THE PRESUMPTION OF VALIDITY IN AMERICAN LAND-USE LAW: A SUBSTITUTE FOR ANALYSIS, A SOURCE OF SIGNIFICANT CONFUSION

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> If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.
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> *Village of Euclid v. Ambler Realty Co.*[1]

> The standard of constitutional review of federal and state legislation is an endlessly perplexing question . . . .
>
> *Daniel R. Mandelker & A. Dan Tarlock*[2]

Over the years, judges and courts have been criticized for needlessly confusing many areas of American land-use law. The failures of courts to articulate a takings formula, to fashion a coherent approach to the comprehensive plan, and to clear up the chaos of ad-hoc, conclusory, and parochial local decisionmaking are some notable examples. Recently, another area of land-use jurisprudence has been subjected to close examination—the presumption of validity of zoning regulations[3] first articulated by Justice Sutherland in the landmark

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[1] 272 U.S. 365, 388 (1926).

[2] Daniel R. Mandelker, A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 8 (1992) [hereinafter Mandelker & Tarlock].

[3] This Article will use, as consistently as possible, the term "presumption of validity." Some authors, including Professors Mandelker and Tarlock, *supra* note 2, at 50, use the term "presumption of constitutionality," perhaps because that is the term used in *United States v. Carolene Products Co.* 304 U.S. 144, 152 n.4 (1938). Other authors use "presumption of validity"

1926 case of *Village of Euclid v. Amber Realty Co.*[4] Professor Daniel M. Mandelker, in three articles,[5] scrutinizes presumptions law and argues for a revised basis of presumption shifting in light of the famous footnote from *United States v. Carolene Products Co.*[6]

The purposes of this article, however, are to suggest 1) that a fundamental problem in the area of land-use jurisprudence is the concept of presumptions itself; 2) that abandoning presumptions is a sensible starting point for clearing up the "endlessly perplexing question"[7] of standards of judicial review; and 3) that the key to providing a revised basis for judicial review of land-use regulations is to address the most important question: what justifies a court in applying heightened judicial review?[8]

If we are really concerned about standards of judicial review and levels of judicial scrutiny, then these issues should be our starting point. We should abandon elusive, ambiguous, and misleading legal terms, such as "presumptions," that tend to be substitutes for and obstacles to clear analysis. Focusing on the appropriate issues and concepts may help us to address and ultimately to resolve the remarkable confusion that exists in American land-use jurisprudence regarding standards of judicial review.

This Article begins with an introduction to the concept of presumptions and some of the difficulties in defining "presumptions." Section II provides a review of presumptions in American land-use law and explains the origins of the confusion surrounding presumptions and

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and "presumption of constitutionality" interchangeably. *See, e.g.*, ROBERT M. ANDERSON, AMERICAN LAW OF ZONING, (3d ed. 1986).

"Presumption of validity" is used in this article because it is the language used in *Village of Euclid v. Ambler Realty Co.* and because "validity" is a more encompassing term which includes constitutionality. *See Euclid*, 272 U.S. at 388–89. For instance, zoning regulations are often challenged on grounds other than constitutional grounds (e.g. spot zoning, or *ultra vires*) requiring courts to review the regulation's "validity" not just its "constitutionality." For these reasons, "presumption of validity," appears to be the more useful term.

[4] 272 U.S. at 388–89.

[5] *See generally* Mandelker and Tarlock, *supra* note 2, at 3; Daniel R. Mandelker, *The Shifting Presumption of Constitutionality in Land-Use Law*, in ZONING AND PLANNING LAW HANDBOOK, 409 (Kenneth H. Young ed., 1991); Daniel R. Mandelker, *Reversing the Presumption of Constitutionality in Land-Use Litigation: Is Legislative Action Necessary?*, 30 WASH. U. J. URB. & CONTEMP. L. 5 (1986).

[6] 304 U.S. at 152 n.4.

[7] Mandelker & Tarlock, *supra* note 2, at 8.

[8] "Heightened judicial review" is used in this Article to mean more active, intrusive judicial review of local and state land-use decisions, both legislative and administrative. It is to be contrasted with the passive, deferential judicial review that was accorded the local land-use decision in *Euclid*. *See* 272 U.S. at 395–96.

judicial standards of review in land-use cases. Section II concludes with a discussion of recent United States Supreme Court cases that have employed heightened judicial scrutiny to land-use laws. Section III discusses some state courts' attempts to clarify their approach to heightened judicial scrutiny as models for avoiding the presumption of validity. Finally, section IV offers some concluding remarks on the future of presumptions in land-use law.

I. PRESUMPTIONS: WHAT ARE THEY AND WHERE DO THEY COME FROM?

Commentators in the areas of Evidence and Civil Procedure have had much to say about presumptions. Professor James Bradley Thayer, in his 1898 *A Preliminary Treatise on Evidence at the Common Law*, concluded that any detailed consideration of the "mass of legal presumptions would be an unprofitable and monstrous task."[9] Instead, Professor Thayer, in an attempt to relieve "the subject of much of its obscurity"[10] tried only to point out the general "nature and place of this topic in our law."[11] In more recent years other commentators have also struggled. For example, Professor Charles V. Laughlin in 1953 worried about the vast array of presumptions, the promiscuous use of the word, and the fact that it was a term that had come to be "devoid of much of its utility."[12] Commentators have described "presumptions" as: "[o]ne of the most complex topics in the area of evidence";[13] "a sea of technicality";[14] "the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof'";[15] and "having suffered badly from rough and careless handling."[16]

Many commentators in Civil Procedure and Evidence have attempted to define the term "presumption."[17] Weinstein's *Cases and Materials*

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[9] JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 313 (1898).

[10] *Id.*

[11] *Id.*

[12] Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196 (1953).

[13] GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 349 (1989).

[14] CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122, at 552 (1977).

[15] STRONG ET AL., MCCORMICK ON EVIDENCE 578 (4th ed. 1992).

[16] JOHN M. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 183 (1947).

[17] *See, e.g.*, JACK B. WEINSTEIN ET AL., CASES AND MATERIALS ON EVIDENCE 1117 (7th ed. 1983).

on Evidence, a widely used law school text, defines "presumption" as "a procedural rule requiring the court, once it concludes that the 'basic' fact is established, to assume the existence of the 'presumed' fact until the presumption is rebutted and becomes inoperative."[18] The *Cyclopedia of Federal Procedure* concludes that a "presumption is an inference which a court is permitted or required to draw to supply the place of a fact."[19] The current editors of *McCormick on Evidence* suggest that "a presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[20]

Just so we do not erroneously conclude that experts limit their definition to "procedural rules," "inferences," and "standardized practices," Professor Laughlin says that presumptions are "magic words" that serve as "substitutes for exact analyses" and that are "used to indicate numerous and unrelated rules of substantive and procedural law."[21] Professor Laughlin concludes that "in most instances [presumptions] could be entirely eliminated without affecting the thought," that judicial decisions relating to presumptions "are largely free from criticism so far as concerns the results reached, but the reasoning processes by which they are reached appear to be in hopeless confusion," and, finally, that "[c]ourts have too frequently behaved like law students when pushed to solve a particular problem. Instead of analyzing, they glibly seize upon such and such a presumption."[22]

In which area of law presumptions reside is another matter of controversy. Professor Thayer thought it was erroneous to regard presumptions as peculiarly a part of the law of Evidence. Rather, Professor Thayer saw presumptions as belonging "to a much larger topic, . . . that of legal reasoning."[23] Professor Laughlin thought the term was used variously to indicate unrelated rules about substantive and procedural law.[24] Others cite to a "vast literature" that falls into Evidence, Civil Procedure, Criminal Procedure, and Constitutional Law.[25] One of the few land-use experts to explore the area of presump-

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[18] *Id.*

[19] CHRISTOPHER J. MILLER & CORA M. THOMPSON, 8 CYCLOPEDIA OF FEDERAL PROCEDURE § 26.268 (3rd ed. 1991 rev. vol.).

[20] STRONG, *supra* note 15, at 578.

[21] Laughlin, *supra* note 12, at 195-96.

[22] *Id.*

[23] THAYER, *supra* note 9, at 314.

[24] Laughlin, *supra* note 12, at 195–96.

[25] WEINSTEIN, *supra* note 9, at 1116–17.

tions concluded that "the problems of presumptions and burden of proof may be considered adjective in character."[26]

If there is a taxonomy of presumptions, it is certainly not coherent. Laughlin noted in 1953 that the article on Evidence in *Corpus Juris Secundum* listed one hundred thirteen particular presumptions.[27] Laughlin then tried to develop his own eight categories of presumptions, none of which included the presumption of legislative validity or presumption of constitutionality.[28] Professors Shreve and Hansen place presumptions into four categories.[29] Over three dozen different kinds of presumptions are discussed in the *Cyclopedia of Federal Procedure*.[30]

What are practitioners and judges in the land-use area to make of all this? Is there a well-settled body of presumption law that has been or could be imported effectively into land-use jurisprudence? Are there theories and applications of presumption concepts that land-use courts could employ with clarity? Or, rather, are presumptions in land-use law permanently muddied and unreliable? Are presumptions a commodity that land-use courts might use as substitutes for clear analysis of topics, such as appropriate standards of judicial review and proper levels of judicial scrutiny? Given these confusions and uncertainties, Professors Mandelker and Tarlock correctly conclude that the area of presumptions in land-use jurisprudence is "unprincipled and disorderly."[31]

Professors Mandelker and Tarlock are not alone. Earlier, the highly regarded Justice Frederick Hall of the New Jersey Supreme Court called the presumption of validity a "shibboleth."[32] Another respected

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[26] ROBERT M. ANDERSON, 1 AMERICAN LAW OF ZONING § 3.14, at 116 (3d ed. 1986).

[27] Laughlin, *supra* note 12, at 195.

[28] *See id.* at 196–206.

[29] SHREVE & RAVEN-HANSEN, *supra* note 13, at 349–50.

[30] *See* MILLER & THOMPSON, *supra* note 19, at 400–26.

[31] Mandelker & Tarlock, *supra* note 2, at 11. Professors Mandelker and Tarlock come to a variety of conclusions about presumptions. They state that the traditional use of presumptions is as "legal rules to promote the discovery of truth," and that truth in our legal system "means a legitimate finding of fact." *Id.* at 8. They further explain that "[t]he law of presumptions has developed in the context of tension between the powers of the judge and jury to define law. . . .[A] presumption is technically a rule to allocate the burden of producing evidence" and the "presumption of validity can perform this function"; some "[c]ourts have occasionally applied this standard." *Id.* But Mandelker and Tarlock concede that the presumption of validity "does not work well" and that the issues facing a court reviewing the validity of land-use legislation are "a mix of empirical evidence and judgment." *Id.* at 9.

[32] Vickers v. Township Comm. of Gloucester Township, 37 N.J. 232, 258 (1962). "Shibboleth" is defined as "a word or saying characteristically used by adherents of a party, sect, or belief

land-use commentator, Norman Williams, has worried about "stomach jurisprudence," i.e., judges who manipulate legal concepts in light of their own biases and social attitudes.[33] At the United States Supreme Court level, Justice Marshall,[34] Justice Brennan,[35] Justice Blackmun,[36] and Justice Stevens,[37] have expressed concern about the liberties their fellow justices have taken with judicial review of local and state land-use and environmental legislation. The numerous concerns about presumptions in general, and presumptions of validity and or constitutionality in particular, among academics, practitioners, and all levels of the judiciary has shrouded land-use jurisprudence with uncertainty.

II. Presumptions in American Land-Use Jurisprudence

A. Village of Euclid v. Amber Realty Co.

Most land-use experts view *Village of Euclid v. Amber Realty Co.*,[38] which involved a challenge to a village ordinance, as the origin of the presumption of validity.[39] The United States Supreme Court in *Euclid*

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and us[ually] regarded as empty of real meaning." Webster's Third New International Dictionary 2094 (1961).

[33] Norman Williams Jr. & John M. Taylor, 1 Williams: American Planning Law § 4.01 at 85 (1988 revision).

[34] City of Cleburne v. Cleburne Living Center Inc., 473 U.S. 432 (1985).

[35] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[36] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

[37] Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

[38] 272 U.S. 365, 388-89 (1926).

[39] Earlier in Hadacheck v. Sebastian, 239 U.S. 394 (1915) the Court suggests a presumption of validity. *Hadacheck* dealt with a landowner's challenge a Los Angeles ordinance that banned brickyards. Justice McKenna writing for the United States Supreme Court stated:

> [i]t is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining.

239 U.S. at 410 (citing Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67, 78 (1915)).

In conclusion Justice McKenna wrote: "[w]e must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action. *Id.* In *Hadacheck*, the Court seemed to be hinting at a presumption of validity that did not become explicit until eleven years later in *Euclid*. *Id.*

Interestingly, in *Welch v. Swasey*, 214 U.S. 91 (1909), a land-use case dealing with a challenge to a Boston height regulation, Justice Peckham writing for the Court seemed more concerned about giving deference to lower court judgments than to legislative judgments:

> [T]his court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by

held that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[40] Implicit in the *Euclid* holding is the placement of the burden of proof on the party challenging the zoning ordinance.[41] The Court expressly defined the level or standard of proof that the challenger must overcome: if the law's validity is "fairly debatable," then the law must stand.[42]

Interestingly, in his *Euclid* majority opinion, Justice Sutherland cited to *Radice v. New York* regarding the validity of legislative zoning classifications.[43] *Radice* was not a land-use case. Rather, *Radice* dealt with due process and equal protection challenges to a New York statute prohibiting night employment of women in restaurants.[44] In *Radice*, Sutherland's discussion of the presumption of validity is more detailed than his one-sentence holding in *Euclid*:

> The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. . . . Where the constitutional validity of the statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts established be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination.[45]

> the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong.

214 U.S. at 106.

[40] *Euclid*, 272 U.S. at 388 (citing Radice v. New York, 264 U.S. 292, 294 (1923)).

[41] *See id.*

[42] *Id.*

[43] *Id.*

[44] *Radice*, 264 U.S. at 293.

[45] *Id.* at 294–95.

In *Euclid*, Justice Sutherland relied on this more extensive discussion that recognizes separation of powers considerations, the ability of the legislature to generate a mass of information, and an established factual basis for the legislative judgment as contributing factors to the Supreme Court's decision to defer to the New York State legislature.[46] Justice Sutherland mentioned the "fairly debatable" standard of proof and, significantly, indicated that because the Supreme Court was unable to say that the legislative finding was not a "valid exercise of authority" it could not invalidate the New York legislation.[47]

The *Radice* and *Euclid* opinions established the model for a deferential standard of judicial review of local land-use decisions.[48] Over time, state courts have articulated this model in language approximating the following formula:

> an enactment of the legislative body of a municipality is entitled to a presumption of validity. The party challenging the rule or law must bear the burden of proof and establish invalidity beyond fair debate. In other words, the presumption may be rebutted only by a showing that the ordinance lacks a real or substantial relation to the public health, safety, morals, or general welfare.[49]

The crucial question is whether the party challenging the validity of the legislative enactment has rebutted the presumption of validity beyond fair debate, not whether the city has established affirmatively in the record the public interest involved.[50] To require the municipality to justify its regulation would constitute an impermissible shifting of the burden of proof concerning the validity of the enactment.[51]

The *Euclid* model starts with the presumption of validity and includes burden of proof and standard of proof components.[52] It is, however, a model based on the elusive concept of presumption, which is difficult to define and classify and which renders analysis confusing. Moreover, the *Euclid* model is based on words that, as Professor Laughlin has suggested, have become substitutes for analysis or have been used to mask an attempt to do something indirectly rather than directly.[53]

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[46] *See Euclid*, 272 U.S. at 391–95.

[47] *Id.* at 388, 397.

[48] *See generally id.*; *Radice*, 264 U.S. at 292.

[49] *See, e.g.*, Willot v. City of Beachwood, 197 N.E.2d 201, 204 (Ohio 1964).

[50] *Id.* at 203–04.

[51] *See, e.g., id.*

[52] *See Euclid*, 272 U.S. at 388.

[53] *See* LAUGHLIN, *supra* note 12, at 195-96.

B. Nectow v. City of Cambridge *and Confused Judicial Review*

The *Euclid* presumption of validity approach articulated by Justice Sutherland soon created problems in later cases for Justice Sutherland and the rest of the United States Supreme Court. In its 1928 decision in *Nectow v. Cambridge*, with Sutherland again writing for the majority, the Supreme Court considered the reasonableness of a multiple-family residential zoning classification as applied to a portion of plaintiff Nectow's property.[54] Nectow's property was located between single-family residential and other land zoned for and being used for industrial purposes.[55] In other words, Cambridge had created a buffer zone between two incompatible zones—a widely accepted zoning technique.[56] Even though the Court was dealing with a legislative classification, Justice Sutherland indicated that a "court should not set aside the determination of public officers in such a matter unless it is clear that their action is unreasonable."[57] Ironically, however, the Court invalidated the Cambridge regulation because the "invasion of the property of plaintiff in error was serious and highly injurious . . . ."[58] Conspicuously absent from Justice Sutherland's opinion was discussion of the *Euclid* presumption of validity, burden of proof, or the "fairly debatable" standard.[59] Justice Sutherland's avoidance of these standards was particularly interesting in view of the Massachusetts Supreme Judicial Court's adherence to the *Euclid* standards in upholding the reasonableness of the Cambridge buffer zone:

> If there is to be zoning at all, the dividing line must be drawn somewhere. There cannot be a twilight zone. If residence districts are to exist, they must be bounded. 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 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

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[54] Nectow v. Cambridge, 277 U.S. 183, 185 (1928).

[55] *Id.* at 186.

[56] A buffer zone is "a strip of land, identified in the zoning ordinance, established to protect one type of land-use from another with which it is incompatible. Buffer zones may either be shown on the zoning map or described in the ordinance with reference to neighboring districts. Where a commercial district abuts a residential district, for example, additional use, yard, or height restrictions may be imposed to protect residential properties." MICHAEL J. MESHENBERG, THE LANGUAGE OF ZONING: A GLOSSARY OF WORDS AND PHRASES 6 (1976).

[57] *Nectow*, 277 U.S. at 187–88 (citing Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926)).

[58] *Id.* at 188.

[59] *See id.* at 185–88.

> separation between different districts. Seemingly 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. . . . No physical features of the locus stamp it as land improper for residence. Indeed, its accessibility to means of transportation, to centers of business, and to seats of learning, as well as its proximity to land given over to residence purposes, give to it many of the attributes desirable for land to be used for residence. . . . Courts cannot set aside the decision of public officers in such a matter unless compelled to the conclusion that it has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense. These considerations cannot be waived with exactness. That they demand the placing of the boundary of a zone one hundred feet one way or the other in land having similar material features would be hard to say as matter of law. . . . The case at bar is close to the line. But we do not feel justified in holding that the zoning line established is whimsical, without foundation in reason.[60]

The Massachusetts Supreme Judicial Court had, in effect, faithfully applied and administered the *Euclid* presumption of validity, burden of proof, beyond fair debate standard.[61] While that court may have had doubts about the legislative judgment, that judgment was not clearly unfounded.[62] The *Nectow* opinion written by Justice Sutherland engaged in less deferential and more active scrutiny in invalidating the legislative judgment, even though there was obviously fair debate about reasonableness.[63] As a result, the *Nectow* decision generated confusion because the *Euclid* approach was not overruled, although *Nectow* implicitly called *Euclid* into question and, without explanation, introduced a new, unarticulated, heightened level of judicial review.[64]

The Supreme Court's unexplained change of position to a more heightened scrutiny of legislative decisionmaking muddied the waters regarding the appropriate standard of judicial review in zoning cases. The uncertainty about judicial review standards and the presumption

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[60] Nectow v. City of Cambridge, 157 N.E. 618, 620 (Mass. 1927), *rev'd*, 277 U.S. 183 (1928).

[61] *See id.*

[62] *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926).

[63] *See Nectow*, 157 N.E. at 620.

[64] *See id.*

of validity continued without clarification, as the United States Supreme Court did not take another zoning case for almost fifty years.[65]

Some states have proceeded without a principled basis for judicial review of local land-use decisionmaking, paying only lip-service to the *Euclid* model and the presumption of validity approach. In Illinois, for example, the Illinois Supreme Court typically discusses the presumption of validity, places the burden of proof on the party attacking the validity of the zoning ordinance, and enunciates the "fairly debatable" standard, but then invalidates the zoning provision in whole or in part.[66] For example, *La Salle National Bank v. City of Chicago*, involved a challenge to a 1942 zoning amendment that established a low-rise apartment buffer zone between a golf course and a high-rise apartment zone.[67] The Illinois Supreme Court went through the ritual of reciting the presumption of validity, the burden of proof, and the "fairly debatable" standard, but then ignored the city's rationale and evidence concerning traffic and parking congestion, decreased light and air, and population density and invalidated the buffer zone's forty-five foot height restriction.[68] The *La Salle* case, which is typical of Illinois zoning jurisprudence, has earned that state a reputation for hostility to zoning, even though the Illinois Supreme Court pretends to embrace the *Euclid* presumption of validity.[69] The Illinois approach is reminiscent of Justice Sutherland's approach in *Nectow*.[70]

Ohio Courts also have mimicked the *Nectow* and Illinois opinions. However, Ohio, long known for erratic land-use jurisprudence,[71] has followed an even more confused path with respect to the presumption

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[65] The next zoning case decided by the United States Supreme Court was Village of Belle Terre v. Boraras, 416 U.S. 1 (1974).

[66] *See, e.g.*, La Salle Nat'l Bank v. City of Chicago, 125 N.E.2d 609, 612 (Ill. 1955).

[67] *Id.*

[68] *Id.* at 612–14

[69] *See id.*

[70] A more forthright treatment of a court's approach to judicial review is apparent in Justice Powell's plurality opinion in Moore v. East Cleveland, 431 U.S. 494 (1977), a case involving a substantive due process challenge to the city housing code's narrow definition of "family" which limited the number of related persons who could live together. The Court invalidated the ordinance on the grounds that it interfered with the "sanctity of the family." *Id.* at 503. Justice Powell concluded that "[w]hen a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate." *Id.* at 499. The *Moore* opinion constitutes a much more straightforward, although rather conclusory, approach to judicial review of legislative judgments in substantive due process cases than either the *Nectow* or Illinois approaches.

[71] *See* DANIEL MANDELKER, LAND-USE LAW 3RD § 1.14 at 12–13 (1993); NORMAN WILLIAMS, 1 AMERICAN LAND PLANNING LAW § 6.07 and § 6.09 at 198, 204 (1974).

of validity.[72] Since the 1920's, Ohio courts have approached presumptions in land-use law with a kind of schizophrenia.[73] For instance, in *Pritz v. Messer*, an early Ohio case involving a takings challenge, the Ohio Supreme Court provided a presumption of validity to a Cincinnati zoning provision.[74] In deference to the local legislature, the Ohio Supreme Court explained that:

> [t]he members of this court may or may not conceive that such an ordinance is wisely calculated to preserve the public health, morals or safety. If the ordinance discloses no purpose to prevent some public evil or to fill some public need, and has no real or substantial relation to public health, morals, and safety, it must be held void. When, however, legislation does have a real and substantial relation to the prevention of conditions detrimental to the public health, morals, or safety, no matter how unwise the measure itself seems to individual judges, it is not for the judicial tribunals to nullify it upon constitutional grounds.[75]

Four years later, however, the Ohio Supreme Court, in *State ex rel. Ice & Fuel Co. v. Kreuzweiser*, reversed its position regarding presumptions of validity.[76] The court held there that:

> [n]o presumption is indulged in favor of the restriction or limitation of an owner in the use of his premises. Statutes or ordinances which restrained the exercise of such right, or impose restrictions upon the use of private property, will always be strictly construed, and the scope of such statutes or ordinances cannot be extended to include limitations not therein clearly prescribed.[77]

The Ohio Supreme Court has yet to resolve its split personality regarding presumptions. As recently as 1981, two Ohio Supreme Court zoning opinions less than five months apart demonstrated the same schizophrenia that first emerged in the 1920's. In *Mayfield-Dorsh, Inc. v. City of South Euclid*, the court embraced the *Euclid* presumption of validity and upheld a South Euclid land-use decision.[78] In an earlier decision that same year, the Ohio Supreme Court had invalidated a zoning ordinance on the basis that "zoning ordinances are in derogation of the common law and must be strictly construed."[79]

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[72] *See* WILLIAMS, *supra* note 71, at 204.
[73] *See id.* at 204 n.69.
[74] Pritz v. Messer, 149 N.E. 30, 33–34 (Ohio 1925).
[75] *Id.* at 33.
[76] State ex rel. Ice & Fuel Co. v. Kreuzweiser, 166 N.E. 228, 230 (Ohio 1929).
[77] *Id.*
[78] Mayfield-Dorsh, Inc. v. City of South Euclid, 429 N.E.2d 159, 160 (Ohio 1981).
[79] Sanders v. Clark County Zoning Dep't, 421 N.E.2d 152, 152 (Ohio 1981).

The Ohio Supreme Court has recently added another confusion to its jurisprudential muddle regarding presumptions. In *Karches v. Cincinnati,* the plaintiff challenged, on taking and substantive due process grounds, Cincinnati zoning as it was applied to a parcel of land that was zoned commercial when purchased by the plaintiffs, but which was later rezoned to a more restrictive classification.[80] The city justified its continuation of the rezoning by citing two studies supporting the zoning change.[81]

Following a bench trial, the trial court struck down the rezoning.[82] The court found that the existing RF-1 zoning[83] as applied to appellant's properties was unreasonable, arbitrary, and confiscatory; had no substantial relation to the public health, safety, or general welfare; substantially interfered with plaintiffs' right to use their property in an economically feasible manner; and therefore, was unconstitutional.[84] The trial court ordered the city to rezone.[85] The Ohio Court of Appeals reversed the trial court's order on the grounds that the issue of constitutionality was not ripe for determination.[86] The Ohio Supreme Court determined that the case was ripe for judicial determination and then turned to the issue of whether the trial court erred in finding the Cincinnati ordinance unconstitutional.[87] The Ohio Supreme Court cited *Euclid,* indicating that to strike a zoning ordinance on constitutional grounds, plaintiffs must demonstrate beyond fair debate that the zoning classification was unreasonable.[88] The Ohio Supreme Court noted that the trial court had ignored the Cincinnati studies and other rationale supporting the legislative judgment and "found it beyond the reach of fair debate that the existing RF-1 zoning as applied to appellants' properties was unreasonable, arbitrary, and confiscatory . . . ."[89] The Ohio Supreme Court changed the focal point of presumptions, stating that it was guided by the principle that lower court judgments supported by competent and credible evidence must not be reversed and that *every presumption must be made in favor of the trial court judgment.*[90] Finally, the Ohio Supreme Court concluded

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[80] Karches v. Cincinnati, 526 N.E.2d 1350, 1353 (Ohio 1988).
[81] *Id.* at 1352.
[82] *Id.* at 1353.
[83] RF-1 (Riverfront) zoning precludes certain commercial/industrial uses. *Id.* at 1352.
[84] *Id.* at 1353.
[85] *Karches,* 526 N.E.2d at 1357.
[86] *Id.* at 1353.
[87] *Id.* at 1357.
[88] *Id.*
[89] *Id.*
[90] *Karches,* 526 N.E.2d at 1357 (emphasis added).

that "if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the trial court's verdict and judgment."[91]

Thus, the Ohio Supreme Court conflated two different presumptions: one presumption attaching to the legislative classification, the other to the trial court judgment and verdict.[92] But in layering one presumption on top of another, the Ohio Supreme Court failed to identify the inconsistency of its analysis. If the evidence is "susceptible to more than one construction,"[93] the zoning could not be beyond fair debate regarding unconstitutionality. However, the Ohio Supreme Court has only extended in later cases its difficulties regarding conflicting presumptions.[94] In view of the many confusions and eccentricities of the Ohio Supreme Court regarding presumptions, it would be difficult for any land-use stakeholder in Ohio to predict litigation outcomes.

Confusion about presumptions has also figured into judicial review of administrative actions.[95] Administrative or quasi-judicial actions taken by local decisionmaking bodies may be treated differently from legislation because the actions are not legislative actions.[96] While legislative actions receive a *Euclid* analysis, some courts, after struggling with the difficulties defining legislative as opposed to administrative decisions,[97] have accorded administrative decisions less deference.[98] For example, a court may use a presumption of validity for review of administrative actions, but it may then adopt a lower standard of proof, such as "preponderance of the evidence" instead of "beyond fair debate."[99] Alternatively, the burden of proof might be shifted to the local government.[100] The presumption of validity could even be converted into a presumption of invalidity.[101]

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[91] *Id.*

[92] *See id.*

[93] *Id.*

[94] *See, e.g.*, Gerijo v. City of Fairfield, 638 N.E.2d 533, 536 (Ohio 1994).

[95] *See generally*, DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 2d §§ 6.1–6.13 [hereinafter HAGMAN & JUERGENSMEYER]; ANDERSON, *supra* note 3, at Chap. 27.

[96] HAGMAN & JUERGENSMEYER, *supra* note 95, § 6.4.

[97] Just what decisions are administrative? For example, is a smalltract rezoning administrative even though it is adopted by a legislative body? *See id.* It would be helpful if courts clearly defined legislative and administrative actions and indicated what variety of judicial review applies. With a couple of notable exceptions, they have not done so. *See infra* Section IV.

[98] HAGMAN & JUERGENSMEYER, *supra* note 95, § 6.4.

[99] *See* ANDERSON, *supra* note 3, § 3.16.

[100] *See id.* § 3.17.

[101] *See id.*

C. *Heightened Scrutiny of Land-Use Legislation*

Confusion regarding presumptions of validity in a variety of forms has been a constant in American land-use jurisprudence. There have also been those who strenuously criticized the presumption of validity itself.[102] Some courts have gone so far as to reverse the presumption and review land-use laws with a heightened level of judicial scrutiny.[103] A critic of exclusionary zoning, Justice Frederick W. Hall of the New Jersey Supreme Court, attacked the *Euclid* presumption of validity in his famous dissent in *Vickers v. Township Committee of Glouster Township*.[104] As Justice Hall explained:

> [a]ny local exercise of that [zoning] power is presumed valid until overcome by an affirmative showing of unreasonableness. Judicial review is so narrow that this showing can never be made if even a 'debatable issue' exists. . . . The trouble is not with the principles [of presumption of validity and beyond fair debate]—if we did not have them, governments could not well operate at all—but rather with the perfunctory manner in which they have come to be applied. . . . Judicial scrutiny has become too superficial and one-sided. The state of the trend is exemplified in the language of the majority that 'if the amendment presented a debatable issue we cannot nullify the Township's decision [to exclude mobile homes] that its welfare would be advanced by the action it took.'[105]

Justice Hall advocated heightened judicial review to prevent a municipality from erecting an isolationist wall on its boundaries. Fourteen years after the *Vickers* dissent, with Hall writing his final judicial opinion, the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel* shifted the presumption of validity by holding that every municipality through its zoning must "presumptively" make an appropriate variety and choice of housing realistically available.[106]

> More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and its regulations must affirmatively afford that opportunity, at least to the extent that municipality's fair share of present and prospective regional need therefor. These obligations

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[102] *See id.*

[103] *See generally id.* §§ 3.18–22.

[104] 37 N.J. 232, 262–63 (1962)(Hall, J., dissenting) *cert. denied and appeal dismissed*, 371 U.S. 233 (1963).

[105] *Id.* at 256–59 (Hall, J., dissenting).

[106] Southern Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713, 713–32 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

> must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required to do so.[107]

Thus, in an effort to provide affordable housing, Justice Hall turned the usual presumption of validity on its head, employing heightened judicial scrutiny in a clear, straightforward fashion.[108]

More recently, in 1982, President Ronald Reagan's Commission on Housing was implicitly critical of the presumption of validity in advocating deregulation of the housing market.[109] The Commission Report criticized the *Euclid* decision and suggested that heightened judicial review of land-use regulations was necessary.[110] The Commission recommended that no land-use regulations that deny or limit the development of housing should be deemed valid unless their existence or adoption is necessary to achieve a "vital and pressing governmental interest."[111] The report thus transformed the *Euclid* presumption of validity into a presumption of invalidity for certain housing regulations.[112] In essence, the Commission recommended that legislatures enact measures that, in effect, prescribe an activist, pro-property rights approach for judicial review of land-use regulations.[113]

The heightened review standards advocated by both the liberal Justice Hall and the conservative, anti-regulation President's Commission had in some ways been heralded in the two-tier analysis that emerged in the equal protection area.[114] Judicial review of equal protection cases incorporated two different levels: "minimal scrutiny" or rationale-basis review in typical equal protection cases,[115] and heightened or "strict scrutiny" in cases involving suspect classifications or impinging upon fundamental constitutional rights.[116] To determine which level of review was appropriate in an equal protection case

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[107] *Id.* at 724–25.

[108] *See id.* at 732.

[109] *See* REP. OF THE PRESIDENT'S COMMISSION ON HOUSING 201 (1982).

[110] *See id.* at 202.

[111] *Id.* at 200–02.

[112] *Id.* at 200.

[113] *Id.*

[114] DAVID R. GODSCHALK ET AL., CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 82–83 (1977).

[115] For an example of minimal judicial scrutiny in a zoning case see *Village of Belle Terre v. Boraras*, 416 U.S. 1 (1974).

[116] For a discussion of suspect classifications see *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

courts use a multi-part inquiry.[117] Significantly, nowhere in this multi-part inquiry does a presumption of validity come directly into play.[118] A court that utilized this two-tier, multi-part approach to judicial review of land-use regulations challenged on equal protection grounds did so in a clearer, more direct fashion than a court using the *Euclid* model.[119]

D. *New Concepts of Judicial Review*

A different approach to judicial review is discernible in recent United States Supreme Court land-use and environmental decisions. Since 1987, the United States Supreme Court has decided four very important cases involving takings challenges: *Nollan v. California Coastal Commission*,[120] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[121] *Lucas v. South Carolina Coastal Council*,[122] and *Dolan v. City of Tigard*.[123] Each of these opinions involves, in one way or another, heightened judicial scrutiny.[124] Interestingly, the two justices who authored these four opinions, Justice Scalia and Chief Justice Rehnquist, appear not to have been con-

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[117]
1. Does a legal classification exist that differentiates among citizens?
2. Is the legal classification the result of state action? If either question is answered negatively, then there can be no equal protection violation. If both questions are answered positively, then one of the two equal protection tests must be chosen.
3. Is the classification based on suspect criteria?
4. Does the classification affect fundamental rights?
If either question 3 or 4 is answered affirmatively, then the *compelling state interest* test will be applied and questions 5 and 6, *infra* must be answered affirmatively for the classification to withstand the equal protection challenge.
5. Are there compelling state interests to justify the classification?
6. Is the classification necessary to accomplish the compelling state interests?
If both questions 3 and 4 are answered negatively, then the *rational basis* test will be applied. Under the rational basis test questions 7, 8, and 9, *infra* must be answered affirmatively for the classification to withstand the equal protection challenge.
7. Does the classification serve permissible state objectives?
8. Is the classification rationally related to the permissible state objectives?
9. Is the classification applied in a nondiscriminatory manner?
GODSCHALK, *supra* note 114, at 83.

[118] *Id.*

[119] *See* MANDELKER & TARLOCK, *supra* note 2, at 12–14.

[120] 483 U.S. 825 (1987).

[121] 482 U.S. 304 (1987).

[122] 112 S. Ct. 2886 (1992).

[123] 114 S. Ct. 2309 (1994).

[124] *See Dolan*, 114 S. Ct. at 2318–19; *Lucas*, 112 S. Ct. at 2893-95 & n.8; *Nollan*, 483 U.S. at 836–37; *First English*, 482 U.S. at 321.

cerned about, or encumbered by, the *Euclid* presumption of validity.[125] In each case the Court engaged in heightened judicial review, but neither of the two authors provided justification for the non-traditional, heightened judicial review.[126] For example, in *Lucas v. South Carolina Coastal Council*, the Court may have given reasons for modifying substantive takings law, but nothing more than conclusory reasoning accompanied the Court's dismissal of the South Carolina legislature's findings and express purposes regarding its Beachfront Management Act.[127] Instead, traditional judicial respect for legislative judgments seems to have been replaced by thinly veiled contempt for legislative findings.[128] In *Dolan*, Chief Justice Rehnquist noted that Justice John Paul Stevens's dissent relied upon a strong presumption of constitutional validity,[129] and went on to say that "Justice STEVENS' dissent takes us to task for placing the burden on the city to justify

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[125] *See, e.g., Dolan*, 114 S. Ct. at 2309.

[126] One commentator, Norman Williams, claimed that what Justice Scalia did in *Nollan* was "really startling." WILLIAMS & TAYLOR, *supra* note 33, § 5A.04, 142. Williams quotes Justice Scalia:

> Contrary to JUSTICE BRENNAN's claim, . . . our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, Agins v. Tiburon, 447 U.S. 255, 260 (1980) . . . , not that the State 'could rationally have decided' that the measure adopted might achieve the State's objective . . . quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) . . . . JUSTICE BRENNAN relies principally on an equal protection case, Minnesota v. Clover Leaf Creamery Co., supra, and two substantive due process cases, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–488 (1955) . . . and Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, 423 (1952) . . . , in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. Goldblatt v. Hempstead, 369 U.S. 590 (1962) . . . , does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.

Id., quoting *Nollan*, 483 U.S. at 836 n.3 (citations omitted).

Williams labels Justice Scalia's approach "strict scrutiny" but in this passage one finds no discussion of presumption of validity, burden of proof, or beyond fair debate. WILLIAMS & TAYLOR, *supra* note 33, at § 5A.04, 142. Rather, Justice Scalia was discussing the substantive law of takings, due process, and equal protection. *Nollan*, 483 U.S. at 834 n.3. Justice Scalia does not discuss standards of judicial review and it is obvious that the traditional, deferential, Euclidean variety of judicial review was no obstacle to his pro-property rights modifications of substantive takings law. *See id.*

[127] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992).

[128] *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994).

[129] *Id.*

its required dedication."[130] Rehnquist then concluded that "[h]ere, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city."[131]

On the one hand, the lack of a set formula[132] for deciding the substantive issues relating to takings questions has provided property rights-oriented justices, such as Scalia and Rehnquist, a fertile playground for new concepts such as "total takings,"[133] "essential nexus,"[134] and "rough proportionality."[135] On the other hand, the confused and elusive state of presumptions of validity in land-use law and the absence of a principled basis for determining standards of judicial review has created a vacuum for activist, property-rights judges to exploit.[136] In recent takings cases, the United States Supreme Court majority has been reviewing more actively state and local land-use decisions without saying exactly what it was doing or why.[137] These opinions involve a significantly heightened judicial scrutiny and, as was true in *Lucas*, even the suggestion that legislative findings deserve virtually no presumption of validity.[138]

III. Clarifying Heightened Judicial Review

While the *Euclid* presumption of validity became the ritualistic model in American land-use jurisprudence, courts have confused it, misused it, and ignored it, resulting in difficult-to-assess standards of judicial review and levels of judicial scrutiny. In the high-stakes game of land-use decisionmaking, the key players, such as the landowners, developers, neighbors, governmental regulators, and excluded parties deserve more precision and predictability from the law. To that end, some state courts have provided significantly more clarity and consistency concerning their approaches to heightened judicial review.[139]

A recent case that dealt directly and carefully with heightened judicial review is *Board of County Commissioners of Brevard County*

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[130] *Id.* at 2320 n.8.

[131] *Id.*

[132] *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992); *see also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[133] *Lucas*, 112 S. Ct. at 2901.

[134] Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

[135] *Dolan*, 114 S. Ct. at 2319.

[136] *See id.*

[137] *See Lucas*, 112 S. Ct. at 2901.

[138] *See supra* notes 38–101 and accompanying text.

[139] *See, e.g.*, Board of County Comm'rs v. Snyder, 627 So.2d 469 (Fla. 1993); Fasano v. Board of County Comm'rs., 507 P.2d 23 (Or. 1973).

v. Snyder.[140] That case involved the Brevard County Commission's denial of plaintiffs' half-acre rezoning request.[141] The rezoning, which was consistent with the county's comprehensive plan, had been recommended for approval by the local planning and zoning board.[142] Nonetheless, the commission denied the request without providing any justification for its decision.[143] The trial court, after stating its view that a stricter standard of judicial review was required for protection of property owners, held that the petition for rezoning was consistent with the comprehensive plan, that there was no assertion or evidence that a more restrictive zoning classification was necessary to protect the public health, safety, morals, or general welfare, and that the denial of the requested zoning classification without reasons or factual support was arbitrary and unreasonable.[144]

In its appeal before the Florida Supreme Court, the county contended that the standard of review for its denial of the plaintiffs' rezoning request was "whether or not the decision was fairly debatable."[145] The Florida Supreme Court weighed the pros and cons of the deferential judicial review afforded by the "fairly debatable" standard of proof, and acknowledged critics' concerns about "'neighborhoodism' and rank political influence on the local decision-making process"[146] and that "zoning decisions are too often ad-hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits."[147]

The first issue addressed by the Florida Supreme Court was whether the county's action on the rezoning application was legislative or quasi-judicial.[148] The court noted that legislative decisions would be sustained as long as they were fairly debatable, but that quasi-judicial decisions would be subject to review and upheld only if supported by substantial competent evidence.[149] The court reviewed the criteria for determining whether local actions are legislative or quasi-judicial and concluded that the county commission's action on the rezoning appli-

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[140] 627 So.2d 469 (Fla. 1993).
[141] *Id.* at 475.
[142] *Id.* at 471.
[143] *Id.*
[144] *Id.* at 472.
[145] *Snyder*, 627 So.2d at 472.
[146] *Id.* at 472–73, (citing RICHARD F. BABCOCK, THE ZONING GAME 1966).
[147] *Id.* at 473, quoting Mandelker & Tarlock, *supra* note 2, at 2.
[148] *Id.* at 474.
[149] *Id.*

cation was in the nature of a quasi-judicial proceeding.[150] The court went on to conclude that its level of review would therefore be "strict scrutiny."[151] The court indicated that the phrase "strict scrutiny" derives from the Florida requirement that the rezoning decision be in strict compliance with the local comprehensive plan.[152] The court further noted that "strict scrutiny, as used in the review of land use decisions must be distinguished from the type of strict scrutiny review afforded in some constitutional cases" that involve fundamental rights.[153] Based on these considerations, the court held that the "landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance."[154] Upon such a showing, "the burden shifts to the governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose."[155] In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will not have the burden of showing that the refusal to rezone the property was not arbitrary, discriminatory, or unreasonable. If the board carries its burden, a landowner's only remaining recourse will be to demonstrate that the existing zoning is confiscatory and thereby constitutes a taking.[156]

With regard to quasi-judicial decisions, the Florida Supreme Court avoided discussion of, or entanglement with, presumptions of validity and focused directly on issues of judicial review and levels of judicial scrutiny.[157] Regardless of whether one agrees with the substantive result, the Florida Supreme Court provided a forthright presentation and resolution of the heightened judicial review issues, avoiding reliance on presumptions of validity.[158]

An earlier Oregon case also achieved clarity in dealing with heightened judicial review. *Fasano v. Board of County Commissioners of Washington County* involved a challenge by neighbors to a thirty-two acre mobile home rezoning.[159] The Oregon Supreme Court stated that

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[150] *Snyder*, 627 So.2d at 474–75.
[151] *Id.* at 475.
[152] *Id.*
[153] *Id.*
[154] *Id.* at 476.
[155] *Snyder*, 627 So.2d at 476.
[156] *See id.* at 475.
[157] *Id.* at 474–75.
[158] *See id.*
[159] Fasano v. Board of County Comm'rs, 507 P.2d 23, 25 (Or. 1973).

the traditional *Euclid* model of judicial review was not appropriate for quasi-judicial zoning decisions.[160] The court indicated that it granted review to consider three questions relating to standards of judicial review: 1) By what standards does a county commission exercise its authority in zoning matters? 2) Who has the burden of meeting those standards when a request for change of zone is made? 3) What is the scope of court review of such actions?[161] Without mentioning presumption of validity in these three issues, the court indicated that any meaningful decision as to the proper scope of judicial review must start with a characterization of the nature of that decision.[162] The court, relying on the Oregon requirement that local governments have a comprehensive plan, and citing the dangers of the "almost irresistible pressures that can be asserted by private economic interests on local government," rejected the notions of presumptively valid legislation.[163] The court concluded that the assumed validity associated with legislative decisions is inappropriate for quasi-judicial actions, that quasi-judicial actions require active judicial review, that the burden of proof to show conformity with the comprehensive plan was placed on the parties seeking the change—here the developer and the county—not the plaintiff neighbors, and finally, that the burden of proof was variable depending on the degree of change involved.[164]

The *Fasano* decision is an example of clarity and directness compared to many decisions that confuse issues of judicial review with discussions of presumptions of validity.[165] The court did not use slippery, confusing terms—except to avoid applying them—and provided a clear notion of what it was doing, and how and why it was doing it.[166]

The *Board of County Commissioners v. Snyder* and *Fasano* opinions provide useful models for courts that seek to avoid the confusions, temptations, and entanglements of the presumption of validity.[167] Both opinions provide clear, direct approaches to applying a heightened standard of judicial review. Each opinion also offers a

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[160] *See id.* at 30 (Bryson, J., concurring).

[161] *Id.* at 25.

[162] *Id.* at 25–26.

[163] *Id.* at 23.

[164] *See Fasano*, 507 P.2d at 29–30.

[165] *See* Nectow v. Cambridge, 277 U.S. 183, 187 (1928).

[166] *See Fasano*, 507 P.2d at 29–30. In *Baker v. City of Milwaukee*, 533 P.2d 772 (Or. 1975), the Oregon Supreme Court required the land-use restrictions in a zoning ordinance to be consistent with a comprehensive plan. *See* DANIEL MANDELKER, LAND-USE LAW § 3.16 (3d ed. 1993).

[167] *Fasano*, 507 P.2d at 30; Board of County Commissioners v. Snyder, 627 So.2d 469, 472–73 (Fla. 1993).

rationale for its scrutiny of the local land-use decision-making.[168] The *Snyder* court pronounced its concern about the "effect of 'neighborhoodism' and rank political influence on the local decision-making process."[169] *Fasano* expressed the court's uneasiness about the dangers of "the almost irresistible pressures that can be asserted by private economic interests on local government."[170] If other courts followed these examples, reasoning processes relating to the standards of judicial review would be strengthened and the use of presumptions, a word that "has been so promiscuously used as to be devoid of much of its utility,"[171] could be avoided.

IV. Conclusion

Without a doubt the presumption of validity has been a source of confusion and a substitute for clear analysis. It has been an obstacle to clarity of thought about standards of, and justifications for, the various types and levels of judicial review. As a result, most courts have either been unable to overcome these confusions or have been unwilling to resist the temptations to manipulate presumptions discussed above.

Because courts have, for the most part, done little to achieve clarity, coherence, and integrity in their land-use jurisprudence, commentators need to do significantly more to help establish a climate of opinion that encourages judges to adopt principled bases for judicial review of land-use regulations. The presumption-free models supplied by Florida and Oregon can be instructive. Courts will also benefit greatly if commentators can articulate the importance of clear, well-defined, and carefully formulated standards of judicial review that must be applied before judges make decisions on substantive issues such as takings, substantive due process, spot zoning, and consistency with a comprehensive plan.

At the same time, experts have been unprepared to avoid these entanglements. Professors Mandelker and Tarlock have merely begun the necessary inquiry. Their 1992 proposal of a revised basis for shifting the presumption of validity is a formidable attempt to reconcile the confusions and uncertainties of present land-use jurisprudence and to establish a principled basis for judicial review of land-use

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[168] *See Fasano*, 507 P.2d at 30; *Snyder*, 627 So.2d at 472.

[169] *Snyder*, 627 So.2d at 472–73.

[170] *Fasano*, 507 P.2d at 30.

[171] Laughlin, *supra* note 12, at 195.

regulations. As the foundation for their proposal, Mandelker and Tarlock provide a new look at, and careful analysis of, *Carolene Products* Footnote Four.[172] Mandelker and Tarlock recognize Footnote Four as providing a "critical theoretical foundation for presumption-shifting" when land-use regulations are challenged.[173] Nevertheless, Mandelker and Tarlock base their proposal on the presumption of validity and presumption shifting. As a result, their attempt fails to get beyond the entanglements, analytical problems, and confusions inherent in the use of presumptions that are the subject of this article.[174]

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[172] Mandelker & Tarlock, *supra* note 2, at 18–30.

[173] *Id.* at 18.

[174] Mandelker and Tarlock expend substantial effort on "what the Footnote says" and "what the Footnote means." They acknowledge, however, that the Footnote has differences in language, lacks clarity, and is ambiguous. In addition, they acknowledge the "subtle distinctions" between the two concepts of presumptions. An excerpt from their proposal demonstrates Mandelker's and Tarlock's difficulty in achieving clarity:

> The introductory clause in the Footnote refers to the presumption of constitutionality, but paragraph three speaks of heightened judicial review. The question is whether there is a difference between these two ways of defining the judicial role in reviewing government regulation.
>
> The phrase "heightened judicial review" usually means a more intrusive judicial review of regulatory legislation. The Court does not apply the usual rule, that it will uphold legislation if its purpose is "reasonably debatable." Instead, the Court requires more justification for the legislative regulation, such as proof of a "compelling governmental interest" if strict scrutiny judicial review is applied under the Equal Protection Clause. In effect, the Court asserts the constitutional power to limit the list of constitutionally protected purposes.
>
> Our argument is the allocation of the burden of persuasion and proof in litigation through the presumption of constitutionality can be used only to allocate the burden of justification in litigation and can favor either the government that defends, or the litigant who attacks, regulatory legislation. Shifting the burden to government by changing the presumtion only requires government to come up with a more focused and empirically based justification for legislation than is required by the reasonably debatable rule. The presumption shift means the court is less willing to accept the outcome of the political process when it is challenged in court.
>
> The distinction between these two concepts of presumption is admittedly subtle. Heightened judicial review will usually occur when the presumption is shifted against government because the question is which party to the litigation must bear the burden of proving or disproving the constitutionality of a regulation. Heightened judicial review occurs because government is put to its proof. It may not hide behind assumptions about legislative policy and purposes that protect it from inquiry into the legitimacy of its regulation. A court may, but is not compelled, to modify substantive constitutional doctrine. Still, we argue it is useful to distinguish between a standard of review and a procedural doctrine.

Mandelker & Tarlock, *supra* note 2, at 24.

Mandelker and Tarlock's task may have been simplified and facilitated by asking, not what justifies presumption-shifting, but rather, what justifies heightened judicial review. Such an inquiry would avoid the many confusions attendant to "presumptions" and directly address the fundamental issue.

Abandoning presumptions of validity will remove one significant source of confusion and allow both courts and commentators to focus on the key issue of standards of judicial review. If courts can be persuaded to abandon presumptions, it will become significantly easier for land-use stakeholders, practitioners, and commentators to assess what courts are really doing and to predict what they may do in the future.

Moreover, the stage will be set for meaningful discussions by both courts and commentators concerning what the true rationales for deferential and heightened judicial review may be. Not only are Professors Mandelker and Tarlock encouraged to rethink their proposal and to rejoin the debate, but hopefully other commentators will join the discussions and debates as well. Through the crucible of discussion and debate, clarity, coherence, and integrity in land-use jurisprudence can and will emerge.