



2007

Due Process Land Use Claims After Lingle

J. Peter Byrne

Georgetown University Law Center, byrne@law.georgetown.edu

Georgetown Public Law and Legal Theory Research Paper No. 976404

Copyright 2007 by the Regents of the University of California. Reprinted from *Ecology Law Quarterly*, Vol. 34, No. 2, by permission of the Regents of the University of California.

This paper can be downloaded free of charge from:

<https://scholarship.law.georgetown.edu/facpub/63>

<http://ssrn.com/abstract=976404>

34 *Ecology L.Q.* 471-492 (2007)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Constitutional Law Commons](#), and the [Property Law and Real Estate Commons](#)

GEORGETOWN LAW

Faculty Publications



January 2010

Due Process Land Use Claims After *Lingle**

34 Ecology L.Q. 471-492 (2007)

J. Peter Byrne

Professor of Law

Georgetown University Law Center

byrne@law.georgetown.edu

This paper can be downloaded without charge from:

Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/63/>

SSRN: <http://ssrn.com/abstract=976404>

Posted with permission of the author

*Copyright 2007 by the Regents of the University of California. Reprinted from *Ecology Law Quarterly*, Vol. 34, No. 2, by permission of the Regents of the University of California.

Due Process Land Use Claims After *Lingle*

J. Peter Byrne*

The Supreme Court held in Lingle v. Chevron U.S.A. Inc. that challenges to the validity of land use regulations for failing to advance governmental interests must be brought under the Due Process Clause, rather than the Takings Clause, and must be evaluated under a deferential standard. This Article analyzes and evaluates the probable course of such judicial review, and concludes that federal courts will resist due process review of land use decisions for good reasons but not always with an adequate doctrinal explanation. However, state courts can use due process review to provide state level supervision of local land use decisions in the absence of other legislative or administrative checks on local discretion. Such judicial review should focus on decisions reflecting distortions in the local political process.

Introduction	471
I. Federal Courts	473
A. Doctrinal Framework	473
B. The Emergence of Entitlement Requirements	476
C. Heightened Standards of Review	477
II. State Courts	480
A. Structural Role of State Courts	480
B. Correcting Political Distortions	485
Conclusion	491

INTRODUCTION

The constitutional law of land use regulation was greatly clarified by the Supreme Court's 2005 decision in *Lingle v. Chevron U.S.A. Inc.*¹ The Court made plain that the Takings Clause did not authorize courts to

Copyright © 2007 by the Regents of the University of California.

* Professor of Law, Georgetown University Law Center. Thanks go to John Echeverria for comments on an earlier draft and to Rebekah Viola and Edward Imperatore for research assistance.

1. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

review the effectiveness or wisdom of such regulations, including the Hawaii statute capping gasoline station rents at issue in *Lingle*. Such judicial investigations must instead be conducted under the Due Process Clause. And in such cases, courts must defer, as some lower courts employing the Takings Clause had not, to legislative judgments of state and local governments. Most importantly, *Lingle* cut off any doctrinal path for heightened scrutiny of the validity of land use regulations in defense of property rights, reaffirming the necessity for judicial deference.²

Despite its rejection of heightened scrutiny, the Court's unanimous decision returns attention to doctrine under the Due Process Clause. In his concurring opinion in *Lingle*, Justice Kennedy noted "today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry."³ He stated that in *Lingle*, because Chevron had not preserved its due process claim, the Court had no occasion to decide whether the Hawaii legislation "represents one of the rare instances in which even such a permissive standard has been violated."⁴ Kennedy's statement characteristically looks both ways, signaling that landowners have rights under the Due Process Clause, but that the legal standard is "permissive" to government and that success by owners will be "rare."

How likely is it that landowners will be able to prevail against local governments on substantive due process claims challenging land use decisions? In federal court, the answer will—and should—be virtually never. In some state courts, the owner's prospects are much better, but in many others the chances are no better than in federal court. Moreover, the odds of success in most fora seem to be growing longer, as courts develop new doctrines to bar or defeat such claims. Some exceptions to this trend may indicate that due process claims can perform a salutary function in very limited circumstances. It may be time for those who think that due process review can serve useful functions to look to statutory reform.

Part I of this Article reviews the federal constitutional framework for due process review of land use decisions and examines additional hurdles that lower federal courts have designed to discourage such cases. Part II examines state due process land use cases in light of the special role state courts play in overseeing local land use decisions. I argue that state court due process review is especially appropriate to correct local political distortions.

2. *Id.* at 545.

3. *Id.* at 548–49 (Kennedy, J., concurring) (citations omitted).

4. *Id.* at 549 (quoting *Eastern Enters. v. Apfel*, 524 U.S. 498, 550 (1998)).

I. FEDERAL COURTS

A. Doctrinal Framework

Venerable Supreme Court precedent indicates that federal courts will take seriously due process challenges to land use legislation and decisions. *Village of Euclid v. Ambler Realty Co.*, the granddaddy of all zoning cases, rejected a facial due process challenge to zoning itself; the Court stated that land use legislation would be upheld unless it were “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁵ The Court’s opinion has been seen as “progressive”⁶ and even “an important charter for ‘social planning.’”⁷ Yet the Court did not intend to allow zoning authorities to regulate uses without judicial supervision, expressly warning that when the zoning power would “come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.”⁸

The Court, indeed, soon reached out to decide an as-applied due process challenge to the residential zoning of one owner’s property in *Nectow v. City of Cambridge*.⁹ Ostensibly applying the *Euclid* standard, the Court relied on the finding of a special master that zoning the plaintiff’s land residential rather than industrial did not promote the public welfare, and reversed the judgment of the Massachusetts Supreme Judicial Court. The facts of the case involve setting a boundary between residential and industrial zones in the middle of a block rather than in the middle of a street. The Massachusetts court had considered the case thoughtfully and in detail, stressing that “there would be great difficulty in pronouncing a scheme for zoning unreasonable and capricious because it embraced land on both sides of the same street in one district instead of making the center of the street the dividing line.”¹⁰ This view seems

5. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

6. Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2158 (2002).

7. Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1544 (1998). Post shrewdly observed: “the social planning authorized by *Euclid* was founded on Sutherland’s appreciation of the systematic interdependence of urban land usages.” *Id.*

8. *Euclid*, 272 U.S. at 395.

9. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

10. *Nectow v. City of Cambridge*, 157 N.E. 618 (Mass. 1927), *rev’d*, 277 U.S. 183 (1928). The Massachusetts court plausibly argued,

If there is to be zoning at all, the dividing line must be drawn somewhere. There cannot be a twilight zone. . . . In the nature of things, the location of the precise limits of the several districts demands the exercise of judgment and sagacity. There can be

entirely consistent with *Euclid's* acceptance of overinclusiveness of zoning categories:

The inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.¹¹

Though *Euclid* had addressed this problem only in the stance of a facial challenge, *Nectow* presented what might be said to involve only that ordinary amount of arbitrary line-drawing inherent in zoning.¹² *Nectow* is curt about the criteria applied, relying entirely on the finding of the special master that the public interest "will not be promoted" by the classification.¹³ This conclusion is confusing, because the classification of *Nectow's* frontage as residential has obvious benefits for the residences located across the street, which otherwise would face industrial installations. While *Nectow* restates the deferential standard of *Euclid*, its application seems demanding. Courts seeking to make sense of the two cases could take a wide range of approaches.

The Supreme Court then stopped deciding land use cases until the 1960s, during which time its general approach to substantive due process challenges not involving certain noneconomic "fundamental interests" became highly deferential to all forms of legislative judgments.¹⁴ The abandonment of due process review of economic legislation is one of the most important and discussed constitutional developments of the twentieth century.¹⁵ One need only say here that there continues today a broad consensus across a wide ideological spectrum that federal courts should not employ the Due Process Clause to evaluate the wisdom of economic regulation. This has eliminated the doctrinal foundation for

no standard susceptible of mathematical exactness in its application. Opinions of the wise and good well may differ as to the place to put the separation between different districts.

Id. at 620. The court also noted that the land in question always had been used for residential purposes and could continue to be so. *Id.*

11. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–89 (1926).

12. There are hints in the report of the special master that Cambridge had zoned *Nectow's* frontage on Brookline Street residential to depress its value in anticipation of condemning it to widen the street. *Nectow*, 277 U.S. at 186–87. Had *Nectow* shown that the city zoned his land to depress its own anticipated compensation payments, he would have had a clearer due process claim based on the self-interest of the regulatory authority. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 58–59 (1998).

13. *Nectow*, 277 U.S. at 188.

14. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

15. See, e.g., Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Burial*, 1962 SUP. CT. REV. 34.

due process review of zoning in federal courts. Justice O'Connor's conclusion for the unanimous court in *Lingle* makes this abundantly clear: "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well-established, and we think they are no less applicable here."¹⁶ *Lingle* actually may be more important for reemphasizing the need for federal deference to zoning judgments than in rejecting the Takings Clause as a textual basis for review.

Justice Kennedy's slight distancing from the Court's reaffirmation of deference in *Lingle* marks his distinctive comfort with some less constrained due process review. His separate opinion in *Eastern Enterprises v. Apfel* represents perhaps the only instance of a contemporary Justice arguing to strike down federal economic legislation as a violation of due process.¹⁷ Moreover, his important opinion for the Court in *Lawrence v. Texas*,¹⁸ invalidating state sodomy laws, eschewed the familiar distinction between "fundamental" and all other interests that has served to cabin the occasions for judicial formulation of substantive constitutional restraints under the Due Process Clause.¹⁹

In the lower federal courts, judges lately have been adamant in the repugnance they feel toward entertaining due process land use claims. Judge Posner's rhetoric had become widely quoted: "No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions."²⁰ He characterized the case before him as a "masquerade" in that it was a "garden-variety zoning dispute dressed up in the trappings of constitutional law."²¹ His concern seems to be that such cases involve common, multitudinous, and trivial disputes that should be and probably are dealt with by state law. A recent student commentator noted with understatement that Posner's statements indicate, "the Seventh Circuit would perhaps prefer not to hear these disputes at all."²²

Beyond adhering to the "permissive" standard of *Euclid*, federal courts have made two doctrinal moves to discourage due process land use

16. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

17. *E. Enters. v. Apfel*, 524 U.S. 498, 550 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (arguing that a federal statute retroactively requiring employers to provide medical benefits to miners violates due process). In *Apfel*, four Justices argued that the act was unconstitutional but relied on the Takings Clause; four agreed that it should be analyzed only under the Due Process Clause but concluded it was valid.

18. *Lawrence v. Texas*, 539 U.S. 558 (2003).

19. Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21.

20. *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988).

21. *Id.* at 467.

22. Parna A. Mehrbani, Comment, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review*, 35 ENVTL. L. 209, 231 (2005).

cases. First, some circuits have raised the bar for what constitutes a protected property interest. Second, federal courts generally have applied an even more permissive standard than merely “arbitrary and unreasonable.”

B. *The Emergence of Entitlement Requirements*

The Due Process Clause applies only when government action deprives someone of a liberty or property interest. If the government action does not deprive someone of such an interest, there is no inquiry whether or not the action is arbitrary. One might have thought that this preliminary inquiry would be easily met in land use cases, since the complaint is about restricting the use an owner may make of her land. And, indeed, the Supreme Court did not question this in either *Euclid* or *Nectow*. Nonetheless, several courts have adopted doctrine from a long line of procedural due process cases, essentially dealing with rights in bureaucratic decision making, to raise the bar for what constitutes a protected property interest.²³ These courts require that the owner have a legal “entitlement” to the permit they are seeking, rather than just own the land affected.²⁴ A federal district court recently described when an owner has a property interest in a permit: “[A] valid property interest exists when a municipality has no discretion in the grant or denial of a permit for proposed land use. This occurs, for instance, when an applicant seeks a permit conditioned only on compliance with certain ordinances.”²⁵

The rationale behind the entitlement requirement is that landowners are being deprived of permission to make a certain use of the land, not of the land itself. Plaintiffs must show that they have a clear right to the permit and that official decision makers had no discretion to deny that right. The effect of such a rule is that usually plaintiffs can attack only revocation of permits already granted, retroactive legislation, or purely ministerial acts. As such, the entitlement requirement is surely inconsistent with *Euclid* and *Nectow*, which welcomed facial and as-applied due process challenges to discretionary land use decisions. Indeed, it is inconsistent with the very idea of substantive due process, which authorizes judicial limits on *legislative* judgments, which will always be discretionary. Whatever sense the “property interest” barrier may make in procedural due process cases, in which a harmed owner

23. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972).

24. See, e.g., *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374 (11th Cir. 1994); *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985).

25. *Minnetonka Moorings, Inc. v. City of Sherwood*, 367 F. Supp. 2d 1251, 1257 (D. Minn. 2005) (citations omitted).

claims that specific agency action requires an individualized hearing, it makes little sense applied to legislative or policy judgments challenged as outside the police power.²⁶ Although this doctrine seems inconsistent with Supreme Court precedent and has been convincingly assailed by Professor Mandelker,²⁷ it has spread and does express loudly the effort by federal courts to avoid due process review of discretionary land use decisions.

C. Heightened Standards of Review

Most federal courts have adopted standards of review even more deferential to zoning officials than arbitrary and unreasonable. In a much-discussed decision written by then Judge Alito, the Third Circuit held that the plaintiff must show that the zoning official's action "shocked the conscience" of the court, and did not just reflect an "improper motive."²⁸ The Supreme Court uses this standard in cases of alleged police misconduct, such as injuring bystanders in conducting high-speed chases of suspects.²⁹ While it is not yet clear what kinds of zoning decisions can shock the judicial conscience, it plainly implies something other than mere failure to reasonably advance a legitimate interest; something venal or invidious must be seen. The First Circuit has said that it permits federal relief only in "truly horrendous situations."³⁰

Other circuits have phrased the higher standard differently.³¹ The Eighth Circuit requires that the zoning action be "truly irrational" such as deciding based on the first letter of the applicant's name or by flipping a coin.³² The D.C. Circuit requires "grave unfairness."³³ The Seventh

26. John Hart Ely assailed the entitlement requirement in procedural due process as "a disaster, in both practical and theoretical terms." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 19 (1980). A less formalistic, reinvigorated procedural due process jurisprudence could help address troubling procedural failures in land use that currently are stuffed awkwardly into substantive doctrines. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) (finding that continually shifting requirements for approval of site plan was a regulatory taking).

27. Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 61 (2000).

28. *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 394 (3d Cir. 2003); see also *Balin v. Twp. of Radnor*, 151 F.App'x 31 (3d Cir. 2006) (unpublished summary order).

29. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

30. *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992).

31. Cases are helpfully collected in the Ellickson and Been casebook on land use controls. See ROBERT C. ELICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 98-104 (2005).

32. *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992). In a recent decision, the Eighth Circuit put several strands together, stating that to be found to violate due process, a regulation must be "'truly irrational . . . something more than . . . arbitrary, capricious, or in violation of state law.'" The action must therefore be so egregious or

Circuit requires the owner to show that the zoning decision not only is arbitrary, but that it violates another constitutional right or that state law does not provide an adequate remedy.³⁴ The Fourth Circuit requires “no conceivable rational relationship.”³⁵ A recent study aptly found due process land use challenges to be those least likely to succeed.³⁶

In the rare cases where federal courts in the modern era have used substantive due process to invalidate land use decisions, there is a sense that the courts detect motives that threaten fundamental interests. In *Marks v. City of Chesapeake*, for example, the Fourth Circuit found a violation of due process in the city’s denial of a conditional use permit to a palmistry business because the council’s decision was “impermissibly tainted by ‘irrational neighborhood pressure’ manifestly founded in religious prejudice.”³⁷ The court’s analysis sifts through the legitimate purposes asserted by the city’s counsel, such as protecting overall property values, and finds them either expressly disclaimed by decision makers or having no plausible connection with the decision, leaving the impermissible purpose as the only probable one.³⁸ This analysis conforms to that followed by the Supreme Court in finding that a city ordinance requiring a group home for the mentally disabled to obtain a special use permit violated the Equal Protection Clause; the stripping away of implausible asserted objectives revealed “an irrational prejudice against the mentally retarded.”³⁹ In such cases, courts disapprove of grounds for a

extraordinary as to shock the conscience.” *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006) (citations omitted).

33. *George Washington Univ. v. Dist. of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003).

34. *See New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474 (7th Cir. 1990).

35. *Sylvania Dev. Corp. v. Calvert*, 48 F.3d 810, 827 (4th Cir. 1995).

36. Joseph D. Richards & Alyssa A. Ruge, *Most Unlikely to Succeed; Substantive Due Process Claims Against Local Government Applying Land Use Restrictions*, FLA. B.J., Apr. 2004, at 34.

37. *Marks v. City of Chesapeake*, 883 F.2d 308, 313 (4th Cir. 1989). The Fourth Circuit now follows the “entitlement” approach described above, *see supra* Part I.B., which might preclude reaching the merits of the *Marks* case. *See* DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, *LAND USE* 403 (2004).

38. John Hart Ely has explained why laws enacted for an unconstitutional purpose violate due process:

It is inconsistent with constitutional norms to select people for unusual deprivation on the basis of race, religion, or politics, or even simply because the official doing the choosing doesn’t like them. When such a principle of selection has been employed, the system has malfunctioned: indeed we can accurately label such a selection a denial of due process.

ELY, *supra* note 26, at 137.

39. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). Cass Sunstein characterizes the few equal protection cases, like *Cleburne*, that invalidate laws despite applying an ostensible rational basis analysis as exceptions “when prejudice and hostility are especially likely to be present.” Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving*

decision, but resist declaring a “fundamental interest” or “suspect classification,” preferring narrower, more fact-bound judgments. Thus, they can nudge cities away from certain grounds for land use decisions without laying down broad rights that may cut too broad a swath in other contexts.

Federal judicial resistance to due process land use cases may even grow in light of a recent Supreme Court decision. In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, the Court rejected a developer’s claim that the city’s failure to award it permits to build low-income housing violated due process.⁴⁰ The permits were delayed due to a citizen petition authorized by the city charter. The Court held that the city’s “refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct.”⁴¹ The Court cited *County of Sacramento v. Lewis*, which adopted the “shocks the conscience” test.⁴² It quoted *County of Sacramento’s* observation that “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’”⁴³ Although the Court did not explicitly embrace it, *Cuyahoga* will be read to confirm the Court’s preference for the “shocks the conscience” approach in land use cases.⁴⁴ Moreover, Justice Scalia wrote a concurring opinion arguing that substantive due process should never be available for claims involving “nonfundamental” interests.⁴⁵ While his opinion, joined by Justice Thomas, is somewhat Delphic, it certainly supports the impetus not to consider due process land use cases.⁴⁶ *Cuyahoga* suggests that the Supreme Court is sympathetic to the lower federal courts’ aversion to substantive due

Things Undecided, 110 HARV. L. REV. 4, 78 (1995). Much the same can be said of *Marks*. See *supra* note 37 and accompanying text.

40. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003).

41. *Id.* at 198.

42. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). The phrase originated in *Rochin v. California*, 342 U.S. 165, 172–73 (1952), where the Court found that police pumping of a suspect’s stomach violated due process.

43. *Cuyahoga*, 538 U.S. at 198 (citing *County of Sacramento*, 523 U.S. at 846).

44. *County of Sacramento* and prior cases had employed “shocks the conscience” to evaluate executive conduct. See *County of Sacramento*, 523 U.S. at 846. *Cuyahoga* provides a link for that standard to land use decisions, which often are a mix of legislative, executive, and adjudicative powers.

45. *Cuyahoga*, 538 U.S. at 200 (Scalia, J., concurring).

46. *Id.* Interestingly, Justice Scalia suggested that concerns about arbitrary land use decisions be addressed under the Equal Protection Clause, where there is no requirement for showing deprivation of a property interest, only unequal treatment. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000). It is not at all clear, however, that shifting to equal protection makes, or should make, much difference. Judge Frank Coffin has written, “[I]n the field of local permits, the nature of the Government conduct (or misconduct) required to establish either a substantive due process or equal protection claim is so similar as to compress the inquiries into one.” *Bake v. Coxe*, 230 F.3d 470, 474 (1st Cir. 2000).

process land use cases, notwithstanding the possibilities left open in *Lingle*.

But does not *Lingle* itself suggest vitality for vigorous land use challenges under the Due Process Clause by indicating that challenges to the validity of regulations must be brought under it instead of under the Takings Clause? Obviously, Justice Kennedy's concurrence, discussed above, does hold out some such hope. But there is precious little in the Court's opinion to encourage federal judges to overcome their aversion. Property rights activists had sought for years to persuade courts to employ heightened scrutiny on regulation of land development analogous to that employed for regulatory limitations on First Amendment rights; the Takings Clause was merely a doctrinal shift to encourage greater activism.⁴⁷ But *Lingle* emphatically rejected any heightened scrutiny for property regulation warning that it would lead to evaluation of a "vast array" of statutes and ordinances and force courts to "substitute their predictive judgments for those of elected legislatures and expert agencies."⁴⁸ The Court described the proceedings in the case before it as "remarkable, to say the least," where the district court had ruled for the property owner on the ground that its expert's prediction that the statute would not achieve its purpose was "more persuasive" than the state's expert testimony.⁴⁹ The Court concluded that the reasons for deference were "well established" and entirely applicable to land use regulations. *Lingle* not only removes the Takings Clause as a justification for heightened scrutiny of limits on property use, it precludes any other ground and insists on deference.

II. STATE COURTS

A. *Structural Role of State Courts*

State courts have a far more intimate relation to the land use regulation process than do federal courts. They routinely decide cases involving interpretation of state and local land use laws, and apply several state law doctrines to oversee the administrations of these systems. They developed approaches to substantive due process review in the decades after *Euclid* when the Supreme Court ignored land use litigation. In most states, the courts are the only state officials who review local land use decisions, so that only they can effect any case-specific correction for oppression of owners or neighbors, or for exporting costs to other

47. See R.S. Radford, *Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353 (2004).

48. *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 544 (2005).

49. *Id.* at 545.

localities. We should think of state court substantive due process review as a judge-made form of state-level supervision of local law. Because of this supervisory role, restrictions placed on due process land use cases at the federal level are unlikely to be mirrored in state courts. State due process review needs to be refined as a form of state common law, not precluded by federal decisions.

The states exhibit a wide disparity in the level of deference they afford land use actions challenged under due process. Some courts are highly deferential, perhaps to the same extent as federal courts.⁵⁰ Others engage in more searching review, even up to overt second guessing of the efficiency or fairness of local choices.⁵¹ Most states fall on a continuum between these extremes.⁵²

In most states, constitutional judicial review of local land use decisions performs an essential function and cannot be dispensed with until a better substitute is found. Land use represents the most significant regulatory power exercised by local governments, allowing them to enhance or wipe out significant economic value, ecological functions, and community identity. Local governments perform this function generally in a parochial but inclusive political process, often combining intense economic interests with great popular passion. The open-ended, political character of land use regulation has increased as legislative amendments to zoning ordinances and discretionary site reviews have replaced traditional Euclidean zoning as the core land use activity. This intense activity goes on with little or no supervision from the state government nor responsibility to regional interests.⁵³ The state government delegates the zoning power to the municipality, but in most states it then fails to provide expertise, coordination, or supervision. The only statewide officials performing any supervisory function on local land use decisions are the courts.

The great vagaries of due process offer courts a residual constitutional justification to invalidate local measures seen to exceed tolerable fairness or efficiency. Courts also sometimes rely on state enabling acts, which provide another basis for requiring that ordinances advance the public welfare.⁵⁴ In either case, the main inquiry is whether a

50. *E.g.*, *Associated Home Builders, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976).

51. *E.g.*, *La Salle Nat'l Bank v. County of Cook*, 145 N.E. 2d 65 (Ill. 1960). The extreme intrusiveness of judicial review in Illinois is extensively considered in Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context Of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527 (1992).

52. See ELLICKSON & BEEN, *supra* note 31, at 110.

53. See, *e.g.*, Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

54. The first section of the 1926 Standard State Zoning Enabling Act (SSZEA) provides specific powers "[f]or the purpose of promoting health, safety, morals, or the general welfare of

reviewing court can discern a plausible way that the ordinance advances the public interest.⁵⁵

Judicial review of the public interest does not necessarily entail courts setting land use policy or second-guessing legislative judgments; formally, the state legislative choice has been to leave these judgments primarily to the local elected officials. But the state courts have been crucial in developing doctrines to oversee the exercise of these powers and to adjust to new regulatory devices. These judicial doctrines have not been technical or clear-edged but rather vague and adaptable. Norman Williams memorably described planning law as “stomach jurisprudence”⁵⁶ where judicial attitudes play large roles and a kind of judicial policy is developed: “In general ‘judicial policy’ refers to interpretation of the broad constitutional guarantees as applied to specific problems involved in land use conflicts; but realistically it must be recognized that such decisions often overlap with what might appropriately be the subject matter of legislative policy.”⁵⁷ While state legislatures can modify many of these judicial doctrines or roles, it is most striking how rarely they have.⁵⁸

the community.” U.S. Dep’t of Commerce, Advisory Comm. on Zoning, A Standard State Zoning Enabling Act, § 1 (1924, reprinted 1926), available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

55. In *Southern Burlington County NAACP v. Township of Mount Laurel*, Justice Hall treated constitutional and enabling standards largely as interchangeable:

It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in [Article I, part 1 of New Jersey’s] Constitution, the requirements of which may be more demanding than those of the federal Constitution. It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. (The last term seems broad enough to encompass the others.) Conversely, a zoning enactment which is contrary to the general welfare is invalid. Indeed these considerations are specifically set forth in the zoning enabling act as among the various purposes of zoning for which regulations must be designed. Their inclusion therein really adds little; the same requirement would exist even if they were omitted. If a zoning regulation violates the enabling act in this respect, it is also theoretically invalid under the state constitution. We say ‘theoretically’ because, as a matter of policy, we do not treat the validity of most land use ordinance provisions as involving matters of constitutional dimension; that classification is confined to major questions of fundamental import.

336 A.2d 713, 725 (N.J. 1975) (citations omitted).

56. NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER* § 4:1 (2003).

57. *Id.* at 69.

58. A notable example is *Hills Development Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986), which upheld New Jersey’s Fair Housing Act despite the Act’s substantial displacement of the New Jersey court’s elaborate approach to vindicating the *Mount Laurel* constitutional disapproval of exclusionary zoning. See J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2279–80 (1997).

State courts are far better locations to conduct this judicial oversight than federal courts.⁵⁹ Local government and land use law is state statutory or administrative law. Property rights primarily are established and their contents defined by state law. All due process claims come embedded in these state and local laws. State judges not only understand these laws better than federal judges, they must interpret them to make sense of the constitutional claim.⁶⁰ State courts often can address apparent injustices or inefficiencies more readily in construing local ordinances, state statutes, or common law doctrines than in the blunderbuss of due process invalidation. State constitutional doctrine has branched into rules inseparable from land use law and policy, and often has a character distinct to that state. Finally, state judges inevitably hear far more land use cases than do federal judges.

The normative core of substantive due process, in the absence of unenumerated rights, hardly implicates a well-understood federal interest. As noted above, economic due process claims generally disappeared from federal dockets seventy years ago and federal courts stoutly resist them in the land use context. Federal due process extends only the vaguest protections to what chiefly are state property rights. No express federal constitutional provisions usually are implicated, unlike, for example, first amendment claims concerning local signage or “adult” motion picture theater ordinances.⁶¹ Federal courts disclaimed responsibility for alleged wrongs in land use cases that might have been thought to be of special federal significance, such as widespread racial segregation in housing.⁶² Rather than federal interests, due process claims invoke troubling departures from normal political practices, which themselves may be quite complex and messy. Thus courts must evaluate whether something unusual has occurred, which requires good knowledge of ordinary practice, and whether invalidation here will improve overall fairness and efficiency. This seems much more like supervision of a lurching local political system than vindication of distinct rights within a fully articulated federal constitutional system.

59. Scholars have argued for a similar precedence for state courts in regulatory takings cases. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004); Carol M. Rose, *What Federalism Tells Us about Takings Jurisprudence*, 54 UCLA L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=981205>.

60. Indeed, a frequent claim made to bolster a federal due process claim is that an action violates state law; in such cases it often will seem easier and more direct simply to adjudicate the claim under state law.

61. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (finding that city ordinance prohibiting homeowners from displaying signs on their property violates the First Amendment); *City of Renton v. Playtimes Theatres, Inc.*, 475 U.S. 41 (1986) (upholding zoning ordinance for “adult” theatres and elaborating First Amendment standards for such regulations).

62. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (determining that plaintiffs must prove discriminatory intent); *Warth v. Seldin*, 422 U.S. 490 (1975) (holding that nonresidents lack standing).

Are state courts likely to change their approaches to due process review as a result of federal developments? Might some, for example, adopt the “shocks the conscience” approach? The latter seems unlikely; it is not reflected in state cases decided since 1998 and state standards seem well settled under state precedents.⁶³ On the other hand, there seems to be some movement toward adopting the restrictive notion of a protected property interest. In *Kittery Retail Ventures v. Town of Kittery*, the Maine Supreme Court rejected a substantive due process challenge to new development limits in part because it concluded that the developer lacked a protected interest in the permit he sought.⁶⁴ However, given the important oversight role of state courts in the land use context, one suspects that if this federal approach to protected property interests takes root, some other basis will be found for courts to supervise local land use decisions, such as equal protection or construction of the state zoning enabling act.

If due process review persists in state courts, what should be its content? Historically, state court due process review of zoning decisions has predominately protected individual property owners from serious losses that do not seem justified by the public gain. *Nectow*-like cases relieved owners from costly regulations when courts doubted the public gain. Certainly, such decisions have dwindled in most states. One reason may be the availability of Takings Clause claims, which conspicuously advance such concerns. Through the regulatory takings approach in *Penn Central Transportation Co. v. City of New York*, property owners can claim that an ordinance unfairly deprives them of too much value.⁶⁵ Significantly, the *Penn Central* test adjusts the severity of economic losses that must be compensated based upon “the character of the governmental action,”⁶⁶ which has been interpreted to allow some limited weighing of the public benefits obtained.⁶⁷ The availability of specific

63. The court in *Concept Properties, LLP v. City of Minnetrista*, 694 N.W.2d 804 (Minn. Ct. App. 2005), did articulate a higher standard than irrationality for zoning cases. Judge Wright explained: “Even arbitrary governmental action or government decision-making lacking a factual basis will not support a substantive due process claim. Courts generally have found substantive due process claims available in zoning cases only when the conduct of the decision-maker was motivated by personal or political animus.” *Id.* at 824 (citations omitted).

64. *Kittery Retail Ventures, L.L.C. v. Town of Kittery*, 856 A.2d 1183 (Me. 2004).

65. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

66. *Id.* at 124.

67. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O’Connor, J., concurring). John Echeverria has waged a long battle to cabin the *Penn Central* test, in no small part because of the belief that this weighing of the importance or fit of the governmental measure belongs solely in due process. See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171, 189–92 (2005).

takings claims may make reliance on the vagaries of due process less attractive.⁶⁸

It will be interesting to see whether the stern disapproval of *Lingle* and the beckoning siren of *Penn Central* will lead the minority of state courts, such as in Illinois, that have maintained a robust tradition of demanding due process review to protect regulated property owners, to abandon it. What seems most likely is that the twin signals will seal the abandonment of such due process property protection in the vast majority of states that have retreated from it in the past decades except in the most egregious cases.

B. Correcting Political Distortions

Lingle's admonishment against interfering with democratic discretion raises the central question of what should be the primary function or concern of state due process review in the future. For many years, in a jurisprudence entwined with the protection of property owners, courts sought to define the scope of permissible legislative authority, the police power, to identify which purposes were illegitimate. State enabling acts seem to have sanctioned this task by tying the exercise of zoning authority to furtherance of broadly identified public values. But the goals of planning laws have grown to encompass a very wide range of cultural and environmental values, as well as the traditional and capacious health, safety, and welfare. A paradigmatic example is aesthetic regulation. Courts long invalidated regulations justified by aesthetic considerations alone, requiring some coupling with more traditional purposes such as safety.⁶⁹ But today, promotion of beauty is accepted as a legitimate public purpose, subject only to some First Amendment limits.⁷⁰

But this does not mean that there are no limits on what goals a zoning body may pursue. The indispensable core of substantive due

68. Courts may need to analyze constitutional claims that address loss to the property owner under the Takings Clause instead of the Due Process Clause. In a few decisions, the Supreme Court has indicated that claims that may be brought under explicit textual provisions of the constitution cannot be brought under the Due Process Clause. *Graham v. Connor*, 490 U.S. 386 (1989); *Albright v. Oliver*, 510 U.S. 266 (1994) (plurality opinion). The Ninth Circuit subsequently held, on the strength of this precedent, that "substantially advance" claims must be brought under the Takings Clause rather than the Due Process Clause. *Armendariz v. Penman*, 75 F.3d 1311, 1319–20 (9th Cir. 1996). While *Lingle* certainly rejected the conclusion that the Ninth Circuit had drawn, the lower court's error was its premise that such claims may be brought under the Takings Clause at all. *See, e.g., S.G. Borello & Sons, Inc. v. City of Hayward*, No. C 03-0891, slip op. at 10–11, 2006 WL 3365598 (N.D. Cal. Nov. 20, 2006). It may well be that those due process claims that have emphasized the loss to the owner not only may be brought under *Penn Central* but *must* be under the doctrine of *Graham* and *Albright*.

69. *See* JUERGENSMEYER & ROBERTS, *supra* note 12, at 559–61.

70. *See* *Berman v. Parker*, 348 U.S. 26, 29 (1954).

process is that legislation must serve a public purpose. Legislation that secures benefits only for powerful or well-placed private entities and harms the public interest fails this test. Thus, in my view, due process here imposes the same limitations on regulatory power that the Public Use Clause imposes on the power of eminent domain, and for the same reasons.⁷¹ The rationale for democratic control over land development is securing the common good. As in the case of eminent domain, however, the problem is to identify criteria that courts can use to identify circumstances where officials have succumbed to illegitimate pressures. And as in eminent domain, substantive criteria are unworkable, because they inevitably prohibit legitimate public goals and will fail to anticipate enough of the circumstances where the public interest may be abused.⁷²

Instead of attempting to identify substantive criteria for the legitimate exercise of police power, the most promising path for state due process review lies in subjecting to heightened scrutiny those local land use decisions most likely to be distorted by unequal participation in the political process.⁷³ Zoning decisions may be distorted by the intensity of economic interest they pose to owners or neighbors, as opposed to the majority of local citizens, or by divergences of interest between a local community and the larger state or region.⁷⁴ Local or state law can ameliorate these distortions by adopting procedures that generate information for and give voice to dispersed or unrepresented residents.⁷⁵ But when they do not, due process review may be the only check on the pursuit of narrow interests.

State courts have developed distinct doctrines that help specify when the local political process might be suspect. Zoning actions that fall within these doctrines typically are not condemned categorically as violations of due process. Rather, they present circumstances in which a reviewing

71. The Supreme Court essentially equated these provisions in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and in *Berman*, 348 U.S. 26. In *Midkiff*, the unanimous Court stated, "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Midkiff*, 467 U.S. at 242–43.

72. See ROBERT G. DREHER & JOHN D. ECHEVERRIA, *KELO'S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT* 40–42 (2006), available at http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIReport_Kelo.pdf; J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL'Y 131, 141 (2005).

73. Cf. Byrne, *supra* note 72, at 157–62 (advocating enhanced procedures to protect low-income residents in eminent domain decisions).

74. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 854–56 (1983).

75. See Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions* (pts. 1 & 2), 24 STAN. ENVTL. L.J. 3, 269 (2005).

court exercises greater scrutiny of whether the measures advance the public interest. All involve some heightened concern about systematic unfairness in the local political process. For example, “spot zoning,” the practice of amending a local zoning classification of a small parcel of property at the behest of the owner, comes under far more searching scrutiny than typical of other due process claims. The concern in these cases is a familiar public choice danger that a small class of owners may lobby intensely for the gain that can come from “upzoning” their land, thereby increasing its development value, but that diffuse neighbors, each of whom is injured only slightly, may be not assert their views.⁷⁶ The judicial remedy that has evolved is a somewhat more demanding search for general public benefits from the amendment weighed against harm to the neighbors. However unsatisfactory any one of these decisions may seem, the availability of such a claim in court likely deters egregious special favor actions that could occur without check in the absence of due process review.

Other types of cases evoking greater due process scrutiny also involve concerns about political distortions, as when a municipality exports the costs of land use decisions to neighboring jurisdictions. These may be more significant than spot zoning because they implicate the interests of the state itself in securing the fair treatment of state residents who do not reside in the enacting locality. If continuing due process review of local zoning is justified by the absence of other state controls, then these cases are among the most significant. Reviewing state courts have long struggled with zoning enactments that impose substantial costs on neighboring jurisdictions. The *Euclid* Court held that, as far as federal constitutional law was concerned, each municipality so authorized by state law need consider only the local costs and benefits of a zoning ordinance. But state courts exercising due process review have sometimes invalidated measures that impose costs on state residents not represented in the local political process. Such measures can be as straightforward as placing a shopping center on a town’s borders, so that much of the traffic must be borne by neighboring jurisdictions while the home jurisdiction

76. At times there has been a formalistic debate about whether a zoning amendment of a small parcel is a “legislative” or “quasi-judicial” act. Compare *Fasano v. Bd. of County Comm’rs*, 507 P.2d 23 (Or. 1973) (en banc) (quasi-judicial, enhanced scrutiny), with *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (legislative, deferential scrutiny). These debates really frame whether courts have a satisfactory doctrinal basis for increasing the level of scrutiny they apply in looking for public benefits. Findings that an amendment is quasi-judicial also has resulted in requirements of enhanced notice to affected parties and a more formal hearing process; these may find justification not in an essentialism about judicial process, but in addressing the legislative process problems that spawn special interest zoning. These or other adjustments may facilitate public participation in the decision-making process, leading to more acceptable outcomes. See generally *Rose*, *supra* note 744.

reaps the property tax benefits.⁷⁷ In such a case, the town enacting the zoning must “give as much consideration” to the rights of residents of the adjoining town as to its own.⁷⁸

More complex external effects can also stimulate heightened review. Exclusionary zoning presents a case where rational, self-interested zoning by each community can isolate poor and minority populations to the detriment of the state or region. In *Southern Burlington County NAACP v. Township of Mount Laurel*, the New Jersey Supreme Court struck down exclusionary zoning practices.⁷⁹ The crucial doctrinal move in *Mt. Laurel* was the court’s conclusion that due process required that a municipality’s ordinance advance the interests of the state as a whole, not just its own residents.

[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state’s citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served. . . .

It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.⁸⁰

The *Mt. Laurel* court significantly raised the level of judicial oversight of residential zoning to combat exclusionary measures; other states have required consideration of a broader public interest, but have not raised the level of judicial scrutiny. For example, the California Supreme Court requires that any one municipality’s growth control ordinance creating effects beyond its boundaries must reasonably advance the interests of the affected region.⁸¹

77. See *Borough of Cresskill v. Borough of Dumont*, 104 A.2d 441 (N.J. 1954).

78. *Id.* at 445. The rationale for some heightened judicial scrutiny here resembles that in federal dormant commerce clause cases, where the Supreme Court has required that state or local laws that impose substantial costs on neighboring states be reasonable.

79. *S. Burlington County NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

80. *Id.* at 726, 727–28.

81. See *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 487–88 (Cal. 1976) (en banc). Some subsequent decisions in California took a more active role. Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 634–35 (1987). McDougall also considers judicial efforts in other states. *Id.* at 631–33; see also *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991).

Courts can pursue more subtle means to promote a sensible sharing of regional costs and benefits. In the interesting case of *Zuckerman v. Town of Hadley*, the Massachusetts Supreme Judicial Court invalidated a town ordinance setting an annual limit on building permits.⁸² The court held that the limit would impermissibly push the need to meet the inevitable demand for new homes in the region onto surrounding towns. The court indicated that it would reach a different conclusion about an annual limit adopted by a regional governance body for environmental reasons. In the latter case, costs presumably would be more fairly spread across the region and a public interest more evident. In a nearly contemporaneous decision, the court had upheld a town's permanent cap on building permits enacted through a regional commission on Cape Cod acting pursuant to state legislative authorization.⁸³ The court emphasized that the cap was adopted through a body established to address issues of regional concern.⁸⁴ The court's rulings create incentives for localities to support state authorization of additional regional bodies to collectively address regional land use issues, thereby lessening the need for supervision by courts.

There are, of course, serious concerns about the extent to which courts can engender more broadly beneficial land use laws by wielding the blunt tool of constitutional invalidation. Scholars continue to debate the effectiveness and legitimacy of the New Jersey courts grappling with exclusionary zoning.⁸⁵ Weaker efforts, such as California's *Livermore* requirement that municipalities consider extrajurisdictional effects, have done little. But it is hard to argue that courts should ignore extrajurisdictional effects when they are the only state officials with supervision of local zoning. Legislated statewide coordination of local land use decisions has proceeded only slightly despite the advantages it plainly offers. Some statewide authority needs to referee parochial decisions by localities, and judges exercising due process review have filled a structural gap, despite continuing questions about the legitimacy and efficacy of such efforts.

Due process invalidation by the courts sometimes can lead to legislative responses creating more specific regulatory requirements, the legitimacy of which is beyond question. New Jersey's enactment of its

82. *Zuckerman v. Town of Hadley*, 813 N.E.2d 843 (Mass. 2004).

83. *Home Builders Ass'n of Cape Cod, Inc. v. Cape Cod Comm'n*, 808 N.E.2d 315 (Mass. 2004).

84. *Zuckerman*, 813 N.E. 2d at 849 n.17. The cap on Cape Cod protected an aquifer upon which the entire town lay. The need to protect groundwater provides a general public purpose for the cap, and the involvement of the regional body provides assurance of a fair allocation of burdens among the affected towns.

85. See, e.g., CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES* (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

Fair Housing Act stands as a major legislative innovation that put the problem of exclusionary zoning on a statutory foundation implemented by an administrative agency. While the respective merits of New Jersey's judicial and administrative efforts continue to stimulate debate, the *Mt. Laurel* court's decisions pushed New Jersey to institutionalize an ongoing requirement to permit affordable housing in nearly every municipality in the state.

When states specify statutory goals and requirements for localities, courts have less reason to wield substantive due process; rather they interpret and enforce statutes. The Massachusetts Low and Moderate Income Housing Statute, enacted in 1969, illustrates this point.⁸⁶ The Act limits the authority of local governments to refuse to permit affordable housing projects, and transfers appeals of denials by local authorities to an administrative body, known as the Housing Appeals Committee, which can overturn local decisions and grant permits to the applicants.⁸⁷ What is striking is the very limited role Massachusetts courts have played regarding exclusionary zoning since the Act was adopted. In *Board of Appeals v. Housing Appeals Committee*, the Supreme Judicial Court upheld the constitutionality of the Act and ruled that courts must defer to judgments of the Housing Appeals Committee. Subsequent decisions have largely interpreted the meaning of the statute rather than reviewing its application.⁸⁸ Debate has persisted about the efficacy and appropriateness of the Act in the state legislature and governor's office, but it has not engulfed the courts.⁸⁹

Similarly, Minnesota expanded the authority of the Metropolitan Council to require coordination in planning among local governments in the Twin Cities region. In *City of Lake Elmo v. Metropolitan Council*, the Minnesota Supreme Court upheld the authority of the Council to require a municipality to modify its comprehensive plan, accept part of the regional growth, and connect to the regional sewer network.⁹⁰

The enactment of statewide criteria shifts the role of courts from due process review of local decisions to interpretation or application of state law.⁹¹ States that do not want courts using due process or other vague

86. MASS. GEN. LAWS ch. 40B, §§ 2–23 (2005).

87. The Act is analyzed in greater detail in Sharon Perlman Krefetz, Symposium, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381 (2001), and Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992).

88. See Stockman, *supra* note 87, at 553–54 & n.126.

89. See Krefetz, *supra* note 87, at 399–415.

90. *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1 (Minn. 2004).

91. Interestingly, the exceptional judicial decision of this character, which has been severely criticized, narrowly construed the regional role in determining the need for affordable

provisions to invalidate local zoning should address statewide issues through specific legislation.⁹² This Article has reviewed a few instances where specific state legislation has addressed land use problems more directly and with greater legitimacy than due process decisions. In the meantime, state judges will continue to exercise some form of due process review, which while highly imperfect, provides a judge-made form of state-level review.⁹³

CONCLUSION

Federal courts have neither the appetite nor the expertise to engage in detailed review of the validity or efficiency of local land use decisions. Thus, it is not surprising that the Supreme Court has acted to restore and even enhance deference to such decisions in substantive due process doctrine. Nor is it surprising that lower federal courts have developed doctrines to discourage filing most such challenges and to permit their dismissal before trial. At the same time, one should not expect state courts to follow suit, because what formally is presented as substantive due process review by state courts may be better thought of as a state common law of land use planning that has developed in the absence of comprehensive state statutory reform. This Article has argued that such state court due process review should focus on circumstances where

housing, gravely weakening the state's affordable housing act. See Christian Activities Council, *Congregational v. Town Council*, 735 A.2d 231 (Conn. 1999); Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?* 23 W. NEW ENG. L. REV. 115 (2001).

92. Oregon created the Land Use Board of Appeals (LUBA), an administrative body that has jurisdiction over local land use appeals. LUBA dispatches cases with efficiency and expertise; although appellate courts have jurisdiction over appeals from LUBA decisions, they are reversed less often than trial courts' land use decisions had been. See Hong N. Huynh, Comment, *Administrative Forces in Oregon's Land Use Planning and Washington's Growth Management*, 12 J. ENVTL. L. & LITIG. 115, 122 (1997); Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,367 (1992). It is remarkable that no other state has created a similar agency.

93. Professor Michael Asimov has argued that due process review is inappropriate for land use cases. Michael Asimov et al., *The Failure of Due Process in Local Land Use Proceedings: is the imperfect way of doing business good enough or should we radically reform it?*, 29 ZONING & PLAN. L. REP., Jan. 2006, at 2. Although he makes many good points, his argument does not suggest to me that substantive due process review by state courts soon will end. First, his arguments largely center on procedural due process, and he makes much of the property prerequisite discussed above. See *supra* Part I.B. His discussion of substantive due process is cursory, and he does not distinguish between the stances of federal and state courts. He plausibly argues that land use decisions are primarily discretionary and political, but it does not follow from this that substantive due process limits on the exercise of that discretion are incoherent. Substantive due process exists to cabin legislative discretion. He may well be right that land use law would function better if judges reviewed local land use decisions under a state statute setting substantive standards of fairness and efficiency.

significantly affected parties face structural obstacles to representation in the local land-use body.