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Constitutional Law - Zoning Referenda - Mandatory Referenda on All Municipal Land Use Changes Do Not Violate the Due Process Clause

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CONSTITUTIONAL LAW—Zoning Referenda—Mandatory Referenda on All Municipal Land Use Changes Do Not Violate the Due Process Clause. *City of Eastlake v. Forest City Enterprises, Inc.*, 96 S. Ct. 2358 (1976).

Forest City Enterprises, Inc., a real estate development company, owned eight acres zoned for "light industrial" use in the City of Eastlake, Ohio.[1] In May 1971 the company applied to Eastlake's City Planning Commission to have the parcel rezoned for multi-family high-rise apartment use.[2] The Commission recommended approval and the City Council amended the zoning ordinance accordingly.[3] While this zoning ordinance was under consideration, the voters of Eastlake amended the City Charter[4] to provide for a mandatory referendum on all land use changes.[5] Under the new

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1. City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2360 (1976).

2. *Id.*

3. *Id.* at 2360-61. The ordinance was amended pursuant to the Codified Ordinances of the City of Eastlake which provide:

> Whenever the public health, safety, necessity, convenience, comfort, prosperity or general welfare, and compliance with the Master Plan or good zoning practice justify the action, and after consideration by the Planning Commission, Council may change by ordinance the districts or the regulations established by this Zoning Code, subject to the provisions of Article VIII, Section Three of the Charter.

EASTLAKE, OHIO, CODIFIED ORDINANCES § 1165.02, *reprinted in* Appendix to Respondent's Brief at 25.

4. The voters themselves initiated the amendment by circulating petitions to place the proposal on the ballot in the November 1971 general election. They adopted the Charter amendment on November 2, 1971. The City Council enacted the rezoning ordinance on December 28, 1971. Forest City Enterprises Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 188 n.1, 324 N.E.2d 740, 742 n.1 (1975), *rev'd*, 96 S. Ct. 2358 (1976).

The Ohio Constitution guaranteed the Eastlake voters' power to make such an amendment:

> The initiative and referendum 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 . . . .

OHIO CONST. art. II, § 1f (1955).

Pursuant to the Constitution, the Eastlake City Charter provides:

> Ordinances and other measures may be proposed by initiative petition and adopted by election, and ordinances and other measures adopted by the Council shall be subject to referendum, to the extent and in the manner now or hereafter provided by this Charter or the Laws of Ohio.

EASTLAKE, OHIO, CITY CHARTER art. III, § 1 (1971), *reprinted in* Appendix to Brief for City of Parma as Amicus Curiae at 35.

5. The amendment provides in pertinent part:

> That any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land . . . cannot be approved unless and until it shall have been submitted

provision, no change could take effect until 55 percent of the voters approved it in an election paid for by the party seeking the change.[6]

The company attempted to proceed with its plans, but the Planning Commission denied its application for a necessary permit because the voters had not ratified the zoning change.[7] When the city scheduled a special election, the company sought a declaratory judgment[8] that the mandatory referendum procedure was an unconstitutional delegation of legislative power to the people[9] in violation of the due process clause of the fourteenth amendment.[10] The Supreme Court of Ohio, reversing two lower courts,[11] found the referendum requirement unconstitutional.[12] The United States Supreme Court reversed and remanded, holding that a referendum may not be characterized as a delegation of power.[13]

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to the Planning Commission, for approval or disapproval. That in the event the city council shall approve any of the preceding changes, or enactments, whether approved or disapproved by the Planning Commission . . . it shall not be effective, but it shall be mandatory that the same be approved by a 55% 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. Said issue shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an applicant, and the applicant agrees to assume all costs of the election and post bond with the City Auditor in an amount estimated by the County Auditor or the Board of Elections proportionate with any other issues that may be on the ballot at the same time.

EASTLAKE, OHIO, CITY CHARTER art. VIII, § 3 (1971), *reprinted in* Appendix to Brief for City of Parma as Amicus Curiae at 69-70.

6. *Id.*

7. 96 S. Ct. at 2361.

8. At the time of filing his complaint, plaintiff also sought to enjoin the Board of Elections from holding the referendum. Brief for City of Parma as Amicus Curiae at 12. However, the Court did not hold a hearing until after the election had taken place and the voters had defeated the amendment. *Id.* at 16.

9. 96 S. Ct. at 2361.

10. U.S. CONST. amend. XIV, § 1.

11. 41 Ohio St. 2d at 188, 324 N.E.2d at 742.

12. The Court of Common Pleas upheld both the mandatory referendum and the 55 percent requirement but held unconstitutional the provision requiring the party seeking the change to pay the costs of the election. The Ohio Court of Appeals affirmed. Forest City Enterprises, Inc. v. Eastlake, No. 72 Civ. 0219 (Lake County C.P., Oct. 27, 1972), *aff'd*, No. 263 (Ct. App., July 23, 1973). Appendix to Petitioner's Brief for Certiorari at 39-47. The City of Eastlake did not cross appeal the lower courts' judgment on the election costs provision. Therefore, neither the Ohio Supreme Court, 41 Ohio St. 2d at 189 n.2, 324 N.E.2d at 742 n.2, nor the United States Supreme Court on certiorari, 96 S. Ct. at 2361 n.3, considered the provision's validity.

13. 96 S. Ct. at 2361.

In early twentieth century America, the first enactments of zoning ordinances provoked lively constitutional debate.[14] The Supreme Court settled the controversy in 1926 when it held that properly drawn zoning ordinances are a valid exercise of the states' police power.[15] With the validity of zoning decided, disputes soon arose over who should ultimately control the zoning process. Property owners, realizing that the adoption or amendment of a zoning ordinance could directly, and sometimes dramatically, affect their lives and property,[16] asserted their right to control by invoking initiative and referendum processes.[17] However, city planners, and some courts and legislators have favored either denial or limitation of local residents' power to control zoning decisions.[18]

State courts have often resolved this conflict on the basis of statutory interpretation rather than constitutional principles.[19] For example, in most jurisdictions only legislative acts are subject to refer-

14. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390-91 (1926); 8 E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.05 (3rd ed. 1965).

15. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

16. The impact of zoning is apparent. It can affect or determine tax rates, property values, the amount of open spaces, aesthetic characteristics, environmental quality, and a variety of other factors. *See generally* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

17. Initiative is defined as the power of the people, acting independently, to propose legislation to be adopted or rejected by a direct vote of the electorate. In a referendum, the people accept or reject a law already enacted by the legislature or referred to them by the legislature. 42 AM. JUR. 2d *Initiative and Referendum* § 1 (1969). *See also* 5 McQUILLIN, *supra* note 14, §§ 16.52-.53 (3rd ed. 1969).

In the late nineteenth century, the adoption of initiative and referendum statutes was a major goal of political reformers seeking to end political corruption by giving the populace direct control over the lawmaking process. *See generally* J. HURST, THE GROWTH OF AMERICAN LAW 37-39 (1950); Note, *Limitations on Initiative and Referendum*, 3 STAN. L. REV. 497 (1951). South Dakota, in 1898, was the first state to enact an initiative and referendum statute. State *ex rel.* Wagner v. Summers, 33 S.D. 40, 47, 144 N.W. 730, 731 (1913). Within a decade, many states followed suit. LaFleur v. Frost, 146 Me. 270, 281, 80 A.2d 407, 413 (1951).

18. *See* notes 20-22 *infra*, and accompanying text.

19. Municipalities have no inherent power to hold a referendum or to enact zoning ordinances. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 3.07 (1968); 5 McQUILLIN, *supra* note 14, § 16.49; 8 McQUILLIN, *supra* note 14, § 25.35; 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, §§ 2.01[3]-2.02[1] (4th ed. 1975). The existence and extent of municipal referendum powers depends upon a state's constitution, statutes and charters. These vary considerably among the states. 1 ANDERSON, *supra*, §§ 3.01-.12; 5 McQUILLIN, *supra* note 14, §§ 16.49-.50; 1 RATHKOPF, *supra*, §§ 2.02[1]-[3]. Every state has enacted a zoning enabling statute, many of which are based on the Standard State Zoning Enabling Act drafted by the United States Department of Commerce in 1921 and revised in 1926. 1 ANDERSON, *supra*, § 3.11.

endum.[20] Some state courts, concluding that rezoning a piece of property was an administrative rather than a legislative act,[21] held that the voters had no right to a referendum with respect to rezoning. Some courts have decided that a popular referendum on zoning changes is inconsistent with the statutory requirement that zoning be "in accordance with a comprehensive plan."[22] Where courts or legislatures have not limited direct citizen control of land use decisions, affected landowners have raised constitutional objections to various popular land control procedures.[23]

The earliest Supreme Court cases attacking the constitutionality of citizen control did not involve referenda.[24] The challenged ordi-

20. *See, e.g.*, West v. City of Portage, 392 Mich. 458, 460-61, 221 N.W.2d 303, 304 (1974); Kelley v. John, 162 Neb. 319, 321, 75 N.W.2d 713, 714 (1956); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964); *see also* 42 AM. JUR. 2d *Initiative and Referendum* § 11 (1969). The need for efficiency in day-to-day government operations justifies the exclusion of administrative and executive acts from the referendum process. The availability of referendum on every measure and act could prevent the implementation of broad policies and plans previously adopted and could cause unacceptable delays. 42 AM. JUR. 2d, *supra*; 1 RATHKOPF, *supra* note 19, § 3.

21. Traditionally, an act is "legislative" if it "prescribes a new policy or plan" and "administrative" if it "merely carries out the policy or purpose already declared by the legislative body." 5 McQUILLIN, *supra* note 14, § 16.55; *accord*, West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); State v. Straham, 374 S.W.2d 127 (Mo. Sup. Ct. 1963); City of Billings v. Nore, 148 Mont. 96, 417 P.2d 458 (1966); Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956); Forman v. Eagle Thrifty Drugs & Mkts., Inc., 89 Nev. 533, 516 P.2d 1234 (1974); Hilltop Realty v. City of South Euclid, 110 Ohio App. 535, 164 N.E.2d 180 (1960); Denman v. Quin, 116 S.W.2d 783 (Tex. Civ. App. 1938).

Although most states apply the same test, they do not always reach the same result. The split of authority among the states on the question whether rezoning ordinances are administrative or legislative is clearly illustrated in *Eastlake*. Both the majority and the dissent marshalled many cases to support the desired classification. 96 S. Ct. at 2362, 2367, 2370-71.

22. Section 3 of the Standard State Zoning Enabling Act requires that zoning ordinances be drawn "in accordance with a comprehensive plan." *Reprinted in* 3 RATHKOPF, *supra* note 19, 100-1 (3rd ed. 1972). State courts have interpreted this requirement in a variety of ways. *See generally* Udell v. Haas, 21 N.Y.2d 463, 470-71, 235 N.E.2d 897, 901-02, 288 N.Y.S.2d 888, 894-95 (1968); E. HAAR, "IN ACCORDANCE WITH A COMPREHENSIVE PLAN," 68 HARV. L. REV. 1154 (1955). During the last decade, there has been a marked trend toward more stringent planning requirements. *See, e.g.*, Fontaine v. Board of County Comm'rs, 493 P.2d 670, 671 (Colo. App. 1971); Green v. City Planning & Zoning Comm'n, 340 A.2d 852, 856-57, *aff'd sub nom.* Sea Colony Inc. v. Green, 344 A.2d 386 (Del. 1975); Dalton v. City & County of Honolulu, 51 Ha. 400, 412-17, 462 P.2d 199, 207-09 (1969); City of Louisville v. Kavanaugh, 495 S.W.2d 502, 505 (Ky. Ct. App. 1973); Udell v. Haas, 21 N.Y.2d 468, 469, 235 N.E.2d 897, 900, 288 N.Y.S.2d 888, 893 (1968); Baker v. City of Milwaukie, 533 P.2d 772, 774-79 (Ore. 1975); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

23. *See* notes 25-54 *infra* and accompanying text.

24. Washington *ex rel.* Seattle v. Roberge, 278 U.S. 116 (1928); Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917); Eubank v. Richmond, 226 U.S. 137 (1912).

nances delegated to some property owners the power to impose land use restrictions on their neighbors. In *Eubank v. Richmond*,[25] a Virginia statute authorized local municipalities to enact building regulations.[26] Pursuant to this statute, a Richmond city ordinance provided that whenever two-thirds of the property owners on any street requested the establishment of a building line, the Committee on Streets would establish the line in accord with their wishes.[27] The Court invalidated the ordinance as an unlawful delegation of legislative power[28] because it left,[29]

> no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. . . . The statute and ordinance, while conferring the power on some proper holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised. . . . [T]he property holders . . . may do so solely for their own interest or even capriciously.

In *Washington ex rel. Seattle Trust Co. v. Roberge*,[30] the Supreme Court invalidated a Seattle ordinance[31] amending the city's comprehensive zoning plan to permit construction of an enlarged philanthropic home. The city enacted the ordinance subject to the approval of the owners of two-thirds of the property within 400 feet of the proposed building.[32] Unlike *Eubank*, in which the Committee on Streets did not act until requested, the legislators in *Roberge* initially determined that the amendment was in the public interest and acted accordingly.[33] Nevertheless, they vested final decision-making authority in a minority of the surrounding property owners. Since there was no provision for review, the neighbors' decision was final, even if made for arbitrary or selfish reasons.[34]

During the period between *Eubank* and *Roberge*, the Court distinguished the situation in which zoning ordinances granted property owners the power to remove, rather than to impose, property

25. 226 U.S. 137 (1912).
26. Id. at 140-41.
27. *Id.* at 141.
28. *Id.* at 144.
29. *Id.* at 143-44.
30. 278 U.S. 116 (1928).
31. *Id.* at 122.
32. *Id.* at 118.
33. *Id.* at 121.
34. *Id.* at 122.

restrictions. In *Thomas Cusack Co. v. City of Chicago*,[35] the challenged ordinance forbade erection of billboards in residential areas but allowed a majority of the property owners on a street to remove the prohibition.[36] Relying on *Eubank*, plaintiff claimed an unlawful delegation of legislative power.[37] The Court upheld the ordinance, noting that it did not confer any legislative power.[38] Instead, it merely made a duly enacted law subject to modification by a majority of those who would be most affected. Furthermore, delegation of power to remove a restriction could only benefit the plaintiff since the absolute prohibition of billboards would prevail in the absence of this power.[39]

These early decisions established the principle that standardless delegations of power to impose restrictions on the property rights of others violated the due process clause. However, the challenged procedures in these cases were not referenda. In cases specifically involving referenda courts have taken a different approach.

Federal courts have decided only a few cases challenging the constitutionality of referendum procedures. Most did not involve private property rights[40] and only one court of appeals case asserted a due process claim.[41] The decisions consistently affirm, with one exception,[42] the validity and inherent democratic qualities of the referendum procedure.[43] *James v. Valtierra*[44] is illustrative. The Supreme

35. 242 U.S. 526 (1917).

36. *Id.* at 527-28.

37. *Id.* at 531.

38. *Id.*

39. *Id.* at 530.

40. *See* cases cited note 43 *infra*.

41. Southern Alameda Spanish Speaking Organization (SASSO) v. Union City, 424 F.2d 291 (9th Cir. 1970).

42. A referendum statute is invalid if it conflicts with fundamental constitutional guarantees. In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court invalidated a mandatory referendum ordinance which created a racial classification in violation of the equal protection clause. *Id.* at 392-93.

43. The first cases to reach the United States Supreme Court challenging the validity of referendum and initiative laws asserted a violation of article IV, section 4 of the United States Constitution which guarantees to every state a republican form of government. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Kiernan v. Portland, 223 U.S. 151 (1912). The Court dismissed both cases for lack of jurisdiction, holding that the issues presented were political and governmental, and therefore solely within the scope of Congressional power. 223 U.S. at 151, 223 U.S. at 163-64 (alternative holding). *See also* Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 570 (1915). More recently, federal courts have asserted jurisdiction in cases challenging referenda on equal protection grounds. They have characterized referenda

Court upheld a California constitutional amendment mandating voter approval of any municipal low income housing project.[45] Plaintiffs claimed that the provision created an unconstitutional classification based on wealth.[46] The Court stated that "[p]rovisions for referendums [sic] demonstrate devotion to democracy. . . . [I]t gives [the people of the community] a voice in decisions that will affect the future development of their own community."[47]

Southern Alameda Spanish Speaking Organization (SASSO) v. Union City[48] considered whether a referendum on rezoning is incompatible with the procedural safeguards required by the due process clause.[49] The Ninth Circuit held that plaintiff's due process contention did not present a substantial constitutional question.[50] Plaintiff, SASSO, sought and obtained rezoning of a particular tract of land for the construction of federally financed low and moderate income housing.[51] Local citizens petitioned for a referendum and defeated the rezoning ordinance. Relying on *Eubank* and *Roberge*,[52] SASSO claimed that "the referendum process destroys the necessary procedural safeguards upon which a municipality's power to zone is based and subjects zoning decisions to the bias, caprice and self-interest of the voter."[53] The court refused to apply the *Eubank* and *Roberge* reasoning to the referendum process:[54]

> A referendum . . . is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters - an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.

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as valid divisions of legislative power between the state and the people which, if founded on neutral principles, should be free from federal constitutional restraint. *See* James v. Valtierra, 402 U.S. 137, 141-42 (1971); Ranjel v. City of Lansing, 417 F.2d 321, 324 (6th Cir. 1969), *cert. denied*, 397 U.S. 980, *rehearing denied*, 397 U.S. 1059 (1970); Spaulding v. Blair, 403 F.2d 862, 863-64 (4th Cir. 1968).

44. 402 U.S. 137 (1971).

45. *Id.* at 143.

46. *Id.* at 139.

47. *Id.* at 141, 143. For a less enthusiastic appraisal of the democratic qualities of referenda, see 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW 90 n.134 (1974).

48. 424 F.2d 291 (9th Cir. 1970).

49. *Id.* at 294.

50. *Id.*

51. *Id.* at 292.

52. *Id.* at 294.

53. *Id.*

54. *Id.*

Although *Eastlake* was a case similar to *SASSO*, the Ohio majority did not discuss *SASSO's* distinction between a referendum and a delegation of power to a small segment of the community. Instead, the Ohio court found that *Eubank, Roberge*, and *Cusack* governed the *Eastlake* situation,[55] and concluded that the referendum requirement was an unconstitutional delegation of power:[56]

> Due process of law requires that 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 assuring that fundamental policy choices . . . are articulated by some responsible organ of municipal government. . . . The Eastlake charter provision ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational.

The Supreme Court reversed on the ground that a referendum is not a "delegation" of power.[57] It adopted *SASSO's* distinction between a referendum and the standardless delegations of power to a narrow segment of the population condemned in *Eubank* and *Roberge*.[58] Citing the Federalist Papers,[59] the Court noted that one

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55. 41 Ohio St. 2d at 191-92, 324 N.E.2d at 744.

56. *Id.* at 196, 324 N.E.2d at 746.

Generally, state courts have not characterized referenda as delegations of power:

> . . . [T]he power of initiative and referendum . . . is the exercise by the people of a power reserved to them, and not the exercise of a right granted to them.

Ley v. Dominguez, 212 Cal. 587, 593, 299 P. 713, 715 (1931); *accord*, Taxpayers Ass'n v. Houston, 129 Tex. 627,105 S.W.2d 655, (1937); State *ex rel.* Wagner v. Summers, 33 S.D. 40, 144 N.W. 730 (1913); Cutter v. Durham, 109 N.H. 33, 241 A.2d 216 (1968). A few states, however, have viewed the referendum as a concession to an organized minority and a limitation on the rights of the people. *See* Ferle v. Parsons, 210 Mich. 150, 177 N.W. 397 (1920); Ley v. Dominguez, 212 Cal. 587, 593, 299 P. 713, 715 (1931). The concurring opinion of Justice Stern of the Ohio Supreme Court rejected the Eastlake referendum procedure on the additional ground that its true purpose was exclusionary: "to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas . . . . The inevitable effect of such provisions is to perpetuate the de facto divisions . . . between black and white, rich and poor." 41 Ohio St. 2d at 200-01, 324 N.E.2d at 749 (Stern, J., concurring). However, *Eastlake* is not an exclusionary zoning case. Plaintiff's brief to the lower court specifically stated that it did not base its claim on any allegation of racial or economic discrimination. Petitioner's Brief for Certiorari at 7-8. The issue was first introduced by Amicus Curiae Lawyers for Housing. The Ohio Supreme Court majority observed that there was no support in the record for a finding that Eastlake's purpose was to exclude low and middle income housing. 41 Ohio St. 2d at 198, 324 N.E.2d at 747-48.

57. 96 S. Ct. at 2361.

58. *Id.*

59. THE FEDERALIST, No. 39.

of the fundamental assumptions underlying our constitutional government is that all power derives from the people.[60] Therefore, they may reserve to themselves the power to legislate directly on any matters they choose.[61]

Having clarified the nature of a referendum, the Court considered whether this rezoning amendment was properly subject to a referendum in Ohio.[62] The Ohio State Constitution reserves initiative and referendum powers "to the people . . . on all questions which such municipality may . . . be authorized by law to control by legislative action."[63] The Ohio Supreme Court had expressly held that rezoning is a legislative act.[64] The Supreme Court accepted this determination without further examination and concluded that the referendum was proper under Ohio law.[65]

The Court then considered plaintiff's contention that the mandatory procedure allowed the voters to exercise the police power in an arbitrary and unreasonable manner.[66] The majority agreed that lawmaking bodies must not act arbitrarily.[67] However, the Court found that the Ohio court had misconstrued the scope of the fourteenth amendment and the teaching of *Euclid v. Ambler* in applying this principle.[68] The mere possibility that voters may act selfishly or capriciously does not invalidate the referendum requirement.[69] Neither the fourteenth amendment nor *Euclid* requires *advance* assurance that voters will act reasonably.[70] When elected legislators act, there is no assurance that they will apply consistent standards. After they legislate, however, an aggrieved party may challege the constitutionality of their act.[71] The same is true when the people

60. 96 S. Ct. at 2361.
61. *Id.*
62. *Id.* at 2362.
63. OHIO CONST. art. II, § 1f (1955).
64. 41 Ohio St. 2d at 189, 324 N.E.2d at 743.
65. 96 S. Ct. at 2362.
66. *Id.* at 2362-63.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 2363. The Court distinguished decisions which have held that Congress must provide discernible standards when it delegates power to regulatory agencies which are not directly responsible to the people. These standards serve as the measure of the agency's fidelity to the legislative will. However, the "doctrine is inapplicable, where, as here, rather than a delegation of power, we deal with a power reserved by the people to themselves." *Id.*
71. *Id.* Legislative acts are not easily invalidated, however. Whether enacted by legisla-

legislate directly. The referendum itself is a valid exercise of the people's legislative power; however, a plaintiff may attack an arbitrary and unreasonable result.[72]

Justice Powell and Justice Stevens dissented in separate opinions.[73] Both argued that Eastlake's procedure was fundamentally unfair when only one individual's property was at issue.[74] In his four sentence dissent, Justice Powell agreed that generally applicable zoning laws are subject to a referendum.[75] However, an individual landowner has no realistic opportunity to be heard by the electorate.[76] He concluded that the " 'spot' referendum technique appears

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ture or referendum, every law has a strong presumption of constitutionality. 1 ANDERSON, *supra* note 19, § 2.14. To rebut this presumption, a plaintiff must present clear and convincing evidence that a zoning statute or ordinance bears "no substantial relation to the public health, safety, morals or general welfare." *Id.* § 2.17. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

72. 96 S. Ct. at 2362-63. The history of *SASSO* on remand is illustrative. Relying on the Ninth Circuit's dicta that a referendum result denying decent housing to low income residents would present a substantial constitutional question, 424 F.2d at 294, the district court ordered the city to act within a reasonable time to provide housing for low income residents. The court reserved the right to grant relief to SASSO if the city's failure to do so could later be described as a denial of equal protection. No. 51950 (N.D. Cal., July 31, 1971).

73. 96 S. Ct. at 2365 (Powell, J., & Stevens, J., dissenting).

74. *Id.* at 2365, 2371 (Powell, J., & Stevens, J., dissenting).

75. *Id.* at 2365 (Powell, J., dissenting).

76. *Id.*

Every state's zoning enabling legislation includes a provision requiring notice and public hearing before any zoning law or regulation may be enacted or amended. ANDERSON, *supra* note 19, § 4.12. Because of these requirements, state courts have denied the right to enact zoning ordinances by initiative, since to do so would circumvent these procedural safeguards. The general rule is that the people may not have greater power to legislate than the legislature has. *See generally* Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929); Taschner v. City Council of Laguna Beach, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973); Dewey v. Doxey-Layton Realty Co., 3 Utah 2d 1, 277 P.2d 805 (1954); City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968); State *ex rel.* Powers v. Donohue, 368 S.W.2d 432 (Mo. Sup. Ct. 1963); Korash v. City of Livonia, 388 Mich. 737, 202 N.W.2d 803 (1972); Forman v. Eagle Thrifty Drugs & Mkts. Inc., 89 Nev. 533, 516 P.2d 1234 (1973).

However, several California cases have held that the broad initiative powers granted to charter cities are not restricted by the statutory procedural requirements of the zoning enabling act. Bayless v. Limber, 26 Cal. App. 3d 463, 469-70, 102 Cal. Rptr. 647, 650-51 (1972); Fletcher v. Porter, 203 Cal. App. 2d 313, 322, 21 Cal. Rptr. 452, 458 (1962).

In San Diego Bldg. Contractors Ass'n. v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal Rptr. 146 (1974), *appeal dismissed*, 44 U.S.L.W. 3747 (U.S. June 29, 1976), plaintiff claimed that zoning by initiative in charter cities was unconstitutional on the grounds that the due process clause as well as the state enabling statute mandates notice and hearing. The California Supreme Court held that notice and hearing were purely statutory requirements.

to open disquieting opportunities for local government bodies to bypass normal protective procedures for resolving issues affecting individual rights."[77]

Justice Stevens with whom Justice Brennan joined reached the same conclusion. Ignoring plaintiff's unlawful delegation of power contention, he saw two critical issues in *Eastlake*: whether the procedure used to rezone an individual parcel of land must comply with the due process clause and, if so, whether Eastlake's procedure did comply.[78] Based on the unique nature of zoning ordinances,[79] he concluded that "the opportunity to apply for an amendment is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment."[80] Therefore, a landowner has a right to fair procedure in the consideration of the merits of his application.[81] Justice Stevens argued that *Eubank* and *Roberge* supported this conclusion.[82] Noting that these cases invalidated statutes for procedural reasons, he found their implied holdings to be that procedures affecting individual rights in property must meet constitutional standards.[83] In Justice Stevens' view, this proposition is applicable to the Eastlake situation even though *Eubank* and

13 Cal. 3d at 212-13, 529 P.2d at 574, 178 Cal. Rptr. at 150. The United States Supreme Court dismissed the appeal for want of a substantial federal question. San Diego Bldg. Contractors Ass'n. v. City Council, 44 U.S.L.W. 3747 (U.S. June 29, 1976).

While most states have rejected zoning by initiative, they have upheld the right to zone or rezone by referendum because notice and hearing are provided prior to the referendum. *See, e.g.*, Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972). Justice Powell's dissent, however, seems to imply that the affected party should have the opportunity to be heard by the ultimate decision makers, the voters. 96 S. Ct. at 2365 (Powell, J., dissenting).

77. 96 S. Ct. at 2365 (Powell, J., dissenting).

78. *Id.* (Stevens, J., dissenting).

79. Id. at 2365-66. Justice Stevens noted that zoning codes are unlike any other legislation affecting property inasmuch as they anticipate and provide for frequent exceptions and changes. As a result, property owners expect that changes consonant with the basic zoning plan will be granted. *Id.*

80. 96 S. Ct. at 2366.

81. *Id.* Justice Stevens rejected the majority's contention that plaintiff had a sufficient remedy in his right to challenge an arbitrary statute after it is enacted. He stated, "if there is a constitutional right to fundamental fairness in the procedure applicable to an ordinary request for an amendment to the zoning applicable to an individual parcel, that right is not vindicated by the opportunity to make a substantive due process attack on the ordinance itself." *Id.* at 2371-72 n.16.

82. *Id.* at 2366.

83. *Id.*

Roberge did not involve referendum procedures.[84]

Justice Stevens also cited numerous state court cases holding that rezoning ordinances are administrative rather than legislative acts.[85] He found this characterization more consistent with the requirements of the due process clause because it affords greater procedural protections to the affected property owner and broader standards of judicial review.[86] However, the Ohio Supreme Court specifically held that rezoning is a legislative function.[87] The Supreme Court's acceptance of this holding led to the conclusion that the referendum on the rezoning of plaintiff's land was proper under Ohio law.[88] However, Justice Stevens argued that the constitutional requirement of fair procedure cannot depend upon the label which a state court applies:[89]

> When we examine a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process, the fact that a State may give it a "legislative" label should not save an otherwise invalid procedure.

Justice Stevens did not conclude that a referendum on the rezoning of a single parcel of land could never be valid. He proposed that the test should be whether issues of community-wide policy or public interest predominate.[90] If they do, a referendum is permissible.[91] If these issues are not present, it is "manifestly unreasonable" to have private rights determined by thousands of persons who have no individual or community interest in the outcome.[92] Rather:[93]

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84. *Id.* at n.5.

85. *Id.* at 2367, 2370.

86. *Id.* Unlike legislative acts, which have a presumption of validity, see note 71 *supra*, administrative acts are subject to broad review. A court may examine whether the governing body observed fair procedures, whether it applied statutory criteria to the evidence presented, or whether it abused its discretion or exceeded its jurisdiction. Snyder v. City of Lakewood, 542 P.2d 371, 376 (Colo. 1975). *See generally*, San Diego Building Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 44 U.S.L.W. 3747 (June 29, 1976); Fasano v. Board of County Comm'rs, 264 Ore. 575, 507 P.2d 28 (1973).

87. 41 Ohio St. 2d at 189, 324 N.E.2d at 743.

88. 96 S. Ct. at 2362.

89. *Id.* at 2368.

90. *Id.* at 2371.

91. *Id.*

92. *Id.*

93. *Id.*

> The essence of fair procedure is that the interested parties be given a reasonable opportunity to have their dispute resolved on the merits by reference to articulable rules. If a dispute involves only the conflicting rights of private litigants, it is elementary that the decision-maker must be impartial and qualified to understand and to apply the controlling rules.

Plaintiff's case in *Eastlake* depended entirely on its characterization of a referendum as a delegation of power,[94] a theory which had little support in prior law.[95] If accepted, plaintiff's theory would have undermined the validity of referenda in general since there is no way to ensure that voters will not act arbitrarily. The Court's rejection of plaintiff's argument was consistent with earlier decisions recognizing the referendum as a time-honored instrument of democratic government.[96]

Plaintiff could have challenged Eastlake's procedure without threatening the referendum as an institution of government. The company might have attacked the validity of the legislative classification which made the rezoning subject to a referendum. The two dissenting opinions suggest that plaintiff could have alleged a denial of procedural due process without asserting an unlawful delegation of power. Both dissenting opinions actually ignored plaintiff's argument and reformulated the critical issues in the case. Justice Stevens' argument that the Eastlake procedure did not meet constitutional standards is well reasoned and persuasive. However, plaintiff's erroneous statement of the issue allowed the majority to avoid considering the procedural due process question and to decide the case on the extremely narrow ground that a referendum is not a delegation of power.[97] Because its holding is so narrow, the majority opinion does not foreclose further argument and consideration of the issues raised in the dissenting opinions.

The impact of *Eastlake* will depend largely upon each state's interpretation of its own zoning statutes. Basic policy questions lie at the core of the matter. States which favor greater accountability of zoning boards, broader judicial review, and long-range deliberate planning by experts and professionals can achieve these goals by classifying the rezoning of individual parcels as administrative acts.

94. *Id.* at 2361.
95. *See* notes 40-54 *supra* and accompanying text.
96. *Id.*
97. 96 S. Ct. at 2361.

By doing so, they preclude citizen referenda on those ordinances.[98] States which place greater emphasis on the people's inherent right and ability to make the decisions which affect their lives, or which view the referendum as a constructive counterbalance to special interest groups and legislative corruption may enact procedures similar to those in *Eastlake.* The decision to follow either course remains entirely with the state courts and legislatures. *Eastlake* does not require states to allow referenda; it does not impose any particular zoning policy. It merely decides that to require a referendum does not violate the due process clause.

Beatrice Close

98. *See* notes 20-21 *supra* and accompanying text.