners was not substantial enough to justify the franchise limitation.\textsuperscript{62} All residents of Phoenix would have an interest in the sewers, parks and public buildings to be built with the bond proceeds. Moreover, Justice White stated that "[p]resumptively, when all citizens are affected

\textsuperscript{58.} Id. The non-owners, as ratepayers, were interested in the issuance of debt because the utility's bonds would be retired not by property taxes but rather by rates derived by operation of the utilities. \textit{Id.} at 705 & n.6. The Court found that the Louisiana law allowed some interested voters to participate in the bond referendum but excluded other equally affected citizens. \textit{Id.} at 703-06. This selective distribution of the franchise, therefore, did not meet the strict standards established in \textit{Kramer} for constitutional limitation on voting. \textit{Kramer}, 395 U.S. at 625-30.

Unable to predict the result in \textit{Kramer}, Louisiana apparently had argued that there was a rational basis between its statute and a legitimate governmental interest. \textit{See Cipriano}, 395 U.S. at 706. This showing was insufficient to satisfy the "exacting standard of precision" required by the Court. \textit{Id.} at 706 (quoting \textit{Kramer}, 395 U.S. at 632). However, Justices Black and Stewart, in their concurrences, found the voting classification "'wholly irrelevant to achievement' of the State's objective." \textit{Id.} at 707 (Black and Stewart, J.J., concurring). To these justices, the Louisiana scheme apparently would not have satisfied even the rational basis test. \textit{See id.}

In \textit{Cipriano}, the Court reserved the question of whether "in some circumstances, [the state may] constitutionally limit the franchise to qualified voters who are also 'specially interested' in the election." \textit{Id.} at 704. Referring to the \textit{Kramer} decision, the Court noted that a law limiting voting rights would be tested for equal protection violations on the basis of "'whether all those excluded are in fact substantially less interested or affected than those the statute includes.'" \textit{Id.} (quoting \textit{Kramer}, 395 U.S. at 632). The Court finally would uphold such a voting rights restriction in \textit{Ball v. James}, 451 U.S. 355 (1981).

\textsuperscript{59.} 399 U.S. 204 (1970). General obligation municipal bonds are secured by the general taxing authority of the issuer. Municipal issuers traditionally have raised revenues by way of the local real property tax imposed upon the ownership of land and improvements. Revenue bonds, on the other hand, are debt instruments secured entirely or partially by the revenues generated by the improvement constructed with the bond proceeds. These securities usually are not secured by the general taxing power of the issuer. \textit{See} 15 E. \textit{McQuillen, The Law of Municipal Corporations} § 43.34 (3d ed. 1970); O. \textit{Reynolds, supra} note 16, § 104.

\textsuperscript{60.} 399 U.S. at 206 & n.2.

\textsuperscript{61.} \textit{Id.} at 208.

\textsuperscript{62.} \textit{Id.} at 209.
in important ways by a governmental decision subject to a referen­
dum, the Constitution does not permit weighted voting or the ex­
clusion of otherwise qualified citizens from the franchise. 63

Despite City of Phoenix's strong statement, the Supreme Court soon
began to retreat from its sweeping policy requiring broad voter par­
ticipation in local decisionmaking. 64 The Court first upheld a system
of limited franchise in Salyer Land Co. v. Tulare Lake Basin Water Storage
District. 65 California authorized the formation of water storage
districts that could plan and execute projects for the conservation
and distribution of water. 66 The directors of the water district were
chosen through general elections in which only landowners were
permitted to vote. In addition, voting rights were apportioned
according to the value of each voter's land. 67 Asserting that they
had a substantial interest in the management of the water district,
voters excluded from water district elections challenged the constitu­
 tionality of the state statute, claiming that it violated their rights
under the equal protection clause. 68

Speaking through Justice Rehnquist, the Court refused to extend
the Kramer line of reasoning to the case at bar. 69 The general rule
favoring full electoral participation was rejected on the grounds that
the water district served a limited rather than general purpose, and
that its operations had a disproportionate impact upon residents who
owned land. 70 The Court emphasized that the water district system

63. Id.
64. The obligation to apply one person-one vote principles to state elections sprang
from the Court's decision in Reynolds v. Sims, 377 U.S. 533 (1964). Avery v. Midland
County, 390 U.S. 474 (1968), extended the Reynolds rationale to the election of county
officials but reserved decision on its application to "a special-purpose unit of government
assigned the performance of functions affecting definable groups of constituents more than
other constituents." Id. at 483-84. The Kramer, Cipriano and City of Phoenix decisions all
reserved the question of whether the voting franchise could be limited constitutionally
to a restricted segment of the electorate. In these cases, the Court had not ruled out the
possibility that in certain instances some citizens might have a special interest in public
or quasi-public matters that should give them complete control over important decisions.
66. Id. at 723-28.
67. Id. at 724-25.
68. Id. at 726. A three-judge panel at the district court level had upheld both the
franchise restriction and the provision for weighted voting. Salyer Land Co. v. Tulare
719, 735 (1973).
69. 410 U.S. at 728. Interestingly, the Court also rejected the heightened scrutiny
equal protection analysis of the California statute that had been used in the Kramer line
of cases. Id. at 730-31. At no point in the Salyer opinion did Justice Rehnquist explain
why the compelling state interest analysis had been abandoned.
70. Id. at 728.
physically benefited land in the district and directly imposed financial burdens only upon landowners. 71

Salyer, then, represents an initial excursion from the general principles of one person-one vote recognized in Kramer. Although that theory of uniform voting rights remains intact, 72 the Court subsequently has defined those circumstances when referendum voting may be curtailed. 73

*Hill v. Stone* considered the Texas dual voting-box scheme for local bond referenda. 74 Persons who had listed property for taxation voted in one box; all other eligible voters placed their ballots in another. A bond referendum passed only if it received both an overall majority and a majority of the taxpayers, effectively giving property owners veto power over the bond referenda in the state. 75

In a rather striking turnabout, the Court reestablished its support for broad-based voting rights and thus invalidated the Texas practice. After reviewing its decisions in *Kramer*, *Cipriano* and *City of Phoenix*, Justice Marshall wrote that the principle to be derived from that line of cases was that "any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the

71. *Id.* at 729. Once the limited franchise principle was accepted by the Court, the next logical step—weighted voting—naturally followed. In his dissent, Justice Douglas was concerned especially about the effects of allowing political representation based on wealth or corporate land holdings. He found it foreign to the American tradition that corporations should be admitted to the franchise. *Id.* at 741 (Douglas, J., dissenting). Justice Douglas perceived a danger from corporate domination of the individual, noting that "[o]ne corporation can outvote 77 individuals in this district. Four corporations can exercise these governmental powers as they choose, leaving every individual inhabitant with a weak, ineffective voice. The result is a corporate political kingdom undreamed of by those who wrote our Constitution." *Id.* at 742. It is difficult to imagine what would have been Justice Douglas's reaction to the Court's decision in *Ball v. James*, 451 U.S. 355 (1981). See infra note 79.

72. In a companion case to *Salyer*, the Supreme Court upheld a Wyoming statute permitting the formation and operation of a watershed improvement district by sole vote of area landowners. *Associated Enter. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973) (per curiam) (weighted voting allowed).


classification serves a compelling state interest.\textsuperscript{76} The Court further developed the dichotomy between general and special interest elections, placing municipal bond referenda in the former category and therefore subject to a full community vote.\textsuperscript{77} This opinion makes it clear that property ownership cannot be the sole qualification for participation in local government debt financing decisions.\textsuperscript{78}

In distinguishing the \textit{Kramer} line of decisions from \textit{Salyer}, a number of points appear consistent. The \textit{Kramer} cases all involved questions concerning the provision of services enjoyed by the public as a whole—for example, parks, transit, schools and libraries. These kinds of benefits traditionally had been available to residents of urban and suburban areas and did not pertain directly to the use of land within the jurisdiction. In \textit{Salyer}, the election involved a limited purpose organization with narrow functions directly related to the economic development of land in a primarily agricultural district. The organization, although technically governmental in origin, appeared to represent, in the Court's view, a voluntary association of landowners. This characterization of the communal action in support of economic self-interest persuaded the Court to find an exception to the \textit{Reynolds v. Sims} principle lauding the right to vote.\textsuperscript{79}

\textsuperscript{76} Id. at 297. The Court readily embraced the strict scrutiny standard of equal protection review as the test to be applied in franchise restrictions cases, notably absent from the Court's holding in \textit{Salyer} two years earlier. \textit{See id.} Justice Marshall concluded that "the state interests proffered by appellant and the city officials fall far short of meeting the 'compelling state interest' test consistently applied in \textit{Kramer, Cipriano and Phoenix}.'" \textit{Id.} at 301.

\textsuperscript{77} Id. at 298-301. Considering the Court's holding in \textit{Cipriano and City of Phoenix}, it is odd that the Court granted certiorari for the \textit{Hill} case. The factual similarities are striking, but perhaps the Court wished to reaffirm its earlier line of holdings after issuing the \textit{Salyer} decision. In fact, the \textit{Hill} Court relegated its discussion of \textit{Salyer} to a footnote reference. \textit{See id.} at 295 n.5.

\textsuperscript{78} \textit{Compare} \textit{Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966)} ("[A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes affluence of the voter or payment of any fee an electoral standard.").

\textsuperscript{79} \textit{See 377 U.S. 533 (1964)}. This idea was later confirmed in \textit{Ball v. James, 451 U.S. 355 (1981)}. Justice Stewart noted that "though the state legislature has allowed water districts to become nominal public entities in order to obtain less expensive bond financing, the districts remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners." \textit{Id.} at 368.

Following \textit{Hill v. Stone}, the Supreme Court surprisingly approved franchise limitations in two subsequent cases. The first case, \textit{Town of Lockport v. Citizens for Community Action}, involved a provision of New York's constitution and municipal home rule law specifying that a county charter or amendment would become effective only if a majority of city voters and a separate majority of non-city voters gave their approval. 430 U.S. 259, 260-61 & nn.1 & 2 (1977). Consequently, this dual majority system gave both city and non-city voters a veto power over county charter proposals. \textit{Town of Lockport} differs from the prior decisions discussed in that it focuses not upon the right of citizens to vote, but rather
3. Cases Examining Referendum Results

Often plebiscites have provided law on matters that legislative bodies had declined to decide. As a result, issues of significant public interest have been decided by the technique of direct legislation. In 1967, the Supreme Court decided the first of a series of four cases that tested the substantive results of initiatives and referenda against the due process and equal protection requirements of the fourteenth

the effectiveness of votes once they are cast. The Supreme Court upheld the New York dual majority system by noting the different interests of city and non-city voters in reordering the structure of county government. Id. at 268-69. The Town of Lockport Court upheld a referendum system that not only accepted the vote of all eligible voters within the jurisdiction but gave one segment of the community a controlling power of rejection. The non-majoritarian control aspect of this holding may be of special significance to zoning referenda litigation employing "ward veto" features. See infra note 211 and accompanying text. Town of Lockport is consistent with the Salyer decision in at least one respect—that is, the preservation of political power in a portion of the total electorate. Yet this reservation of non-majoritarian control in Town of Lockport appears considerably less open to abuse than the situation in Salyer.

The most recent Supreme Court case in this area is Ball v. James, 451 U.S. 355 (1981). Under the challenged statutory scheme, only landowners could vote for directors of an organization formed to store and deliver water to landowners in a particular district; voting power was apportioned according to each landowner's acreage. Id. at 359. Non-landowners living in the district challenged the constitutionality of the acreage-based franchise limitation by analogizing the functions of the water district to those of a general purpose government. It was asserted that electricity sales affected all residents, regardless of property ownership. Id. at 360. The plaintiffs also alleged that, through its water management, the district could significantly affect flood control and environmental conditions. Id. Although the Court agreed that the Salt River district provided a more diverse range of services than its counterpart in Salyer, it did not find this difference to have constitutional significance. Id. at 366. Writing for the five-justice majority in Ball, Justice Stewart adopted a narrow view of the water district's functions, finding them limited enough to avoid the "strict demands of Reynolds [v. Sims]." Id.

Of even greater significance is Justice Stewart's total rejection of a public impact analysis as a means of determining whether voting restrictions will be upheld. See id. at 370. The fact that the Salt River district supplied significant amounts of electrical power to nearly half of the citizens of Arizona, issued tax exempt debt instruments, exercised eminent domain and taxing powers and controlled water resources within a nearly quarter of a million acre region did not convince the Court's majority that non-voting citizens were being denied equal protection. The focus clearly was not on what the majority perceived as incidental beneficiaries of the water district system but rather on "the disproportionate relationship the District's functions bear to the specific class of people whom the system makes eligible to vote." Id. This latter group now can be identified in state legislation and empowered to control a limited range of issues.

The Court's willingness to restrict the franchise in Salyer and Ball is attributable to its narrow view regarding the community-wide impact of the special district decisions. It is conceivable that future cases may find other special governmental decisions insulated from general electoral control. However, so long as the methods of land use control remain a function of general purpose government, referendum decisions will remain open to the full voting community.
amendment. These cases were similar in one additional respect: they considered housing and land use issues. A brief review of these opinions reveals the development of the Court's acceptance of plebiscite decisionmaking at the state and local level of government.

Reitman v. Mulkey involved a federal equal protection challenge to a California constitutional provision, adopted by initiative vote, prohibiting the state, or its agencies, from restricting residential landowners from selling or leasing real property to the buyer of their choice. The question presented to the Supreme Court was whether such a voter-initiated constitutional amendment constituted illegal state action in contravention of the fourteenth amendment. Justice White concluded for the majority that considering the purpose of the amendment—to forbid the state from interfering with the rights of sellers and lessors to discriminate—the Supreme Court of California was correct in finding a federal constitutional defect.

Reitman's importance lies in its extension of fourteenth amendment theory to find invidious racial discrimination in less than direct or affirmative state action. Justice White considered constitutional amendment by plebiscite equal to more conventional methods of lawmaking. Moreover, the majority expanded the judicial role to include not only a consideration of the explicit state activity but also an assessment of the potential impact of the official action upon a segment of the population. Here, the effect of the California in-

80. 387 U.S. 369 (1967). The initiative proposed adoption of the following amendment to the California constitution:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id. at 371. This initiative was overwhelmingly adopted by a vote of 4,526,460 to 2,395,747.

Id. at 388.

81. Id. at 373-81.

82. The majority in Reitman may have been concerned especially about the effect of the amendment upon the ability of minority groups to seek relief from the state legislature for real property discrimination matters. If § 26 had been upheld against fourteenth amendment attack, political recourse against private discrimination would have been an impossibility. This potential restriction upon available political processes might have been extremely influential. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Recently, the Court has reaffirmed the idea that the equal protection clause "guarantees racial minorities the right to full participation in the political life of the community" by preventing subtle distortions of governmental structure that impose "special burdens on the ability of minority groups to achieve beneficial legislation." Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 467 (1982).

83. This precarious search for illicit voter intention has been carried forward to the present day. See Crawford v. Board of Educ., 458 U.S. 527, 539 n.21 (1982).
itiative would have been to prevent the state from devising and implementing fair housing regulations. Reitman demonstrates the Court's willingness to strike down a popularly generated social policy position adversely affecting important interests of minority citizens. It is not inconceivable that a similar attack might be aimed at exclusionary zoning schemes adopted by referendum or initiative. Although later Supreme Court opinions have made it more difficult to assert successful constitutionally based discrimination claims, under the proper factual setting Reitman could serve as a basis of challenging exclusionary practices.

Two years after Reitman, the Supreme Court considered Hunter v. Erickson, in which procedures to enforce a local fair housing ordinance were challenged. Hunter attempted to file a complaint under certain antidiscrimination provisions relating to housing but was informed that the city charter had been amended; any ordinance regulating fair housing matters now required approval, by a majority of voters at a referendum, before it could take effect. The amendment also voided preexisting antidiscrimination legislation. Because the fair housing ordinance Hunter tried to enforce had not been so approved, the city considered it ineffective by operation of the charter amendment.

The majority rejected the city's assertion that the charter provision was merely "a public decision to move slowly in a delicate area of race relations." The Court viewed this ratification requirement to be constitutionally impermissible because of its selective application to a limited subject matter—an ordinance opposing racial and religious discrimination in housing—and of the probable negative effect upon the ordinances being reviewed. As in Reitman, the element of direct participatory democracy did not insulate the mandatory referendum practice from strict scrutiny equal protection analysis and appropriate invalidation. Justice White noted that "[t]he
sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unreppeled.\textsuperscript{92}

A third decision in the \textit{Reitman} line of cases upheld a mandatory referendum requirement applied to the development of government-sponsored, low income housing projects. In \textit{James v. Valtierra}, California had adopted a constitutional provision demanding that a community referendum ratify any decision to proceed with a "low-rent housing project."\textsuperscript{93} Citizens in California localities rejecting subsidized housing proposals challenged the state constitutional provision in federal court.

The Court, in a brief opinion written by Justice Black, concluded that the mandatory referendum technique did not violate the equal protection clause. Justice Black distinguished \textit{Hunter} from the facts at hand by noting that the California constitution did not create separate classifications based upon race,\textsuperscript{94} but only upon wealth. This difference was of critical importance to the logic of the decision.\textsuperscript{95} Avoiding any form of disproportionate impact analysis, Justice Black found the constitutional provision to be a race-neutral device supported by reasonable public purposes.\textsuperscript{96} Because the California system applied the referendum technique only to low income housing developments, the wealth-related classifications did not necessitate judicial review under the strict scrutiny level of equal protection analysis.

\textit{James v. Valtierra} is the first modern case in which the Court accorded state referendum and initiative schemes broad respect as illustrations of direct democracy. In Justice Black's view, "[p]rovisions for referendums demonstrate devotion to democracy, not to

\begin{itemize}
\item 92. \textit{Id.} at 392.
\item 93. 402 U.S. 137, 139 n.2 (1971). The California constitution had been amended because the state supreme court had barred local referenda on low income housing proposals, believing that they constituted non-legislative acts and thus were outside of the scope of the referendum power. See \textit{Housing Auth. v. Superior Court}, 35 Cal. 2d 550, 557-58, 219 P.2d 457, 460-61 (1950).
\item 94. 402 U.S. at 141.
\item 95. The mandatory referral ordinance in \textit{Hunter v. Erickson} was similar structurally to the constitutionally based system found in \textit{James v. Valtierra}, 393 U.S. 385 (1969). In \textit{Hunter}, however, the referendum requirement applied to fair housing ordinances with the explicit goal of dealing with racial discrimination. This element triggered the application of the equal protection strict scrutiny analysis. In \textit{Valtierra}, the state constitutional provision in question nominally affected only low income persons. The \textit{Valtierra} Court refused to extend the \textit{Hunter} analysis and result to the facts before it. See 402 U.S. at 141.
\item 96. Justice Black emphasized that the referendum procedure provided the general citizenry a method to have "a voice" in local fiscal and land development matters. 402 U.S. at 143. Without directly stating it, Justice Black assumed that these were reasonable objectives for government to have; they were, therefore, constitutionally acceptable.
\end{itemize}
bias, discrimination, or prejudice.' 97 This idea that local plebiscites represent a form of majoritarian decisionmaking, deserving of judicial approval, had its inception in Valtierra and was carried forward in City of Eastlake v. Forest City Enterprises. 98 By eliminating the racial issue from the context of the decision, the Valtierra Court gave strong support to the mandatory referendum as a structure for local government law and policymaking.

C. The Eastlake Case

1. State Court Consideration

In City of Eastlake v. Forest City Enterprises, the Supreme Court of the United States first considered a constitutional challenge to the practice of subjecting local rezoning decisions to a mandatory referendum approval. 99 The Court held that a local charter provision of this type did not violate federal constitutional due process guarantees. 100

The facts of the case were uncomplicated. Forest City Enterprises, a real estate developer, sought to rezone an eight-acre parcel of land, previously classified for limited industrial use, to build a high-rise, multifamily apartment building. 101 Following existing procedures, the Eastlake, Ohio Planning Commission recommended approval of the land use modification to the city council. 102 Prior to council’s action, however, the citizens of Eastlake amended the city charter to require that any land use change adopted by council would not become effective until it was ratified by fifty-five percent of the voters in a referendum. 103 Council then approved the requested rezoning proposal; but when the developer applied for the necessary parking and yard permit, the planning commission denied its request because the Eastlake voters had not ratified council’s rezoning decision. 104

While Forest City's suit for declaratory judgment was pending, the Eastlake voters considered and disapproved the rezoning request. 105 Disatisfied by the referendum result, Forest City would not be comforted by the holding of the trial court. In a brief opinion, the

97. Id. at 141.
100. Id. at 679.
101. Id. at 670.
102. Id.
103. Id. at 670 n.1.
104. Id. at 670-71.
105. Id. at 671.
Ohio Court of Common Pleas upheld the charter and found no improper retroactive application of the Eastlake referendum requirement to Forest City.\textsuperscript{106} The trial court cloaked the Eastlake charter provision with a presumption of validity, and that presumption was not overcome by the evidence presented by Forest City.\textsuperscript{107} In retrospect, the decision did not discuss seriously any of the legal challenges raised to the Eastlake charter, but it did conclude with a simple statement that masked the complexity of the issues presented by the case. Judge Clair wrote that "[t]he Court makes no comment on the wisdom of what appears to be a cumbersome method of changing zoning to meet changing times."\textsuperscript{108}

Forest City appealed the trial court's decision, and the issue before the appellate court bore no similarity to those argued below. The appellant maintained that the Eastlake charter provision requiring mandatory zoning referenda was unconstitutional because it omitted certain procedural requisites demanded both by the state constitution and statutes.\textsuperscript{109} For the appellate court, Judge Cook ruled that this technical challenge failed because state law anticipated expansion of referendum and initiative rights through the adoption of particular charter provisions. Therefore, the Eastlake charter did not conflict with article II, section 1f of the Ohio constitution and was a valid exercise of referendum power.\textsuperscript{110} Without any mention of the varied

\textsuperscript{106} The trial court's ruling indicated that there had been no improper delegation of city council's legislative functions and no denial of due process for failure to provide the voters with meaningful decisionmaking standards. Both the trial and appellate court opinions were not reported formally but were obtained from the appendices of the petitioner's brief before the Supreme Court of the United States. See Petition for and Writ of Certiorari at 45-47 (Appendix C) (Court of Common Pleas) & Brief for Appellant at 39-44 (Appendix B) (Court of Appeals), City of Eastlake v. Forest City Enter., 426 U.S. 668 (1976) [hereinafter cited as Petition].

It is difficult to know precisely which arguments were made at the trial court level because Judge Clair's opinion does not establish clearly the claims made. Occasionally, partially described assertions were dismissed without discussion, thereby escaping analysis.

\textsuperscript{107} This traditional presumption of validity of municipal ordinances allocates the burden of proof to the challenger in a suit to invalidate the local legislation. See 4 R. Anderson, supra note 2, § 25.26; P. Rohan, Zoning and Land Use Controls § 52.09[2] (1979).

\textsuperscript{108} Petition, supra note 106, at 47. Perhaps Judge Clair viewed the Eastlake charter provision as merely a procedural obstacle engrafted on to the traditional rezoning method.

\textsuperscript{109} Id. at 40-43. Precisely, the issue was whether the mandatory referendum device attached to zoning actions violated an Ohio statute requiring that referenda be preceded by a signed petition of 10% of the voters at the prior gubernatorial election. The court of appeals concluded that a charter municipality need not comply with that procedure if its charter creates a different method for conducting a referendum. Id. at 42-43; see State ex rel. Bramblette v. Yordy, 24 Ohio St. 2d 147, 150, 265 N.E.2d 273, 275 (1970) (municipality may narrow scope of constitutional grant of referendum authority by specifying types of measures to which a referendum may be directed).

\textsuperscript{110} Petition, supra note 106, at 41-42. See infra note 114 for the pertinent text of the state constitution.
legal arguments raised below, the court of appeals affirmed the trial court, and the case proceeded to the state supreme court.

By the time Forest City's appeal reached the Supreme Court of Ohio, it was clear that the constitutionality of the Eastlake charter provision under federal law would be the primary issue for consideration. In a five-two decision, the state supreme court reversed the lower court rulings, holding instead that the mandatory referendum device denied Forest City property rights without due process of law, a violation of the fourteenth amendment.111 This holding stood briefly as a victory for landowners against the practice of automatic referral of all proposed land use changes to the community's voters for approval. It also represented a significant reversal of longstanding state law favoring the broad use of plebiscites to establish and to redirect local governmental policies.112

The court commenced its consideration of Forest City's appeal in much the same way as the Supreme Court of the United States would a year later; it began by classifying rezoning as a legislative act and therefore subject to the referendum process.113 Such a step was necessary because the Ohio constitution explicitly limited municipal referendum power to legislative matters.114 Justice Brown, writing for the majority, properly employed the traditional method in classifying the eight-acre rezoning proposal in Eastlake. No attempt was made to examine the judicially imposed label of "legislative act" attached to the rezoning.115 Under the terms of the Eastlake

112. In general, the Ohio courts have interpreted the referendum and initiative provision of the state constitution to favor the exercise of the referendum right and the objectives sought under it. See, e.g., State ex rel. Middletown v. City Comm., 140 Ohio St. 368, 44 N.E.2d 459 (1942), cited in Hilltop Realty, Inc. v. South Euclid, 110 Ohio App. 553, 164 N.E.2d 180 (1960) and Merryman v. Gorman, 117 N.E.2d 629 (Ct. Common Pleas 1953).
113. 41 Ohio St. 2d at 189-90, 324 N.E.2d at 743; see City of Eastlake v. Forest City Enter., 426 U.S. 668, 673-74 (1976).
114. Article II, section 1f of the Ohio Constitution provides: "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law." Ohio Const. art. II, § 1f (emphasis added).
115. Justice Stevens, in his dissent to the Supreme Court ruling in Eastlake, cited decisions of the supreme courts of Oregon and Washington that had looked behind the legislative/administrative labels and concluded that the traditional classifications and subsequent implications regarding judicial review need not be followed; the essence of particular rezonings was adjudication to which procedural due process rights should apply. 426 U.S. at 684-85 (Stevens, J., dissenting) (citing Fasano v. Board of County Comm'rs, 264 Or. 574, 580-81, 507 P.2d 23, 26 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 298-99, 502 P.2d 327, 331 (1972)).
charter, "any change in the existing land uses or any change whatsoever to any ordinance" affecting land use were to be reviewed first by the planning commission and later approved by the city council, followed by a fifty-five percent favorable vote of the electorate. The effect of the charter was to subject all land use changes to the mandatory referendum and not just those characterized as legislative acts. This overinclusiveness in applying the referendum requirement to administrative actions not only violated the express provisions of the Ohio constitution but also reflected the intent of the Eastlake voters to control directly all deviations from the preexisting zoning structure. Relying upon a past decision, the state supreme court struck down this attempted extension of mandatory referenda to administrative acts.

The court then embarked upon its most significant task—that is, determining whether the Eastlake mandatory referendum system denied the landowner rights protected by the due process clause of the federal Constitution. The court's due process inquiry was not

116. The charter provision is reprinted at 426 U.S. at 686 n.8 (Stevens, J., dissenting).
117. The language of the Eastlake charter was so expansive that it could have required all land use changes to be first considered by the planning commission and then subject to a vote by council. Depending upon the meaning given to the term "change to the existing land use," variances, special use permits, rezonings and other changes conceivably could have been subject to the elaborate approval procedure established in the charter. Undoubtedly, this would have discouraged any land development requiring even a slight variation from the existing zoning rules. A survey of Ohio municipalities revealed other overinclusive charter and ordinance provisions, similar to those litigated in Eastlake, in existence long after that decision. See infra note 210.
118. See Myers v. Schiering, 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971). In Myers, the court held that a city council's granting of a permit for the operation of a sanitary landfill—pursuant to a local zoning ordinance—constituted an administrative act not subject to voluntary referendum proceeding. In this case, as in the Eastlake charter provision, the city council—normally a legislative body—was acting in an administrative capacity by executing or administering a law already in existence. In Myers, the connection of the council-issued permit to the zoning code was determinative. 27 Ohio St. 2d at 14, 271 N.E.2d at 866. In Eastlake, the expansion of the referendum requirement to acts traditionally characterized as administrative facilitated the same result.
119. 41 Ohio St. 2d at 191-96, 324 N.E.2d at 744-46. With the hindsight of Chief Justice Burger's opinion in Eastlake, it now appears that Justice Brown would have been wise to articulate a state constitutional law theory of due process underlying his decision to strike down the Eastlake procedure. Had the state supreme court made the same arguments in defense of landowners' rights under the rubric of state constitutional law, the Supreme Court probably would not have had grounds to reverse. There is, of course, no reason why principles of state constitutional law may not be more protective of individual rights than their federal counterparts. See State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974). Indeed, Justice Brennan has suggested that state constitutional provisions need not mirror federal law and, further, that state law ought to retain its own vitality as a separate source of protective constitutional principle. See Brennan, State Constitutions and the Protections of Individual Rights, 90 HARV. L. REV. 489, 496-502
focused upon the substantive result of the Eastlake practice; rather, the Ohio opinion examined the more intriguing question of whether the city’s procedure denied Forest City Enterprises the right to a decision made by a “responsible organ of municipal government.”

Although Justice Brown attempted to define a due process standard for the method of land use decisionmaking, in the end, he simply summarily concluded that Eastlake’s mandatory referendum system “clearly violates the due process clause of the Fourteenth Amendment.”

Instead of focusing upon violations of specific procedural due process rights, the court grounded its opinion on an improper delegation theory modelled after the Supreme Court’s decision in *Washington ex rel. Seattle Title Trust Co. v. Roberge.* Justice Brown reasoned that to subject local government legislative acts to referendum approval constituted an unlawful delegation of a city’s legislative authority. Given that Eastlake derived its municipal power from the people and that the Ohio constitution expressly reserved the right of plebiscite to Ohio citizens, the court’s delegation analysis was particularly unpersuasive.

Linking a constitutional due process violation with the *Roberge* theory of unlawful delegation confused the issue. Plainly applica-

(1977). As an admonition to both the state judiciary and to attorneys, Justice Brennan adds this further comment:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

Id. at 491. The Ohio supreme court lost an opportunity to establish such an independent course in the *Eastlake* case. Interestingly, in California, voters have adopted a constitutional provision specifying that “[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” Cal. Const. art. I, § 24.

120. 41 Ohio St. 2d at 196-97, 324 N.E.2d at 746. 121. Id. The Ohio court apparently never measured the Eastlake procedure against anything other than a federal due process standard. In a rather superficial fashion, Justice Brown concluded that *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116 (1926), was most similar factually to the matter at bar and therefore controlling. 41 Ohio St. 2d at 196-96, 324 N.E.2d at 746. The court’s effort to distinguish the Supreme Court’s decision in *James v. Valtierra,* 402 U.S. 137 (1970), also was unsatisfactory. See 41 Ohio St. 2d at 196-98, 324 N.E.2d at 747. The state supreme court believed that the *Valtierra* referendum was acceptable because it raised an issue of “community-wide policymaking”—that is, the approval of low income public housing. Id. at 197, 324 N.E.2d at 747. But the court never explained adequately why a community vote on matters of narrower application should be constitutionally impermissible.

122. 41 Ohio St. 2d at 194-96, 324 N.E.2d at 746; see *Roberge,* 278 U.S. 116 (1928).

123. See Ohio Const. art. II, § 1.
tion of *Roberge* was inapposite. The Supreme Court of Ohio misconstrued the *Roberge* rationale underlying the fourteenth amendment due process violation. Under the *Roberge* facts, the Supreme Court was concerned with the delegation of complete land use control power to an extremely narrow segment of the community—those property owners living within four hundred feet of a proposed philanthropic home.\(^{124}\) The *Eastlake* case, however, presented a localized decision subject to confirmation by the entire community. The *Roberge* Court bristled at the exclusionary effect the ordinance before it would have: it not only would permit a small number of citizens to prevent construction of a socially beneficial structure, but it also would have precluded any judicial intervention.\(^{125}\) The

\(^{124}\) 278 U.S. at 118. Justice Butler, speaking for the *Roberge* majority, clearly was offended by what he perceived as the exclusion of a socially important activity by a small group of determined neighbors. He noted that:

> The section [of the Seattle ordinance] purports to give the owners of less than one-half of the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. Id. at 121-22. The idea that a few individuals could exercise prohibitory powers as part of a public law regulatory scheme particularly concerned the *Roberge* Court. Such an unconstrained private use of police power was found to be "repugnant to the due process clause of the Fourteenth Amendment." Id. at 122. In *Eastlake*, Justice Brown never considered whether an exclusionary land use decision arrived at by a referendum vote of the entire community also would be "repugnant" to his conception of landowners' due process rights.

\(^{125}\) Undoubtedly, this feature of the case made the Seattle consent provision even more obnoxious to the Court. The landowner, a charitable organization, planned to replace an existing home for the elderly poor with a new building accommodating thirty residents; the proposed structure would be situated 110 to 400 feet from bordering land. Id. at 117. The zoning ordinance was amended in 1925 to contain an enhanced consent requirement, applying only to a "philanthropic home for children or old people," that demanded the approval of two-thirds of the neighbors within 400 feet of the site. Id. at 120 n.\(^*\). The original zoning ordinance allowed approval of such diverse uses as fraternity, sorority or boarding houses for students, private schools, community club houses and "a building necessary for the proper operation of a public utility" to be within the discretion of the Board of Public Works after a public hearing. Id. Clearly, these land uses appear as disruptive to the character of a neighborhood as a philanthropic home, yet they need only obtain the approval of a municipal administrative agency. It was this apparent bias against the petitioner’s proposed home that may have piqued the Court. It seems that the socially favored character of the home also allowed the Court to distinguish its decision from that in *Cusack Co.* v. *City of Chicago*, 242 U.S. 526 (1917), in which a neighbor's consent provision was upheld as applied to the location of billboards. The home in *Roberge* did not parallel the urban billboard, considered to be "by reason of [its] nature . . . offensive." 278 U.S. at 122.
Eastlake circumstances parallel those in Roberge in terms of exclusionary effect but not method. 126

Justice Brown perceived that a system of mandatory referenda for all land use changes was an unwarranted extension of the familiar plebiscite under federal constitutional doctrine. He accepted the use of the referendum device for large scale, community-wide decisions but rejected it for more specific determinations affecting separate parcels of land. 127 Because the opinion did not frame this position in terms of particular elements of unfairness experienced by individual landowners, the court’s federal due process holding was nothing but an unsupported conclusion. In retrospect, a fully developed rationale might have been considerably more persuasive to the Supreme Court upon review.

The state supreme court’s holding can be best interpreted as a judicial reaction to the danger of arbitrary action by a majority of voting citizens in a community. The state court’s opinion expressed the idea that traditional, local government legislative policy choice was superior to similar action taken by citizen referendum on an ad hoc basis. Unfortunately, the court never explained fully why zoning plebiscite votes were inherently more suspect than similar decisions made by the customary, representative method. The essence of the court’s view was that an individual landowner would be subjected to an extraordinary approval requirement over which neither the owner nor the courts could exercise much control. This factor, as much as the additional uncertainty imposed upon landowners seeking zoning changes, explains the court’s hostility to the referendum zoning device as an abstract proposition.

However, the Supreme Court of Ohio’s decision in Eastlake revealed another, more sinister ground for rejecting the referendum zoning technique, its potential for exclusionary zoning. In his concurrence, Justice Stern viewed referendum zoning as a municipal practice adopted for the sole purpose of obstructing attempts to pro-

126. Justice Stern, in his concurring opinion in Eastlake, characterized referendum zoning as an undesirable technique purposefully adopted “to obstruct change in land use” and more specifically intended “to prevent multi-family housing.” 41 Ohio St. 2d at 199, 324 N.E.2d at 748 (Stern, J., concurring). In terms of judicial review, the Ohio courts could have considered only legal challenges to the adequacy of the referendum procedure under state law and the reasonableness of the zoning classification.

127. In his dissent to the Supreme Court’s Eastlake opinion, Justice Stevens adopted the same position. He noted that, “I have no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy. I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants.” 426 U.S. at 693 (Stevens, J., dissenting).
vide multifamily housing within the locality. Instead of embracing *James v. Valtierra*’s positive characterization of land use referenda, Justice Stern interpreted the Eastlake charter provision to foster economic and racial exclusion from suburban communities. Implicit in his theory is the understanding that the mandatory referendum requirement could be used by existing community residents to preserve high cost, low density housing within the municipality. Proposals for less costly residential development to be occupied by persons of other racial or economic groups could be rebuffed by the voters wishing to protect their homogeneous community. Justice Stern’s opinion demonstrated a fear that zoning practices could become more discriminatory and, ironically, more legally defensible if the referendum device were given judicial sanction. In an effort to forestall that result, the Ohio court pronounced the municipal technique of referendum zoning to be unconstitutional under the fourteenth amendment.

128. Justice Stern explicitly concluded that “[z]oning provisions such as that in Eastlake’s charter have a simple motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas.” 41 Ohio St. 2d at 200, 324 N.E.2d at 749 (Stern, J., concurring).

129. *Id.* at 199-201, 324 N.E.2d at 748-49 (Stern, J., concurring). An amicus brief filed by Lawyers for Housing had argued that such a provision was designed with an exclusionary intent. *Id.* at 198 n.4, 324 N.E.2d at 747 n.4.

130. Justice Stern’s fears became reality five years later in another Ohio case. See United States v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio 1980), *modified*, 661 F. 2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). In *City of Parma*, the municipality was sued by the United States for violating §§ 804(a) and 817 of the Fair Housing Act (42 U.S.C. §§ 3604(a) & 3617 (1976)). *Id.* at 1055. The Justice Department successfully demonstrated that Parma voters had adopted a community policy of racial and economic exclusion by enacting a city ordinance that required prior referendum approval of “(1) the development, construction or acquisition in any manner of a subsidized housing project by a public body, or (2) any participation by private individuals or non-public bodies in any program in which the Federal Government pays all or part of the rent of low-income families.” *Id.* at 1086 (citing Parma, Ohio, General Bldg. Regs. § 1229.01 (Nov. 5, 1974)). This initiative ordinance bore a striking similarity to the California constitutional provision upheld by the Supreme Court six-and-one-half months earlier in *James v. Valtierra*, 402 U.S. 137, 159 n.2 (1971) (quoting CAL. CONST. art. XXXIV, § 1). The Parma electorate later passed another initiative ordinance requiring “voter approval for any change in the zoning code or in existing land uses.” 494 F. Supp. at 1089 (citing Parma, Ohio, Bldg. Code § 1229.01 (Nov. 5, 1974)). In an extensive opinion, Chief Judge Battisti held that these two ordinances formed part of a pattern and practice of racial discrimination that violated the Fair Housing Act. *Id.* at 1096. In his subsequent remedial order, Judge Battisti totally invalidated the 1971 ordinance and modified the 1974 legislation by precluding its application to “any proposed change in land use where any low or moderate income housing project is proposed.” United States v. City of Parma, 504 F. Supp. 913, 920 (N.D. Ohio 1980), *modified*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). Thus, *City of Parma* illustrates that an otherwise constitutionally acceptable referendum zoning ordinance may be thwarted if found to serve racially exclusionary purposes violative of federal antidiscrimination statutes.
2. Supreme Court Consideration

By a six-three vote, the Supreme Court of the United States reversed the state court's holding and upheld the referendum zoning technique against federal constitutional challenge. In reaching this result, the majority embraced a theoretically coherent, yet surprisingly short-sighted view of the impact of the referendum zoning device upon landowners and upon the public land use control system. The decision clearly rejected the reasoning of the Ohio supreme court.

The Court approached the issue of referendum zoning as a question of classification: was the referendum device a reservation or a delegation of legislative power? Chief Justice Burger, writing for the majority, found that the Ohio court had mischaracterized the referendum as a delegation of lawmaking authority without any standards or guidelines within which to confine the nearly unbridled discretion of the voters. He noted that "[a] referendum cannot . . . be characterized as a delegation of power . . . [because] all power derives from the people. . . . [T]he people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." As a matter of technical analysis this conclusion was correct; in the state constitution, Ohioans had reserved to themselves the power to legislate directly by way of the referendum and initiative. However, by focusing upon the Eastlake referendum provision as an example of reserved legislative power, Chief Justice Burger preordained the result in this case by way of a simple syllogism: if the referendum is but a method of direct legislation generally reserved to the people and if rezoning matters are categorized as local legislative acts, then rezoning by referendum is exempt from procedural due process attacks in much the same way as are other legislative decisions. With this starting point,
the Court effectively insulated the referendum zoning procedure from constitutional challenges based upon the unfairness of the decision-making process.

Once cloaked with the "legislative act" characterization, the referendum zoning technique easily could withstand attack as an improper or standardless delegation of legislative power. Under this rationale, the Eastlake voters were exercising direct control over matters within the broad area of zoning legislation. Consequently, any analogy to the improper delegation of power to administrative agencies was irrelevant. While this conclusion followed logically from the legislative classification, it ignored the basic principle addressed by the Supreme Court of Ohio—that fundamental local policy choices be made "by a responsible organ of government" in a non-arbitrary fashion. Unlike its Ohio counterpart, the Supreme Court was not disturbed about the lack of fair procedure inherent in referendum zoning. By declining to impose due process limits on the practice of rezoning by public vote, the Court was willing to limit the federal interest to questions surrounding the substantive effect of the zoning decision. With the legislative classification neatly made, the scope of federal constitutional review would be limited to matters of irrational application or confiscatory effect.

In the name of participatory democracy, Chief Justice Burger permitted localities to rezone land by way of procedures not specifical-

Statute, administered by a local board of equalization, works an unconstitutional denial of due process when it taxes local property without opportunity for redress. Id. at 385-86. And in Bi-Metallic, imposition of a particularly onerous burden upon a limited number of landowners militated in favor of finding a federal violation. See 239 U.S. at 446. Might not such an analogy have been important to the Eastlake court?

137. See 426 U.S. at 675.
139. See 426 U.S. at 676. Chief Justice Burger was not convinced that the local legislative body would follow predetermined standards for decision any more than the voting citizenry. Id. at 675 n.10. Because of his lack of confidence in the representative decisional process, the Chief Justice apparently surmised that referendum actions were at least as worthy of support as legislative actions. He concluded that "the critical constitutional inquiry, rather, is whether the zoning restriction produces arbitrary or capricious results." Id. at 676 n.10. In this instance Chief Justice Burger appeared to blur his understanding of legislative motivation with a reasonably specific statement describing the elements required for procedural fairness.
ly authorized by state land use law. By granting the electorate the ultimate power to grant or deny rezoning actions, the Court nearly obliterated the landowners' preexisting rights to the traditional rezoning process. Eastlake's system measures, in a rough way, general community support for a change in land use regulations. Yet the holding in Eastlake permitted the use of the referendum zoning system for all rezoning determinations, whether or not of community-wide interest. Chief Justice Burger uniformly applied the legislative characterization to both of these factual situations; he failed to explain adequately why the justifiable rules regarding community-wide legislation ought to apply with equal force to rezoning requests of a limited geographical, social or economic impact.

As a practical matter, perhaps the Court declined to distinguish between these two categories of rezonings in an effort to conserve judicial resources. But this motivation would not justify the position taken. The application of the referendum requirement to "spot" rezonings denies the landowner the right to a fair procedure in which there is a "decisionmaker [who is] impartial and qualified to understand and to apply the controlling rules." In these cases, the adverse impact of the referendum rezoning technique is focused particularly upon the individuals seeking the zoning change and is imposed with little recourse for judicial review. Further, the Court's holding in Eastlake operates to insulate only those zoning actions classified as legislative from the demands of procedural due process analysis. By comparison, other forms of relief from land use regulations, such as variances, special exceptions and special use permits, would have been considered administrative or adjudicative acts, and therefore subject to minimal elements of procedural rights.

The Eastlake referendum approval system also affected the local community planning methodology. Under the charter, the referral mechanism was constructed so that essentially changes only to the

142. See 426 U.S. at 682-83 (Stevens, J., dissenting). See generally 8 E. McQuillen, supra note 140, § 25.65.
143. Chief Justice Burger apparently believed, as did Justice Stevens, that such a decision should be left to the state courts. See 426 U.S. at 683-84 (Stevens, J., dissenting).
144. For a discussion of "spot" zoning, see D. Mandelker, Land Use Law § 6.23 (1982).
145. 426 U.S. at 693 (Stevens, J., dissenting).
146. The Supreme Court of California's ruling in Topanga Ass'n for a Scenic Community v. County of Los Angeles exemplifies the high level of administrative factfinding and procedure needed to justify the issuance of a zoning variance. 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12 (1974) (en banc).
existing zoning scheme had to be ratified by the voters. In practical terms, this extraordinary approval mechanism froze the present land use control system. The Court did not view municipal planning and zoning as a gradually evolving process requiring periodic legislative reexamination and change. The present zoning configuration in a jurisdiction with a referendum zoning requirement effectively is preserved by the fact that a rezoning ordinance cannot be successful unless it survives both city council and voter approval. In creating such a two-tiered system, the ultimate responsibility attached to rezoning decisions has been diffused and decentralized. Indirectly this reduces the influence of professional city planners in the municipal land use regulatory system because all zoning changes would require voter ratification. A city planning director's recommendation, even if fully accepted by the city council, might not be approved by the electorate.

Elimination of the representative feature of local government legislative decisionmaking, rather than constituting an admirable return to participatory democracy, changes the essence of land use determinations. Ironically, the Supreme Court's broad approval of the referendum zoning technique silences the articulate presentation of views on matters of public interest and removes the need for a decisionmaking body to defend coherently the positions taken.

III. ZONING REFERENDA AND INITIATIVES IN THE STATE COURTS

Eastlake represents the sole instance in which the Supreme Court of the United States considered the constitutionality of municipal systems combining zoning and referendum approval; as noted above, subjecting land use decisions to the direct control of the electorate was found not to violate the due process clause of the fourteenth amendment. The court's narrow holding presented a simplified view of the referendum zoning techniques and a limited application of constitutional due process principles. It hardly reflects the variety of issues and analyses found in state court opinions considering referendum and initiative land use decisionmaking. This section of the Article examines the analytical approaches taken by the state courts in this type of litigation with special emphasis given to those decisions rendered since Eastlake. Through this analysis, it will become clear that the Eastlake holding has not served as a great im-

147. 426 U.S. at 670 n.1 (quoting EASTLAKE, OHIO, CHARTER art. VIII, § 3 (Nov. 2, 1971)).
petus for the adoption of referendum zoning; in fact, state law has been substantially more influential.

Referendum zoning matters have been a frequently litigated local government law subject in many states. Although the Supreme Court first considered referendum zoning in 1976, state courts have decided cases involving this phenomenon since the inception of zoning as a municipal regulatory technique. State courts often are presented with a choice of competing public values: a fundamental respect for direct popular decisionmaking through electoral devices versus the desire to preserve the existing, judicially enforceable planning and zoning regulatory system. Despite Eastlake's sweeping encouragement of land use control by direct voter participation, the courts in several states have limited the scope of referendum zoning and preserved the existing system of planning. State court judges apparently have realized that upholding a system of land use decisionmaking by plebiscite greatly limits judicial supervision of the conventional process by which significant community development questions are answered and private wealth transfers are made. State judges wisely note that with a referendum zoning approval mechanism superimposed on the traditional zoning procedure, novel problems arise concerning the timing of judicial review, procedural compliance with statutory referendum requirements, and the power to order the remedy of rezoning.

For the most part, state courts have employed two major legal theories in approaching these cases. The first category places primary focus upon the precise nature of the local government's land use decision. The court determines whether, as a matter of state law, the particular type of zoning action was eligible for decision by direct popular vote; eligibility typically exists if the local land use decision can be classified a "legislative" one. For a number of reasons,


only legislative matters may be exposed to plebiscite control. Consequently, actions that are characterized as "administrative" or "quasi-judicial" cannot be made properly subject to referendum approval. If a non-legislative matter has undergone the referendum process, its result must be invalidated. Once classified as a legislative act, a local government decision acquires immunity from most procedural due process attacks.

A second group of decisions examines the relationship between the statutory procedures for zoning activities and those permitted when land use decisions are made by referendum or initiative; courts consider what, if any, conflict exists between the specific procedural requisites of state zoning legislation and the general requirements of direct electoral decisionmaking. In these decisions, the elements of a referendum and initiative procedure have been subordinated to the particular notice and hearing requirements of the state’s zoning enabling statute. Although courts have used several rationales in reaching this result, the effect has been to nullify decisions generated by the referendum method for failure to give the affected landowner sufficient pre-enactment rights to notice and public hearing.

150. Often this is true because of the dictates of state constitutional provisions or statutes. See supra note 135 and accompanying text. The legislative/administrative distinction, although long recognized, has been difficult to apply. See Fordham & Prendergast, The Initiative and Referendum at the Municipal Level in Ohio, 20 U. Cin. L. Rev. 313, 320 (1951); see also 5 E. McQuillan, The Law of Municipal Corporations § 16.55 (3d ed. 1981). As a practical matter, subjecting zoning administrative decisions to popular approval could interfere unduly with necessary and routine workings of local government. See Kelley v. John, 162 Neb. 319, 323-24, 75 N.W.2d 713, 716 (1956), overruled, 210 Neb. 504, 507, 315 N.W.2d 628, 630 (1982). It is not clear why this rationale also should not preclude referendum consideration of minor rezonings having a minimal effect on the community.


152. Recent decisions have carried forward the logic of the Supreme Court's decision in Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915), holding that the public deserves no specific procedural due process in the development of legislation. See Cour v. DeBlaker, 652 F.2d 585, 590 (5th Cir. 1981), cert. denied, 455 U.S. 921 (1982).


154. But see Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 596, 557 P.2d 473, 480, 135 Cal. Rptr. 41, 48 (1976) (en banc) (notice and hearing requirements
courts have found referendum zoning impermissible because the authority to zone land had been granted exclusively from the state legislature to local government bodies. Since Eastlake, it is clear, however, that state courts have not been discouraged from approving referendum zoning practices. Surprisingly, the Eastlake opinion has not served as a major theoretical support for the holdings in these cases. In general, the post-Eastlake decisions have followed the same two-pronged analytical structure as had the cases decided prior to 1976.

A. Jurisdictions Favoring Zoning Referenda

The most well-developed line of decisions supporting land use decisionmaking has come from the Supreme Court of California. In San Diego Building Contractors Association v. City Council, that court considered two fundamental questions: whether San Diego’s city charter precluded the use of the initiative for zoning matters and whether the fourteenth amendment required notice and hearing before enactment of zoning legislation. San Diego voters had adopted, by initiative, a thirty-foot height limitation ordinance applying to all buildings constructed within a specifically defined area of California zoning statute inapplicable to instances of zoning by initiative); see also Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 672 n.5, 146 Cal. Rptr. 687, 690 n.5 (1978) (same).


All of the reported California litigation concerns judicial review of voluntary citizen initiatives; apparently the mandatory referendum system employed in Eastlake has never confronted the California courts. It seems unlikely, however, that zoning by referendum would receive different treatment than has land use control by citizen initiative. In fact, one of the earliest reported California high court opinions concerning plebiscites and land use control upheld a zoning referendum in Berkeley. See Dwyer v. City Council, 200 Cal. 505, 519, 253 P. 932, 938 (1927); see also Johnston v. City of Claremont, 49 Cal. 2d 826, 834, 323 P.2d 71, 75 (1950) (en banc).

coastal zone area. 158 With respect to the first issue, Justice Tobriner found that all legislative matters, including zoning, were encompassed within the general initiative power reserved by the San Diego Charter. 159

The court devoted most of its effort, however, to the second question, specifically the allegation that adoption of local land use control ordinances by initiative procedure violated the due process clause of the fourteenth amendment. The plaintiff claimed that local government acts affecting private property interests must be preceded by notice and hearing procedural elements to pass muster under federal constitutional theory. 160 Justice Tobriner responded with the proposition that the same notice and hearing procedures constitutionally required to insure fairness in adjudicative or administrative decisions were not necessary to support government acts categorized as legislative. 161 Adhering to this distinction and characterizing the height limitation as "unquestionably a legislative act," the California court refused to invalidate the San Diego initiative ordinance. 162

San Diego's significance is fourfold. First, it demonstrates the constitutional importance of the administrative/legislative dichotomy and the differing rights associated with each classification, 163 a distinc-

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158. Id. at 208 & n.1, 529 P.2d at 571 & n.1, 188 Cal. Rptr. at 147 & n.1.
159. Id. at 209, 529 P.2d at 572, 118 Cal. Rptr. at 148.
160. Id. at 211, 529 P.2d at 573, 118 Cal. Rptr. at 149.
162. 13 Cal. 3d at 212, 218, 529 P.2d at 574, 578, 118 Cal. Rptr. at 150, 154. The court also rebuffed the plaintiff's argument that zoning legislation should be exempted from the general "no due process" constitutional position because land use control has a "substantial impact on real property values." Id. at 212, 529 P.2d at 574, 118 Cal. Rptr. at 150. Justice Tobriner correctly concluded that zoning ordinances were not the only form of legislation that adversely could affect private property. Id. at 213, 529 P.2d at 574-75, 118 Cal. Rptr. at 150-51.
163. See id. at 211, 529 P.2d at 573, 118 Cal. Rptr. at 149. In subsequent cases, the California courts have employed the adjudicative or administrative label to various local government actions to make them ineligible for decision by plebiscite. In Friends of Mount Diablo v. County of Contra Costa, the California court of appeals decided that a county board of supervisors resolution approving reorganization of a planned unit district was an administrative, as opposed to a legislative, act and thus was outside the scope of the citizens' referendum power. 72 Cal. App. 3d 1006, 1008, 139 Cal. Rptr. 469, 470 (1977). County approval of the reorganization involved "a matter of [such] statewide concern ... as to convert the local legislative body into an administrative agent of the state." Id. at 1010, 139 Cal. Rptr. at 471 (quoting Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 40, 48 n.14). In Horn v. County of Ventura, the Supreme Court of California ruled that a county's approval of a tentative
tion material to the Supreme Court of the United States in the Eastlake case. Second, the decision reflects the California court's willingness to distinguish between legislative and non-legislative zoning actions and to extend direct electoral control only to the former. By viewing zoning variances and conditional use permits as administrative acts, the court recognized that formal differences in regulatory action constitutes a valid basis for divergent procedural rights. Third, San Diego exemplifies a state supreme court fully embracing the participatory democratic model for land use issues and beginning to break free from the inhibiting effects of existing state law precedent. Foreshadowing subsequent broad acceptance of the principle of initiative control of community development policy recognized in Associated Home Builders v. City of Livermore and Arne Development Co. v. City of Costa Mesa. And fourth, Justice Tobriner's opinion earns mention for its failure to consider the plaintiff's challenge to the San Diego ordinance under any doctrine other than federal constitutional law.

In 1976, California precedent concerning land use control by plebiscite was extended significantly in Associated Home Builders v. City of Livermore. The voters of Livermore, California considered an initiative ordinance that placed a moratorium upon the issuance of residential building permits until three public facilities performance criteria—education, sewage disposal and water supply—had...
been satisfied. The factual setting of the Livermore case is typical of local government efforts during the 1970's to control the development of suburban areas; Livermore's total prohibition of residential construction for an indefinite period, however, may be viewed as one of the more extreme growth management devices. Speaking through Justice Tobriner, the court explicitly overruled a forty-seven-year-old precedent that had precluded California cities from adopting zoning ordinances by initiative. Beginning with the premise that the right to conduct a popular initiative is one that had been constitutionally reserved, as opposed to legislatively delegated, to the citizenry, the court found that this fundamental political power need not be subordinated to the procedural dictates of the California zoning legislation.

The Livermore decision is strongly supportive of popular determination of community-wide land use policy. In fact, both the Livermore and the San Diego fact patterns present situations in which general issues of community development were decided by initiative vote. In this respect, then, the California experience with land use plebiscites has been limited to broad public issues that readily could be considered proper subjects for legislation; treatment of the site specific zoning matters addressed in the Eastlake case would be left until a later day. Livermore did not consider seriously the effect of the prohibitory initiative ordinance from the perspective of the regulated landowner. The court's major concern was with the substantive effect of the Livermore ordinance rather than with the procedural method of its adoption. Like the Supreme Court in Eastlake, the California court approved the direct method of enacting local legislation in sweeping terms and with little consideration of the practical implications of the decision.

Taken together, San Diego and Livermore approved a broader use of referenda for local land use decisions than did the Supreme Court in Eastlake. And the state supreme court's holding in Arnel Develop-

171. *Id.* at 588, 557 P.2d at 475, 135 Cal. Rptr. at 43. For specification of the standards, see *id.* at 590-91 & n.2, 557 P.2d at 476 & n.2, 135 Cal. Rptr. at 44 & n.2.
172. *Id.* at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48 (overruling Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929)).
173. *Id.* at 591, 596, 557 P.2d at 477, 480-81, 135 Cal. Rptr. at 45, 48-49.
174. The court devoted most of its opinion to a discussion and subsequent rejection of the plaintiff's constitutional arguments of vagueness, the impact upon the right to travel and the breadth of the police power. *Id.* at 597-610, 557 P.2d at 481-89, 135 Cal. Rptr. at 49-57.
175. Even though Livermore was issued after Eastlake, it did not discuss whether its holding would apply to zoning by referendum or initiative.
ment Co. v. City of Costa Mesa applied the expansive principles of the two prior cases to a zoning context.\(^{176}\) Arnel involved a challenge to a rezoning initiative that had blocked construction of a fifty-acre single-family and apartment construction project.\(^{177}\) Neighboring property owners organized and circulated an initiative petition that resulted in the rezoning of the subject parcel to an R-1 single family residential one.\(^{178}\) The court considered the issue of whether rezoning by local initiative violates federal or state constitutional precepts when the land involved is a small parcel or has a limited number of owners.\(^{179}\) With this question presented, the state supreme court was asked to repudiate a substantial number of prior opinions and to join the courts of several other states in viewing the limited-area rezoning as an administrative or adjudicative act;\(^{180}\) the majority declined the invitation.

The Arnel court adhered to California's classification of zoning and rezoning as legislative acts and the proper subject of democratic decisionmaking.\(^{181}\) It explicitly found that rezoning by initiative did not violate the due process clause of the federal Constitution.\(^{182}\) One of the few state court opinions discussing the Eastlake case, the opinion merely restates the positions taken by the Supreme Court concerning the federal constitutional issue.\(^{183}\) Justice Tobriner stated that the availability of administrative relief mechanisms plus the potential for judicial review of the substantive zoning classification were sufficient protection against any unfairness a zoning plebiscite might exact against a landowner.\(^{184}\) As a matter of state constitu-

\(^{176}\) 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980).

\(^{177}\) Id. at 513, 620 P.2d at 566, 169 Cal. Rptr. at 905. The rezoning initiative involved three contiguous parcels of land with a combined area of 68 acres. Arnel's parcel was 50 acres in size and had been rezoned in 1976 to accommodate 127 single-family residences and 539 apartment units. The city had approved Arnel's development plan and tentative tract map nearly a year prior to the passage of the rezoning initiative that blocked construction of the project. Id. at 515, 620 P.2d at 567, 169 Cal. Rptr. at 906. Apparently Arnel had not come within the scope of the vested rights doctrine to enable him to complete the project. See D. MANDELLER, supra note 144, §§ 6.11-21; see, e.g., County of Kauai v. Pacific Standard Life Ins. Co., 653 P.2d 766 (Hawaii Sup. Ct. 1982), appeal dismissed, 103 S. Ct. 1762 (1983).

\(^{178}\) Id. at 516, 620 P.2d at 567-68, 169 Cal. Rptr. at 907.

\(^{179}\) Id. at 522 n.10, 620 P.2d at 571 n.10, 169 Cal. Rptr. at 910 n.10 (citing West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Leonard v. City of Bothell, 87 Wash. 2d 847, 557 P.2d 1306 (1977)).

\(^{180}\) Id. at 522, 620 P.2d at 571, 169 Cal. Rptr. at 910.

\(^{181}\) Id. at 519-21, 620 P.2d at 570-71, 169 Cal. Rptr. at 909-10.

\(^{182}\) Id., 620 P.2d at 570-71, 169 Cal. Rptr. at 909-10.

\(^{183}\) Id. at 521, 620 P.2d at 571, 169 Cal. Rptr. at 910.
tional principle, Arnel reiterated San Diego’s position. The logic of Justice Tobriner’s constitutional analysis turned entirely upon the legislative characterization of the initiative rezoning. Almost as an afterthought, the majority opinion justified its generic classification of rezoning as an effort to assure interested parties concerning matters of procedural rights and the availability of judicial review for popularly adopted land regulation. The court’s automatic labelling system effectively removed the question of classification from the state’s judiciary.

In Arnel, the Supreme Court of California fully embraced the plebiscite as a legitimate method of local land use control, augmenting the Supreme Court’s Eastlake view of direct democracy by foreclosing any state constitutional due process cause of action. Perhaps the state’s political tradition influenced the court’s willingness to recognize and to uphold direct democratic decisionmaking. The majority also genuinely may have believed that the owners affected would be protected by preexisting legal doctrines applicable to all zoning decisions, thus making state due process principles duplicative and unnecessary. Obviously, Arnel’s broad approval has made California a leading jurisdiction supporting the referendum zoning principle, inviting others to follow its example.

B. Jurisdictions Unfavorable to Zoning Referenda

The Supreme Court of Washington has enunciated the most extreme position rejecting zoning referenda. In Leonard v. City of Bothell, the court affirmed a denial of a writ of mandamus that would have compelled city council to order a referendum election to consider a recent rezoning ordinance. Under the facts, the owner

185. Id., 620 P.2d at 571, 169 Cal. Rptr. at 910 (citing San Diego Bldg. Contractors Ass’n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974)).

186. Id. at 523, 620 P.2d at 572, 169 Cal. Rptr. at 911. The certainty borne by such a system of automatic classification was believed to spare the state courts case-by-case decision as to whether a zoning initiative or referendum was a legislative or adjudicative act. Id., 620 P.2d at 572-73, 169 Cal. Rptr. at 912.

187. See supra text accompanying notes 140-41.

188. Jurisdictions other than California support the use of the referendum zoning technique. See, e.g., Margolis v. District Court, 638 P.2d 297 (Colo. 1981); Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983); see also Richmount Partnership v. Board of Supervisors of Elections, 283 Md. 48, 388 A.2d 523 (1978); Anne Arundel County v. McDonough, 277 Md. 271, 354 A.2d 788 (1976). Richmount Partnership raises an issue that is discussed infrequently: what happens when a popular referendum rejects a rezoning ordinance?

189. 87 Wash. 2d 847, 557 P.2d 1306 (1976) (en banc).
of a one-hundred-and-forty-one-acre parcel—originally zoned for agricultural use—sought rezoning to build a regional shopping center. Pursuant to state law, a comprehensive environmental impact statement was prepared. The planning commission conducted thirteen public meetings and ten public hearings on the rezoning request; it later voted unanimously to rezone the area to allow the intended use. Thereafter, city council considered the matter at twenty-four public meetings and two public hearings that had followed a city-wide advisory ballot approving the rezoning request. Ultimately city council rezoned the property as requested, precipitating the plaintiff's request to seek a referendum election on the rezoning ordinance.

The Leonard case was considered on appeal after it had become moot, reflecting the state supreme court's interest in the referendum zoning issue. The court commenced its analysis with the customary—and unexceptional—statement that referendum elections were limited to those acts of governmental bodies that are legislative in nature. But application of this classification principle to the zoning and rezoning context produced an unusual result. The majority conceded that the initial adoption of the zoning code and a comprehensive zoning plan constituted a legislative policymaking act. By comparison, however, amendments of a zoning ordinance were characterized as mere implementations of the zoning code, properly considered part of the administrative function. Thus, the Leonard court viewed rezonings as adjudications that balance the rights of competitors in a quasi-judicial context. Viewing the matter in this light, the majority found that "[t]he ordinance merely rezoned the property and modified the language of the plan to reflect the anticipated land-use change. We do not view the ordinance as

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190.  Id. at 848, 557 P.2d at 1307.
191.  Id., 557 P.2d at 1307.
192.  Id., 557 P.2d at 1308.
193.  Id., 557 P.2d at 1308.
194.  Justice Hamilton noted that this case involved a matter of substantial public interest and warranted treatment other than mere dismissal. Id. at 849, 557 P.2d at 1308.
195.  Id. at 849-50, 557 P.2d at 1308.
196.  Id. at 850, 557 P.2d at 1309 (citing Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972) (en banc)).
197.  Id., 557 P.2d at 1309. Such a stance broke no new ground for the Washington court given that three recent cases had adopted the same view. See Barrie v. Kitsap County, 84 Wash. 2d 579, 586, 527 P.2d 1377, 1381 (1974) (en banc); Fleming v. City of Tacoma, 81 Wash. 2d 292, 299, 502 P.2d 327, 331 (1972) (en banc); Buell v. City of Bremerton, 80 Wash. 2d 518, 524, 515 P.2d 1358, 1362 (1972) (en banc).
198.  87 Wash. 2d at 850-51, 557 P.2d at 1309.
a legislative policy-making decision, and thus it is not subject to a referendum election.\footnote{Id. at 851, 557 P.2d at 1309.} Of course, this result ignored the fact that the developer intended to convert a one-hundred-and-forty-one-acre parcel from low to extremely high intensity use. Even if small area rezonings might be considered the proper subject for adjudication, a rezoning of this magnitude would seem instead better suited for a broad, legislative policymaking decision. Apparently, the court wished to maintain a uniform position against subjecting rezoning decisions to referendum control.\footnote{See id. at 851-52, 557 P.2d at 1309-10 (quoting Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956), overruled, 210 Neb. 504, 315 N.W.2d 628 (1982)).}

\textit{Leonard} concluded its analysis with discussion of an element raised by Justice Stevens in his dissent to the \textit{Eastlake} decision.\footnote{See City of Eastlake v. Forest City Enter., 426 U.S. 668, 693 (1976) (Stevens, J., dissenting).} The Washington court emphasized that rezoning decisions "require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social and physical characteristics of the community."\footnote{87 Wash. 2d at 854, 557 P.2d at 1311.} Such reasoned decisionmaking obviously is absent from a system that demands only a "yes" or "no" decision on complex issues. And although the \textit{Leonard} court did not require, as a matter of state constitutional principle, this kind of informed decisionmaking, it did voice its approval of the city's thorough analysis of the consequences of the rezoning proposal. Undoubtedly, the \textit{Leonard} holding represents a different view of a local government's land use control functions than do the other cases sustaining referendum zoning.\footnote{Jurisdictions other than Washington disfavor the use of the referendum zoning technique. See, e.g., Gumprecht v. City of Coeur d'Alene, 104 Idaho 615, 661 P.2d 1214 (1983); San Pedro North, Ltd. v. City of San Antonio, 562 S.W.2d 260 (Tex. Civ. App.), cert. denied, 439 U.S. 1004 (1978).}

\section*{IV. An Empirical Analysis of Referendum Zoning in Cuyahoga County, Ohio}

This section of the Article examines the referendum zoning techniques used by municipalities within Cuyahoga County, Ohio between 1962 and 1982. This area was selected because of its geographical size, varied population density and number of municipal governments. Within the county there are sixty local governments, each possessing either home rule or general law powers. As stated above, Ohio constitutional, statutory and case law encourages the use of
plebiscites by permitting legislative matters to be initiated by citizen petition and to be reviewed by referendum. The variety of municipal ordinance or charter provisions that subject land use control decisions to the vote of the electorate will be noted, as will patterns developed as a consequence of using the referendum zoning system.

A. An Overview of Charter Provisions

Empirical analysis began by a review of the municipal ordinances and charter provisions, with special attention paid to their treatment of referendum and initiative matters. Because there is no central registry of local legislation, direct inquiry was made of each municipal office and each law director. This survey revealed the pervasiveness of referendum zoning within Cuyahoga County. Mandatory referendum requirements were found in nineteen of sixty municipalities.204 Within these nineteen jurisdictions, local law required that a wide range of land use control decisions be subject to referendum approval prior to taking effect. Ordinances in a number of other communities simply stated that their citizens possessed all of the rights with respect to initiatives and referenda as conferred by state law. In these instances, the popular right to review locally enacted legislation or to originate new proposals becomes a voluntary matter dependent upon sufficient voter interest to support full electoral consideration. It also was apparent from the survey that the Eastlake decision had not caused the immediate adoption of referendum zoning legislation. In fact, a number of the jurisdictions adopted their referendum schemes during the early 1970s, subsequent to the Supreme Court’s opinion in James v. Valtierra.205 As a general proposition, there was no geographical, or size, pattern to the distribution of the mandatory zoning referendum ordinances throughout the county.

204. Within the county there were 19 municipalities that had referendum zoning provisions in their charters or ordinances. Cities: (1) Bay Village, Ohio, Charter art. VII, § 7.6; (2) Brecksville, Ohio, Charter art. IV, § 12; (3) Broadview Heights, Ohio, Charter art. IX; (4) Fairview Park, Ohio, Charter art. IV, § 16; (5) Garfield Heights, Ohio, Charter § 58; (6) Highland Heights, Ohio, Charter art. VIII, § 8.02.02; (7) Independence, Ohio, Charter art. IV, §§ 5d-5e; (8) Middleburg Heights, Ohio, Charter (no section given); (9) North Olmsted, Ohio, Charter art. VII, § 2e; (10) Parma, Ohio, ordinance issue 38; (11) Pepper Pike, Ohio, Charter art. VIII, § 1; (12) Seven Hills, Ohio, Charter art. XIV; (13) Solon, Ohio, Charter art. XIV; (14) Strongsville, Ohio, Charter art. IV, § 6(h); (15) Westlake, Ohio, Charter § 13. Villages: (16) Chagrin Falls, Ohio, Charter art. X, § 4; (17) Mayfield, Ohio, Charter art. III, § 14; (18) Moreland Hills, Ohio, Charter art. VIII, § 2; and (19) Orange, Ohio, Charter art. III, §§ 13-14.

The substance of the language appearing in charter and ordinance provisions demonstrates numerous approaches. First, as mentioned, many jurisdictions were found to have no legislation specifically dealing with plebiscites; therefore, they implicitly recognize the rights conferred to citizens by the Ohio constitution and relevant statutes. Second, some localities merely acknowledged the state-granted rights to initiative and referendum in their local ordinances. These provisions were general in scope and did not focus on the application of referenda and initiatives to land use decisionmaking. Third, a number of municipalities subjected all zoning classification, district and use change ordinances to confirmation by mandatory referenda, reminiscent of that construed in Eastlake. However, some jurisdictions have modified this type of ordinance to require that all zoning changes, both legislative and administrative, undergo mandatory voter approval. Fourth, five of the communities sampled had coupled a "ward veto" provision with their mandatory zoning referendum requirements, granting veto power over land

206. See supra note 135.
207. For example, the Lyndhurst, Ohio charter provides that "'[o]rdinances and other measures may be proposed by initiative petition and adopted by election, and ordinances and other measures adopted by the Council shall be subject to referendum, to the extent and in the matter now or hereafter provided by the Constitution or the Laws of Ohio.'" Lyndhurst, Ohio, Charter art. VIII, § 1.
208. The Village of Chagrin Falls provides in its charter that:
   No ordinance which provides for a change in the existing municipal zoning map or which otherwise provides for a change in the use of property from the uses presently authorized by the existing zoning code shall become effective until referred to the Board of Elections of Cuyahoga County for submission to the electors and approved by a majority of the electors voting thereon at the next succeeding general election, in any year occurring subsequent to 90 days after the approval of such ordinance by the Mayor, or the overriding by Council of the disapproval whichever occurs later.
   Chagrin Falls, Ohio, Charter art. X, § 4.
210. The city charter of Solon, Ohio provides a good example of this:
   An ordinance, resolution, or other action, whether legislative or administrative in nature, effecting a change in the zoning classification or district of any property within the City of Solon, Ohio, shall not become effective after the passage thereof, until Council submits such ordinance, resolution or other action to the electorate at a regularly scheduled election.
   Solon, Ohio, Charter art. XIV, § 1.

Several other charter provisions seem to track this language rather closely. The extension to include administrative land use control modification plainly appears to be unauthorized in light of the Supreme Court of Ohio's holding in Forest City Enter. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), rev'd, 426 U.S. 668 (1976). The Solon charter section was approved by the voters shortly after the Supreme Court's decision in Eastlake.
use changes to the voters in the election ward in which the subject land was located. Because exercise of this veto vests ultimate legislative power in a narrow segment of the community, such a provision runs contrary to the direct holding of the Eastlake majority. Fifth, several localities limited their mandatory referendum requirements to zoning changes that would facilitate the construction of multifamily housing construction designed to exceed a predetermined height limitation, or when the number of multifamily units within the municipality exceeds a preset percentage of all dwellings in the town. Such selective application of the referendum requirement to these multifamily residential land uses demonstrates the potential of referendum zoning as a not so subtle variant of exclusionary zoning. Although such a categorization probably would not violate fourteenth amendment due process and equal protection principles, it might be unlawful within the context of the Fair Housing Act. Sixth, several localities specifically required that the applicant for the zoning change pay the costs associated with the conduct of the mandatory referendum, undoubtedly deterring all but the most solvent landowners from even seeking zoning changes.

This survey indicates that the basic requirement to refer zoning

211. The ward veto system vests a great deal of power in relatively few people. For example, in the Fairview Park, Ohio charter “an ordinance . . . effecting a change in the uses permitted in any zoning use classification or district . . . shall not become effective after the passage thereof, until Council submits such ordinance . . . to the electorate at a regularly scheduled election, occurring more than sixty (60) days after the ordinance, resolution, or other action is approved by a majority of the electors voting thereon, in his Municipality and in each ward in which the change is applicable to property in the ward.” See Fairview Park, Ohio, Charter art. IV, § 16(h). In this jurisdiction, the referendum requirement and ward veto provision also apply to zoning legislation initiated by the voters. Id. § 16(c).

212. Several of the mandatory referral ordinances were focused specifically on the perceived problem of increasing multifamily residential units within the jurisdiction. For example, those phrased in terms of percentage include: North Olmsted, Ohio, Charter art. VII, § 2(e) (20%); Strongsville, Ohio, Charter art. IV, § 6(h) (15%). Mandatory referenda delimited by height provisions include: Mayfield, Ohio, Charter art. III, § 12; Orange, Ohio, Charter art. III, § 14. A final category of provisions requires the referendum approval any time zoning or rezoning is designed to provide for multifamily dwellings; here, the nature of the proposed new use of land is all important. See Independence, Ohio, Charter art. IV, § (d).

213. See supra note 129 and accompanying text.


215. See, e.g., North Olmsted, Ohio, Charter art. VII, § 2(e) ("[T]he applicant agrees to assume all costs of the special election (on the referendum zoning issue) including advertising, and further posts a bond with the Director of Finance of the City of North Olmsted.").
changes to the electorate for ratification or rejection has been embellished considerably by the ordinances of some localities. The embellishments observed in this Ohio county also reflect the quality of legal counsel available to these local governments; several of the features of these referendum zoning provisions either are of dubious validity or plainly are unlawful. Apparently, no attempts were made to revise local legislation to comport with the demands of federal or state supreme court judgments. Perhaps inadvertence explains local counsels' failure to recommend the reformation of ordinance and charter provisions, but inaction may represent a conscious attempt to ignore the prevailing legal principles until a lawsuit is threatened. In any event, the survey no doubt reflects the reality that local governments do not embrace immediately the rulings of judicial authorities and that specific provisions of local law often lag behind the direct commands of the courts. Beyond this, the referendum zoning requirements studied reflect a general attitude favoring citizen control over changes in the nature of the local community. They reflect a lack of trust in the judgment of local elected officials and an implicit desire to reinforce existing land use patterns.

B. Evaluation of Referendum Zoning Results

The research project examined Cuyahoga County election records from 1962 to 1982 to determine how referenda and initiatives were used to make land use control decisions. The study sought data on a range of matters related to the subject of referendum zoning, the frequency of occurrence, the distribution of occurrence, the types of issues subjected to voter approval by plebiscite, and the rates of success and failure of land use subjects over time.

As the table below indicates, the total number of land use

<table>
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<th>Year</th>
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<th>Success Rate</th>
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</tr>
<tr>
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<td>0</td>
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<td>15</td>
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<td>5</td>
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</tr>
<tr>
<td>1971</td>
<td>4</td>
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</tr>
</tbody>
</table>

216. All Referenda on Land Use Matters
REFERENDUM ZONING

Referenda generally grew; the peak—an average of nearly eighteen per year—occurred from 1977 through 1980. An increased adoption of mandatory zoning provisions following the Supreme Court’s decisions in *Valtierra* and *Eastlake* may explain the peak. Over the entire duration of the research, however, the average frequency was far less; slightly greater than seven referenda per year. Oddly enough, during 1981 and the first half of 1982, no zoning matters were decided by public vote. Considering the size of Cuyahoga County and the number of local governments included in it, the data gathered describe a land use control technique remarkably underutilized.

Attempted zoning changes by voter initiative were far less frequent. Over the same study period, there were thirty-five initiatives compared to one hundred and fifty-two referenda. This discre-

<table>
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<td>—</td>
</tr>
<tr>
<td>1965</td>
<td>6</td>
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<td>0%</td>
</tr>
<tr>
<td>1964</td>
<td>4</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
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<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1962</td>
<td>5</td>
<td>4</td>
<td>80%</td>
</tr>
<tr>
<td></td>
<td>152</td>
<td>93</td>
<td>61.2%</td>
</tr>
</tbody>
</table>

217. The survey of county records indicated that a variety of land use control issues were placed on the ballot besides the automatic referral of rezoning and other regulatory relief requests. For instance, localities used the referendum technique to (1) change the definition of residential use as it pertained to home offices; (2) change procedural requirements for zoning administration; (3) alter the composition of zoning boards; (4) eliminate washing of vehicles as a permitted use for automotive facilities; (5) adopt comprehensive planning documents; and (6) amend minimum side yard requirements. The vast majority of referenda, however, were held to determine whether a particular parcel of land should be rezoned to a different use classification.

218. In the period following the Supreme Court’s decision in *Valtierra*, the following 12 municipalities adopted mandatory referendum zoning provisions: Bay Village (May 7, 1974, general); Broadview Heights (Nov. 2, 1976, general); Fairview Park (Nov. 4, 1975, general); Garfield Heights (Nov. 8, 1977, general); Highland Heights (Nov. 5, 1974, general); Independence (Nov. 8, 1977, general); North Royalton (May 2, 1972, multifamily only); Pepper Pike (May 7, 1974, general); Seven Hills (Nov. 2, 1976, general); Solon (Nov. 8, 1977, general); Strongsville (Nov. 4, 1980, multifamily only); and Westlake (Nov. 6, 1973, multifamily only). It would seem that the Supreme Court’s support for land use plebiscites influenced a large number of municipalities to adopt mandatory referral provisions.

219. All Initiatives on Land Use Matters
pancy is understandable; initiatives require citizens to form an organization concerned with a particular issue and to collect a sufficient number of signatures to have the question placed on the ballot. Such an undertaking requires a level of personal commitment to a land use issue that ordinarily can be mustered only in a limited number of instances. Initiatives, in addition to being less numerous than zoning referenda, fail to demonstrate the same increasing pattern of frequency over the study period as did zoning referenda. The distribution of all land use control initiatives over the twenty-year period was relatively uniform, averaging slightly less than two per year. But during the 1962-1982 period, only fourteen of these initiatives were for specific rezoning requests. Thus, rezoning by initiative has been used less frequently to circumvent the traditional governmental zoning process.

Undoubtedly the most important data derived were those concerning the success or failure of matters presented for direct voter decision through the referendum or initiative mechanism. Over the study period, land use referenda were successful sixty-one percent of the time, while initiatives—at forty-eight percent—enjoyed a lower degree of success. If the analysis were limited to referenda and initiatives concerned solely with single parcel rezonings, the success ratio drops to forty-eight percent and twenty-one percent respectively. These results hardly reflect a picture of complete

<table>
<thead>
<tr>
<th>Year</th>
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<th>Initiative Success</th>
<th>Percentage</th>
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<tr>
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<td>0</td>
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</tr>
<tr>
<td>1977</td>
<td>3</td>
<td>2</td>
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<td>1976</td>
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<td>1975</td>
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<td>1966</td>
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</tr>
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<td>1962</td>
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</tr>
<tr>
<td></td>
<td>35</td>
<td>17</td>
<td>48%</td>
</tr>
</tbody>
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221. Referenda Concerning the Rezoning of a Single Parcel of Land
citizen hostility to all zoning changes. But it must be remembered that most of the unsuccessful referendum proposals would have been

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
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<tbody>
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<td>1980</td>
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<tr>
<td>1965</td>
<td>7</td>
<td>0</td>
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</tr>
<tr>
<td>1964</td>
<td>3</td>
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</tr>
<tr>
<td>1963</td>
<td>0</td>
<td>0</td>
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</tr>
<tr>
<td>1962</td>
<td>2</td>
<td>1</td>
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</tr>
<tr>
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<td>0</td>
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<tr>
<td></td>
<td>79</td>
<td>38</td>
<td>48.1%</td>
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Initiatives Concerning the Rezoning of a Single Parcel of Land

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Successful</th>
<th>Success Rate</th>
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<tr>
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<td>1977</td>
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</tr>
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<td>1975</td>
<td>1</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>1974</td>
<td>3</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
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</tr>
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enacted into local law absent the plebiscite requirement. As the tables presented reveal, there has been great variation in the annual success rates of the rezoning plebiscites. For instance, from 1961 through 1970, only one referendum and two initiative proposals were approved out of a total of twenty-four conducted. Yet the time from 1971 through 1980 saw both an increased frequency and a higher success ratio for zoning referenda: thirty-seven of sixty-one rezoning proposals won approval. In contrast, rezoning by citizen initiative during this decade was markedly less successful: only one victory. The recent high success rate is puzzling given its tendency to refute claims that zoning referenda represent a sophisticated exclusionary land use technique. Moreover, it suggests that the mandatory referral system largely confirms decisions previously made by city councils on matters of land use policy. As such, it unnecessarily adds time delay and administrative and project costs to the process. In light of these conclusions, one must question whether the costs of the referendum zoning system imposed upon the municipality and the landowner are justified by the benefits accruing to the community.

C. Observations Concerning Referendum Zoning in Cuyahoga County

A number of conclusions follow from the results of the Cuyahoga County study. First, the automatic referral system adopted throughout the county was much more pervasive than was originally anticipated. Nearly one-third of all the municipalities within this county require some or all zoning changes to be ratified by positive vote of the electorate. Still, a number of zoning referenda identified by the research were conducted in jurisdictions that did not automatically refer zoning matters to the voters. Specific issues, therefore, were submitted for public approval simply because sufficient numbers of citizens petitioned their local governments to call for a vote of the electorate. In context, however, the automatic referral and the voluntary referenda did not constitute a large number of zoning matters in the abstract. Considering the population count, geographic size and large number of political jurisdictions within the study area, it is somewhat surprising that there were so few rezonings actually referred to the citizens for approval. This observation possibly means that land developers both used their property in consonance with existing zoning classifications and sought infrequent deviations from existing regulations. A more likely explanation posits that techniques probably were developed that escaped

222. See supra notes 216 and 219.
automatic referendum requirements contained in local charters or ordinances. For instance, use of an emergency declaration attached to a piece of municipal legislation effectively would shield a rezoning matter from the requirement of referendum approval. This technique and others may have circumvented the technical requisites of the referendum zoning provisions of local law.

Second, an interesting side issue emerges. The study reveals that the referendum requirement has been applied to land parcels of varying sizes. This means, of course, that the rezoning of a one-acre parcel from single-family to duplex use might require validation by referendum just as a seventy-eight-acre parcel would. Often the election records did not reveal the exact size of the parcel being considered; but when that information was provided, it was clear that zoning referenda were required for both small and large lots. Apparently size was not a determinative factor in presenting the land use issue before the electorate.

Finally, no clear pattern regarding the success or failure of rezoning matters was discernible. At best, one can only conclude that the data does not permit stereotyping with respect to public acceptance. Although there seemed to be a general trend against the approval of rezonings from a less intensive to a more intensive land use classification, even this generality did not always bear itself out. Cuyahoga County's election records did not reveal consistent opposition to new commercial or multifamily land uses within the community. Nor did the review indicate that the referendum zoning techniques had been used as exclusionary devices insulating localities from unwanted residents or development. It is, however, impossible to estimate the number of development proposals requiring zoning changes that never advanced to the rezoning stage simply because a referendum requirement existed. Such deterrence is a subtle, yet largely unquantifiable, result of the technique.

V. Conclusion

The prior observations concerning referendum zoning are not intended to indicate that the device is a desirable or even innocuous local government technique. The Supreme Court's holding in Eastlake significantly reinforces the legitimacy of this technique within the land use control context. Many states have adopted legislation and judicial positions consistent with the Eastlake view. Unfortunately, the Supreme Court's support reflects an unrealistic view of local government affairs and the value of local democratic expression.

For example, as practiced in Cuyahoga County, Ohio, referendum zoning subjects both major and minor zoning decisions to voter
approval, showering minor rezonings with the same attention warranted by and given to significant questions of community development policy. Furthermore, a review of the election records suggests that the issues presented to the public are not explained clearly by the formal language appearing upon the voter’s ballot. The ballot language employed for land use referenda within the study area was confusing and occasionally incomprehensible. If zoning referenda are to be encouraged as an enlightened form of participatory democracy, an interested voter plainly cannot form an educated opinion on the electoral issue based solely upon ballot language. If ballot language is the primary source of information on a land use issue, the voter will have merely the most superficial understanding of the question presented. In addition, the Cuyahoga County survey reveals that voter participation in land use referenda has been very low. Obviously, then, a relatively small percentage of the eligible voters within the jurisdiction determine whether a development proposal will proceed. In fact, in those jurisdictions having referendum zoning systems with the ward veto feature, a mere handful of voters can reject a proposal even if the overwhelming majority within the locality wishes to approve it. In this instance, the referendum zoning mechanism is conspicuously undemocratic.

What of the quality of the decisions referendum zoning renders? Arguably a minor rezoning issue ought not be subjected to referendum approval given its limited impact upon the community. For this reason, a number of western states have categorized such rezonings as administrative actions, thereby removing them from the referendum approval requirement. And, for a different reason, large scale rezoning questions may not be well-suited to referendum approval. These significant developmental changes present complex questions of social and economic policy for the local community. It seems particularly inappropriate for such a complicated matter to be determined on the basis of a “yes” or “no” decision. A majority vote does not necessarily reflect a rational choice on the matter under consideration. Ironically, the referendum requirement actually denies meaningful public participation in the selection of future community growth policy. By requiring referendum approval for these decisions, the ability to establish community goals and to implement them through legislative action is withdrawn from the popularly elected representatives. The significance of public debate before legislative bodies on matters of importance to the community is drastically lessened. Mandatory referendum zoning effectively devalues the practice of open and full discussion of important community issues in a public forum. In essence, referendum zoning limits
public debate on complex public issues by providing the simple alter­native of approval or disapproval and decentralizes public respon­sibility for important decisionmaking.

A related criticism of the referendum zoning technique is that it reflects a basic distrust of local elected officials and the representa­tive system of government. By installing the plebiscite as a check against the malfeasance or nonfeasance of these officials, the com­munity has established that it does not believe that legislative deci­sions merit citizen respect. It appears that the referendum zoning system relegates the city council to the role of a "super" planning commission—one that makes advisory recommendations to the public at large for ratification. There should be less drastic ways to control the behavior of local legislative officers, with removal at the next regularly scheduled election serving as the most direct method.

Beyond the impact of referendum zoning upon the integrity of the local legislative decisionmaking process is its effect upon the work of city planners and planning commissions. Few judicial opinions have accorded much attention to this factor, despite the fact that referendum zoning seriously interferes with a system that recognizes and takes advantage of city planner expertise. The traditional struc­ture of rezoning practice usually requires that a proposal receive approval from the municipality's planning staff, the community’s planning commission and, finally, the locality’s elected officials. Regrettably, the referendum technique reduces the incentive for thorough project evaluation by planning officials. Further, the long­term effect of referendum zoning may be to freeze the existing municipal zoning map, given that changes must run the gauntlet of electoral approval.

This stultifying effect could have longlasting implications for com­munity growth and development. The process of community plan­ning and land use regulation is a dynamic one. Referendum zoning seemingly would force a municipality to adhere to conceptions of desirable community form and zoning structure not because they represent the best plan for local growth, but rather because they constitute a known and accepted use of the land within the locality. In this sense, the adoption of mandatory referendum zoning represents an impressive, conservative force in local affairs. Prior to embracing a doctrine encouraging referendum zoning as a means of increasing citizen involvement in the affairs of local government, states and localities must understand fully the less attractive implica­tions of the technique.