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Eastlake and Arlington Heights: New Hurdles in Regulating Urban Land Use?

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Two recent Supreme Court decisions, City of Eastlake v. Forest City Enterprises, Inc. *and* Village of Arlington Heights v. Metropolitan Housing Development Corp., *will directly affect the ability of lawyers to bring about housing reform for the urban poor. In his analysis, Professor Hogue finds that the combined effect of these two cases is to restrict the availability of federal constitutional remedies to invalidate discriminatory land use regulations enacted by municipalities. As a result, the author concludes that greater use will be made by developing state constitutional claims and statutory remedies by those challenging exclusionary housing patterns.*

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Eastlake and *Arlington Heights*: New Hurdles in Regulating Urban Land Use?

> Zoning provisions such as that in Eastlake's charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas. The struggles of our suburbs to build such walls can be seen in cases throughout the county.[1]

I. INTRODUCTION

THOSE WHO CONCERN THEMSELVES with land use regulation, particularly in the urban setting, have good reason to be concerned about two of the Supreme Court's more recent efforts in this area:[2] *City of Eastlake v. Forest City Enterprises, Inc.*[3] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[4] Together the two cases portend the serious possibility of increased neighborhood segregation based on race and wealth coupled with greater difficulties in subjecting such discrimination to judicial scrutiny.

This disturbing portent is an apparent setback in the fight against exclusionary zoning.[5] Sadder still, it marks a notable departure from what was emerging as a fairly clear pattern of judicial sympathy toward the plight of the urban poor. This now-broken trend was evident in such cases as *Norwalk CORE v. Norwalk Redevelopment*

1. Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 200, 324 N.E.2d 740, 749 (1975) (Stern, J., concurring), *rev'd and remanded*, 426 U.S. 668 (1976). *See also* KERNER COMMISSION'S REPORT OF THE UNITED STATES NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 118–20 (1968).

2. For a criticism of recent Supreme Court decisions prior to *Eastlake* (*e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); James v. Valtierra, 402 U.S. 137 (1971)), see 1 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 5.05, at 110–11 (1974); 3 N. WILLIAMS, *supra*, at § 66.34.

3. 426 U.S. 668 (1976).

4. 429 U.S. 252 (1977).

5. *See* D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION (1977). Both *Arlington Heights* and *Eastlake* were pending at the time Moskowitz's treatise went to press, *id.* at 86 n.17, and before the United States Supreme Court first undercut and then reversed the *Arlington Heights* decision by the Seventh Circuit, 373 F. Supp. 208 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd and remanded*, 429 U.S. 252 (1977). *See* text accompanying note 141 *infra*. For a discussion of the district and appellate level decisions, see D. MOSKOWITZ, *supra* at 115–21. *See also* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 582–89 (1977).

Agency,[6] which involved a successful challenge to a city's failure to provide adequate alternative housing opportunities for low income minorities displaced by urban renewal; *Kennedy Park Homes Association v. City of Lackawanna*,[7] in which plaintiffs succeeded in attacking a city's refusal to permit the construction of a low income housing project; *Southern Alameda Spanish Speaking Organization v. City of Union City*,[8] which upheld a California referendum provision by which a housing project for low-and-moderate income families had been stymied, but nevertheless contained dicta suggesting that a violation of equal protection could be inferred from the effect of segregation;[9] *United States v. City of Black Jack*,[10] which invalidated an effort to frustrate construction of low income housing by zoning out multi-family dwellings; and *Hills v. Gautreaux*,[11] which permitted a remedial court order to go beyond city boundaries and include the entire relevant metropolitan-area housing market.

Some of the gains for decent housing opportunities marked off in these cases have been lost in *Arlington Heights*, whose effects will be exacerbated by *Eastlake*. It is the purpose of this article to analyze the impact of these two cases on urban housing and land use, as well as to assess the tactics remaining in the arsenal of housing rights litigators. This analysis begins with *Eastlake* because it invites a brief historical treatment of both prior federal constitutional zoning law and relevant state law considerations.

II. *EASTLAKE* AND ITS BACKGROUND

In *Eastlake*, the Supreme Court had before it a challenge to the provision of a city charter that permitted the voters of the city to approve by a 55 percent majority any alteration in existing land uses.[12] As a property owner who had sought a zoning change, Forest City

6. 395 F.2d 920 (2d Cir. 1968).

7. 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

8. 424 F.2d 291 (9th Cir. 1970).

9. *Id.* at 295–96.

10. 508 F.2d 1179 (8th Cir. 1974). *See* text accompanying note 235 *infra*.

11. 425 U.S. 284 (1976).

12. As adopted by the voters, Art. VIII, § 3, of the Eastlake City Charter provides in pertinent part:

> That any change to the existing land uses or any change whatsoever to any ordinance . . . cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the city council should approve any of the preceeding changes, or enactments, whether approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55%

Enterprises, Inc. alleged that the referendum requirement denied it due process of law under the fourteenth amendment because it was an unconstitutional delegation of legislative power to the people.[13] The Supreme Court rejected this argument and upheld the referendum provision. The High Court reasoned that a referendum involving the entire municipality "cannot . . . be characterized as a delegation of power,"[14] so that the delegation doctrine[15] did not apply to the case.[16]

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favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election.

Referendum provisions are authorized by Article II, § 1(f) of the Ohio Constitution which 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.

This constitutional provision had earlier been interpreted to limit the use of local referenda to questions within the legislative power of municipalities. Myers v. Schiering, 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971). Thus, even though Eastlake's city charter covered "any change to the existing land uses," its force was limited to zoning ordinances recommended by the planning commission and approved by the city council in its legislative capacity. As stated by the Ohio Supreme Court:

> On its face, the charter provision makes no distinction between those changes made by council in an administrative capacity, and those made by council in a legislative capacity. Thus, the requirement of a mandatory referendum falls upon all changes with equal weight. Insofar as this purports to mandate a referendum as to an administrative determination, it is clearly invalid.

41 Ohio St. 2d at 191, 324 N.E.2d at 744 (citation omitted).

The Federal Supreme Court majority apparently read this construction to mean that hardship occasioned by referenda might be alleviated by administrative action, which remained immune from plebiscite review:

> [T]he Ohio Supreme Court concluded that only land use changes granted by the City Council when acting in a *legislative* capacity were subject to the referendum process. Under the court's binding interpretation of state law, a property owner seeking relief from unnecessary hardship occasioned by zoning restrictions would not be subject to Eastlake's referendum procedure. For example, if unforeseeable future changes give rise to hardship on the owner, the holding of the Ohio Supreme Court provides avenues of administrative relief not subject to the referendum process.

426 U.S. at 674 n.9. Reliance on the "escape valve" of administrative action to alleviate the individual hardships left by this decision is shortsighted. It ignores the substantial procedural and practical problems which remain. *See* notes 68–109 *infra* and accompanying text.

13. *See* 426 U.S. at 671.

14. *Id.* at 672.

15. Courts have frequently held in other [*i.e.*, federal] contexts that a congressional delegation of power to a regulatory entity must be accompanied by discernable standards, so that the delegatee's action can be measured for its fidelity to the legislative will. . . . Assuming, *arguendo*, their relevance to state governmental functions, these cases involved a delegation of power by the legislature to regulatory bodies, which are not directly responsible to the peo-

Instead, the city's referendum met procedural due process requirements simply because it was "a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies."[17] Although disappointed property owners may still challenge zoning results, they may not contest the procedure. In challenging such results, the Court reaffirmed that in the usual case[18] the appropriate constitutional test is the one announced in the landmark zoning case of *Village of Euclid v. Ambler Realty Co.*:[19] "Under *Euclid*, a property owner can challenge a zoning restriction if the measure is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' "[20]

The Court's approval of plebiscite[21] zoning in *Eastlake* raises a number of important questions relating to land use controls. In their simplest form, these concern the extent of land use regulation by private citizens permitted under the federal Constitution, the problem of spot zoning,[22] and the mechanics of "due process" as meted out in the election forum (or the problem of "procedural fairness" suggested by two of the dissenting Justices in *Eastlake*, Brennan and Stevens).[23]

Not all of these problems were fully examined in the course of

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ple; this doctrine is inapplicable where, as here, rather than a delegation of power, we deal with a power reserved by the people to themselves.

Id. at 675 (citations omitted) (footnote omitted).

16. *Id.*

17. *Id.* at 673.

18. The Court does note, however, that where specific constitutional limitations are offended, a zoning result would be subject to a different standard of review. *Id.* at 676 (quoting Hunter v. Erickson, 393 U.S. 385, 392 (1969) (equal protection challenge to referendum zoning provision which treated racial matters differently than all others)). However, after *Arlington Heights*, the equal protection standard has become more difficult. *See* sections VII and VIII *infra*.

19. 272 U.S. 365 (1926).

20. *Id.* at 395, *quoted in* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. at 676.

21. The term "plebiscite" is used throughout this article notwithstanding the fact that technically it may not apply to the situation in *Eastlake* where a referendum was held on a measure already approved by the town's legislative body. A plebiscite, in its most limited sense, contrasts with a referendum in that it is a vote on a measure originally submitted to the people and not a vote to approve the legislative act of another body. WEBSTER'S INTERNATIONAL DICTIONARY 1739 (3d ed. 1961). It is intended that all forms of popular legislating, including initiative, plebiscite and referendum, be encompassed within the term plebiscite.

22. Mr. Justice Powell noted this difficulty in his one-paragraph dissenting opinion. 426 U.S. at 680.

23. *Id.*

Forest City Enterprises' effort to have its land rezoned.[24] In *Eastlake*, a development corporation acquired an eight-acre parcel zoned for light industrial use and applied for a zoning change to permit construction of a multi-family, high-rise apartment building. Both the city's planning commission and the city council approved the rezoning. In the meantime, however, the voters of Eastlake, Ohio, amended the city charter to require a referendum on any changes in land use approved by the council.[25]

When Forest City returned to the planning commission to seek a further variance for "parking and yard" approval, it was rejected since the now-required referendum on the original rezoning had not yet been held. Forest City then sought a declaratory judgment that the charter amendment was an unconstitutional delegation of legislative power.[26] Both the Court of Common Pleas and the Ohio Court of Appeals upheld the charter amendment, but the Ohio Supreme Court reversed.

A. *An Historical Look at Land Use Controls*

In its reversal, the Ohio Supreme Court relied on a trilogy of early cases: *Eubank v. City of Richmond*,[27] *Thomas Cusack Co. v. City of Chicago*,[28] and *Washington ex rel. Seattle Title Trust Co. v. Roberge*.[29] On at least one level, the difference in outcome between the Ohio and federal Supreme Courts can be attributed, in part, to their respective views of the meaning of these three cases. Whether *Eastlake*, in construing these cases, has clarified that earlier law is questionable.

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24. Indeed the Supreme Court emphasized the narrow scope of its review: "The Supreme Court of Ohio rested its decision solely on the Due Process Clause of the Fourteenth Amendment. . . .. The only questions presented to this Court in the petition for certiorari concern the validity of that due process holding. Pet. for Cert. 2." *Id.* at 677 n.11.

25. *See* note 12 *supra*.

26. *See* 41 Ohio St. 2d at 187–88, 324 N.E.2d at 742. In its original complaint, the plaintiff also sought an injunction to bar the board of elections from holding the referendum. *See* Note, *Constitutional Law—Zoning Referenda—Mandatory Referenda on All Municipal Land Uses Do Not Violate the Due Process Clause*, 5 FORDHAM J. URB. L. 141, 142 n.8 (1976). This resembles the pattern in Mulkey v. Reitman, 64 Cal. 2d 529, 535, 413 P.2d 825, 829, 50 Cal. Rptr. 881, 885 (1966) ("Prior to its enactment the unconstitutionality of Proposition 14 was urged to this court in Lewis v. Jordan. . . . In rejecting the petition for mandamus to keep that proposition off the ballot we stated in our minute order 'that it would be more appropriate to pass on those questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls.' "). *See also* Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881, 886 & n.26 (1970).

27. 226 U.S. 137 (1912).

28. 242 U.S. 526 (1917).

29. 278 U.S. 116 (1928).

Both *Eubank* and *Roberge* involved ordinances imposing land use restrictions that were invalidated by the federal Supreme Court on constitutional grounds. In *Cusack*, an ordinance restricting billboards was upheld. A common consideration in all three cases was the degree to which adjoining property owners are permitted to regulate their neighbor's use of his land.

The ordinance attacked in *Eubank* permitted building lines to be established that defined a portion of the landowner's property between the street and the line that was to remain free of building encroachments. The decision as to whether or not a building line was to be drawn was determined by two-thirds of the property owners whose land abutted a given street. Once these landowners submitted a written request, the city's street committee was to set the line at between five and thirty feet back from the street. Thereafter, building permits would issue only for construction that did not cross the line, and a fine was provided for violation of the ordinance. Eubank constructed a house with a bay window that obtruded beyond the building line into the proscribed space, and he attacked the imposition of a fine for the violation.

The Supreme Court, per Justice McKenna, held that the ordinance was unconstitutional. The Court found the regulation to be an unlawful delegation of legislative power in that "while conferring the power on some property holders to virtually control and dispose of the proper rights of others, [it] creates no standard by which the power thus given is to be exercised. . . ."[30]

In *Cusack*, the Supreme Court was confronted with an ordinance that prohibited billboards of a certain size in residential areas unless a majority of the affected owners consented to their construction. This requirement was attacked as an improper delegation of legislative power to a majority of the owners of property fronting on the proposed billboard site.

In an opinion by Justice Clarke, the Court held that since billboards were prohibited outright, Cusack, the plaintiff in error, could only be benefited by the procedure. Billboards, the Court reasoned, were "offensive structures" and suitable for such draconian treatment. *Eubank*, on which plaintiff Cusack had sought to rely, was distinguished as follows:

> The former [ordinance in *Eubank*] left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in

30. 226 U.S. at 143–44.

> the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances.[31]

Justice McKenna dissented.

These cases were followed by *Roberge* which involved a comprehensive Seattle zoning ordinance uniformly prohibiting certain types of buildings in districts dedicated to restricted uses. The ordinance in *Roberge* permitted "a philanthropic home . . . for old people"—an otherwise proscribed use—upon the written consent "of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." Without complying with the written consent requirement, a trustee for a charity that desired to construct a geriatric home challenged the ordinance as an improper delegation of legislative power. The Supreme Court agreed:

> The section purports to give the owners of less than one-half 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 delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.[32]

Cusack was distinguished on the grounds that it involved a nuisance: "The facts shown clearly distinguish the proposed building and use from such billboards or other uses which by reason of their nature are liable to be offensive."[33]

B. *Construction Problems:* Eubank, Cusack, *and* Roberge

On their faces, the ordinances in *Cusack* and *Roberge* operated in like fashion: a given use of property was forbidden, until permission was secured from adjoining, affected landowners. Yet this apparent similarity, stressed in *Cusack*,[34] was given short shrift in *Roberge*.[35]

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31. 242 U.S. at 531.

32. 278 U.S. at 121–22.

33. *Id.* at 122.

34. *See* note 23 *supra*.

35. *See* Jaffe, *Law Making By Private Groups*, 51 HARV. L. REV. 201, 228 n.67 (1937). The problem, of course, is that though commentators like Jaffe long ago con-

Instead, the Court relied on a factual distinction between billboards and old folks' homes bottomed on nuisance characteristics. Professor Jaffe offered an interesting analysis of the problem:

> Commentators find it difficult to reconcile these decisions of the Supreme Court and suggest that the *Roberge* case probably overrules the *Cusack* case. Whether that is so, we cannot say; it does not purport to do so. It may be said that in the setback and poorhouse cases, property owners would be moved almost entirely by cupidity: the prohibited conditions had none of the qualities of a common-law nuisance. The billboard because of its assumed function of sheltering immorality, is at least in the doubtful class; judgment conceivably may be based on more disinterested, or at least broader, grounds. Possibly, this distinction limps but the *Cusack* case is still of importance because it demonstrates in itself that a delegation to private parties is not necessarily a violation of federal due process.[36]

Concededly, encroaching into territory marked off by a set-back line or building a home for the aged do not usually create nuisances, but they often call forth problems that have nuisance characteristics. For example, set-back restrictions can prevent wooden houses from being built too close together and creating a fire hazard,[37] or prevent

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cluded that the distinction was without vitality, courts continued to rely on it. *E.g.*, "In *Eubank*, a reasonable use of property was prohibited by arbitrary fiat; in *Cusack*, an unreasonable use of property was prohibited by valid legislative action, subject to said prohibition's being lifted by those affected." 41 Ohio St. 2d at 193, 324 N.E.2d at 745. *See also*, Village of Belle Terre v. Boraas, 416 U.S. 1, 6–7 (1974). Even more troubling is the following footnote in the Federal Supreme Court's majority opinion in *Eastlake* which purports to interpret *Cusack*:

> In contrast to *Eubank* and *Roberge*, the *Cusack* Court *upheld* a neighborhood consent provision which permitted property owners to waive a municipal restriction prohibiting the construction of billboards. . . .
>
> Since the property owners could simply waive an otherwise applicable legislative limitation, the Court in *Cusack* determined that the provision did not delegate legislative power at all.

426 U.S. at 677 n.12 (emphasis in original).

The problem with this explanation is that the *Roberge* ordinance, which was held unconstitutional, also operated on a waiver principle. However, given that *Cusack* still has some vitality, perhaps Jaffe is correct in saying that "the *Cusack* case is still of importance because it demonstrates in itself that a delegation to private parties is not necessarily a violation of federal due process." Jaffe, *supra* at 228. Indeed, under the Supreme Court's apparent theory that property owners could waive legislative limitations, could not the referendum procedure in *Eastlake* be upheld simply on the grounds that it did not involve a delegation because it in effect allowed a "waiver" of the "light industrial" restriction placed on the property by the comprehensive zoning plan if the voters, by a requisite majority, acquiesced in the rezoning? Note that both zoning and rezoning are subject to referendum in Ohio. 41 Ohio St. 2d at 189–90, 324 N.E.2d at 743 (citing Hilltop Realty v. City of S. Euclid, 110 Ohio App. 535, 164 N.E.2d 180 (1960)).

36. Jaffe, *supra* note 35, at 228.

37. 7 E. McQUILLIN, MUNICIPAL CORPORATIONS § 24.541 (3d ed. 1968) (citing Town

crowding and thus assure the maintenance of an adequate right-of-way[38] as well as preserving the city's option to widen streets without undue difficulty.[39] Homes for the aged are not an unmixed blessing, and they can clearly be seen as inconsistent with the use of an area for residential homes dedicated to single-family dwellings. The trustee in *Roberge* proposed to replace a former private residence that would accomodate "about fourteen guests" with a building that would house thirty. Neighbors might understandably object to this change because of the probability of increased traffic and noise, for example. If these are not nuisance-based considerations, at least they approach them. Furthermore, the principal objection to billboards is probably aesthetic.[40] Their characterization as shelters for immorality is probably makeweight.[41]

The language of *Roberge* itself provides little additional help in reconciling the cases. The opinion urged somewhat inconsistently that the exclusion of the old folks' home "is not indispensable to the general zoning plan" and reasoned that this can be inferred from the provision for constructing the home if adjacent owners approve:

> The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance

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of Windsor v. Whitney, 95 Conn. 357, 111 A. 354 (1920); City of Miami v. Romer, 58 So.2d 849 (Fla. 1952); Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 (1965)).

38. *See* Town of Windsor v. Whitney, 95 Conn. at 364–65, 111 A. at 356 ("Streets . . . of suitable width help transportation, add to the safety of travel, furnish better protection against fire, and better light and air to those who live upon the streets. They afford better opportunities for laying, maintaining and inspecting water, sewer, gas and heating pipes, and electric and telephone conduits in the streets.")

39. *E.g.*, Vangellow v. City of Rochester, 190 Misc. 128, 71 N.Y.S.2d 672 (1947).

40. *E.g.*, State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908). *See* 7 E. McQUILLIN, *supra* note 37, at § 24.382.

41. McQuillin lists four additional reasons for legitimately banning billboards under the police power: "(1) billboards being temporary structures are liable to be blown down and thus injure pedestrians; (2) they gather refuse and paper which may tend to spread conflagrations; (3) they are used as dumping places for dirt, filth, and refuse, and as public privies; (4) they serve as hiding places for criminals." 7 E. McQUILLIN *supra* note 37, at § 24.380 (citations omitted). These are not particularly pursuasive in the *Cusack* context since none of these asserted bases, if true, should be an appropriate subject for waiver. The most applicable basis for regulating billboards would seem to be to avoid interference with drivers, *e.g.*, Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 199 N.W.2d 525 (1972), or perhaps to avoid distracting drivers, *see* Variety Theaters, Inc. v. Cleveland County, 282 N.C. 272, 192 S.E.2d 290 (1972) (a ban against drive-in theaters), which rest on the police power authority to regulate traffic. *See also* Comment, *Planning and Aesthetic Zoning—Getting More Out of What We've Got*, 52 J. URB. L. 1033, 1055–57 (1975).

> of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance.[42]

But for the assumed existence of a nuisance in *Cusack*, this logic could, of course, apply to billboards as well. How this differs from the argument that providing for billboards subject to the neighbors' approval implies a finding by the city that they are free from the stigma of nuisance is difficult to grasp. Indeed, not all courts agree[43] that billboards and the like are nuisances.[44]

Given the difficulty in reconciling this trilogy of cases, and yet considering the reasoning in *Roberge*, it is not surprising that the Ohio Supreme Court concluded that standardless delegation was the central element in understanding the cases:

> The distinction to be drawn between the court's decisions in *Eubank* and *Roberge*, on the one hand, and . . . in *Cusack*, on the other, is this: A reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public.[45]

Not so, said the Federal Supreme Court:

> The thread common to both . . . [*Eubank* and *Roberge*] is the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a *narrow segment* of the community, not to the people at large. . . .
>
> . . . [T]he standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decisionmaking by the people through the referendum process.[46]

Cusack was distinguished from *Roberge* because the waiver in the former case involved the participation of "the persons who are to be most affected . . . ."[47] In this way, the *Eastlake* Court found that the waiver in *Cusack* did not involve a delegation at all.[48] This interpreta-

42. 278 U.S. at 121.

43. State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908). "[A] secure structure upon private property, and one which is not per se an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat and then prohibited." *Id.* at 543–44, 63 S.E. at 123 (citations omitted).

44. Most courts, however, have found billboards to be nuisances. *E.g.*, Bryan v. Chester, 212 Pa. St. 259, 61 A. 894 (1905). *See also* 7 E. McQUILLIN, *supra* note 37, at 330.

45. 41 Ohio St. 2d at 195, 324 N.E.2d at 746.

46. 426 U.S. at 677–78 (emphasis in original).

47. *Id.* at 677–78 n.12 (quoting Thomas Cusack Co. v. City of Chicago, 242 U.S. at 531).

48. *Id.*

tion of the *Eubank-Cusack-Roberge* trilogy apparently blurs several distinct questions: (1) Is the problem addressed by the trilogy the delegation of legislative[49] power to any *limited group ("narrow segment")* of persons rather than to the citizenry as a whole (*i.e.*, all voters[50] in the municipality)? (2) Is the problem the delegation of legislative power to *a limited group of property owners?*[51] (3) Or is the problem the *standardless* delegation of legislative power?

The Supreme Court upheld the Ohio procedure on the ground that a referendum is not a delegation, but instead a direct exercise of "decisionmaking by the people,"[52] a resort to "power reserved by the people to themselves."[53] This avoids the necessity for dealing with the questions just posed, but does not diminish their importance for lawyers who must live with the land use law articulated in these cases.

At stake in question (1) is the problem of scope—how many persons must pass on a matter of land use in order to satisfy the "standards" established by the *Roberge* line of cases? Is a general plebiscite within the boundaries of the governing unit sufficient? (Suffice it to suggest at this point, that if the block-level property control condemned in *Eubank* were instead attempted through a plebiscite of all residents (owners?)[54] of a block-sized unit acting pursuant to appropriate state constitutional and legislative authority, it would likely be valid).[55]

The issue in question (2) is the problem of property-owner control, or, as it was stated in *Eubank*, of "[o]ne set of owners determin[ing] not only the extent of use but the kind of use which another set of

49. "Under Article II, § 1(f) of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are 'authorized by law to control *by legislative* action.'" 41 Ohio St. 2d at 191, 324 N.E.2d at 744 (quoting Myers v. Schiering, 27 Ohio St. 2d 11, 271 N.E.2d 864, 865 (1971)). *See* note 12 *supra*.

50. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

51. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (Poll tax held unconstitutional) ("Lines drawn on the basis of wealth or property, like those of race . . . , are traditionally disfavored.").

The language contained in footnote 12 of the majority opinion in *Eastlake* suggests, in its interpretations of *Cusack*, that this may not be a problem. 426 U.S. at 774 n.12.

52. 426 U.S. at 678.

53. *Id.* at 675.

54. *Cf.* Reynolds v. Sims, 377 U.S. 533, 565 (1964) ("[E]ach . . . citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.").

55. *Cf.* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (involving a political unit less than one square mile in size).

owners may make of their property."[56] Is the referendum involving all voters the only appropriate procedure, or may adjacent property owners in certain cases continue to control property on the authority of *Cusack* as interpreted in *Eastlake*?[57]

The problem in question (3) is, of course, that confronted by the Ohio Supreme Court as it originally understood the operation of Eastlake's ordinance:

> The facts in the present case parallel those in *Roberge*. Here, the city council of Eastlake . . . permitted the use of appellant's 8-acre parcel for multifamily high-rise apartments. But before such ordinance and the use there allowed could become effective, appellant was required to obtain the consent of 55 percent of Eastlake's voting public, in a mandatory referendum. No standards were established whereby that action would be reasonable, rational and unarbitrary.[58]

When are standards required? The Federal Supreme Court's statement that they are not a part of the plebiscite[59] is only a partial answer. For if the standardless delegation of power to a limited group of property owners is an evil, then will the mere provision of standards cure it? If so, what standards would be required? By holding out the prospect of highly localized land use control, the Court encourages legal innovation which is hardly in the public interest because it dilutes property owners' rights and encourages segregation by race and income.[60] *Cusack*, if not stillborn, is now moribund and should have been interred by the *Eastlake* court.[61] Instead, the substantial ambiguities inherent in the *Eubank-Cusack-Roberge* trilogy will, with the *Eastlake* imprimatur, continue to haunt those who try conscientiously to formulate rational land use controls.

III. *EASTLAKE* AND THE "NON-PROBLEM" OF DELEGATION

In approving the Ohio referendum process, the Federal Supreme Court looked to the Ohio constitutional provision[62] which "reserved" the powers of initiative and referendum to the people.[63] The Court

56. 226 U.S. at 143.

57. 426 U.S. at 677–78 n.12. *See* text accompanying note 48 *supra*. *See also* note 35 *supra*.

58. 41 Ohio St. 2d at 195–96, 324 N.E.2d at 746.

59. 426 U.S. at 675.

60. *See* 41 Ohio St. 2d at 199–201, 324 N.E.2d at 748–49 (Stern, J., concurring).

61. Some commentators see continued vitality for *Cusack*. *See* Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803, 821 n.56 (1976).

62. OHIO CONST. art. II, § 1(f). For the text of this provision, see note 12 *supra*.

63. 426 U.S. at 672 n.5.

found that for purposes of federal constitutional law, a referendum cannot be a delegation in violation of the due process clause of the fourteenth amendment.[64] The Supreme Court had earlier upheld referendum voting on property issues in a prior Ohio case, *Hunter v. Erickson*.[65] In *Hunter*, the Court approved the use of referenda generally,[66] but invalidated an Akron law that subjected all ordinances dealing with race and the transfer of property to referendum approval, while excluding from its ambit all other provisions dealing with property. The Court found that this law denied the black petitioner equal protection as it was an impermissible classification based on race.[67]

In the view of the *Eastlake* Court, the problem presented by delegation is the exercise of power by groups such as regulatory bodies which are not responsive to the people.[68] Plebiscites arguably are subject to similar problems. The example is suggested by Madison in *The Federalist No.* 39, cited by the *Eastlake* majority in support of the proposition that governmental power is popularly derived.[69] Madison described republican government as that "which derives all its powers directly or indirectly from the great body of the people."[70] What is the effect then of permitting less than the whole to exercise the power broadly derived? If the delegation is from the legislature to a regulatory agency, then standards are required because popular checks are absent.[71] But where Madison's "great body of the people" delegates power to the legislature and at the same time permits it to be exercised by smaller subgroups of the whole, *e.g.*, citizens of municipalities or other units of local government, then a delegation problem begins to emerge.[72]

It is not sufficient to suggest that abuses are correctable by the popular power to amend constitutions or the implementing statutes. Like the standardless regulatory body, unchecked by the popular will, the municipality also has the potential to operate apart from the will that called it into being and is thus arguably in need of standards to guide it.[73] The *Eastlake* majority's singular emphasis on the referen-

64. *Id.* at 672. *See* notes 14–18 *supra* and accompanying text.

65. 393 U.S. 385 (1969).

66. *Id.* at 392.

67. *Id.* at 393.

68. 426 U.S. at 675.

69. *Id.* at 672.

70. THE FEDERALIST No. 38, at 206 (Smith ed. 1901); *see also id.* at 207.

71. 426 U.S. at 675.

72. *See* Elliott v. City of Clawson, 121 Mich. App. 363, 175 N.W.2d 821 (1970).

73. *But see* 426 U.S. at 675–76 n.10.

dum *qua* direct political participation overlooks this "delegation aspect" of the operation of the Ohio constitutional scheme.

IV. *EASTLAKE* AND ZONING PROCEDURE

The primary concern of the dissents in *Eastlake*, and to a certain extent the majority of the Ohio Supreme Court as well, was the procedure followed in the referendum and its congruence with the requirements of the fourteenth amendment.

Taken together, the dissenting Justices—Powell, Stevens and Brennan—may be said to object to the Ohio zoning provision on procedural grounds. In a one-paragraph dissent, Justice Powell rested his objection on the inherent unfairness of the referendum procedure to individual owners[74]—the problem of "spot zoning" via referendum. This point will be examined in greater detail in Section VI below. The dissenting opinion of Justice Stevens, joined by Justice Brennan, described the procedural problems with *Eastlake* in terms of two issues:

> (1) whether the procedure which a city employs in deciding to grant or to deny a property owner's request for a change in the zoning of his property must comply with the Due Process Clause of the Fourteenth Amendment; and (2) if so, whether the procedure employed by the city of Eastlake is fundamentally fair?[75]

In urging the application of the due process clause of the fourteenth amendment,[76] Justice Stevens argued for a somewhat different position than the majority's holding that a city-wide referendum satisfies the requirements of procedural due process.[77] He insisted that the appropriate question under the due process clause is not simply that of *Village of Euclid v. Ambler Realty Co.*[78]—whether the end product of

74. Stated in full, Justice Powell's dissent is as follows:

> There can be no doubt as to the propriety and legality of submitting generally applicable legislative questions, including zoning provisions, to a popular referendum. But here the only issue concerned the status of a single small parcel owned by a single "person." This procedure, affording no realistic opportunity for the affected person to be heard, even by the electorate, is fundamentally unfair. The "spot" referendum technique appears to open disquieting opportunities for local government bodies to bypass normal protective procedures for resolving issues affecting individual rights.

426 U.S. at 680. The implications of Powell's objections to what may be seen as, (1) narrow specific applications of the police power, (2) by plebiscite, and (3) without an opportunity for a hearing, will be examined more fully in section VI, *infra*.

75. 426 U.S. at 680 (Stevens, J., dissenting).

76. *I.e.*, "No State shall . . . deprive any person of . . . property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

77. 426 U.S. at 672–73.

78. 272 U.S. 365 (1926).

a given zoning decision is arbitrary or capricious.[79] He also argued that the Court should look beyond the unasserted position that the due process clause does not apply at all (since petitioner is not denied "any interest in property").[80] Justice Stevens focused on what he saw as the linchpin of the majority's analysis. He attacked their finding that the Court must be bound by the Ohio Supreme Court's conclusion that changes in the zoning classification of a specific parcel of land were legislative in nature.[81] Instead, Justice Stevens would examine the context of a given procedure to determine whether it is being used to decide "questions of community policy."[82] If so, then regardless of the label applied for state law purposes, "the referendum would be an acceptable procedure."[83] By contrast, Justice Stevens viewed the record in *Eastlake* as failing to show that any such public policy interests were at issue,[84] so that the case simply involved the rights of a single landowner and his neighbors,[85] the determination of which Justice Stevens would treat as a judicial function for purposes of the fourteenth amendment, requiring standards for the adjudication of individual landowners' rights.[86]

Proceeding from Justice Stevens' conclusion that state law determinations as to whether a given procedure is legislative or administrative ought not to control for purposes of the fourteenth amendment, and given that the question at issue in the *Eastlake* referendum was not shown to predominantly involve matters of public policy, it is still necessary to consider whether the opportunity to seek a zoning reclassification is substantial enough to merit constitutional scrutiny under the due process clause. This is so regardless of "whether that opportunity is denominated a privilege or a right."[87] It may now be taken for

79. 426 U.S. at 675, 675–76 n.10, 679 n.13.

80. *Id.* at 680 (Stevens, J., dissenting).

81. *Id.* at 674 n.9. Indeed, it is not clear why, at least for purposes of the fourteenth amendment, this state law determination should be binding on the Federal Supreme Court. This is particularly true when, for purposes of that amendment, the *Eastlake* majority rejected the Ohio Supreme Court's finding that the referendum provision was a delegation of authority. *Id.* at 672.

82. *Id.* at 686, 693.

83. *Id.*

84. *Id.* Justice Stevens took issue with the majority's unsupported observation that such issues might be involved. *Id.* at 688 n.10. *See also id.* at 673 n.7.

85. *Id.* at 693.

86. *Id.* at 693–94. On remand, the Ohio Supreme Court ignored the invitation of both Justice Stevens and the majority to reconsider whether a legislative or administrative function was involved. 48 Ohio St. 2d 47, 356 N.E.2d 499 (1976). *See* 426 U.S. at 674 n.9 (majority opinion), 692 (dissenting opinion).

87. 426 U.S. at 682.

granted that the characterization of that opportunity as a "right" or "privilege" will not affect its status vis-à-vis the due process clause.[88] What is important is whether zoning reclassification and the opportunity to seek it are "property" interests within the protection of the due process clause, and this, at least in the first instance, is a question of state zoning law:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined . . . . It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[89]

State law generally defines the entitlement to seek reclassification of zoned land as a part of land ownership. Zoning is distinguished from a taking, for which compensation would be required, (1) by its foundation in the police power,[90] and (2) by the mutuality of benefits and burdens that fall alike upon the owners of zoned property.[91] Where zoning imposes a hardship on the owner by precluding all reasonable

88. *E.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."). *See also id.* at 571 n.9; 426 U.S. at 682. For an introduction to the subject predating the Court's current clarification of the matter, see generally, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

89. 408 U.S. at 577.

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

91. Not every restriction placed by authority of the state upon the use of property for the general welfare of the state, without payment of compensation constitutes a deprivation of property without due process of law. . . . 'Compensation for such interference with and restriction in the use of property is found in the share that the owner enjoys in the common benefit secured to all.'

Headley v. City of Rochester, 272 N.Y. 197, 202, 5 N.E.2d 198, 200 (1936) (quoting People *ex rel.* Wineburgh Advertising Co. v. Murphy, 195 N.Y. 126, 131, 88 N.E. 17, 19, 155 N.Y.S. 997, 999 (1909)). *See also* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 6-4 (4th ed. 1975).

For a criticism of the notion of zoning's impact on land and its limitations, see 1 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 7.03 (1974).

use, the zoning regulation will be found to be a taking.[92] It is in the mutual application of these principles that the entitlement to seek reclassification emerges.

Most zoning statutes incorporate a means for granting "variances" from the initial zoning scheme.[93] The immediate purpose of such means is to avoid hardship:

> The plain intent and purpose . . . is to permit . . . the amelioration of the rigors of necessarily general zoning regulations by eliminating the necessity for a slavish adherence to the precise letter of the regulations where, in a given case, little or no good on the one side and undue hardship on the other would result from a literal enforcement.[94]

Apart from this pragmatic end, however, there is also the thought that the right to challenge individual zoning classifications is constitutionally mandated.[95] The basis for this theory is that where a unit of local government has established a police power interest for the zoning scheme, the property owner has no hope of releasing the government's "griphold" on his property other than the opportunity to seek a variance or similar change.[96] For these reasons the right to seek a

92. 1 A. RATHKOPF, *supra* note 91, at 6-5, 6-6. *See also* Nichols, *Powers and Duties of the Zoning Board of Adjustment*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 121 (1975). "Although the public interest may justify a restriction on the use of property, it is also required that the owner of private property be allowed a reasonable use of his property, or the zoning ordinance may be held unconstitutional as applied to specific property." *Id.* at 123 (citing cases from Georgia, Maryland, Ohio, and Texas).

93. *E.g.*, Puritan-Greenfield Improvement Ass'n v. Leo, 7 Mich. App. 659, 153 N.W.2d 162 (1967), (considering MICH. COMP. LAWS ANN. § 125.585(d) (1958), which states: "[W]here there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the ordinance, the board of appeals [actually "the legislative body of a city or village (acting) as a board of appeals," *see* MICH. COMP. LAWS ANN. § 125.585(a) (1958)] shall have power . . . to vary or modify any of its rules, regulations, or provisions . . . so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done."). *See also* Green, *The Power of the Zoning Board of Adjustment to Grant Variances From the Zoning Ordinance*, 29 N.C.L. REV. 245 (1951); Reps, *Discretionary Powers of the Board of Zoning Appeals*, 20 L. & CONTEMP. PROB. 280 (1955); Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668 (1969); *Zoning Variances*, 74 HARV. L. REV. 1396 (1961). For a discussion of the current North Carolina decisions, see Brough, *Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases*, 53 N.C.L. REV. 925 (1975).

94. Lee v. Board of Adjustment, 226 N.C. 107, 111, 37 S.E.2d 128, 132 (1946). *See* Puritan-Greenfield Improvement Ass'n v. Leo, 7 Mich. App. 659, 153 N.W.2d 162 (1967).

95. Bryden, *Zoning: Rigid, Flexible, or Fluid?*, 44 J. URB. L. 287, 295-96 (1967); *Zoning Variances*, 74 HARV. L. REV. 1396 & n.5 (1961).

96. Biske v. City of Troy, 381 Mich. 611, 166 N.W.2d 453 (1969) (per curiam). The term "griphold" is the court's. *Id.* at 457. *Biske* is discussed in 1 N. WILLIAMS, *supra*

zoning reclassification or variance must be considered at least an aspect of the right to possess and use real property, and thus cognizable under the fourteenth amendment.

Given the significance of the right to seek a reclassification in zoning, it is necessary to consider next the due process requirements applicable to rezoning. The Ohio Supreme Court relied on an interpretation of due process in *McGautha v. California*.[97] *McGautha* upheld a California statute that permitted guilt and penalty to be determined in two separate proceedings, and an Ohio statute permitting both guilt and penalty to be considered in a single trial. The issue was whether standards were required for the jury, and the majority held that the absence of definitive standards did not violate the Constitution.

Justice Brennan, in a dissenting opinion joined by Justices Douglas and Marshall, surveyed the judicial history of the requirement of procedural safeguards.[98] Two portions of his survey were relied upon by the Ohio Supreme Court:

> [D]ue process requires that procedures for the exercise of state power be structured in such a way that, ultimately at least, fundamental choices among competing state policies are resolved by a responsible organ of state government.[99]
>
> . . . .
>
> In my view, the cases discussed above establish . . . the following propositions. *First*, due process of law requires the States to protect individuals against the arbitrary exercise of state power by assuring that the fundamental policy choices underlying any exercise of state power are explicitly articulated by some responsible organ of state government.[100]

Applied by the Ohio court to the municipal zoning process, Brennan's formulation would then require

> [t]hat procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against the arbitrary exercise of municipal power, by

note 91, at § 6.08. *See also* Comment, *Planning and Aesthetic Zoning—Getting More Out of What We've Got*, 52 J. URB. L. 1033, 1047–50 (1975). Note that under Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972), the timing of that interest may be regulated without constitutional difficulty. *See also* Nickola v. Township of Grand Blanc, 394 Mich. 589, 603–04, 232 N.W.2d 604, 608 (1975); Sabo v. Township of Monroe, 394 Mich. 531, 232 N.W.2d 584 (1975).

97. 402 U.S. at 248–312 (1971) (Brennan, J., dissenting).

98. *Id.* at 248–71.

99. *Id.* at 256.

100. *Id.* at 270.

> assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government.[101]

The constitutional problem with plebiscite zoning when viewed from this perspective is that it incorporates no mechanism for effectively putting the issue of reclassification before the voters in such a way that the landowner can (1) tell his side of the story and (2) determine whether the decision reached rests on more than whim or caprice (*i.e.*, is not arbitrary).[102] An inquiry under the *Euclid* standard as to the reasonableness of the result of the reclassification (or failure to reclassify) avoids rather than resolves this problem.[103]

The landowner is either left at the mercy of his community *in gross*[104] or is forced to seek to tell his story in a larger forum—asserting his "due process" through the election machinery.[105] Procedural fairness, however, has at least some application to the voting process.[106] The greatest difficulty with recourse to plebiscite lies in its potential for differential results based on wealth, which are constitutionally permissible under present law.[107] The landowner who has greater funds can better carry his case to the electorate in order to

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101. Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d at 196, 324 N.E.2d at 746.

As of September, 1977, only one court outside Ohio had expressed approval of Justice Brennan's formulation. *See* Andover Dev. Corp. v. New Smyrna Beach, 328 So. 2d 231, 237 (Fla. Ct. App. 1976) (quoting Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), *rev'd and remanded*, 426 U.S. 668 (1976)). *But see* Furman v. Georgia, 408 U.S. 238, 248 n.11 (1972) ("The tension between [*Furman*] . . . and *McGautha* highlights, in my view, the correctness of Mr. Justice Brennan's dissent in that case [*McGautha*]. . . .") (Douglas, J., concurring).

102. 426 U.S. at 680–86. Williams explains the problem this way:

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

1 N. WILLIAMS, *supra* note 91, at 110.

103. *See* 426 U.S. at 694–95 n.16 (Stevens, J., dissenting).

104. *See* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912).

105. 426 U.S. at 675–76 n.10.

106. *See generally, Developments in the Law—Elections*, 88 HARV. L. REV. 1111 (1975).

107. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *But cf.* Boddie v. Connecticut, 401 U.S. 371 (1971) (financial barriers limiting accessibility to the courts violated due process).

persuade them to approve a reclassification than can the impecunious landowner.[108] From this problem arise a number of additional problems, involving the ability to take one's case to the electorate, which are beyond the scope of this article.[109]

A second, related problem is that, as a process, plebiscite zoning is decidedly second-rate. In *Eastlake*, the majority likens the referendum to a town meeting.[110] Both involve a legislative decision by voters on a direct rather than a representative basis. There, however, the similarity ends. Town meetings require an assembly of all voters who wish to participate in one location at a given time; a referendum does not. More importantly, town meetings involve discussions and alterations of proposals—the give-and-take of the legislative process; a referendum is simply a vote. Finally, town meetings provide the opportunity for equal access to the legislative ear; as already discussed, a referendum provides no such equality.

V. PLEBISCITE ZONING AND THE PROBLEM OF SUBSTANTIVE DUE PROCESS

Apart from the procedural difficulties of plebiscite zoning just discussed, there is the further problem of judicial review of the "substantive results" of referendum decisionmaking. As noted above, the applicable test is the "arbitrary and capricious" standard of *Village of Euclid v. Ambler Realty Co.*[111] The problem with this standard is that it frequently tests nothing. So much passes muster under this formulation, or its equal protection analogue, that one leading commentator has called it "virtual judicial abdication"[112] in the latter context.

In the typical case, when a zoning classification is attacked under *Euclid*, the reviewing court will be able to consider how the challenged classification relates to the overall scheme adopted by the municipality.[113] Where the classification at issue has been made by a formal legislative body, and not by referendum, the court may also be aided by minutes, reports, and other legislative documents. These will

108. *See Mark* 4:25 ("For to him who has will more be given; and from him who has not, even that which he has will be taken away.").

109. The immediate problem of deciding the validity of the Eastlake provision that imposed election costs of the referendum on the landowner, was avoided on the state level by a finding that the entire procedure was unconstitutional. 41 Ohio St. 2d at 188–89, 324 N.E.2d at 742. *See* 426 U.S. at 671 n.3.

110. 426 U.S. at 672–73.

111. 272 U.S. 365 (1926). See notes 18–20 *supra* and accompanying text.

112. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972).

113. For a discussion of the requirement that a municipality have a zoning plan in order to zone at all, see notes 121–29 *infra* and accompanying text.

all help the court determine whether the classification under attack is "arbitrary and capricious," or instead bears some rational relationship to the municipality's recognized interest in protecting the health and safety, as well as the overall quality of life of the community.[114] Even where a town meeting is the legislative forum, there may be records of the proceedings to help establish the purposes of the legislative act under attack. However, where a reclassification is decided by municipal referendum, there is much less for the reviewing court to examine. For example, in Forest City Enterprises' attempted reclassification, the only evidence bearing on the reasonableness of the result arrived at by the voters is the pre-existing scheme, because both the planning commission and the city council had advocated a change in the zoning of the affected parcel. While this evidence is probably enough to sustain the validity of voters' action in *Eastlake*,[115] perhaps courts should require more to sustain a substantive result where the process, even though valid in terms of procedural due process,[116] provides less assurance that the proposal was in fact considered in terms of valid police power interests.[117]

The problems of zoning-by-plebiscite are further exacerbated if one takes *Eastlake* a step beyond its facts. Assume that initial zoning—not merely reclassification—is the subject of referendum. The procedure is unchanged, and therefore it would satisfy procedural due process requirements under *Eastlake*. The validity of the substantive results of that process—the zoning classifications—presents greater difficulties, however. Unless the voters act to approve or disapprove a plan of zoning which subjects all property to zoning restrictions, there is no articulated basis from which to find a reasonable regulation of property rights, because there is neither a legislative record nor a legislative scheme. In the case where zoning restrictions have been imposed by referendum, without first implementing a plan, the only rational bases for the restriction will be those supplied by the court. Here again, one should query whether this is proper at all,[118] especially where it is fatuous to assume that the plebiscite legislative "process" of referendum-without-meeting involved such considerations.

114. *E.g.*, Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

115. The Supreme Court did not decide the issue, but there is language in the case suggesting that either "multi-family high rise" or "light industrial" would be a reasonable classification of Forest City Enterprises' property. 426 U.S. at 673 & n.7 (majority opinion), 686–88 & n.10 (dissenting opinion).

116. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

117. *See* note 110 *supra* and accompanying text.

118. *See* GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 591–92 (9th ed. 1975).

The problem of finding a basis for due process review of referendum zoning classifications leads to a subsidiary problem—the scope of permissible judicial inquiry into legislative motivation in the absence of some other indicia of purpose.[119] Since *Fletcher v. Peck*[120] it has been the rule that courts are loath to inquire into the motives of legislators. In this respect, *Eastlake* presents the easy case. The city already had a comprehensive zoning plan in effect,[121] which evidences some measure of purpose.[122] As discussed above, however, the voters in a plebiscite do not leave a record which will indicate a purpose. In addition, although some courts have viewed the requirement of a comprehensive zoning plan as essential to satisfying due process requirements,[123] others have not.[124] For example, in *Raabe v. City of Walker*,[125] the Michigan Supreme Court found no master plan as required by statute[126]

> save only as may be uncertainly implied from the city's original zoning ordinance or carried in the possibly variant memories of city officials. Thus there is no record to which one rightfully interested may turn for reliable comparison of what may have been planned originally for Walker township and Walker city, and thereafter effectuated to great or less extent, with any proposed amendatory enactment.[127]

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119. It should be emphasized that this inquiry relates solely to the search for a legislative purpose against which to test a given legislative act. It should not be confused with an inquiry into the presence or absence of standards with which to test the validity of a procedure. As the Supreme Court noted, the latter inquiry has no relevance to *legislative* procedures because "there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters." 426 U.S. at 675–76 n.10.

120. 10 U.S. (6 Cranch) 87, 130–31 (1810). *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977).

121. 426 U.S. at 670.

122. *See generally*, Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

123. *E.g.*, Speakman v. Mayor & Council, 8 N.J. 250, 256, 84 A.2d 715, 718 (1951). *See also* Haar, *supra* note 122, at 1170–72. "Running through the various decisions emphasizing forethought as the essence of comprehensiveness is the realization that only an ordinance drawn with forethought can be a reasonable ordinance, and only a reasonable ordinance can hurdle the constitutional barriers of due process and equal protection." *Id.* at 1171.

124. Haar, *supra* note 122, at 1157.

> [T]here appears to have been a judicial tendency to interpret the statutory directive that zoning ordinances shall be "in accordance with a comprehensive plan" as meaning nothing more than that zoning ordinances shall be comprehensive—that is to say, uniform and broad in scope of coverage. The lack of a master plan is deemed irrelevant to the validity of zoning measures.

Id.

125. 383 Mich. 165, 174 N.W.2d 789 (1970). The Court held that the property in question could not be rezoned from "agricultural" to "heavy industrial."

126. MICH. COMP. LAWS ANN. § 125.31 (1976).

127. 383 Mich. at 176, 174 N.W.2d at 795.

Yet the absence of the plan was not fatal to the zoning scheme: "The absence of a formally adopted municipal plan, whether mandated by statute or not, does not of course invalidate municipal zoning or rezoning. But it does . . . weaken substantially the well known presumption which, ordinarily, attends any regular-on-its-face municipal zoning ordinance or amendment. . . ."[128] The Connecticut Supreme Court followed similar logic when it concluded: "The town's comprehensive plan of zoning is to be found in the scheme of the zoning regulations themselves, which are primarily concerned with the use of property."[129] It remains to be seen whether a zoning "scheme" which arises out of the lesser legislative process of plebiscite zoning will be viewed as kindly when specific results are attacked as arbitrary and capricious.

VI. PLEBISCITES AND THE PROBLEM OF SPOT ZONING

Related to the problem just discussed of finding a proper legislative purpose, is what Justice Powell saw as the problem of the " 'spot' referendum technique."[130] Spot zoning, as it is generally conceived of in state law, arises from a zoning ordinance, or amendment thereto, that creates a small area of inconsistent use within a larger zone.[131] Such inconsistency in the treatment of otherwise similar property deprives the ordinance of its requisite relationship to the legitimate exercise of police power.[132] The inconsistency is demonstrated by a factual showing that the property in question has been treated differently than other property, and that such treatment is not based on actual differences in the property. Frequently, such special treatment subjects the ordinance to an examination of its conformity with an overall objective or comprehensive plan.[133]

But, as noted in the preceding section, a plan is not always required. Where this is the case, what restraints are available to avoid spot zoning resulting from a plebiscite? The easy answer urged by the *Eastlake* Court is that any zoning result not up to *Euclid* standards, i.e., not reasonably related to some legitimate police power

128. *Id.* at 178, 174 N.W.2d at 796. *See also* Sabo v. Township of Monroe, 394 Mich. 531, 232 N.E.2d 584 (1975). For a highly critical view of zoning decisions in the Michigan courts, see 1 N. WILLIAMS, *supra* note 91, at 129.

129. Loh v. Town Plan. & Zoning Comm'n, 161 Conn. 32, 35, 282 A.2d 894, 896 (1971).

130. 426 U.S. at 680 (Powell, J., dissenting).

131. *E.g.*, Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972); Penning v. Owens, 340 Mich. 355, 65 N.W.2d 831 (1954).

132. *E.g.*, McNutt Oil & Ref. Co. v. Brooks, 244 S.W.2d 872 (Tex. Civ. App. 1951).

133. Orr v. Hapeville Realty Inv., 211 Ga. 235, 85 S.E.2d 20 (1954).

interest, will not stand.[134] The limitations of this viewpoint have already been discussed.[135] What is left is a slender reed of judicial reluctance in some states to permit the extension of the plebiscite to zoning matters.[136] The issues presented in such cases are either an absence of authority to submit the zoning proposal to plebiscite[137] or conflicts with general statutory provisions on zoning procedure.[138]

Other states have upheld plebiscite zoning.[139] The problem of spot applications of the zoning power resulting from such a procedure is

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134. 426 U.S. at 676.

135. See notes 104–30 *supra* and accompanying text.

136. For example, the use of initiative and referendum in zoning matters has been *disapproved* in:

Arizona.

> [W]e hold that the initiative process is not available as a mode for amending a comprehensive zoning plan. It is an irreconcilable conflict with the due process clause of the United States Constitution, 14th Amendment. *See generally*, Eubank v. City of Richmond, 226 U.S. 137 . . ., State of Washington *ex rel.* Seattle Title & Trust Co. v. Roberge, 278 U.S. 116 . . . and the express provisions of the state statute which delegated zoning powers to 'the governing body of an incorporated city.'

City of Scottsdale v. Superior Court, 103 Ariz. 204, 207–08, 439 P.2d 290, 293–94 (1968).

California. Laguna Beach Taxpayers' Ass'n v. City Council of Laguna Beach, 187 Cal. App. 2d 448, 9 Cal. Rptr. 775 (1960); Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929). *But cf.* Bayless v. Limber, 26 Cal. App. 3d 463, 102 Cal. Rptr. 647 (1972) (upheld initiative zoning in a chartered city, as contrasted with the initiative of zoning laws in general law cities, which were held invalid in the earlier line of cases). *See* Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74 (1976); Comment, *Zoning by Initiative to Satisfy Local Electorates: A Valid Approach in California?*, 10 CALIF. W.L. REV. 105 (1973).

Michigan. Korash v. City of Livonia, 38 Mich. App. 626, 196 N.W.2d 883 (1972); Elliott v. City of Clawson, 21 Mich. App. 363, 175 N.W.2d 821 (1970).

Missouri. State v. Donohue, 368 S.W.2d 432 (Mo. 1963) (initiative).

Nebraska. Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956).

Nevada. Forman v. Eagle Thrifty Drugs & Mkts., Inc., 89 Nev. 533, 516 P.2d 1234 (1974).

New Jersey. Smith v. Township of Livingston, 106 N.J. Super. 444, 256 A.2d 85 (1969).

Utah. Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964); Dewey v. Doxey-Layton Realty Co., 3 Utah 2d 1, 277 P.2d 805 (1954).

137. *E.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968) (alternative holding).

138. *E.g.*, Laguna Beach Taxpayers' Ass'n v. City Council of Laguna Beach, 187 Cal. App. 2d 448, 9 Cal. Rptr. 775 (1960).

139. For example, the use of initiative or referendum in zoning matters has been *approved* in:

California. San Diego Bldg. Contr. Ass'n v. City Council of San Diego, 35 Cal. App. 3d 376, 110 Cal. Rptr. 758 (1974) (chartered cities only). *See* note 107 *supra*.

Colorado. City of Fort Collins v. Dooney, 178 Colo. 25, 496 P.2d 316 (1972).

Missouri. State v. Reim, 445 S.W.2d 336 (Mo. 1969) (referendum), *cf.* State v. Donohue, 368 S.W.2d 432 (Mo. 1963) (initiative invalid).

Ohio. Hilltop Realty v. City of S. Euclid, 110 Ohio App. 535, 164 N.E.2d 180 (1960); State v. Hitt, 155 Ohio St. 529, 99 N.E.2d 659 (1951).

thus real and present in some states. Finally, in states such as North Carolina, which lack general statutory plebiscite provisions, the difficulties are more remote,[140] but nonetheless likely, if popular pressure for local land use control develops after the *Eastlake* decision.

VII. *ARLINGTON HEIGHTS* AND ITS BACKGROUND

The Supreme Court did not invite a comparative examination of *Eastlake* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[141] That is not surprising. Read jointly, the cases should trouble both those concerned with land use and those interested in securing better housing for America's urban poor.[142] While *Eastlake* articulates the constitutional acceptability of the exclusivist mechanism of referendum zoning under the due process clause, *Arlington Heights* limits constitutional inquiry into the racial impact of zoning laws under equal protection principles.

In *Arlington Heights*, the Court had before it a claim that a failure to rezone a fifteen-acre parcel in Arlington Heights, Illinois, from single-family to multiple-family classification in order to permit the

140. Thus, despite the language of the North Carolina Constitution ("All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. CONST. art. I, § 2.), political power is exercised by the General Assembly, *id.* art. II, § 1, unless lawfully delegated, *e.g.*, *id.* art. VII, § 1 (local government), and even the constitutional amending process itself is under the strict control of the General Assembly, *id.* art. XIII, § 1 ("No Convention of the People of this State shall ever be called unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and unless the proposition 'Convention or No Convention' is first submitted to the qualified voters of the State at the time and in the manner prescribed by the General Assembly.") and § 2 ("The people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article [*i.e.*, by Convention pursuant to § 1 quoted *supra*, or by approval of three-fifths of the members of each house of the General Assembly pursuant to § 4], but in no other way.") These provisions contrast sharply with California's constitutional reservation of the powers of initiative and referendum, CAL. CONST. art. 4, § 1; *see* Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717 (1966), and Michigan's statutory delegation of such powers, MICH. COMP. LAWS ANN. §§ 117.4(i), 125.581–.591 (1976). *See* Elliott v. City of Clawson, 21 Mich. App. 363, 175 N.W.2d 821 (1970) (this provision was held *not* to extend to zoning). It will be interesting to see whether states lacking plebiscite provisions will be encouraged by the *Eastlake* decision to adopt them.

141. 429 U.S. 252 (1977). In fact, *Arlington Heights* makes no mention of *Eastlake* which was decided less than a year earlier. Indeed, the majority opinion in *Arlington Heights* refers to "the generous *Euclid* test, recently reaffirmed in *Belle Terre*," 429 U.S. at 263, rather than the more recent and extensive exposition of *Euclid* in *Eastlake*, 426 U.S. at 676.

142. *See generally*, Housing and Community Development Act of 1974, 42 U.S.C. § 1437(f) (Supp. V 1975). For a discussion of the housing problem, see United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

construction of federally subsidized housing for low-and-moderate income persons, was racially discriminatory and violative of the fourteenth amendment.

Events underlying the litigation began in 1970, when a religious order in Arlington Heights decided to devote a portion of vacant land that it owned there to low-and-moderate income housing. Minority representation in Arlington Heights was scant: "According to the 1970 census, only 27 of the Village's 64,000 residents were black,"[143] and the religious leaders of the order sought to alter that pattern by making additional federally subsidized housing available. They approached a Chicago developer, Metropolitan Housing Development Corporation (MHDC), which had prior experience with federally assisted housing, and ultimately entered into a lease/purchase agreement with MHDC for the land. MHDC then applied to the Village of Arlington Heights for rezoning of the fifteen-acre tract from a single-family to a multiple-family classification. When that request was denied, MHDC and certain potential minority tenants brought suit in federal district court alleging that the denial was based on racial discrimination in violation *inter alia* of the fourteenth amendment and the Fair Housing Act of 1968.[144] The district court ruled against the plaintiffs,[145] and they appealed. The Seventh Circuit reversed after finding that the "ultimate effect"[146] of the denial was discrimination based on race in violation of the fourteenth amendment.[147] The Supreme Court reversed.

The principal issue was the appropriate test to apply to Arlington Heights' refusal to rezone. The zoning classification was not (and apparently could not be) attacked as unreasonable under due process principles.[148] Thus, the traditional test of rationality mandated by *Euclid*, and reaffirmed in *Belle Terre*[149] and *Eastlake*,[150] was of no help to MHDC and its fellow plaintiffs. What was needed was a basis for utilizing a more exacting scrutiny. The court of appeals found that such a basis existed under the equal protection clause.[151] In arriving at

143. 429 U.S. at 255.

144. 42 U.S.C. §§ 3601–19 (1970).

145. 373 F. Supp. 208 (1974).

146. 517 F.2d 409, 414 (7th Cir. 1975).

147. *Id.* at 415.

148. 429 U.S. at 263. "[T]he heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*." *Id.* *See* note 68 *supra*.

149. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

150. 426 U.S. at 676. *See* text accompanying note 104 *supra*.

151. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 415 (7th Cir. 1975), *rev'd and remanded*, 429 U.S. 252 (1976). For earlier cases in which classifications based on race mandated strict scrutiny under the equal protection clause, see Hunter v. Erickson, 393 U.S. 385, 391–92 (1969); McLaughlin v. Florida, 379 U.S.

that result, the Seventh Circuit first examined several earlier cases. The court noted *James v. Valtierra*,[152] which involved a California constitutional provision excluding low income housing that had not first been approved at a community election. In *Valtierra*, those eligible for low income housing argued that the general referendum requirement was unconstitutional, but the Court held that mere disparity in impact on a given group did not require strict scrutiny. The Court concluded that "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection."[153] Interestingly, in *Valtierra*, the decision whether or not to permit low income federal housing was put to a referendum vote, foreshadowing the result postulated at the outset of this article. The court of appeals considered *Valtierra* in passing judgment on Arlington Heights' failure to rezone. It concluded that *Valtierra* had rejected the notion that racial disparity alone meant racial discrimination.[154]

The Seventh Circuit, however, accepted plaintiff's contention that more than results must be considered when racial discrimination is alleged.[155] Such an expanded inquiry was justified principally by reliance on *Kennedy Park Homes Association v. City of Lackawanna*.[156] The Seventh Circuit relied on *Kennedy Park Homes* for the rule that "[t]he impact of the Village's refusal to rezone 'must be assessed not only in its immediate objective but its historical context and ultimate effect.' "[157] As applied by the court of appeals in *Arlington Heights*, it resulted in a finding of "racially discriminatory ef-

184, 194 (1964); Korematsu v. United States, 323 U.S. 214, 216 (1944). *See also* Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 356 (1949).

152. 402 U.S. 137 (1971).

153. *Id.* at 142.

154. "*James* [*v. Valtierra*] supports our analysis that racial disparity alone as it relates to the housing project under consideration does not amount to racial discrimination." 517 F.2d at 413.

155. *Id. Valtierra* distinguished Hunter v. Erickson, 393 U.S. 385 (1969), which rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." . . . In *Hunter* the citizens of Akron had amended the city charter to require that any ordinance regulating real estate on the basis of race, color, religion, or national origin could not take effect without approval by a majority of those voting in a city election. The Court held that the amendment created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election.

402 U.S. 137, 140–41 (citation omitted). *See also* note 54 *supra*.

156. 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

157. 517 F.2d at 413 (quoting Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d at 112). In *Kennedy Park Homes*, the ultimate effect of racial discrimination in violation of the equal protection clause was found from various city actions including the declaration of a moratorium on the development of new subdivisions shortly after steps were taken to construct low income housing. *See* 436 F.2d at 111.

fects."[158] Because of this, the court subjected the zoning decision to strict constitutional scrutiny, so that it could be held valid only upon a showing of "compelling public interest."[159] Judged against this standard, the ordinance was held invalid. Neither the policy "of maintaining the integrity of the zoning plan"[160] (permitting apartments only as a buffer between commercial and residential areas) nor "protecting neighborhood property values,"[161] the two bases for the ordinance proffered by the Village, met this exacting standard. The *Kennedy Park Homes* rationale on which the court of appeals relied had been rejected, however, by the time *Arlington Heights* reached the Supreme Court.

That rejection was made clear in *Washington v. Davis*,[162] a case which holds the key to *Arlington Heights*. In *Washington*, the Supreme Court concluded that the racially disproportionate impact of a governmental act or decision, irrespective of the purpose behind it, does not violate the equal protection component of the due process clause of the fifth amendment.[163] The subject of the action in *Washington* was a test of "verbal ability, vocabulary, reading and comprehension"[164] required of those applying to be police officers with the District of Columbia Metropolitan Police Department ("Test 21"). As read by the Supreme Court, the court of appeals had held that a showing of a disproportionate impact on black applicants was sufficient to "establish a constitutional violation, absent proof by petitioners that the test was an adequate measure of job performance in addition to being an indicator of probable success in the training program, a burden which the court ruled petitioners had failed to discharge."[165] The Supreme Court reversed and held that racially disproportionate impact was not sufficient.

What is more pertinent to the *Arlington Heights* decision is a passage from *Washington* in which several prior appellate-level decisions were noted and rejected.[166] The inclusion of *Arlington Heights*

158. 517 F.2d at 415.

159. *Id.*

160. *Id.*

161. *Id.*

162. 426 U.S. 229 (1976). *See* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

163. Bolling v. Sharpe, 347 U.S. 497 (1954). *Bolling* extended to the federal government the disabilities placed on state discrimination by the equal protection clause of the fourteenth amendment in Brown v. Board of Educ., 347 U.S. 483 (1954).

164. 426 U.S. at 235.

165. *Id.* at 237. *See* Davis v. Washington, 512 F.2d 956, 959–61, 963 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

166. 426 U.S. at 244–45 & n.12.

in this list foreshadowed its demise even before it was argued.[167] The relevant portion of the opinion reads as follows:

> Both before and after *Palmer v. Thompson*[168]. . . various Courts of Appeals have held in several contexts . . . that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.[169]

The cases cited by the Court, with which it disagreed,[170] included *Kennedy Park Homes Association v. City of Lackawanna*, [171] and *Arlington Heights*.[172]

The immediate question—whether *Washington* may be said to invalidate these zoning cases—is most likely to be answered in the affirmative. Four Justices joined Justice White in his majority opinion.[173] Only three Justices objected to the summary treatment of the cases listed above. Justice Stevens stated: "Specifically, I express no opinion on the merits of the cases listed in n.12 of the Court's opinion."[174] And Justice Brennan, with Justice Marshall concurring, stated in a dissenting opinion:

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167. *Washington* was decided June 7, 1976. *Arlington Heights* was argued on Oct. 13, 1976.

168. 403 U.S. 217 (1971) (closing of five public swimming pools after a desegregation decree could not be challenged as invidious on constitutional grounds). *See generally* Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 26–29 (1976).

169. 426 U.S. at 244–45 (footnote omitted).

170. *Id.* at 244 n.12.

171. 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (zoning).

172. 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977) (zoning). Other cases in the Court's list included Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970). *See* notes 5–11 *supra* and accompanying text.

173. Burger, C.J., Blackmun, Powell, Rehnquist, JJ. Justice Stevens joined in Parts I and II of the opinion of the Court but filed a concurring opinion. *See* note 174 *infra* and accompanying text.

174. 426 U.S. 254 n.* (Stevens, J., concurring). His caveat preceding this note is likewise cautionary with respect to "overriding" the majority's rejection of impact absent evidence of impermissible motivation:

> [T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not

> arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Gomillion v. Lightfoot*, 364 U.S. 339 [(1960)] or *Yick Wo v. Hopkins*, 118 U.S. 356 [(1886)] it really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.

426 U.S. at 254.

Implicit in Justice Stevens' view is the concept of a threshold test for invidious discrimination, so that up to a point, disproportionate impact is merely evidence of impermissible motivation, but beyond that point it is conclusive on the issue and motivation becomes irrelevant. In *Gomillion*, the legislative redrawing of the municipal boundaries of Tuskegee, Alabama, excluded from the city all but four or five of some 400 Negro voters while not excluding any white voters or residents. This was held to have deprived black voters of their right to vote in municipal elections on account of race in violation of the fifteenth amendment. The Court did not require an inquiry into motivation in order to invalidate the redrawing of the boundaries:

> When a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution . . . did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens.

364 U.S. at 346.

In *Yick Wo* a facially neutral municipal ordinance purporting to regulate laundries was applied in such a way that two hundred two Chinese were not permitted to operate laundries while eighty similarly situated non-Chinese were entitled to operate their laundry businesses. The ordinance was held to violate the equal protection clause of the fourteenth amendment. By contrast to *Gomillion*, the racial impact of the application of the ordinance in *Yick Wo* was arguably only evidence of the equal protection infirmities of the ordinance—the opportunity for the arbitrary exercise of governmental power unguided by legislative guidelines among those similarly situated. This construction of *Yick Wo*—what might be termed the original understanding of *Yick Wo*, (*cf.* Tussman and tenBroek, *supra* note 151, at 342, 359 n.36)—is amply supportable from the opinion by Justice Matthews:

> The power given . . . is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.
>
> . . . .
>
> The ordinance . . . does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure.

118 U.S. at 366–68. It is only after the formal development of this view of equal protection that the Court turns to the evidence of its unequal application to Chinese petitioners. *Id.* at 368.

The importance of this distinction between *Yick Wo* and *Gomillion* is clarified in *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.) (three-judge court), *aff'd per curiam*, 336 U.S. 933 (1949), a case discussed later in the context of evidence required to show discriminatory intent. *See* text accompanying note 186 *infra*. The *Schnell* court apparently interpreted *Yick Wo* as condemning the lodging of arbitrary discretion in a board:

> [I] feel constrained to comment upon the propriety of footnote 12. . . . One of the cases "disapproved" therein is presently scheduled for plenary consideration by the Court in the 1976 Term. *Metropolitan H.D. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (CA 7), cert. granted, 423 U.S. 1030 (1975). If the Court regarded this case only a few months ago as worthy of full briefing and argument, it ought not be effectively reversed merely by its inclusion in a laundry list of lower court decisions.[175]

Given the statement of the majority (except Justice Stevens quoted above), and because the dissenters speak of these cases as "disapproved" and "effectively reversed," and because *Arlington Heights* was in fact reversed, it is difficult to contend that any of these cases remain good law. Even if the demise of the zoning cases listed may not be as serious as it appears at first blush, it will certainly hamper efforts to provide housing opportunities for the urban poor of all races in previously all-white suburbs. And even though it will not eliminate all judicial scrutiny of exclusionary zoning policies, the undermining of these cases has clearly narrowed the focus of possible legal attacks. The *Arlington Heights* decision forces one to look to statutory and state law solutions rather than federal Constitutional remedies for exclusionary zoning. The availability of the Fair Housing Act of 1968[176] should ameliorate the problem vis-à-vis housing. This point will be considered below in Section IX.

> To state it even more plainly, the board, by the use of the words "understand and explain [any article of the Federal Constitution]," is given the arbitrary power to accept or reject any prospective elector that may apply, or, to use the language of Yick Wo v. Hopkins, 118 U.S. 356, 366 . . . . "actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent."

81 F. Supp. at 878. In *Schnell*, the court had two sorts of evidence to consider—the unequal application of the Boswell Amendment resulting in a disproportionate impact on blacks seeking the franchise, and extrinsic evidence of impermissible motivation surrounding the adoption of the Boswell Amendment. *Id.* *See* text accompanying note 186 *infra*. The majority in *Arlington Heights* no doubt cited it for its latter point. *See* 429 U.S. at 267.

Problems arise only in attempting to reconcile *Yick Wo* and *Gomillion*. If, as Justice Stevens suggested, there is a threshold test for invidious discrimination apart from intent, then how does *Yick Wo* support it? *Gomillion* was decided under the fifteenth amendment. Is a threshold test appropriate under fifteenth, but not under fourteenth amendment cases where a motivation test is required? Language in *Schnell* suggests that no different test applies under the respective amendments. 81 F. Supp. at 876; *cf.* Gomillion v. Lightfoot, 364 U.S. 339, 349 (Whittaker, J., concurring) (would have grounded the decision on the equal protection clause of the fourteenth amendment, rather than on the fifteenth amendment).

175. 426 U.S. at 257 n.1 (Brennan, Marshall, JJ., dissenting).

176. 42 U.S.C. §§ 3601–19 (1970). *See Arlington Heights*, 429 U.S. 252 (1977); *accord* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

But alternative statutory remedies are not available for all the cases summarily undercut by footnote twelve in *Washington*. This means further civil rights legislation will be required to remedy the problems pinpointed by those cases. Perhaps the best example of this is *Hawkins v. Town of Shaw*,[177] which concerned disparities in the provision of municipal services between black and white areas of Shaw, Mississippi—more specifically, differences in street paving, street lighting, sanitary sewerage, surface water drainage, water mains, fire hydrants, and traffic control signs. The Fifth Circuit found Shaw to be a town in which "racial segregation is almost total."[178] Ninety-seven percent of the black residents of the town lived in neighborhoods where there were no white residents. The evidence before the court reflected a distribution of city services that approximated the town's pattern of racial segregation.[179]

In *Hawkins*, the court of appeals examined the differences in municipal services in terms of their impact on whites and blacks and, finding no compelling state interest to justify them, concluded that they violated the equal protection clause of the fourteenth amendment. Since there was no evidence of intent to discriminate, the case rests entirely on an assessment of "the discriminatory *results* of Shaw's administration of municipal services."[180] For this reason, it seems clear that the rule of *Washington v. Davis* and *Arlington Heights* would mandate a different result today. Yet there is no apparent statutory analogy to the Fair Housing Act to cover the situation in *Hawkins*. Without the ability to scrutinize results alone under the fourteenth amendment, such discrimination will go unreviewed and unremedied.[181]

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177. 437 F.2d 1286 (5th Cir. 1971).

178. *Id.* at 1288.

179. Ninety-seven percent of those in houses fronting on unpaved streets are black, *id.* at 1289; no high-power, mercury vapor street lights were installed in black occupied areas, *id.*; 99 percent of white residents, as compared to 80 percent of black residents, were served by sanitary sewers, *id.* at 1290.

180. *Id.* at 1292.

181. It is easy to understand Justice Stevens' problem with the summary treatment of the cases listed by the majority, 426 U.S. at 244 n.12, and his express reservation of opinion on the merits of those cases. *Id.* at 254 & n.*. The facts in *Hawkins* closely approximate those in *Yick Wo* and certainly *Gomillion*. As Justice Stevens noted, the line between intent and impact is frequently blurred, and statistical and other evidence becomes an effective indication of intent. The real difficulty in reconciling the standards laid down in the majority opinion with the disapproved cases in footnote 12 is illustrated by *Hawkins*. In *Arlington Heights*, the Court says: "Absent a pattern as stark as that in *Gomillion* or *Yick Wo* [cases in which 'the evidentiary inquiry is . . . relatively easy' apparently since the 'statistical pattern[s]' are ones of 'extremes,' 429 U.S. at 266 & n.13], impact alone is not determinative." *Id.* at 266. But what is the evidence in

VIII. TESTS FOR DISCRIMINATION IN *ARLINGTON HEIGHTS*

Arlington Heights sets forth a partial[182] series of "evidentiary sources" by which racially discriminatory intent or purpose may be detected: (1) the "historical background of the decision"; (2) "[t]he specific sequence of events leading up to the . . . decision"; (3) "[d]epartures from the normal procedural sequence"; (4) "[s]ubstantive departures" (*i.e.*, a decision contrary to the facts normally weighed by the decision-maker) and (5) "legislative or administrative history."[183] The application of these tests, as the following discussion demonstrates, is not easy; nor does it always clarify the existence or absence of impermissible motivation.

A. *"Historical Background"*

The first test, historical background, is illustrated by three cases which reveal "a series of official actions taken for invidious purposes." They are *Lane v. Wilson*,[184] *Griffin v. County School Board*,[185] and *Davis v. Schnell*.[186] The *Lane* case attacked discrimination in voting rights under the fifteenth amendment. Oklahoma had enacted a literacy test for voters from which white persons were exempt by virtue of a "grandfather clause." This test was held to violate the fifteenth amendment in *Guinn v. United States*.[187] Oklahoma had meanwhile held an election under the provisions of the law embodying the literacy test. A new registration law, replacing the one struck down in *Guinn*, provided that all who had voted in the 1914 election would remain qualified to vote, while those otherwise qualified who were previously excluded would have twelve days within which to register (from April 30, 1916 to May 11, 1916), after which time they would be perpetually disenfranchised. Since the new law passed in 1916 had the effect of locking in the results of the registration pattern of 1914, which was itself based on an unconstitutional scheme,

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Hawkins if not extreme? And what would be required, apart from evidence of intent to make it square with *Yick Wo* and *Gomillion* on whose authority it is still apparently possible either to (1) infer intent from extreme, racially disproportionate impact or (2) weigh state actions on equal protection grounds without resort to intent? The summary inclusion of *Hawkins* in the disapproved cases would appear to be a source of additional difficulty in understanding the *Washington* and *Arlington Heights* rule on impact and in deciding when one is required to consider the rule.

182. 429 U.S. at 268.

183. *Id.* at 267–68.

184. 307 U.S. 268 (1939).

185. 377 U.S. 218 (1964).

186. 81 F. Supp. 872 (S.D. Ala.) (three-judge court), *aff'd per curiam*, 336 U.S. 933 (1949).

187. 238 U.S. 347 (1915).

the Court found the new law disenfranchising black voters similarly infirm. As the *Lane* Court concluded, historical background indicates invidious purpose, "[the Act of 1916] was obviously directed towards the consequences of the decision in *Guinn*. . . ."[188] The lesson of history in *Lane* is clear. It is likewise so in *Griffin*, the next case pointed to by the Court.

Griffin traced the history of Prince Edward County, Virginia's response to the desegregation mandate of *Brown v. Board of Education*.[189] The county refused to appropriate funds for public schools, and instead made tuition grants and tax credits available for white-only private schools. This practice was held to violate the equal protection clause of the fourteenth amendment. The role of history in *Griffin* seems clear enough, but *Griffin* and the earlier case of *Gomillion v. Lightfoot* were both construed and limited in the later case of *Palmer v. Thompson*,[190] which upheld the closing of five public swimming pools in the face of a desegregation order. According to the *Palmer* Court:

> It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality [citing *Griffin* and *Gomillion*]. But the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did. In *Griffin* . . . the State was in fact perpetuating a segregated public school system by financing segregated "private" academies. And in *Gomillion* the Alabama legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections. Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city.[191]

In *Schnell* a three-judge federal court invalidated an Alabama literacy requirement (the Boswell Amendment) that permitted a board of registrars to judge whether an applicant for the franchise could " 'understand and explain' any article of the United States Constitution. . . ."[192] The district court found that the registrars had, in their legislatively unguided discretion, applied the standard to the detriment

188. 307 U.S. at 270–71.

189. 347 U.S. 483 (1954).

190. 403 U.S. 217 (1971).

191. *Id.* at 225. *Griffin* is, of course, distinguishable, as *Palmer* indicates, if the constitutional infirmity is not closing public schools per se but supporting private segregated schools at the same time.

192. 81 F. Supp. at 874.

of black applicants: "The evidence shows that during the incumbency of the defendant board that more than 2800 white persons have been registered and approximately 104 Negroes. The estimated population of Mobile County is 230,000 of which approximately 64 per cent is white and 36 per cent is colored."[193] Thus far *Schnell* itself appears to be an "ultimate effects" case.[194] But the district court went on to consider the legislative history and other evidence of the invidious purpose surrounding the adoption of the Boswell Amendment,[195] and it is this historical background and not the disparity in application alone that identifies the racial basis of the Alabama law in *Schnell*.

The contrary pull of *Arlington Heights* and *Palmer v. Thompson* is striking. On the one hand, the court would require inquiry into historical background in order to infer invidious purpose from official actions (*Arlington Heights*), and on the other hand would confine the scrutiny to "the actual effect of enactments" in disregard of illicit motivation[196] (*Palmer*)—an approach condemned outright in *Washington v. Davis*. The Court in *Arlington Heights* alluded to the problematic language in *Palmer*[197] but did not reconcile the various positions the Court has taken.

B. "*Specific Sequence of Events*"

As its second evidentiary source, the *Arlington Heights* majority looked to "[t]he specific sequence of events leading up to the . . . decision."[198] The Court cites *Reitman v. Mulkey*,[199] a case that ex-

193. *Id.* at 876.

194. *See* note 174 *supra*.

195. 81 F. Supp. at 878–80.

196. It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

403 U.S. at 225; *cf.* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977):

> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action.

Id. at 268. *But see* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); 429 U.S. at 268 n.18; note 109 *supra*.

197. "Although some contrary indications may be drawn from some of our cases . . . ." 429 U.S. at 265 & n.10 (citing *inter alia* Palmer v. Thompson, 403 U.S. 217, 225).

198. 429 U.S. at 267.

199. 387 U.S. 369, 373–76 (1967).

amined the history of the adoption of California's Proposition 14[200] which was designed to eliminate state restrictions on the right of private persons to discriminate. The Court also relied on *Grosjean v. American Press Co.*,[201] which invalidated a Louisiana tax on gross receipts of publishing firms having a publication with a circulation of more than 20,000 copies per week. Such reliance is puzzling because in *Grosjean* the Court considered the history and circumstances surrounding the adoption of the first amendment[202] and also noted the Louisiana tax to be the first of its kind imposed by a state.[203] It is difficult to see how this illustrates a sequence demonstrating improper motive on the part of the Louisiana legislature—and more particularly motivation analogous to that involved in racially based discrimination.

A hypothetical example provided by the Court as a counterpoint to *Arlington Heights* is more helpful: "[I]f the property involved here always had been zoned R–5 but suddenly was changed to R–3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case."[204] Both the hypothetical and the cases cited by the Court—*Progress Development Corp. v. Mitchell*[205] and *Kennedy Park Homes Association, Inc. v. City of Lackawanna*[206]—show sudden changes in land regulation to forestall integration. This evidentiary test of motivation has the advantage of being easier to prove for one challenging zoning as improper, but it does nothing for the plaintiff seeking to challenge those who have long since put their racially exclusive neighborhood together. Communities like Arlington Heights are rewarded under this test for long-standing patterns of exclusivity. A possible approach to this hurdle, consistent with the "sequence of events" test, would be to look at the degree to which now-impermissible private restraints on alienation, *e.g.*, enforcement of restrictive covenants excluding persons of a designated race or color from the use or occupancy of residential real estate held invalid in

200. 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.

201. 297 U.S. 233, 250 (1936).

202. *Id.* at 245–50.

203. *Id.* at 250–51.

204. 429 U.S. at 267.

205. 286 F.2d 222 (7th Cir. 1961). *See* 429 U.S. at 266 n.16.

206. 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). The Court was careful to note that it cited this case only as an example of a sequence of events reflecting improper motivation and not as an approval of the grounding of the case on discriminatory impact alone.

Shelley v. Kraemer,[207] worked in tandem in the past with facially neutral zoning regulations to create a suspect result analogous to that in *Guinn* and *Lane*.

C. *"Departures from the Normal Procedural Sequence"*

In its third test the Court attached evidentiary significance to procedural irregularities by municipal bodies. By so doing, the Court set an evaluative task for lower courts that has largely been avoided in the past. Thus, although courts have purported to honor procedural regularity as a touchstone of proper legislative conduct,[208] they have generally presumed that meetings are regular and valid.[209] Unlike the other four tests discussed by the Court, no case law is cited to indicate how this test should be applied. Procedure in this sense, as a part of "such circumstantial and direct evidence of intent as may be available,"[210] should probably not be limited merely to legislative or administrative procedure. Rather, it should be understood broadly, to embrace the whole range of "municipal demeanor." For example, in *Amen v. City of Dearborn*,[211] the district court found that the city violated the due process rights of the plaintiff property owners in an ethnic area sought by the city as an industrial site. In its acquisition process, the city was found to have misused its powers to issue building and occupancy permits, and itself contributed to the pollution of the area by selling sites to brick and asphalt manufacturers, posting signs encouraging vandalism, and by other similar oppressive acts which forced property owners to sell to the city at a depressed price. This conduct amounted to a taking of property without compensation. In electing to pursue oppressive acquisition practices in place of condemnation or mere purchase, the city's acts could be fairly construed as a deviation from normal procedural sequence. Similar results have been reached in other cases of oppressive acquisition practice.[212]

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207. 334 U.S. 1 (1948).

208. *E.g.*, Swindell v. State, 143 Ind. 153, 42 N.E. 528 (1895).

209. *E.g.*, Board of Supervisors v. Judges, 106 Mich. 166, 64 N.W. 42 (1895); 7 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 13.37d (3d ed. 1968).

210. 429 U.S. at 266.

211. 363 F. Supp. 1267 (E.D. Mich. 1973), *rev'd and remanded*, 532 F.2d 554 (6th Cir. 1976). *Amen* was remanded for additional factfinding on the issues of jurisdiction over (1) the parties and (2) the subject matter of the dispute.

212. *E.g.*, Madison Realty Co. v. City of Detroit, 315 F. Supp. 367 (E.D. Mich. 1970); Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

D. *"Substantive Departures"*

The evidentiary standard of "substantive departures" referred to decisions which are unreasonable or are substantially contrary to the facts considered by the legislative or administrative body. By this measure, where race is a factor, instances of zoning which presumably approach the limits of *Euclid's* reasonableness tolerance become evidence of impermissible motivation.[213] For instance, in the case cited by the *Arlington Heights* majority—*Dailey v. City of Lawton*[214]—the Tenth Circuit upheld a district court finding "of racial motivation and of arbitrary and unreasonable action in violation of the Fourteenth Amendment and of § 1983,"[215] and awarded injunctive relief. The ruling was based on evidence that the area for which rezoning was sought for high density residential use—in order to permit the construction of low-income housing—was itself surrounded by land similarly zoned. The bases which the city offered for refusing to rezone, *i.e.*, overcrowding of the neighborhood, the schools, and the recreational facilities, and overburdening of the fire fighting capabilities, were essentially unsupported by evidence.[216]

The facts in the *Dailey* case do not point solely to "substantive departures" which identify racial motivation. For although the court of appeals found that the justifications relied on were without foundation, it also found direct evidence of racial prejudice. That is to say, *Dailey* is not a simple instance in which race was implicated and no support existed for actions affecting minorities. It was rather an instance where other evidence of invidious racial motivation was available:

> The [proposed] housing project is designed to serve low-income groups which consist of Negroes, Spanish-Americans, and poor whites. The signers of the petitions in opposition [to the project] were all white. The racial situation was discussed in connection with the circulation of the petitions. The project sponsors received numerous anonymous phone calls which opposed the project on a racial basis. The one dissenting member of the Planning Commission testified that the opposition was based on racial bias. The evidence is sufficient to show that the public bodies acted as they did because of the opposition to the project by the residents of the North Addition.[217]

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213. For a discussion of the constitutional implications of spot zoning, see note 125 *supra* and accompanying text.

214. 425 F.2d 1037 (10th Cir. 1970).

215. *Id.* at 1040.

216. *Id.* at 1039.

217. *Id.*

Not only was direct evidence of improper motive present in *Dailey*, but the only defenses to the allegation of racism were the unsupported alternative bases offered by the city. After the endorsement of the *Dailey* test, it is difficult to imagine that, in the future, a community bent on racial exclusivity would fail to fill the record with support for racially neutral reasons for zoning out low income integrated housing. Sophisticated discrimination would seem difficult to detect by the *Dailey* test of "substantive departures" as it is posited in *Arlington Heights*.

E. "*Legislative or Administrative History*"

The last evidentiary test set out by the Court—legislative or administrative history—is the most problematic. Yet, the Court did not dodge this difficulty. Because the test may encourage attempts to examine members of decision-making bodies, the opinion mentioned the problem of privilege,[218] citing *Tenney v. Brandhove*,[219] *United States v. Nixon*,[220] and Wigmore's treatise.[221]

The issue of immunity and privilege is likely to take directions not immediately evident from *Tenney*, a case involving the alleged abuse of the immunity for legislators performing legislative functions, or from the Nixon tapes case. Although some officials may be able to lay claim to the privilege delineated in these cases and in Wigmore's commentary, local officials involved in zoning will likely be subject to a more searching inquiry. That search for evidence would probably arise in an action for improper conduct under the Civil Rights Act. *Tenney* represents the immune, privileged side of the liability spectrum of officials subject to suit. Officials who make zoning decisions are, however, subject to the more recent rule of *Wood v. Strickland*[222] in which the Court held school board members personally liable for violations of students' constitutional rights. The prospect of a collateral action, asserting liability as a natural component of most legal efforts aimed at seeking evidence of improper racial motivation, would seem likely. That liability could be personal under the Civil Rights Act

218. 429 U.S. at 268.

219. 341 U.S. 367 (1951) (traditional immunity of state legislators from civil liability for acts done within the sphere of legislative action unaffected by 42 U.S.C. § 1983 (1970)). *See* Pierson v. Ray, 386 U.S. 547 (1967) (common law doctrine of judicial immunity is unaffected by 42 U.S.C. § 1983 (1970)).

220. 418 U.S. 683, 705 (1974) (presidential privilege under article II).

221. 8 WIGMORE, EVIDENCE § 2371 (McNaughton rev. ed. 1961) (testimonial privilege of executive and subordinate government officers).

222. 420 U.S. 308 (1975). *See* Hogue, *Board Member and Administrator Liability Since* Wood v. Strickland, 7 SCH. L. BULL. 1 (Oct. 1976).

of 1871[223] as in *Wood*, or it could be corporate, naming the city, zoning board, or similar entity as a defendant.[224]

There is another major problem posed by this evidentiary test, and that is the degree of interference with legislators and administrators: "In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action. . . ."[225] This difficulty is resolved in a footnote.[226] Yet the problem goes to the heart of the doctrine of separation of powers among the three coequal branches of government—a principle as important in state constitutional law[227] as in federal law.[228] The problem is as old as *Fletcher v. Peck*,[229] and the authorities cited by the Court discuss but do not resolve the extent to which this doctrine may limit judicial inquiry into the legislative or administrative acts of local officials.

These four evidentiary tests of discriminatory intent are admittedly difficult to administer and in some cases difficult even to define with precision. Unlike the test of "ultimate effects" rejected in *Washington v. Davis* and *Arlington Heights*, they will make the detection and redress of racially restrictive zoning decisions more difficult.

There is, however, some hope remaining for America's urban poor. It lies principally in the Fair Housing Act of 1968[230] and in state constitutional law approaches to the problem.[231]

IX. FUTURE DIRECTIONS IN BATTLING EXCLUSIONARY ZONING

Arlington Heights was reversed and remanded for consideration of the plaintiffs' claim that the city's refusal to rezone violated the Fair Housing Act of 1968.[232] This claim, unlike the constitutional one

223. 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1970)).

224. Hogue, *supra* note 222, at 9 n.58. *See also* Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U.L. REV. 770 (1975); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976).

225. 429 U.S. at 268.

226. *Id.* at 268 n.18.

227. *E.g.*, N.C. CONST. art. I, § 6: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *See also* Note, *Administrative Law—Judicial Review and Separation of Powers*, 45 N.C.L. REV. 467 (1967).

228. *E.g.*, United States v. Nixon, 418 U.S. 683 (1974).

229. 10 U.S. (6 Cranch) 87 (1810). *See* notes 109, 189 *supra*.

230. Title VIII (Fair Housing) Civil Rights Act of 1968, 42 U.S.C. §§ 3601–19 (1970).

231. *E.g.* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975). *See* Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803, 805–21 (1976).

232. 429 U.S. at 271.

which received such short shrift, will likely be tested by a more generous standard[233]—the very test that plaintiffs sought unsuccessfully to apply to the fourteenth amendment. Indeed, just as *Washington v. Davis* may be viewed as a failure to engraft the statutory standards of Title VII of the Civil Rights Act of 1964 onto the fifth amendment,[234] so *Arlington Heights* represented a failure to impose the standards of Title VIII of the Civil Rights Act of 1968 on the fourteenth amendment.

The burden of proof under Title VIII, the Fair Housing Act, is stated in *United States v. City of Black Jack*:[235]

> To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . .[236]
>
> Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest.[237]

In *Black Jack*, the Eighth Circuit found that a city ordinance prohibiting the construction of any new multiple-family dwellings, and making present ones nonconforming uses, did result in discrimination and that the interests urged by the city—*inter alia*, road and traffic control, prevention of overcrowding of schools, and the prevention of devaluation of adjacent single-family homes—did not demonstrate a compelling governmental interest. The analogy to *Arlington Heights* is striking—the court of appeals in *Arlington Heights* found a dis-

233. It must be conceded, however, that after *Washington* and *Arlington Heights* it remains an open question whether Congress has the power under section five of the fourteenth amendment to authorize the imposition of sanctions upon an evidentiary showing which is less rigorous than that required by section one of the amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Oregon v. Mitchell, 400 U.S. 112 (1970).

234. Civil Rights Act of 1964, §§ 701–16, 42 U.S.C. §§ 2000e–2000e-17 (1970) (Equal Employment Opportunity Act).

> Although appellants' complaint did not allege a violation of Title VII of the Civil Rights Act of 1964, which then was inapplicable to the Federal Government, decisions applying Title VII furnish additional instruction as to the legal standard governing the issues raised in this case. . . . The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VIII.

512 F.2d at 956 n.2, *quoted in* Washington v. Davis, 426 U.S. at 236–37 n.6. *Washington* held this test to be erroneously applied. 426 U.S. at 238. The application of Title VII is explained in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

235. 508 F.2d 1179 (8th Cir. 1974).

236. *Id.* at 1184.

237. *Id.* at 1185.

criminatory effect[238] and further concluded that the city's justification, *i.e.*, maintaining the integrity of its zoning plan through a buffer policy that permitted multi-family housing only as a transition between single-family zoning and commercial or industrial areas, was inadequate.[239] The result in *Arlington Heights* on remand would appear to follow directly from *Black Jack*. Of some interest will be the effect, if any, of the apparent distinction between the cases. The City of Black Jack took its discriminatory step with some forethought[240] while Arlington Heights did not. Under the tests set out in *Black Jack*, this should have no importance, although it would under the "sequence of events" test for the fourteenth amendment under *Arlington Heights*.[241]

In addition to the federal statutory remedy for discrimination just discussed, state constitutional law may also afford a remedy in certain instances. For example, in *Southern Burlington County NAACP v. Township of Mount Laurel*,[242] the New Jersey Supreme Court held that a restrictive zoning ordinance prescribing minimum lot area and frontage, minimum building size, and bedroom restrictions which prevented altogether the construction of low-and-moderate income housing and multi-family dwellings, violated the "state constitutional requirements of substantive due process and equal protection. . . ."[243] The provision of adequate housing was seen as "an absolute essential in promotion of the general welfare required in all local land use regulation."[244] As explained by the New Jersey Supreme Court, once it is shown that a developing community has not adequately provided for diversity in its available housing so as to meet the needs of low-and-moderate income persons, there is a prima facie violation of substantive due process and equal protection. At this point, "the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action."[245]

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238. 517 F.2d at 413–14.

239. *Id.* at 415.

240. The Black Jack ordinance was adopted in 1970 in response to a proposal to build low-and-moderate income housing that began in 1969: "Within a month, the proposal became a matter of public knowledge, and public opposition was swift and active." 508 F.2d at 1182.

241. 429 U.S. at 267. *See* note 191 *supra*.

242. 67 N.J. 151, 336 A.2d 713 (1975). *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977). For a review of recent literature on *Mount Laurel*, see Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803, 807 n.21 (1976). The result in *Mount Laurel* was reaffirmed in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977).

243. 67 N.J. at 174, 336 A.2d at 725.

244. *Id.* at 179, 336 A.2d at 727.

245. *Id.* at 181, 336 A.2d at 728.

The result in *Mount Laurel* is appealing, but the substantive due process ground which the court unabashedly adopted will offend many. For example, one commentator has argued:

> No matter how sympathetic one may be to the societal vision conjured by Justice Hall in *Mount Laurel*, I submit that the decision thrusts the courts into a substantive policy-making role so far beyond the range of judicial skill and political tolerance that the promise of *Mount Laurel* begins to look like a cruel hoax.[246]

Substantive due process has been a perennial thorn in the flesh at the federal level,[247] but state courts have traditionally been more tolerant of it.[248] And although many states do not face the precise problems confronting the low-to-middle income shelter seeker in Mount Laurel,[249] it is worth noting that other states do have the judicial material out of which *Mount Laurel* alchemistically emerged.

Perhaps of most interest with respect to *Mount Laurel* is that it does not require a race-based analysis to reach its result. The court found that "the regulatory scheme was not adopted with any desire or intent to exclude prospective residents on the obviously illegal bases of race, origin or believed social incompatibility."[250] Thus, the case would not have succeeded under the intent standard of *Arlington Heights*. The housing focus in the case makes it an attractive alternative to the Fair Housing Act in circumstances where an adequate showing of racial impact is not possible.

In the wake of recent decisions such as *Village of Belle Terre v. Boraas*,[251] *Golden v. Planning Board of Town of Ramapo*,[252] *Con-*

246. Payne, *supra* note 242, at 808. Payne offers an alternative ground for the decision in *Mount Laurel, i.e.*, as an unconstitutional delegation of legislative power to local governments. He argues in favor of a new understanding of delegation as "lateral" from the legislature to a unit at the same level of government and "hierarchical" to subordinate units of government such as a municipal corporation. The nomenclature is his own. *Id.* at 821–22.

247. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. *See also* Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 277–86.

248. *E.g., In re* Aston Park Hospital, Inc., 282 N.C. 542, 193 S.E.2d 729 (1973). *See* Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); Note, *Hospital Regulation After* Aston Park*: Substantive Due Process in North Carolina*, 52 N.C.L. REV. 763 (1974); Comment, *Substantive Due Process in the States Revisited*, 18 OHIO ST. L.J. 384 (1957).

249. *See generally* 67 N.J. 151, 161–73, 336 A.2d 713, 718–24.

250. *Id.* at 159, 336 A.2d at 717.

251. 416 U.S. 1 (1974) (The Court upheld a restriction of land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-

struction Industry Association of Sonoma County v. City of Petaluma,[253] and *Arlington Heights*, it is comforting to note that legal mechanisms to provide housing for the poor have not been wholly foreclosed.

X. CONCLUSION

As has been shown in the preceding section, *Arlington Heights* does not signify the end of housing remedies for the poor; however, it will necessitate a shift in the legal bases for asserting housing claims. The elimination of judicial inquiry into the racial impact of zoning will force housing litigators to seek relief via state constitutional claims and statutory remedies. What remains uncertain is whether the legislature will act to fill the gaps left by the state constitutional claims and the existing statutory remedies.

Most disturbing is the total result brought about by *Eastlake* and *Arlington Heights*. In concert they effectively preclude most federal constitutional attacks against discriminatory land use regulation. Municipalities are now apparently free to enact plebiscite zoning provisions (assuming they are authorized to do so under state law) and to insulate such rezoning from federal constitutional attack. Unless such plebiscite provisions can themselves be shown to violate overtly either due process or the now tougher requirements of equal protection,[254] the results flowing from those referenda will be substantially more difficult to attack.

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dwelling houses where a family is defined by ordinance to mean one or more persons related by blood, adoption or marriage, or no more than two persons not so related but living as a single housekeeping unit: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." *Id.* at 9.

252. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (residential restrictions based on an 18-year capital plan which would delay development for close to 18 years held constitutional).

253. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (housing development growth rate fixed at 500 dwelling units per year not unreasonable).

254. *E.g.*, Hunter v. Erikson, 393 U.S. 385 (1969) (charter amendment requiring a validating referendum only for ordinances which regulated land use on the basis of race held to violate equal protection). *See also* note 155 *supra*.