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Shifting the Presumption of Constitutionality in Land-Use Law*

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I. Introduction

JUDICIAL REVIEW OF LOCAL LAND-USE DECISIONS is a paradox. Land-use decisions are either local administrative or legislative decisions, both of which are generally accorded a formal presumption of rationality and constitutionality.[1] But, these decisions have always been subject to intense, if ad hoc, judicial scrutiny under both federal and state law. Despite courts' almost ritualistic invocation of the presumption of constitutionality, the reality is that the presumption does not immunize land-use decisions from intense judicial review to the same degree that

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1. "In almost every case in which the validity of an ordinance is attacked it contains language supporting the basic proposition that zoning ordinances will be presumed to be constitutional and valid . . . ." 1 ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING § 5.02 (1988). Zoning bodies can perform both legislative and administrative functions and courts often extend the presumption to both functions. *E.g.*, South Fork Coalition v. Board of Comm'rs, 792 P.2d 882 (Idaho 1990) (elected county board of commissioners classified as administrative agency for purpose of judicial review of denial of planned unit development).

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the presumption immunizes acts of Congress and state legislatures from Supreme Court review.[2]

The paradox arises from judicial perceptions about how local government actually works. For decades, the planning profession has defined the ideal zoning decision as one based on technical criteria and accepted by open and informed political debate. Theoretical considerations aside, in reality zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits. As the pace of land-use controls has evolved, especially in the past twenty-five years, judicial perceptions have begun to try to bridge the gap between the ideal and the actual. Initially, courts focused on the democratic prong of the ideal and promoted informed public participation, although courts had always had doctrines to control ad hoc, self-serving decisions. Courts have long intervened in zoning to police fidelity to ignored legislatively imposed procedural requirements,[3] vires, and local ordinance provisions.[4] This tradition, along with the fact that most zoning decisions will support at least a weak takings challenge, formed the precedent for the modern erosion of the presumption of constitutionality which seeks more open and considered decisions.

Judicial review is ultimately a function of the judge's "sense" of the legitimacy of the institution that produced the decision. Although courts are seldom explicit, many decisions are explainable only on the ground that judges sense that zoning decisions are in need of more rigorous judicial control beyond the existing control doctrines.[5] In modern "real-politic" jurisprudence, the lack of legitimacy of legislative decision is

2. The question of the decree of judicial scrutiny arises most often when a statute is alleged to violate equal protection. In theory, statutes that do not involve either a fundamental interest or a suspect class are subject to "low level" scrutiny, although the Court has never articulated a consistent standard. *See generally* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049 (1979). In the New Deal and post-New Deal eras, the presumption of validity or constitutionality is generally invoked to support a minimum rationality standard. *See* McGowan v. Maryland, 366 U.S. 420 (1961). *But cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), discussed *infra* at text accompanying notes 35–36.

3. The requirements generally relate to notice and hearing. *See* 1 RATHKOPF, *supra* note 1, at ch. 10.

4. Munch v. City of Mott, 311 N.W.2d 17 (N.D. 1981).

5. RICHARD F. BABCOCK, THE ZONING GAME 104 (1966); RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED 256–59 (1985).

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not per se a basis for judicial intervention[6] and may even be the basis for judicial deference. However, state courts, perhaps because they are closer to the ground, are less willing to wink at what they perceive as a flawed political process.[7] Finally, the recent "federalization" of land-use law has given state courts a variety of new doctrines to justify more intense scrutiny. The First, Fifth, and Fourteenth Amendments are applied with varying degrees of precision and rigor by state courts along with doctrines that are a mix of federal and state constitutional law and legislation.

In this Article we examine the reasons for the removal of the presumption of constitutionality and the effect of its removal on judicial review of local land-use decisions. We first discuss whether the presumption is appropriate for land-use litigation and why the courts have abandoned the presumption in recent years. We next examine the extent to which courts have shifted the presumption of constitutionality in land-use law, and then examine the basis for presumption-shifting in the Supreme Court's landmark footnote in its *Carolene Products* opinion (the *Carolene Products* Footnote or the Footnote).[8] We argue that the basis for presumption-shifting articulated in the *Carolene Products* Footnote is still the relevant starting point to understand the modern approach to judicial review of land-use decisions. Finally, we propose a revision of the Footnote's criteria for presumption-shifting that is appropriate for land-use law.

II. Why the Courts Have Questioned the Presumption in Land-Use Law

Judicial unease with local land-use control administration reflects the increasing public unease with both its processes and results. Public

6. *See* Richard A. Posner, *The* De Funis *Case and the Constitutionality of Preferential Treatment of Minorities*, 1974 SUP. CT. REV. 1; Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984). Elegant criticisms of this position include Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U.L. REV. 646 (1988); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

7. Given the conventions of judicial analysis, courts can, of course, never articulate a general theory of nondeference, but there are hints of such a theory in the opinions. In its opinion reclassifying map amendments as quasi-judicial acts, the Oregon Supreme Court observed: "Local and small decision groups are simply not the equivalent in all respects of state and national legislatures. There is a growing judicial recognition of this fact of life." Fasano v. Board of Comm'rs, 507 P.2d 23, 26 (Or. 1973).

8. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

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unease alone is not an adequate basis for more intense judicial review. Unless, as we are not, one is prepared to scrap land-use controls, it is difficult to develop a single comprehensive theory of zoning control. Zoning suffers both from the vices of over-regulation and over-exclusion of groups with a constitutionally protected dignity interest that is likely to be slighted in local political processes, as well as the tragedy of under-regulation. Under-regulation is a major problem with land-use activities that degrade sensitive land, but in this Article we are concerned with regulation that needs to be discouraged. The standard explanation for land-use controls is that it minimizes the external costs of land-use controls. The problem is that many of the presumed external costs of land-use controls are dubious especially in rapidly developing areas on the urban fringe. Zoning is land-use segregation. The benefits to be gained from discrimination were not lost on the founders, who encouraged cities to be rent seekers.[9]

Local units of government possess both the power to redress the serious external costs of land development and to do great mischief by distorting regional social inequities and by shifting spillovers from one jurisdiction to another.[10] Zoning law is not indifferent to these problems, but it has not adjusted fully to the mixed blessings of zoning. In all but a few states, zoning law adjusted to the efforts of cities to regulate the post-World War II boom of the 1950s and 1960s by removing most per se barriers to the exercise of land-use controls and by imposing minimal restraints on the exercise of the police power. Courts freed the police power from its nuisance-law limitations and allowed cumulative zoning, aesthetic regulation, fiscal zoning, and even allowed cities to use zoning to confer competitive advantages on one area of a city over another.[11] Only in a few states, most notably Illinois and Pennsylvania,[12] did courts use the Fifth Amendment to strip municipalities of the benefits of the presumptions of rationality and constitutionality.

9. See SEYMOUR I. TOLL, ZONED AMERICAN (1969), for the full account of the ways in which cities seized upon zoning for rent seeking.

10. In the past decade, critical legal scholars have emphasized the lack of municipal power, *see, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980), but local governments in fact possess great regulatory power. For a recent articulation of the thesis that units of local government, especially suburban units, possess too much autonomy see Richard Briffault, *Our Localism: Part I: The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism: Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

11. *See* DANIEL R. MANDELKER, LAND USE LAW §§ 5.31, 5.32-5.36, 11.02-11.05 (2d ed. 1988) [hereinafter LAND USE LAW].

12. *See* Harris Trust & Sav. Bank v. Duggan, 449 N.E.2d 69 (Ill. 1983); National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965).

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During the post-World War II waves of suburban expansion, judicial adherence to these presumptions was underpinned by two contradictory ideas. Zoning is both a product of the progressive faith in scientific rationality and the Jeffersonian faith in the virtues of local control, and both these ideas supported the presumption of rationality and judicial deference to local decisions. These justifications are more problematic today. Both the progressive vision of an objective public interest and the ideal of effective representative government died in the Post-World War II disillusionment with the possibility of effective public action. During the 1950s and 1960s at the federal level, the republican vision of government was kept alive by the interest group liberalism which served to justify judicial deference to administrative decision making. Interest group liberalism has died as a justification for judicial deference in the wake of Theodore Lowi's criticism that pluralistic government produced by interest group liberalism is one devoid of substance and procedure: "There is only process."[13] Today, many critics believe that interest group liberalism serves only as a cynical justification for judicial deference to legislative decisions. This Article attempts a reconstruction of democratic pluralism that can provide the basis for the assignment of the presumption of constitutionality in land-use litigation.

Faith in local land-use controls began to die in the late 1960s. The use of fiscal zoning to create clean, prosperous, and homogeneous suburbs was attacked as exlusionary zoning. The purpose of zoning has always been to exclude, but the tension between this purpose and democratic values did not become a matter of widespread concern until the 1960s.

Courts became increasingly aware that many local decisions were highly arbitrary to the two major stakeholders in the process, landowners and neighbors, as well as to those whose potentially legitimate claims were excluded from the process. Many zoning changes were approved to accommodate individual developers with little consideration for neighborhood or community impacts.[14] Others discriminated against property owners. By the 1970s, the progressive and Jeffersonian images

13. THEODORE LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 97 (1969).

14. Oregon was one of the first states to reverse the presumption of constitutionality to protect neighbors' interest in land-use stability. Roseta v. County of Washington, 458 P.2d 405 (Or. 1969). DANIEL R. MANDELKER, THE ZONING DILEMMA (1970), is an early and influential effort to demonstrate the inadequacy of the formal presumption of constitutionality to control the process given the realities of the urban land market and the relevant interests at stake.

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were replaced by those of racially, culturally, and economically discriminatory parochial local actions. Still courts adhere to the fiction that units of local government are the contemporary embodiment of the Greek polis.[15]

The rise of LULUs (locally undesirable land uses) as a discrete category illustrates an important modern zoning administration problem which stresses traditional notions of judicial deference. The conversion of land to any new use can generate intense controversy among neighbors, but certain new uses that a neighborhood or community perceives as extremely detrimental to the area are different from the usual zoning fight. These uses have been characterized as presumptive nuisances. LULUs include evangelical churches, adult entertainment businesses, deinstitutionalization facilities, and hazardous waste sites. At one level, LULU is without meaning because most land-use controversies involve activities that neighbors perceive as unneighborly, but the term does have some meaning because land-use planners adopted it to signal that existing land-use control mechanisms did not appear adequate to deal with the use. Put another way, it signals a higher level of market failure than that which usually occurs when an alien land use enters a neighborhood.

Environmental activism added a new dimension to zoning practice.[16] In addition to the vast expansion of sensitive land-use controls, it led many communities to become much more aggressive in extracting concessions from developers. The modest law of subdivision approval and exactions became the basis for a taxation scheme and bargaining on a grand scale. Arbitrariness follows power. Courts began to respond to

15. Briffault, *supra* note 10, at 393–412, argues that there is no empirical or normative basis for the claim that small units of government encourage political participation. In fact, the corporate model is a better explanation of entry into a unit of local government. People buy a mix of goods or services and expect performance not participation.

16. Our approach does not exclude any type of land-use regulation from a presumption shift. However, it will seldom be necessary to shift the presumptions of validity and constitutionality in cases challenging environmental regulations such as riparian zone preservation (*see* M & I Marshall & Ilsley Bank v. Town of Somers, 414 N.W.2d 824 (Wis. 1987)), or steep slope erosion prevention (*see* Sellon v. City of Manitou Springs, 745 P.2d 229 (Colo. 1987)), for two reasons. The first reason is that the necessity for a firm scientific basis for the regulation imposes a discipline on the process that is lacking in other contexts. The second reason is that the Takings Clause provides an effective constitutional remedy because environmental regulation usually imposes a severe economic loss on property owners. *See, e.g.*, Beacon Hill Farm Assocs. II Ltd. Partnership v. Loudon County Bd. of Supervisors, 875 F.2d 1081 (4th Cir. 1989); Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991). For a recent case consistent with this analysis, see Beverly Bank v. Illinois Dep't of Transp., No. 70105, 1991 WL 183105 (Ill. Sept. 19, 1991).

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these less shining visions of the exercise of local land-use authority by stripping away the presumptions of rationality and constitutionality. Ironically, in 1965, Pennsylvania struck down large-lot zoning through a traditional application of anti-progressive theory that zoning was in derogation of the common law, and the decision was widely hailed as progressive.[17]

There are a number of new methods of control, but none has been totally effective. There has been a modest increase in the vigor with which legislative due process doctrines such as freedom from bias and conflicts of interest are applied to local authorities. Courts have generally followed the Supreme Court's *Eastlake* decision[18] and allowed cities to enact and modify zoning ordinances by referenda.[19] After years of criticism by planners, courts and legislatures have abandoned the doctrine that the zoning ordinance is the comprehensive plan. In a few states such as Oregon and Florida, the requirement that zoning decisions be consistent with a separate plan operates as somewhat of a check on local decision making, but in most states it has been reduced to a reasonable test that gives little weight to conclusions contained in the plan.[20]

III. Is a Presumption of Constitutionality Appropriate for Land-Use Law?

The presumption of constitutionality in land-use law dates from the Supreme Court's landmark *Euclid* case,[21] decided in 1926. In *Euclid*, the Court upheld a suburban zoning ordinance that excluded apartments from a two-family residential district. In an opinion raising substantive due process and equal protection questions, the Court held that the legislative judgment must stand if the validity of a legislative zoning

17. *See* National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965).

18. City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976).

19. *E.g.*, Margolis v. District Court, 638 P.2d 297 (Colo. 1981); City of Winter Springs v. Florida Land Co., 413 So. 2d 84 (Fla. Dist. Ct. App. 1982); Peachtree Development Co. v. Paul, 423 N.E.2d 1087 (Ohio 1981) (implementation of planned unit development).

20. *E.g.*, Bone v. City of Lewiston, 693 P.2d 1046 (Idaho 1984); Ferguson v. Board of County Comm'rs, 718 P.2d 1223 (Idaho 1985); South Fork Coalition v. Board of County Comm'rs, 792 P.2d 882 (Idaho 1990). *South Fork* held that the board of county commissioners could approve a recreational PUD on 3000 acres of land in the face of a widespread consensus among federal and state agencies, reflected in the comprehensive plan, "that this area, virtually a rare gem in the mountains, should not be invaded by a housing development." *South Fork*, 792 P.2d at 899 (Bistline, J., dissenting).

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

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classification is fairly debatable. This holding is the genesis of the presumption of constitutionality in land-use law. Since *Euclid*, the courts have applied the presumption of constitutionality in a wide variety of land-use cases.

The use of the term presumption to describe the relationship between a zoning body and a court is misleading because it is being used to describe two different concepts. Both concepts have a useful role to play in judicial control of land-use decisions, but the difference between the two concepts needs to be articulated to synthesize them. "Presumption" is a technical term to allocate the burden of producing evidence, but this is not the usual use of the term in land-use decisions. Courts generally use the term "presumption" to refer to standards of judicial review that will be applied. Legislative bodies are not subject to the same evidentiary burdens as fact finders. Instead, they must offer only a plausible rationale for what they do unless a constitutional norm is violated. The standard of constitutional review of federal and state legislation is an endlessly perplexing question. With few procedural or specific constitutional standards, courts must either rubber stamp decisions or skirt the bog of inquiry into legislative purpose. We do not enter that debate but instead argue that more intense judicial review is more explainable and justifiable with respect to land-use controls. And, we also argue that presumption shifts can be seen as a dialogue between courts and fact-finding bodies about the way in which decisions should be made but often are not.

Presumptions are legal rules to promote the discovery of the truth. In our legal system, truth means a legitimate finding of fact, and the law of presumptions has developed in the context of tension between the powers of judge and jury to define law.[22] As noted earlier, a presumption is technically a rule to allocate the burden of producing evidence.[23] The presumption of validity can perform this function. For example, the landowner attacking the ordinance bears the burden of going forward and of persuasion, but if he produces evidence to show that the ordinance substantially decreases the value of the property and

22. FLEMING JAMES, JR. AND GEOFFREY C. HAZARD, JR., CIVIL PROCEDURES § 7.4 (1985).

23. The most widely used definition of a presumption is the "Thayer" model. When a basic element of the prima facie case is established, the presumed fact must be assumed until contradictory evidence has been introduced. RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 550 (1984). At that point, the trier of fact must make a determination as if no presumption had ever been applicable. *Id.* "In other words, the presumption affects the production burden only . . . ." *Id.*

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does not advance a standard zoning purpose, then the burden of going forward shifts to the city. Courts have occasionally applied standard presumption analysis to land-use disputes,[24] but the procedural definition of a presumption does not work well when the issues are a mix of empirical evidence and judgment.

The concept of a prima facie case, central to the control of the fact-finding process, has a limited applicability to land-use controls. There is no standard challenge to a typical zoning change decision. Even in states which have developed a list of judicial factors to determine the reasonableness of a rezoning decision, there is no requirement that the factors be applied consistently.[25] Courts are right not to develop a prima facie case and to base decisions on which party met the burden of production and the burden of persuasion. The reasonableness of a zoning decision

24. *See* Cole-Collister Fire Protection Dist. v. City of Boise, 468 P.2d 290 (Idaho 1970).

Idaho's experiment with Thayer presumptions in zoning cases seems to have begun and ended with *Cole-Collister*. The dissenting justice argued that the use of the presumption violated separation of powers principles. *Id.* at 297–98 (McQuade, J., dissenting). Five years later the supreme court rebuffed an argument, on the same Boise arterial, that Cole-Collister allowed a mobile home park applicant to challenge the rationality of a rule requiring that all parks front on or have direct access to a state primary or secondary highway. The Court said, "Essentially herein we are asked to review and reverse legislative judgments. Those judgments should not be overturned by this court unless it can be shown that the ordinance bears no rational relationship to a permissible state objective." Cooper v. Board of Ada County Comm'rs, 534 P.2d 1096, 1099 (Idaho 1975); *see also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

Of course, some zoning issues are more susceptible to conventional proof, and the use of Thayer presumptions is justified. *See, e.g.*, Babcock Co. v. Florida, 558 So. 2d 76 (Fla. Dist. Ct. App. 1990) (once state proved that development would have adverse regional impact, company had burden of proving that its proposals would remedy the adverse effects; company failed to prove that overpass would clear the traffic congestion).

25. Kansas is an interesting case study of the inability of a court to develop a prima facie case for run-of-the-mill rezonings. The Kansas Supreme Court modified Illinois' multi-factor test for reasonableness and adopted it as the standard for review of quasi-judicial decisions. *See* Golden v. Overland Park, 584 P.2d 130 (Kan. 1978); Taco Bell v. Mission, 678 P.2d 133 (Kan. 1984). Subsequently, the court downgraded the *Golden* factors to suggestions. *See* Landau v. Overland Park, 767 P.2d 1290 (Kan. 1989). The Tenth Circuit relied on *Landau* to hold that landowners and a developer who wanted to put a mall on the southern edge of Lawrence, Kansas, but were blocked by the city's efforts to preserve the historic downtown core had no constitutional entitlement to the rezoning. *See Landau*, 767 P.2d at 1295. "[T]he state law's requirement that zoning decisions be reasonable, even as modified by the factors enunciated in *Golden*, is insufficient to confer upon the applicant a legitimate claim of entitlement." Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111, 1116 (10th Cir. 1991). Even Idaho, which applied the "Thayer" definition of a presumption to zoning, see *supra* note 24, soon reverted to a more conventional reasonableness review. Cooper v. Board of Ada County Comm'rs, 534 P.2d 1096 (Idaho 1975).

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cannot be proved as the term is used in civil and criminal litigation. Factual questions such as impact studies are relevant to the reasonableness of a decision but ultimately zoning decisions rest on assumptions about the desired city form and the social make-up of the area.

Zoning courts are thus faced with the choice that all courts face in reviewing the decisions of political bodies, elected or appointed. A deferential standard satisfies separation of power concerns by ensuring that elected bodies discharge their constitutional and legislative functions. But, deferential review, usually the substitution of a more coherent and elegant rationale for the decision, leaves too many persons at risk from arbitrariness. Intrusive review puts courts on the shoals of value substitution. There are no transcendent zoning values that could form the basis for a rights-based approach to judicial control of zoning.

A process-based approach along the lines of what Justice Hans Linde has called a "due process of legislation" has greater promise.[26] We believe that courts have been groping toward a theory that seeks to ensure that decision makers do the two things that are most likely to suffer in community politics: careful consideration of the relationship between individual decisions and the future form and composition of the community and particular attention to voices most likely to be ignored in representative government.

Planners have always worried about the form of the American city; it is not compact like the classic European city.[27] Social observers of zoning have recognized that land-use patterns in fact implement deeply held national values but have worried about the costs of social sorting.[28] The tension between better city form and social equity is at the center of modern zoning debates, and this Article is an attempt to tilt the balance more to social equity when it is sacrificed to social sorting disguised as good form.

IV. A Review of Presumption-Shifting in Land-Use Law

The courts have provided an opportunity for new voices in the land-use decision making process by reversing the presumption of constitutionality in a wide variety of land-use cases. This section briefly reviews the

26. Hans A. Linde, *The Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).
27. *See* KEVIN LYNCH, A THEORY OF GOOD CITY FORM (1981).
28. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

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types of cases in which presumption-shifting has become common. It provides a basis for the examination and reconstruction of the role of presumption-shifting in land-use law that follows.

There are major differences in presumption-shifting in federal as compared with state law. Federal constitutional law shifts the presumption only when fundamental constitutional rights are violated or when a classification is suspect.[29] State law is more diverse and complex. Most state courts do not shift the presumption of constitutionality when a substantive challenge is made to a land-use restriction. But, there are many exceptions based on federal and state constitutional law as well as policies implicit in state legislation. Presumption-shifting has long been the rule in several types of small rezonings, although the presumption shift is usually implicit rather than explicit. For example, the presumption is shifted because of perceived defects in the decision making process in upzoning or traditional "spot" zoning cases where a landowner receives an upzoning to a more intensive use. The presumption has more recently been shifted in cases in the major urban states invalidating restrictions on nontraditional families, and a respectable minority of state courts shift the presumption in other types of cases, especially the exclusionary zoning cases.

Presumption-shifting in land-use cases is unprincipled and disorderly when it does occur. There is no clear, consistent, and coherent doctrine that determines when presumption-shifting is appropriate. This disorder in the case law suggests that a principled review of the basis for presumption-shifting in land-use litigation is in order.

A. *Constitutional Rights and Suspect Classification Cases*

The clearest case in which courts shift the presumption of constitutionality is the case in which a land-use regulation violates an important constitutional right or contains a suspect classification. The application of federal constitutional free speech doctrine to political and commercial

29. A leading constitutional law scholar, in a classic article, argued for the application of a sliding scale of judicial review in equal protection cases. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). The Court's application of low-level rational basis judicial review to invalidate legislation in recent cases indicates it has rejected Gunther's proposal. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (applying rational basis judicial review to invalidate denial of special use permit for group home for mentally retarded).

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signs and adult businesses is a good example.[30] Billboards were once merely another land use, but they are now classified as commercial speech; courts apply a multi-factored test that reverses the presumption of constitutionality by requiring that local governments select a less restrictive regulatory alternative.[31] Abortion clinics enjoy comparable protection under the federal Constitution because abortion is an exercise of the fundamental constitutional right of privacy. Courts reverse the presumption of constitutionality and require compelling governmental reasons for zoning restrictions on the location of abortion clinics.[32]

Religious uses are in a less-protected position under the "free exercise of religion" clause of the federal Constitution because land-use regulations of religious activities do not directly affect religious belief. Although the federal courts apply a balancing test that effectively reverses the presumption of constitutionality, they have upheld most land-use restrictions on religious uses.[33] The situation is mixed in the state courts. Some state courts allow the exclusion of religious uses from residential areas, but other state courts give religious uses a preferred status under zoning ordinances.[34] These courts in effect reverse the presumption of constitutionality against zoning ordinances that restrict the location of religious uses.[35]

Property rights are protected from restrictive land-use regulation by the Taking Clause of the federal Constitution. The property rights protected by the Taking Clause are not fundamental, so courts have not

30. On signs, see DANIEL R. MANDELKER ET AL., FEDERAL LAND USE LAW §§ 7.01–7.12 (1991) [hereinafter FEDERAL LAND USE LAW]. On adult businesses, see *id.* §§ 8.02–8.07; Ronald M. Stein, *Regulation of Adult Businesses Through Zoning After* Renton, 18 PAC. L.J. 351 (1987).

31. Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980). A later decision held that Central Hudson's test for governmental regulation of commercial speech is not an exacting least-restrictive-means test, but only a requirement that there be a reasonable fit between ends and means. *See* Board of Trustees v. Fox, 429 U.S. 492 (1989). The measure is constitutional if it is narrowly tailored and does not burden speech substantially more than is necessary. *Id.* at 476.

32. *See* Deerfield Medical Ctr. v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981).

33. The leading case is Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984). *But see* City of Seattle v. First Covenant Church, 111 S. Ct. 1097 (1991), remanding a case holding that a landmarks ordinance interfered with the practice of religion for further consideration in light of Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). The *Smith* decision held that religiously neutral regulations of religious groups did not interfere with the Free Exercise Clause. *Id.*

34. *See* LAND USE LAW, *supra* note 11, § 5.51.

35. *See, e.g.*, Ellsworth v. Gercke, 156 P.2d 242 (Ariz. 1945); State *ex rel.* Lake Drive Baptist Church v. Village of Bayside Bd. of Trustees, 108 N.W.2d 288 (Wis. 1961).

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reversed the presumption of constitutionality when landowners challenge a restriction on their property as a taking. All land-use regulation has the potential to reduce the value of the regulated land, but courts historically have used substantive standards rather than the fundamental rights approach to review takings challenges. The doctrine, in theory, applies regardless of the validity of the justification.

A footnote by Justice Scalia in a Supreme Court taking case[36] may have modified this rule.[37] The footnote suggests that courts should apply heightened judicial scrutiny when they review land-use ordinances and decisions for Taking Clause violations. Echoing the judicial review standard applied to land uses claimed to violate the free speech clause, Justice Scalia held that land-use regulations must "substantially advance" a "legitimate state interest" to avoid a violation of the Taking Clause.[38] This test, Justice Scalia explained, is stricter than the standard of judicial review that is applied under the substantive due process and equal protection claims.[39]

Classifications adopted in land-use regulations can trigger a presumption reversal in equal protection cases. Courts usually apply a presumption of constitutionality to legislative classifications and require only a "rational relationship" between the classification and a legitimate governmental purpose. Most classifications, including zoning classifications, are held constitutional under this test. The presumption is shifted when a regulation contains a suspect classification, such as a racial classification, and the courts apply strict scrutiny judicial review. Government must have a "compelling reason" to justify a suspect classification, and courts rarely, if ever, find that a compelling reason exists. A classification is racially suspect if it was racially motivated. As the Supreme Court explained in a land-use decision,[40] a court can find racial motivation if a municipality "was motivated in part by a racially discriminatory purpose."[41]

The Supreme Court applies a heightened but not as rigorous "intermediate" standard of judicial review to "quasi-suspect" classifica-

36. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987).

37. *See* Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301 (1991).

38. *Nollan*, 483 U.S. at 834 n.3.

39. *Id.*

40. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

41. *Id.* at 270–71 n.21. The municipality then has the "burden of establishing" it would have made the same decision even if the "impermissible purpose" had not been considered. *Id.*

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tions. The Court has not applied this intermediate standard of judicial review to land-use regulation, but has indicated that it is willing to apply rational basis equal protection review more stringently. *City of Cleburne v. Cleburne Living Center, Inc.*[42] is the leading example. A municipality refused a special use permit for a group home for the mentally retarded.[43] The Court held the mentally retarded were not a quasi-suspect class entitled to intermediate judicial review of classifications that discriminate against them,[44] but Justice White then applied rational relationship review "with a bite" to conclude that the permit denial violated equal protection.[45] The "mere negative attitudes" of neighbors, the Court held, were not a sufficient basis for the permit denial.[46] In effect, the Court shifted the presumption to the city.

B. *Zoning Barriers to Affordable Housing*

The state exclusionary zoning cases are classic examples of judicial presumption-shifting. Exclusive residential zoning to protect a municipality's quality of life has been constitutional since the Supreme Court's *Euclid* case,[47] but the Court indicated it would invalidate zoning "where the general public interest" outweighed the interest of the municipality.[48] The New Jersey Supreme Court picked up on this suggestion in its first exclusionary zoning case, which held that municipalities had to provide their fair share of the regional need for affordable housing.[49] The court shifted the presumption by holding that every municipality through its zoning must, "presumptively," make an appropriate "variety and choice" of housing realistically available.[50] This obligation

42. 473 U.S. 432 (1985).
43. *Id.* at 437.
44. *Id.* at 442.
45. *Id.* at 450.
46. *Id.* at 448. The *Cleburne* decision inquired into the motives for the permit denial, an analysis inconsistent with the presumption of constitutionality usually applied to land-use decisions. *See* Harold A. Ellis, Neighborhood Opposition and the Permissible Purposes of Zoning (1991) (on file with authors; forthcoming Florida State Journal of Environmental and Land Use Law).
47. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Ironically, Ambler Realty's attorney, Newton D. Baker, feared that the presumption of validity would result in "communistic ownership and control." Arthur V.N. Brooks, *The Office File Box—Emanations from the Battlefield, in* ZONING AND THE AMERICAN DREAM 3, 6 (Charles M. Haar & Jerold S. Kayden eds. 1986). In reality, the opposite happened. Zoning strengthened the power of cities to exclude the "masses" and to reaffirm the status quo. *See* Michael Allan Wolf, *The Prescience and Centrality of* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM 252 (Charles M. Haar & Jerold S. Kayden eds. 1986).
48. *Euclid*, 272 U.S. at 388.
49. Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I), 336 A.2d 713, 724–25 (N.J.), *cert. denied*, 423 U.S. 808 (1975).
50. *Id.* at 724.

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must be met unless the municipality "can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do."[51]

Presumption-shifting also occurs in decisions striking down excessive residential zoning restrictions. The Pennsylvania Supreme Court holds that excessive large lot zoning is unconstitutional unless the municipality can show an "extraordinary justification."[52] The New Jersey Supreme Court shifts the presumption of constitutionality against ordinances that require a minimum size for a house. If a showing is made that a municipality has adopted a minimum house size requirement unrelated to any other factor, the municipality's purpose in adopting the ordinance will be presumed to have been improper.[53] The burden is on the municipality to establish that a valid basis exists for the restriction.[54]

C. *Zoning Barriers to Nontraditional Families and Dwellings*

The Supreme Court's nuisance rationale, adopted to uphold exclusive residential zoning,[55] has long been questioned, but courts adhered until the 1960s to the fiction that only the All-American single-family home and family were acceptable as a residential use. This led to cases upholding the exclusion of mobile homes from single-family residential zones.[56] The Supreme Court confirmed this practice when it held, in *Village of Belle Terre v. Boraas*,[57] that a municipality could limit to two the number of unrelated persons who could live together. As Justice Douglas held, "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."[58]

Although a number of state courts followed *Belle Terre*, this decision

51. *Id.*

52. Appeal of Kit-Marr Builders, Inc., 268 A.2d 765 (Pa. 1970).

53. Home Builders League of S. Jersey, Inc. v. Township of Berlin, 405 A.2d 381 (N.J. 1979).

54. Pennsylvania's Supreme Court has held that when a municipality excludes a legitimate commercial use the burden shifts to the municipality to justify the exclusion. Beaver Gasoline Co. v. Zoning Hearing Bd., 285 A.2d 501 (Pa. 1971).

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

56. *See* LAND USE LAW, *supra* note 11, § 5.14. The leading case upholding the exclusion of mobile homes from an entire community was Vickers v. Township Comm. of Gloucester, 181 A.2d 129 (N.J. 1962), *cert. denied*, 371 U.S. 233 (1963).

57. 416 U.S. 1 (1974).

58. *Id.* at 9. Justice Douglas also noted that "[w]e deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law" is reasonable and not arbitrary. *Id.* at 8.

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shocked courts in a number of states, especially as the problems of under-funded deinstitutionalization policies began to mount, and they held restrictions of this type unconstitutional.[59] In many of these cases the courts applied strict scrutiny judicial review, based on a state equal protection or comparable constitutional clause, and reversed the presumption of constitutionality. In *City of Santa Barbara v. Adamson*,[60] for example, the court relied on a right of privacy guaranteed by the state constitution to invalidate a zoning ordinance that allowed no more than five unrelated families to live together as a family unit.[61] Applying an analysis similar to strict scrutiny judicial review, the court required but did not find a "compelling public need" for the restriction.[62] It held the city should apply other forms of regulation, such as population density and parking regulations, as a "least restrictive alternative."[63]

D. *Malfunction in the Zoning Process*

Courts shift the presumption of constitutionality because of defects they perceive in the zoning process, although presumption shifts in these cases are usually implicit rather than explicit. A court may require a municipality to provide a justification for a zoning decision, or will inquire into its legislative purpose. Either requirement effectively shifts the presumption by abandoning the "reasonably debatable" rule that allows a court to accept a municipal justification for a regulation that is arguable rather than proved.[64]

Upzoning or "spot zoning" cases where a landowner has received an upzoning for a more intensive use can be a classic example of political malfunction. Because the courts believe that improper pressure on the legislative body may have been responsible for the upzoning, they may require the municipality to show a legitimate reason for the zoning change.[65] This requirement is more onerous than the standard of proof required by the reasonably debatable rule and amounts to a shift in the presumption of constitutionality.[66]

59. LAND USE LAW, *supra* note 11, §§ 5.02–5.05.
60. 610 P.2d 436 (Cal. 1980).
61. *Id.*
62. *Id.* at 439.
63. *Id.* at 441.
64. *See* LAND USE LAW, *supra* note 11, § 1.12.
65. *See, e.g.*, Fritts v. City of Ashland, 348 S.W.2d 712 (Ky. 1961) (invalidating rezoning to industrial use because no evidence of change in neighborhood since adoption of original ordinance and promotion of employment in city not sufficient justification).
66. Courts may test the validity of a spot zoning by asking if the benefits it confers on the public outweigh the detriments it imposes on neighboring landowners. *See, e.g.*, Woodland Estates, Inc. v. Building Inspector of Methuen, 358 N.E.2d 468 (Mass. App. Ct. 1976); Randolph v. Town of Brookhaven, 337 N.E.2d 763 (N.Y. 1975); Godfrey v. Union County Bd. of Comm'rs, 300 S.E.2d 273 (N.C. Ct. App. 1983).

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The courts also shift the presumption in downzoning cases, which are the converse of spot zoning, because the municipality makes a zoning regulation more rather than less restrictive, although the malfunction is different. Spot zoning is often a classic case of capture and abuse of power with more than a hint of corruption. Downzoning is often the result of a creation of a new majority that secures a restrictive change in a land-use regulation.[67] Although most courts apply the usual presumption of constitutionality to a downzoning, a few courts restrict the potential for abuse in downzonings by reversing the presumption of constitutionality.[68]

The issue is whether a municipality has improperly controlled competition in another group of presumption-shifting cases. In a typical case, a municipality rezones a site for a major shopping center and then refuses to rezone a nearby site for a similar shopping center. The landowner whose rezoning is rejected argues the municipality has improperly controlled competition. Courts hold the zoning decision is valid if its primary purpose was to implement a legitimate government objective rather than to control competition. These cases effectively reverse the presumption of constitutionality by inquiring into the dominant purpose for the zoning decisions.[69] This type of inquiry is inconsistent with the

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For a case that adopts a process failure approach to spot zoning similar to the one advocated in this Article, see Fulton County v. Wallace, 393 S.E.2d 241 (Ga. 1990). The *Fulton County* case is an example of "judicial spot zoning" but the analysis applies equally to legislative spot zoning. A trial court held that the refusal to allow multi-family use on a tract zoned for "village-type shops" was unconstitutional, but the state supreme court reversed because of the neighbors' reliance interest in the stability of fringe areas which the original zoning had generated.

67. The courts recognize a downzoning may occur because of rapid legislative change but do not invalidate the downzoning because they believe they are bound by the presumption of constitutionality. *See, e.g.*, Carty v. City of Ojai, 143 Cal. Rptr. 506 (Cal. Ct. App. 1978); Raley v. California Tahoe Regional Planning Agency, 137 Cal. Rptr. 699 (Cal. Ct. App. 1977); Willdel Realty, Inc. v. New Castle County, 281 A.2d 612 (Del. 1971); *see also* Linde, *supra* note 26 (arguing the proper function of the Due Process Clause is to ensure procedural safeguards in the enactment of legislation, not to restructure the ends and means constitutionally available to legislators).

68. *See, e.g.*, Parkridge v. City of Seattle, 573 P.2d 359 (Wash. 1978). A few courts, in similar cases, will also shift the presumption when a landowner claims a downzoning has impaired his vested right to development. *See* Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980).

69. *See* Charles Weaver & Christopher Duerksen, *Central Business District Planning and the Control of Outlying Shopping Centers*, 14 URB. L. ANN. 57 (1977). The usual rule is that a court cannot inquire into legislative motives. For discussion of this problem in a control of competition case, see Ensign Bickford Realty Corp. v. City Council, 137 Cal. Rptr. 304 (Cal. Ct. App. 1977). As the court notes by discussing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), racial discrimination cases are an exception to this rule because proof of an equal protection violation requires proof of racially discriminatory motivation. *Ensign Bickford*, 137 Cal. Rptr. at 311.

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usual application of the presumption, which assumes a regulation is constitutional if its purposes are reasonably debatable.

Other courts recognize the need for rational decision making in the zoning process by linking the presumption of constitutionality with the consistency of a zoning decision with a comprehensive plan. The presumption is reversed against government when a zoning decision is inconsistent with a plan.[70] The link between the comprehensive plan and the decision on how to apply the presumption of constitutionality is an important one that will be examined later in this Article.

V. The *Carolene Products* Footnote and Its Critics

A famous footnote in a 1938 Supreme Court decision, *United States v. Carolene Products Co.*,[71] provides the critical theoretical foundation for presumption-shifting when legislative regulations are claimed to be unconstitutional.[72] The *Carolene Products* Footnote has had a major

70. *See, e.g.*, Haines v. City of Phoenix, 727 P.2d 339 (Ariz. Ct. App. 1986). *See generally* Charles L. Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603 (1987).

71. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). For the Footnote's text, see *infra* note 79.

72. There is now sizeable literature on the *Carolene Products* Footnote. *See* Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991); J.M. Balkin, *The Footnote*, 83 NW. U.L. REV. 275 (1989); Wojciech Sadurski, *Judicial Protection of Minorities, The Lessons of Footnote Four*, 17 ANGLO-AM. L. REV. 163 (1988); Frank R. Strong, *A Post-script to* Carolene Products, 5 CONST. COMMENT. 185 (1988); Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U.L. REV. 389 (1987); Mark Tushnet, *Community and Fairness in Democratic Theory*, 15 FLA. ST. U.L. REV. 417 (1987); Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Insider-Outsider"*, 134 U. PA. L. REV. 1291 (1986); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982); Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087 (1982); Milner S. Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787 (1981); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974); Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. ANN. 397.

Much of the *Carolene Products* footnote commentary addresses and criticizes the process-defect theory of judicial review that John Hart Ely constructs from the footnote. *See* JOHN M. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). For commentary on Ely see, for example, Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988); Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984); Charles

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impact on constitutional theory even though it has been cited hardly at all in land-use cases[73] and has had minimal impact on the development of constitutional law in other areas.[74] Despite its neglect, the Footnote is the centerpiece of any inquiry into presumption-shifting in land-use cases because it is the Court's major attempt to rationalize the more stringent judicial review that presumption-shifting requires. This section examines the *Carolene Products* Footnote and its meaning to determine how it should affect presumption-shifting in land-use law.

A. *The Historic Background*

The *Carolene Products* Footnote is only a dictum in a simple post-*Lochner* era case upholding a federal statute prohibiting the shipment of filled milk in interstate commerce.[75] Some history can indicate why the Court wrote the Footnote and what it accomplished. *Carolene Products* was one of several cases that marked the end of an era when the Court invalidated regulatory economic legislation because it disagreed with the legislative purpose. This era was called the "*Lochner* Era," after one of the most famous of these cases.[76] In *Carolene Products* and other cases during the New Deal period, the Court retreated from *Lochner* and consistently upheld regulatory economic legislation.

R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991).

73. An exception is Columbus Park Congregation of Jehovah's Witness, Inc. v. Board of Appeals, 182 N.E.2d 722 (Ill. 1962) (reversing denial of special use permit for religious use). A LEXIS search produced only a handful of zoning cases decided since 1945 that even cited *Carolene Products*. *Compare* Rochester Business Inst. v. City of Rochester, 267 N.Y.S.2d 274 (N.Y. App. Div. 1966) (applying presumption of constitutionality in upholding official map designation), *with* De Sena v. Gulde, 265 N.Y.S.2d 239 (N.Y. App. Div. 1965) (expressly disregarding *Carolene* presumption to invalidate downzoning adopted in response to neighborhood opposition).

74. Farber & Frickey, *supra* note 72, at 691–96.

75. Filled milk was evaporated skimmed milk in which coconut oil replaced the removed butterfat, so that the resulting product approached the taste and consistency of whole milk. Miller, *The True Story of* Carolene Products, *supra* note 72, at 401. Dairy interests, anxious to maximize demand for butterfat, campaigned for state and federal legislation against both the manufacture and sale of filled milk. *Id.* at 402–06; *see also id.* at 406–15 (history of filled milk legislation from the 1920s to the 1970s).

76. *See* Lochner v. New York, 198 U.S. 45 (1905) (striking down a state law regulating employment in the bakery industry because the law unreasonably interfered with employers' and workers' freedom of contract); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-7 (2d ed. 1988) (on the *Lochner* Era and the reaction against it). The trouble with the *Lochner* Era was not that the Court sometimes intervened to strike down regulatory legislation, but that the Court did so in an inconsistent manner, *cf.* Komesar, *Taking Institutions Seriously*, *supra* note 72, at 420–22, 421 n.171 (criticizing *Lochner* Era rulings by the Supreme Court as contradictory).

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The New Deal theory of judicial review was premised on a strong presumption of deference to legislative judgment, but Justice Stone added a Footnote in *Carolene Products* in which he suggested cases in which judicial deference would not be required.[77] Although the Footnote required judicial deference in most cases of government regulation, it urged heightened judicial review when fundamental rights were violated or when legislation "prejudice[d] . . . 'discrete and insular' minorities." [78] The Footnote did not attract much attention at first because the period of judicial deference continued until after the Second World War. At that time, as the Court's focus shifted from the problem of national power to the protection of individual rights, the Footnote became the linchpin of a new basis for heightened judicial review of the exercise of governmental power.

B. *What the Footnote Says*

The Footnote contains three paragraphs that suggest three very different bases for heightened judicial review.[79] The first paragraph begins importantly by stating, "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution."[80] This paragraph

77. *See* Lusky, *Footnote Redux*, *supra* note 72 (a history of the footnote's redaction). According to Lusky (former law clerk to the footnote's author, Justice Harlan F. Stone), *Carolene Products* reaffirmed the Roosevelt Court's deference to legislative judgment in reviewing socioeconomic legislation, while footnote four suggested the types of cases in which closer scrutiny might be warranted. *Id.*

78. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

79. The *Carolene Products* Footnote:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [Citing cases dealing with restrictions upon the right to vote, restraints upon the dissemination of information, on interferences with political organizations, and the prohibition of peaceable assembly.]
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry.

Id. (citations omitted).

80. *Id.*

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establishes a basis for heightened judicial review when a government regulation violates a specific provision of the Constitution, such as the Free Speech Clause. The preface to this statement also indicates the Court was elaborating a basis for shifting the presumption of constitutionality usually applied to legislation, not the revision of any particular substantive constitutional doctrine.[81]

The third paragraph[82] is central to the role of presumption-shifting in land-use law. The Court suggested it would give "more searching judicial inquiry" when "prejudice against 'discrete and insular' minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[83] This paragraph presents serious problems of interpretation because it moves beyond the protection of discrete constitutional rights.

C. *What the Footnote Means*

Paragraph three of the *Carolene Products* Footnote is a watershed in the application of the presumption of constitutionality to government regulation, such as land-use regulation. Yet the meaning of paragraph three is unclear, and the problem of interpretation is not helped by the failure of courts to apply the Footnote in their decisions.[84]

The emphasis in paragraph three on "prejudice" against "minorities" suggests to some that the Court was talking about prejudice in the legislative process against certain minority groups, especially racial minorities. This view of paragraph three led many commentators to

81. That the Court was considering the application of the presumption, not revision in any particular substantive constitutional doctrine, is clear from remarks by Justice Stone, the author of the Footnote, in conference on another case. In conference on Skinner v. Oklahoma, 316 U.S. 535 (1942), Justice Stone said he would "not apply [the] ordinary presumption in [a] field where [he] knows the leg[islature] knows nothing." Justice Douglas' notes on the *Skinner* conference, Library of Congress, Douglas Papers, Box 75, case file no. 782 (quoted in Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 821 (1991).

82. The second paragraph in the Footnote, though of importance in constitutional law, is only of marginal relevance in land-use law. The Court suggested it might afford heightened judicial scrutiny when "legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Carolene Products*, 304 U.S. at 152 n.4. The Court had reference to legislation that interferes directly with the political process as it cited cases considering restrictions on the right to vote and interference with political organizations. *Id.*

83. *Id.*

84. *See, e.g.*, Farber & Frickey, *supra* note 72, at 691–94 (observing that the Supreme Court has rarely relied on the Footnote in race-discrimination cases). But the *Carolene Products* Footnote has inspired a large body of commentary, *see supra* note 72, and even critics of the Footnote's political theory maintain that the Footnote's "vision" was "the impetus for fundamental constitutional change" and "will always be with us," Farber & Frickey, *supra* note 72, at 727.

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view it as a call for applying the Equal Protection Clause to invalidate legislation that discriminates against minority groups.[85]

Recently, paragraph three has been extended to include a more general theory of political malfunction. The basis for this interpretation is clear in the statement that the presumption should shift when prejudice against minorities "seriously [] curtail[s] the operation" of political process in which minorities should be protected. This interpretation is adopted by a number of commentators, who recognize the concern with political process in the Footnote but urge a revision in its teaching. An important article, for example, holds that "discrete and insular" minorities now possess effective political power, and that it is diffused and anonymous minorities or majorities who are at risk in the political process.[86] Another commentator identifies capture by powerful minorities as a serious problem that can impair the integrity of the political process.[87]

These interpretations are defensible, but the Footnote's history suggests an alternative and more plausible interpretation. The Footnote came after the Court had rejected the *Lochner* era's willingness to invalidate social legislation and was moving toward the position that political checks are the only checks on the exercise of governmental power.[88] In this context, the Footnote can be read as an attempt by the Court to recast *Lochner* review of legislation so it would fit a more limited class of legislation that would be least likely to reflect consensus among affected groups. That this was the Footnote's intent is indicated by its call for a shift in the presumption of constitutionality when the political process does not operate fairly. The emphasis is on institutions,

85. Commentators of diverse viewpoints argue that a process-defect theory based on prejudice is necessarily substantive. *See, e.g.*, Powell, *supra* note 72, at 1091 (because judges must have a substantive vision of political outcomes undistorted by prejudice, although the choice of outcomes properly belongs to legislators); *see also* Tribe, *supra* note 72, at 1067–72 (because the purpose of procedure is the protection of substantive values); *id.* at 1072–73 (because otherwise prejudices would be indistinguishable from the principles that individuals and groups are entitled to hold). *Accord* Ackerman, *supra* note 72, at 737, 739–40.

86. *See* Ackerman, *supra* note 72, at 722–33, 742.

87. *See* Komesar, *A Job for the Judges*, *supra* note 72, at 671–77; Komesar, *Taking Institutions Seriously*, *supra* note 72, at 375, 415.

88. This tendency is evident in cases upholding federal statutes affecting state and local governments on matters of local concern. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that Tenth Amendment does not bar congressional action affecting states); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding federal statute prohibiting racial discrimination in public accommodations even if assumed to be purely "local" in character).

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not values.[89] This interpretation of the *Carolene Products* Footnote means that the Court directed paragraph three, not solely at the protection of minorities, but at any malfunction in the political process that distorts the political distribution of benefits and burdens.

This interpretation of the Footnote is especially appropriate for land-use decisions, whose primary purpose is to distribute benefits and burdens in land-use markets. This interpretation also moves paragraph three beyond racial discrimination and into the realm of economic regulation. We recognize that this application to economic legislation is a major departure from federal constitutional doctrine, which for decades erected a high wall of judicial deference around economic legislation that kept it outside the pale of heightened judicial scrutiny. Deferential judicial treatment of economic legislation reflects a number of concerns that have less force as the size of the decision maker decreases. They include a concern that all legislation creates winners and losers, and that giving certain losers a preferred place in constitutional adjudication poses formidable theoretical problems because it improperly intrudes the courts into the political process.[90] A broad interpretation of the *Carolene Products* Footnote to include economic interests as "discrete and insular" minorities would work a major change in constitutional principles because it would allow courts to choose between economic winners and losers in the legislative process.

89. *See* Balkin, *supra* note 72, at 296 (arguing that *Carolene Products* saw the vice of *Lochner* in institutional terms and that the "revolution of 1937" was fought, not over the content of values, but over who was to choose those values); *see also* Cover, *supra* note 72, at 1314–16 (arguing that Justice Stone wrote the *Carolene Products* Footnote to protect against transitional hysterical politics).

90. For example, Justice Powell writes:

> The problem is this: in a democratic society there inevitably are both winners and losers. The fact that one group is disadvantaged by a particular piece of legislation, or action of government, therefore does not prove that the process has failed to function properly. To infer otherwise—that the process has been corrupted by invidious discrimination—a judge must have some substantive vision of what results the process should have yielded. Otherwise he has no way to know that the process was unfair.

Powell, *supra* note 72, at 1091.

Justice Powell's concerns are articulated in Supreme Court decisions. Chief Justice (then Justice) Rehnquist, dissenting in Sugarman v. Dougall, 413 U.S. 634 (1973) (Rehnquist, J., dissenting), cast doubt on the continuing vitality of the *Carolene Products* Footnote and noted that in our "multitudinous" society it would be possible "to find insular and discrete minorities at every turn in the road." *Id.* at 655–57. Justice White took a similar position in City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), noting that "[a]ny minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect." *Id.* at 445. Justice Marshall's dissent disputes Justice White's characterization. *Id.* at 465–66.

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This concern is modified if the Footnote is viewed as requiring only a shift in the presumption of constitutionality when the political process malfunctions. Process theory is always attractive because of its apparent neutrality, but the support for this theory in the text of the Footnote is ambiguous. The introductory clause in the Footnote refers to the presumption of constitutionality, but paragraph three speaks of heightened judicial review.[91] 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.[92] In effect, the Court asserts the constitutional power to limit the list of constitutionally protected purposes.[93]

Our argument is the allocation of the burden of persuasion and proof in litigation through the presumption of constitutionality need not require heightened judicial review. 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 presumption only requires government to come up with a more focused and empirically based justification for legislation than is re-

91. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). For the Footnote's text, see *supra* note 79. Differences in language may have come about because the Footnote was patched together by contributions from Justice Hughes as well as Justice Stone. *See* Lusky, *supra* note 72.

92. In equal protection cases the courts subject socioeconomic regulation to low-level or rational-basis review, and ask whether classifications made by the government are rationally reled to a legitimate governmental end. *See generally* TRIBE, *supra* note 76, §§ 16-2 to 16-5. If a legislative classification is suspect, the courts will apply strict scrutiny judicial review. If the classification is quasi-suspect, the courts will apply intermediate scrutiny judicial review. Under intermediate scrutiny judicial review, courts ask whether a classification serves an important governmental end and is substantially related or closely tailored to it. *See generally id.* § 16-32 (reviewing the multiple techniques of intermediate scrutiny). Under strict scrutiny judicial review, courts require that a classification be necessary to a compelling governmental end. *See id.* § 16-6.

93. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). *See* Daniel R. Mandelker, *The Free Speech Revolution in Land Use Control*, 60 CHI.-KENT L. REV. 51 (1984).

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quired by the reasonably debatable rule.[94] 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.[95] Heightened judicial review occurs because government is put to its proof. It may not hide behind assumptions about legislative policy and purpose 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.

D. *The Political Process Interpretation and Its Academic Critics*

The importance of the *Carolene Products* Footnote to constitutional adjudication has attracted the attention of academic legal commentators. Most are critical and argue that the Footnote is plainly wrong or at least needs serious revision. The criticism reflects the counter-majoritarian basis for judicial review that substitutes judicial judgment for the judgment of an elected legislature.[96] The struggle is to find some principled basis for an intrusive judicial review that displaces legislative judgment. Powerful as the criticisms are, they apply with less force at the local level.

Much criticism of the *Carolene Products* Footnote concentrates on the political malfunction problem and the political process orientation of the Footnote's dictum. Political malfunction as a basis for judicial

94. City of Portland v. Tidyman, 759 P.2d 242 (Or. 1988) illustrates this use of a presumption. Speaking for the Oregon Supreme Court, Justice Linde invalidated an adult zoning ordinance copied from Detroit's, which was upheld in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). *Tidyman*, 759 P.2d at 243–44. Justice Linde noted that the ordinance failed to explain "how the presence of an 'adult business' causes specific effects that are incompatible with residential zones or blight commercial areas." *Id.* at 247. Compare the Supreme Court's approach in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), *see infra* text accompanying note 149.

95. This is evident in the free speech cases. *See* Board of Trustees v. Fox, 492 U.S. 469 (1989) ("least restrictive alternative" rule does not apply to government regulation of commercial speech; government need only show a "reasonable fit" between ends and means).

96. *See also supra* note 90 and accompanying text. For contributions to the debates about *Carolene Products* Footnote Four, see *supra* note 72.

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intervention presents difficult issues of political theory.[97] Certainly, the founders would be surprised to find the courts as the repository of civic virtue. The most important defender of a political process justification for the Footnote is Professor John Hart Ely. He stated his position clearly in an important book, *Democracy and Distrust*.[98] Professor Ely likened the discipline imposed on the legislative process by the *Carolene Products* Footnote to the discipline antitrust law provides for misbehaving economic markets:

> The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" orientation to economic "affairs"—rather than dictate substantive results it intervenes only when the "market," in our case the political market, is systematically malfunctioning. . . . Malfunction occurs when the *process* is undeserving of trust, when . . . representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded to other groups by a representative system.[99]

This interpretation of the Footnote attracted criticism arguing that Professor Ely's interpretation is much too narrow. One criticism is that Ely ignored institutional problems created by judicial correction of the political process. Professor Neil Komesar captures the essence of this criticism.[100] He points out that market malfunction can, but need not necessarily, require market correction rather than regulation. Regulation may be more appropriate in some cases, as when a business monopolizes an industry. The question is to determine when correction rather

97. A wide range of commentators note that the process-defect theory of judicial review, particularly if it takes seriously *Carolene Products* Footnote Four's solicitude for the victims of "prejudice," necessarily implicates courts in making substantive judgments. *See supra* note 85 and accompanying text. In response to such arguments, one process-defect theorist would save process-defect theory by dropping its solicitude for prejudice. *See* Klarman, *supra* note 81, at 782–88. But other commentators assert and embrace the substantive implications of judicial concern for prejudice, thereby rejecting the search for a pure process theory of judicial review. *See* Ackerman, *supra* note 72, at 739–40; Farber & Frickey, *supra* note 72, at 697– 98, 716, 727; Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 730–45 (1991); Tribe, *supra* note 72, at 1067–73. *Cf.* Komesar, *A Job for the Judges*, *supra* note 72, at 665–66; Komesar, *Taking Institutions Seriously*, *supra* note 72, at 399 (arguing against ELY, *supra* note 72, that a pure process theory of judicial review is impossible, because judicial oversight necessarily engages courts in the making of substantive policy. *Cf.* Komesar, *Taking Institutions Seriously*, *supra* note 72, at 408–11 (arguing against Ely that judicial oversight engages courts in the protection of substantive constitutional values as well as in refereeing the political process).

98. ELY, *supra* note 72. The book continues to inspire debate. *See, e.g.*, *Symposium on Democracy and Distrust*, *supra* note 72.

99. ELY, *supra* note 72, at 102–03 (emphasis in original).

100. Komesar, *Taking Institutions Seriously*, *supra* note 72, at 400–03.

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than regulation is preferable, and this choice requires a comparison of institutional resources, advantages and disadvantages.[101]

Stronger criticism of Professor Ely's process interpretation of the *Carolene Products* Footnote is that his concern with political process rather than substantive constitutional rights is simply wrong. Professor Lawrence Tribe is the major advocate of this view,[102] and other critics followed him.[103] The flaw in this position is that the dichotomy between process and substance is a false one because it is clear the *Carolene Products* Footnote addresses both political process and substantive issues. Professor Bruce Ackerman explained this dual function in a thoughtful article in which he noted that the Footnote contains two very important insights. The first insight provides a basis for judicial correction of policy judgments made in the political process. This insight recognizes that pluralist bargaining is the normative ideal in American politics.[104] From this conclusion, Professor Ackerman argues that

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101. Professor Komesar concludes:

> What is true for the economic analogy is also true for constitutional law. Whether the judiciary is to play any role, and what that role should be, should not be determined simply on the basis of the existence or nonexistence of malfunction in the political process . . . . [S]ubstitution is [not] always institutionally inferior to correction or any other mode of intervention.

Id. at 402–03.

What Professor Komesar means is that there is no prior reason why the courts, rather than the legislature, should be responsible for correcting a political process that does not function properly. Professor Komesar goes on in his article to explain the comparative institutional factors that make legislative rather than judicial correction the preferred solution. *See id.* at 403–40.

102. Tribe, *supra* note 72; *see also* TRIBE, *supra* note 76, § 8–7, at 582–86 (in retreating from *Lochner*, the Court, in *Carolene Products* and elsewhere, wrongly rejected possible arguments that economic substantive due process might protect human freedom against economic subjugation and human domination).

103. *See, e.g.*, Balkin, *supra* note 72, at 293–303, esp. 295–96 (citing and following TRIBE, *supra* note 76, § 8–7, at 585); *see also supra* note 97 (citing other commentators who agree with Tribe, that judicial review sustains substantive constitutional values).

104. But note Ackerman's view that the Framers may not have intended solely to confirm the pluralist system, and that constitutional provisions were not just "outcomes of ordinary pluralist bargaining" but rather "the highest legal expression of a different kind of politics" yielding "fundamental principles transcending the normal processes of interest-group accommodation." *Id.* at 743.

> We must repudiate this reduction of the American Constitution to a simple system of pluralist bargaining if we are to reassert the legitimacy of the courts' critical function. Although the bargaining model captures an important aspect of American politics, it does not do justice to the most fundamental episodes of our constitutional history. We make a mistake, for example, to view the enactment of the Bill of Rights and the Civil War Amendments as if they were outcomes of ordinary pluralist bargaining. Instead, these constitutional achievements represent the highest legal expression of a different kind of politics—one characterized by mass mobilization and struggle that, after experiences like the Revolution and the Civil War, yielded fundamental principles transcending the normal processes of interest-group accom-

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courts should intervene to protect groups who are disadvantaged when the political process malfunctions.[105] Professor Ackerman explains:

> *Carolene*'s first insight is that some groups suffer from systematic disadvantages in pursuing their interests in the pluralist bargaining process normally central to American politics. On this view, the Court appears as a perfecter of pluralist democracy. It corrects political results generated by unfair bargaining advantages but does not question the substantive values pursued by the participants.[106]

Professor Ackerman then points out that the second function of judicial review contemplated by the *Carolene Products* Footnote requires courts to enter the legislative process, not "as the perfecters of pluralist democracy, but as pluralism's ultimate critics."[107] In exercising this

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modation. It is only by reasserting the relevance of this tradition of constitutional politics, as I have called it, that we shall gain the necessary perspective to put pluralist bargaining in its place as one—but only one—form of American democracy, and the lesser form at that.

Id. (citing Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984)); *see also id.* at 743–44 (claiming paragraph one of *Carolene Products* Footnote supports this argument).

105. Accepting pluralist bargaining as a model for local government politics raises a representation problem. The question is to determine which interest groups are entitled to participate in the political process. This problem is not insurmountable in the land-use process, where it is customary to identify developers, neighbors, and third parties (who are often nonresidents) as the principal political players. To these interests must be added the locally undesirable land uses (LULUs), such as group homes and hazardous waste landfills. *See* 1 NORMAN WILLIAMS, JR., AMERICAN LAND PLANNING LAW §§ 2.01, 2.02 (2d ed. 1988), for discussion of the interest groups who participate in the land-use process.

106. Ackerman, *supra* note 72, at 740–41. Although he applauds "*Carolene*'s first insight," *id.*, Professor Ackerman maintains that it is flawed by "bad political science," *id.* at 743, 745. He claims this insight restricts judicial solicitude to victims of "prejudice against discrete and insular minorities" even though these minorities may be better able to organize for pluralist political bargaining than groups, be they minorities or majorities, whose members are "diffuse" and "anonymous." *Id.* at 722–31. For Ackerman, therefore, political bias against a group follows not from prejudice but from powerlessness created by structural impediments to organization. Ackerman also maintains that prejudice is unlikely to block pluralist politicians from striking bargains with any group, unless—and this is no less unlikely in Ackerman's view—prejudice against that group is so strong that it transforms the group into a "pariah." *Id.* at 732–35.

For a critique of Ackerman's interpretation of *Carolene Products*' political science, see Farber & Frickey, *supra* note 72, at 699–16. Emphasizing Ackerman's debt to public choice theory, *id.* at 700–01, the authors concede that discrete and insular minorities may have organizational advantages over diffuse and anonymous groups, *id.* at 701. But the authors insist that prejudicial ideologies may distort the political process, *id.* at 702–03, that racial minorities still labor under the effects of prejudice, *id.* at 703–04, 707–08, and were not well-organized political players in the politics that produced contemporary affirmative action programs, *see id.* at 708–16.

On two important points, however, Ackerman and his critics agree. First, and most important here, they all maintain that pluralist politics can be defective and that the *Carolene Products* Court recognized this possibility in Footnote Four. Second, Ackerman and his critics all insist that the ultimate message of the *Carolene Products* Footnote is substantive and normative, *see infra* note 108.

107. Ackerman, *supra* note 72, at 741.

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function, courts insist that there are substantive issues, called "prejudice" in the Footnote, "that pluralist politicians are simply not allowed to bargain over in normal American politics."[108] This is the substantive rights theory of the *Carolene Products* Footnote and a necessary supplement to the heightened judicial scrutiny necessary to correct political malfunction.

This interpretation, however, fails to distinguish the application of the Footnote to federal and state as compared with local governments. The distinction is important; both the political process and substantive rights theory of *Carolene Products* are problematic at the federal level because building constitutional doctrine on excluded participants underestimates the potential for change in the federal political process. Indeed, the problem at the federal level is too much access to government and the resulting political deadlock. All minority groups gain as free riders because the majority is powerless to protest.[109] This problem also exists in state government.

The substantive rights critique has also failed. Constitutional scholars have attempted to formulate a comprehensive constitutional rights theory for constitutional adjudication, but this effort has not succeeded.[110] Nor has the Supreme Court adopted substantive rights theory as the governing formula for constitutional adjudication beyond a limited class of clearly guaranteed or clearly implied rights.[111]

Whatever the limitations of applying the dual function interpretation at the federal level, the Footnote's call for presumption-shifting when the political process malfunctions is decidedly relevant for local government. Several major differences between local and federal government politics support this conclusion. The first is that the risk of exclusion is much greater in local government politics; process failure is more

108. *Id.*; *see also id.* at 743 (arguing that constitutional politics and principles are not reducible to pluralist bargaining but override it because they embody substantive commitments by the political community). Here Ackerman's critics appear to agree, for they argue that the essential meaning of *Carolene Products* Footnote Four is "normative." Farber & Frickey, *supra* note 72, at 694, 716, 727.

109. For discussion of this problem as it is relevant to the *Carolene Products* Footnote, see Farber & Frickey, *supra* note 72.

110. The theoretical disarray among constitutional scholars is well-illustrated by an extensive symposium on Professor Ely's book on constitutional theory. *See Symposium on* Democracy and Distrust*: Ten Years Later*, 77 VA. L. REV. 631 (1991).

111. Although the Supreme Court has recognized limited fundamental constitutional rights, such as the right to vote, it has refused to extend this list and has not embraced a comprehensive constitutional rights theory as the basis for adjudication. This is evident in land-use cases. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (refusing to recognize mentally retarded as quasi-suspect class in case challenging denial of special zoning permit for group home for this group).

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embedded in the political system.[112] The second is that the substantive rights problem is not an issue in local government, at least in land-use law. The substantive rights problem was resolved decades ago when courts decided that the Taking Clause in state constitutions protected landowners from excessive regulation of their property.[113]

Another important factor at the local level is that local governments are more revenue-driven than the federal government, and the resulting distortions more focused and immediate. Stringent constitutional and statutory limitations on borrowing and taxation make local governments more accountable fiscally, but this accountability forces them to consider the impact of their land-use regulations on their tax base. These concerns can drive a local government into a land-use program that attempts to increase the tax base by allowing new development or that limits public expenditure by limiting service-generating development.[114] Political malfunction may occur in this situation if political groups concerned only with tax base protection capture the political process.

VI. Applying the *Carolene Products* Footnote to Local Government Politics

A. *The Distinctive Character of Local Government Politics*

Transferring *Carolene Products* to the land-use arena in local government requires a major revision in the Footnote's assumptions about local government politics. The first step in revising these assumptions is to recognize that local government politics is significantly different from politics in the states and in the federal government. The major

112. Some state courts shift the presumption of constitutionality against government when they perceive process failure in land-use decision making. *See, e.g.*, Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973) (shifting burden to government to show legitimate basis for piecemeal upzonings).

113. There is general agreement that the Taking Clause should serve as a check against regulation, no matter how justified, that shifts unconscionable burdens to selected individuals. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). No consensus exists among the courts or commentators about when regulation constitutes a taking, although most commentators agree that the clause only constrains extreme devaluation and does not invalidate most land-use regulation. *But see* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). Our analysis does not depend on the future direction of taking law for its asserts only that heightened judicial scrutiny of zoning decisions is not constitutionally problematic.

114. For discussion of theories of local government arguing that the promotion of economic development is a major function of local government, see MARK J. GOTTDIENER, THE DECLINE OF LOCAL POLITICS 75-93 (1987).

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difference is territoriality. The territorial limits that define a local government define its demographic and socioeconomic character. These characteristics in turn define the interest groups that compete in the local political process to form political coalitions. How these coalitions organize, their strength in the bargaining process, their ability to demand political recognition, and the governmental settings in which they operate determine the character of the local political process as it affects land-use regulation.

The territoriality distinction is critical. States are also territorial, but there is a difference. The federal Constitution protects nonresidents from discriminatory state legislation. Examples are the Commerce Clause, the Privileges and Immunities Clause, and the right to travel doctrine.[115] These constitutional protections do not protect residents of the state from unfair burdens imposed by local government regulation.[116]

Territoriality determines the interest groups who are disadvantaged by land-use regulation. Because metropolitan areas are balkanized with numerous local governments of different types, the socioeconomic character of the local governments within any region varies tremendously and so does their land-use politics.[117] A local government with high socioeconomic status, for example, may adopt an exclusionary zoning policy. Another local government may decide it is most benefited by a pro-growth policy that favors new development.[118]

Territoriality also determines whether there is a conflict of interest among residents who live in a community. If a community is small and homogenous, such as a metropolitan suburb, internal conflicts of interest may not occur and the problem is to prevent the land-use system

115. *See* U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); *id.* at art. IV, § 2 (Privileges and Immunities Clause); *see also* FEDERAL LAND USE LAW, *supra* note 30, § 2.07 (right to travel doctrine in land-use cases).

116. The constitutional provisions apply only to nonresidents, and the courts have not used the right to travel doctrine to invalidate land-use regulation. *See, e.g.*, CEEED v. California Coastal Zone Conservation Comm'n, 118 Cal. Rptr. 315 (Cal. Ct. App. 1974).

117. For a discussion of disparities among local governments in metropolitan areas, see U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FISCAL DISPARITIES: CENTRAL CITIES AND SUBURBS, 1981 (1984).

118. The two major outside groups affected by local land-use planning and zoning are residents not presently living in the community and developers. Nonresidents are represented in the community by proxy by residents who have the same interests because they belong to the same socioeconomic class. Nonresidents not belonging to this class, especially less affluent nonresidents, are not represented. Nonresident developers may be excluded from building in the community if there are resident developers the community prefers. This kind of preference is common.

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from burdening outsiders. If a community is internally heterogeneous, conflicts may develop among different community land-use interests. One important conflict is between residents who want to protect their neighborhoods and invading intrusive uses.[119]

Internal community conflict receives much less recognition in the literature than discrimination against outsiders. Internal conflict has also received much less attention in the cases, which have gone much further in protecting outsiders from regulatory discrimination. Zoning ordinances that discriminate against nonresidents, such as racial or lower income minorities, are much more vulnerable constitutionally than zoning ordinances that discriminate only against insiders. This difference in judicial treatment may change as courts begin to use presumption-shifting to protect land-use interests within the community that may be disadvantaged in the local political process. Group homes are an example.

This analysis of local government politics does not distinguish between the economic regulation of property interests and a regulation directed at vulnerable minority groups, such as racial minorities. The analysis thus ignores the historic cleavage in constitutional law between regulation of economic interests, which is less constitutionally protected, and regulation affecting suspect classes and fundamental rights, which is more constitutionally protected. The question is whether land-use interests that have been less constitutionally protected deserve more protection through a shift in the presumption of constitutionality when the local political process malfunctions.[120]

B. *The Pluralist Bargaining Model*

Now that the distinctive character of local government politics is understood, it is necessary to specify an optimal model of the local political process that does not require presumption-shifting. This analysis adopts

119. Invaders can be nonresidents but they can also be residents, such as the local group home that wants to locate a new facility in a neighborhood that previously did not have this use.

120. An earlier article by one of the authors suggested that developers might be less in need of protection in the land-use decision-making process than other land-use interests and can be protected by reforms that do not require a presumption shift. Daniel R. Mandelker, *Reversing the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?*, 30 WASH. U.J. URB. & CONTEMP. L. 3, 14–17 (1986). This Article modifies that position by treating all contenders in the land-use decision-making process as equally deserving of judicial protection through presumption-shifting.

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the pluralist bargaining model as optimal,[121] and the first task is to make clear the assumptions behind the pluralist bargaining model and how it should perform.[122] This task is critical, especially because most legal academic critics of the *Carolene Products* Footnote are not aware of the political theory that motivates a process-based reform of the presumption of constitutionality.[123] Pluralist bargaining theory rejects the assumption that a local government is a unitary political community and analogizes them instead to markets.[124] The pluralist assumption is that

121. Process theories of judicial review tend to identify defects in pluralist bargaining as the factors that might trigger close judicial scrutiny of political outcomes. But students of urban politics are no longer convinced, as they may have been when Robert Dahl and his pupils were changing the face of urban political studies, that urban and suburban politics conform to the pluralist model. *See* ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY (1982); *see also* MICHAEL J. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). Multiple factors—including economic constraints, the burdens and possibilities of coalition building, and even the triviality of much local politics—are now taken to explain its various styles and outcomes. For a recent attempt to survey, criticize, and synthesize the explanatory political theories now applied to local politics, see MARK J. GOTTDIENER, THE DECLINE OF URBAN POLITICS: POLITICAL THEORY AND THE CRISIS OF THE LOCAL STATE 64–268 (1987).

Nor does this Article imply that a defense of pluralism is the only basis for judicial review of legislative regulation. Chief Justice Hughes added paragraph one to the *Carolene Products* Footnote to indicate that presumption-shifting should also occur when legislation violates specific constitutional rights. *See* Ackerman, *supra* note 72, at 742–44.

122. Requiring local government politics to conform to the pluralist bargaining model may well have the effect of increasing the number of cases in which presumption-shifting occurs in land-use cases. First, pluralism proper requires shifting coalitions of different interest groups to which politics is readily and perfectly responsive. No group may be impeded from political action and bargaining by internal organizational constraints or by external bias, whether it is system bias or prejudice against minority groups.

Second, as modified by public choice theory, pluralist theory drops its assumption that organizational or transactional costs are zero. The consequence is that system biases and organizational handicaps are now assumed to be likely features of any political landscape and therefore frequent triggers for heightened judicial scrutiny. *See* Gottdiener, *supra* note 121, at 64 (aligning public choice and pluralist theory).

Third, as applied to land-use regulation, public choice theory suggests that a "healthy" market for suburban housing and government will produce self-segregated communities with economically and racially homogeneous populations. Communities of this type are prime candidates for heightened judicial review. *See, e.g.*, Vicki J. Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991).

123. Ackerman, *supra* note 72, and Farber & Frickey, *supra* note 72, are exceptions.

124. A pluralist theory of politics, in which groups negotiate with each other to form coalitions and strike bargains, does not support a concept of unitary community interest. That concept, moreover, is absent from pluralist political science. But, the most forceful critics of the unitary community interest concept are those urban political scientists who reject pluralism, *see* SIDNEY J. PLOTKIN, KEEP OUT: THE STRUGGLE FOR LAND USE CONTROL 5–7 (1987) (on methodological shifts in political science), and embrace instead a political economy approach to urban politics. *See generally* Clarence N. Stone,

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local government is an arena of conflict rather than consensus. This assumption means that when consensus does exist, as in an upscale homogenous suburban community, there is a clear danger that the conditions for pluralist bargaining are not present.[125]

How pluralist bargaining should operate in the political process and why it is considered optimal is captured in the following definition: "[C]ompetition between formal and informal groups pursuing a range of divergent goals and interests is assumed to place all important issues on the public agenda, guarantee that no group dominates the political arena, maintain political stability, and improve individuals' intellectual and deliberative skills."[126] A land-use decision making process that meets this definition is one in which groups with a wide range of interests are represented. All land-use interests have a place on the decision-making agenda, no single interest dominates the political arena, and the identities of the participants do not determine decisions.

This definition means that local government land-use politics may

City Politics and Economic Development: Political Economy Perspectives, 46 J. POL. 286 (1984). Political scientists who take that approach recognize that global economic forces constrain local politics. These political scientists seek to determine how economic constraints shape urban regimes or governing coalitions, and how those regimes or coalitions respond to economic constraints. Because localities compete for investment and development in order to sustain local economies and local governments, one adherent of the political economy approach to urban politics argues that investment and development are in each competitive community's unitary interest, for without investment and development the whole community will suffer. *See* PAUL E. PETERSON, CITY LIMITS (1981); *see also* Cynthia J. Horan, *Beyond Governing Coalitions: Analyzing Urban Regimes in the 1990s*, 13 J. URB. AFF. 119 (1991).

Other exponents of the political economy approach to urban politics reject that theory and argue that politically sponsored economic development is uneven, benefiting certain groups and interests (e.g., by offering tax abatements to developers) and imposing costs on others (e.g., by cutting services for ordinary residents). *See, e.g.*, Stone, *supra* note 124 (on Peterson and his political economy critics). Thus, two exponents of the political economy approach to urban politics write: "The city is not a unitary political community, but rather a site for class and racial conflict." Susan S. Fainstein & Norman I. Fainstein, *Economic Change, National Policy, and the System of Cities*, *in* RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT 3 (1983).

125. Note how this assumption runs contrary to the traditional assumption of planning legislation and planning doctrine, that local plans and regulations serve a unitary public interest. It was this assumption that provided, to some extent, the basis for heavy judicial reliance on a presumption of constitutionality in land-use cases. *See* UNITED STATES DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT § 7 (1928) (city plan to guide "a coordinated, adjusted, and harmonious development of the municipality"); UNITED STATES DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 1 (1924) (zoning is to promote "health, safety, morals, or the general welfare of the community").

126. Richard E. Klosterman, *Arguments For and Against Planning*, 56 TOWN PLAN. REV. 1, 11 (1985). For criticism of pluralist analysis, see Sidney J. Plotkin, *Property, Policy and Politics: Towards a Theory of Urban Land-Use Conflict*, 11 INT'L J. URB. & REGIONAL RES. 382 (1987).

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not be pluralist for two reasons. One is that all major land-use interests are present in the community, but some are excluded from the decision-making process by a dominant land-use coalition or minority interest. A second reason is that the land-use interests within a community do not represent the larger regional community in which it is located.[127]

C. *Political Categories in Local Government*

1. THE PLURALIST LOCAL GOVERNMENT

Local governments in this category have a political process that conforms to the pluralist bargaining model. Competition in the political marketplace ensures that all interests have an effective voice in political decision making, including land-use decision making. The important requirement is that the political process must remain open and competitive; any land-use interest is likely to win some of the time and lose some of the time.

One important question is whether the pluralist bargaining process will produce a "good" land-use decision-making process. What constitutes a "good" land-use decision-making process is indicated by the rational decision-making theories that form the basis for land-use planning. These theories suggest that a "good" land-use decision-making process will be based on consistently applied land-use criteria. These criteria are usually contained in a comprehensive plan which is binding on land-use regulations and decisions.

A pluralist bargaining process will produce a "good" land-use decision-making process only if all or a majority of the groups that participate in the dominant political coalition agree that this kind of process is desirable. However, a "good" land-use decision-making process is likely to be, even though it need not be, pluralist. Political coalitions that wish to destroy pluralism are not likely to create a regime in which land-use decisions depend on pre-established criteria. This usually means a loss of political control.[128]

127. This analysis makes a clear normative judgment. Pluralist bargaining is not a neutral concept. Judgment is required on how the political process functions when pluralist bargaining is possible. Judgment is also required on how the political process functions when pluralist bargaining is not possible because essential interests are not represented in the community. Pluralism thus means both that the basis for pluralist bargaining must exist, and that it must occur in fact.

128. This does not mean a comprehensive plan should be rigid. *See* Robert W. Rider, *Local Government Planning: Prerequisites of an Effective System*, 18 URB. AFF. Q. 271 (1982) (noting that a key issue in the design of a planning process is the tension between the need for flexibility to make decisions and the need to limit discretion).

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2. THE CAPTURED PLURALIST LOCAL GOVERNMENT

The pluralist local government that is captured by a single land-use interest or coalition of land-use interests is the second local government category.[129] Capture theory was initially developed to explain why administrative agencies were unresponsive to new values, but can also be applied to local government politics. For example, environmentalists can singlehandedly capture the political process and use it to implement an environmentally protective land-use program. In another scenario, environmentalists might unite with local residents interested in holding down property taxes to achieve the adoption of growth management controls.[130]

An important question is whether political dominance should shift frequently between different interests and coalitions that compete for power in order to qualify a local government as pluralist. This kind of shifting has occurred in fast-growing suburban governments which adopted and then abandoned anti-growth policies depending on which coalition controlled the county governing body.[131] Frequent coalition shifts may indicate that the politics in a community is pluralist.

Care must also be taken that the planning process that produces the plan is a pluralist process in which all interests are represented. Achieving adequate interest representation can be difficult, and some critics claim that broad-based representation in the planning process makes it impossible to achieve the consensus necessary to produce a plan. *See* JOSEPH F. DI MENTO, THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING 53–56, 86– 88 (1980). Professor Di Mento replies to these criticisms:

> The response has a legal form. The reviewing court should look to the process of plan formulation to determine if it was sufficiently open to merit judicial deference. The plan can be regarded as primarily a legislative act, and therefore not require broad-based and representative participation by private citizens and yet be reviewed for procedural acceptability.

Id. at 55, 56.

129. Commentators on the *Carolene Products* Footnote have noted that one shortcoming of the Footnote is its attention only to prejudice against minorities. These commentators noted that capture of government by minority interests is another possibility that must be considered in the Footnote's application. *See, e.g.*, Ackerman, *supra* note 72, at 718–22 ("organizational difficulties" may handicap majorities and benefit minorities); *id.* at 722–31 (insularity and discreetness may give minorities organizational advantages over other groups); Komesar, *A Job for the Judges*, *supra* note 72, at 668–69, 671– 72, 673–74 (on structural determinants of "minoritarian bias," such as comparatively high per capita stakes in a given political outcome, complex and inaccessible issues, etc.).

130. Capture often occurs in local land-use politics when a single issue dominates the local political scene and provides an opportunity for domination by interest groups who have a high stake in the political outcome on this issue. Growth management is an example of this kind of issue.

131. Studies of growth management coalitions indicate they are not necessarily adopted by affluent, socially stratified communities as an alternative to exclusionary zoning. *See* Elizabeth Deakin, *Growth Controls and Growth Management: A Summary*

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Frequent coalition shifts may not occur in many communities. Indeed, some commentators claim that stability of coalitions and continuity in decision making are the rule rather than the norm in local government politics. Stability occurs because political leaders prefer continuity to change in local government decision making.[132] Habit and prudence come down heavily on the side of continuity. Politicians are not well-equipped, either in ideology or incentives, to recognize demands pressed by opposition groups.[133]

Another reason for stability and continuity is that excluded groups may not have the resources to challenge a dominant coalition that does not represent their interests.[134] Different interest groups have different organizational costs and different capacities to bear them. These disadvantages may create a "cumulative bias" in favor of groups that have the resources and capacity to organize and participate effectively in the political process.[135]

These barriers to political participation may prevent pluralist bargaining from occurring in many communities, but stability of coalitions and decision-making continuity do not necessarily mean a local government's politics is not pluralist. Coalitions may be stable because they include all of the important land-use interests. In this situation, there will be no outside interests that will be tempted to challenge the dominant coalition. Another reason for stability may be that the dominant coalition does not include all of the major land-use interests but ensures its continuity by taking the demands of excluded interests into account.

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and Review of Empirical Research, *in* UNDERSTANDING GROWTH MANAGEMENT 3 (David Brower et al., eds. 1989); Alan J. DiGaetano & John S. Klemanski, *Restructuring the Suburbs: Political Economy of Economic Development in Auburn Hills, Michigan*, 13 J. URB. AFF. 137 (1991); *see also* Ronald K. Vogel & Bert E. Swanson, *The Growth Machine Versus the Antigrowth Coalition: The Battle for Our Communities*, 25 URB. AFF. Q. 63 (1989). For discussion of no-growth politics in a Washington, D.C., suburban county where growth politics has dominated the political agenda, see Alan Eherenhalt, *How Do You Run Against Growth When There Isn't Any?*, 5 GOVERNING 12 (1991).

132. *See* CLARENCE N. STONE, ECONOMIC GROWTH AND NEIGHBORHOOD DISCONTENT: SYSTEM BIAS IN THE URBAN RENEWAL PROGRAM OF ATLANTA 208–10 (1976).

133. *See id.* at 212; CLARENCE N. STONE, REGIME POLITICS: GOVERNING ATLANTA, 19461988 186–88, 193, 200–18 (1989).

134. *See, e.g.*, Stone, *supra* note 132, at 193–95, 199–200, 208–10, 212; *see also* STONE, *supra* note 133, at 161– 63, 186–88, 193, 208–09 (on durable patterns of cooperation among Atlantan elites).

135. STONE, SUPRA note 132, at 11–12, 14. For analogous arguments by legal commentators, see, for example, Ackerman, *supra* note 72, at 722–31; Komesar, *A Job for the Judges*, *supra* note 72, at 673–74 (on organizational handicaps that certain groups may suffer), *id.* at 677–83 (on systemic representation and bias).

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Politics is pluralist, either because all interests are represented in a stable coalition or because bargaining occurs within the coalition.

Some examples can illustrate how the capture of pluralist local governments occurs. The first example is the community dominated by neighborhood opposition groups. In this type of community there may be a long-standing policy of "ward courtesy," which means that the legislative body votes on zoning matters as directed by the member from the ward in which the zoning issue arises. If this member defers regularly to neighborhood opposition to certain zoning changes, such as fast-food restaurants, the entire council follows and neighborhoods dominate the decision-making process.[136]

It may be argued that deference to neighborhood opposition does not indicate a captured pluralist government. If each neighborhood controls the decision-making process when its interests are affected, the system produces majority rule by residents of the community as each neighborhood exercises its zoning veto in turn. This argument misses the point. The decision-making process is not pluralist because the identity of the opponent, in this case the neighborhood, determines the outcome. Land uses that seek to enter neighborhoods and that provoke opposition, such as group homes, are excluded from effective participation in the political process.

A second type of capture occurs in just the opposite situation, when a coalition of business interests and political elites make pro-development decisions that are opposed by a minority and or even a majority of the community's residents. Minority coalitions of this type that prejudice minority residents are most studied in community redevelopment programs, where analysts identify "urban regimes" that dominate local decision making for redevelopment projects.

A coalition of this type in one city was described as "a redevelopment clientele of property owners, lawyers, contractors, appraisers, developers,

136. Permanent capture of this type can occur without a ward courtesy system if the governing body regularly defers to neighborhood opposition in its land-use decision making. The judicial reaction to zoning decisions based on neighborhood pressure is mixed. *Compare* Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989) (invalidating denial of conditional use permit based on negative fears voiced by neighbors), *with* Arroyo Vista Partners v. County of Santa Barbara, 732 F. Supp. 1046 (C.D. Cal. 1990) ("ward courtesy" arrangement does not violate substantive due process). *See generally* Harold A. Ellis, Neighborhood Opposition and the Permissible Purposes of Zoning (1991) (on file with authors; forthcoming FLORIDA STATE JOURNAL OF ENVIRONMENTAL AND LAND USE LAW).

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rehabilitation organizations, and housing sponsors."[137] These coalitions receive and disburse federal grants for redevelopment projects desired or supported by local business interests.[138] Although these coalitions are not primarily interested in zoning, they will utilize the zoning process to achieve their redevelopment objectives when this is necessary. An example is an upzoning in a residential neighborhood to more intensive office, retail, and luxury residential uses that are part of a redevelopment project.

Regimes that consist of alliances between business interests and political elites can also capture suburban communities. Any growth is considered good, and there is almost no effort to use zoning to deal with the side effects of development. Professor Mark Gottdiener describes a classic example of this kind of capture. He documented long-term permanent capture of land-use decision making in a Long Island, New York, county where developers, allied with local political machines, manipulated land-use decision making to obtain needed land-use approvals.[139]

3. THE CONSENSUS NON-PLURALIST LOCAL GOVERNMENT

In the final local government category, pluralist bargaining is not possible because the community does not contain the variety of racial, social, and economic groups that is required for this kind of bargaining. Local governments in this category enjoy a consensus in land-use politics because their residents belong to a restricted and often affluent socioeconomic group. Bargaining is not necessary because there is internal consensus on the land-use policy the community should adopt.

This type of local government adopts a land-use policy that is inter-

137. Susan S. Fainstein & Norman I. Fainstein, *New Haven: The Limits of the Local State, in Restructuring the City, in* RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT 38 (1983).

138. Fainstein & Fainstein, *supra* note 124, at 18- 20.

139. MARK GOTTDIENER, PLANNED SPRAWL: PRIVATE AND PUBLIC INTERESTS IN SUBURBIA 67-113 (1977). Gottdiener notes that balkanized municipal government, along with criss-crossing special districts and jurisdictions, attract undistinguished figures to local politics while inducing low party affiliation and low political interest in the electorate. An analysis of zoning petitions considered by the council during a three-year period showed the Republican Party dominated the legislative council, which became a conduit for zoning and land-use decisions favored by the local Republican leadership.

Local residents paid scant attention to the activities of the council unless scandal brought it to their attention. That rarely happened, as the council was only moderately corrupt, and those scandals that did occur only enhanced public contempt for a local government already wanting in power and prestige. As a result, local politicians could subvert what little planning there was in order to foster their own short-term interests. Gottdiener concludes: "The local political party and those businessmen involved in submetropolitan growth tend to merge into something of a land development corporation." *Id.* at 111.

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nally agreeable but which may be exclusionary. A well-known example is exclusionary zoning by upscale suburban communities.[140] There is political malfunction in local governments in this category, not because minority special interests capture land-use politics, but because the homogenous group that makes up the community and dominates land-use politics does not represent the pluralist character of the larger metropolitan area in which it is located. Just as the Commerce Clause restricts states from adopting regulations that burden interstate commerce, so should the Constitution restrict communities from ignoring the external social effects of their land-use decisions.

VII. Shifting the Presumption of Constitutionality in Land-Use Litigation

A. *Fundamental Rights, Suspect Classifications, and the Protection of "Discrete and Insular" Minorities*

Presumption-shifting always occurs in land-use litigation when a fundamental constitutional right is implicated or when a court finds a land-use classification is suspect. A presumption shift occurs in these cases, not because the local political process malfunctions, but because a court is constitutionally required to protect fundamental rights or to invalidate suspect legislative classifications. Presumption-shifting when fundamental rights are violated is a response to paragraph one of the *Carolene Products* Footnote, while presumption-shifting when classifications are suspect protects the "discrete and insular" minorities identified by paragraph three.

In these cases the courts essentially apply a balancing test that balances the suppression of speech or the adoption of a suspect classification against governmental interests not tainted with either defect.[141] The results are mixed and erratic in land-use cases. Land-use regulation is a minor theme in the litany of free speech doctrine, which is not always a good response to the free speech problems land-use regulation presents. An example is the exception in free speech doctrine that allows "time, place and manner" regulations of speech. This exception is awkwardly

140. The local government whose character prevents it from having a pluralist political process often is, but need not necessarily be, suburban. Many suburban governments have an economic, social, and demographic character that prevents pluralist bargaining, but not all suburban governments fit this model. For a political typology of suburban governments, see DiGaetano & Klemanski, *supra* note 131, at 140.

141. *See, e.g.*, Alan C. Weinstein, *The* Renton *Decision: A New Standard for Adult Business Regulation*, 32 WASH. U.J. URB. & CONTEMP. L. 91 (1987).

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applied to sign regulation, which can be a hybrid because it regulates the time, place, and manner of displaying signs as well as their content or viewpoint.[142] In racial discrimination cases, the presumption shifts only if a court finds racial discrimination was a motivating factor in a land-use decision.[143] Racial motivation is difficult to prove, so opportunities to reverse the presumption because a land-use regulation is claimed to be racially discriminatory do not arise frequently.[144]

These problems suggest that presumption-shifting when fundamental rights are implicated or when classifications are suspect may not be the best way to reassign the presumption of constitutionality in land-use litigation. Presumption-shifting because of political malfunction under paragraph three of the *Carolene Products* Footnote can provide a better alternative. In practically all the cases in which the presumption is shifted because a fundamental right is violated or a classification is suspect, the land-use interest protected by the presumption shift is vulnerable in a political process that malfunctioned. Adult sex businesses are an example, as are racial minorities and the sign industry.[145]

The difficulty is that courts cannot abandon presumption-shifting in the fundamental rights and suspect classification cases because this is what paragraph one of *Carolene Products* requires. Presumption-shifting under paragraph three of the *Carolene Products* Footnote, when the political process malfunctions, can still provide an alternative basis for presumption-shifting to protect groups already protected under paragraph one. Presumption-shifting because of political malfunction can also protect groups who are not protected in the fundamental rights and suspect classification cases, but who deserve comparable protection. The mentally retarded, who are denied protection as a quasi-suspect class, are an example.[146]

142. *See* FEDERAL LAND USE LAW, *supra* note 30, § 6.04.

143. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (rejecting racial challenge to refusal to rezone land for subsidized housing).

144. For a failed case in which a racial discrimination claim was made against a downzoning of land intended for a subsidized housing project, see *In re* Malone, 592 F. Supp. 1135 (E.D. Mo. 1984), *aff'd mem.*, 794 F.2d 680 (8th Cir. 1986).

145. There may be exceptions in some communities. For example, the sign industry may be able to forge an effective coalition with political decision makers, as in City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991) (rejecting claim that city's protection of outdoor advertising company through sign regulations violated antitrust law). In these communities the sign industry will not be excluded from participation in the political process, and a presumption shift will not be necessary.

146. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985). Although adopting this view, the Court invalidated a permit denial for a group home for the mentally retarded under the rational relationship test for judicial review in equal protection cases. *Id.* at 433. The Court relied on facts, such as neighborhood opposition, that could have supported a presumption reversal because of political malfunction. *See id.*

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The two approaches can be married through the least restrictive alternative standard. Justice Powell suggested this approach in his concurring opinion in *American Mini Theatres*,[147] a case holding a zoning ordinance restricting the location of adult businesses did not violate the Free Speech Clause. Justice Stevens' majority opinion justified the regulation by using the dubious concept of a sliding scale of constitutionally protected speech, while Justice Powell's concurring opinion sought to justify the regulation as a time, place, and manner regulation that did not deny access to speech.[148] This approach has the virtue of making it more difficult for cities to mask a constitutionally prohibited or suspect prejudice as a technical land-use decision. The Powell approach in effect shifts the burden of justification to the city and requires a decision that is grounded in planning theory backed by empirical evidence. There is no guarantee that the outcome will change, but it is hard to be exclusionary when a city plays it straight. Chief Justice Rehnquist's opinion in *City of Renton v. Playtime Theatres, Inc.*[149] perversely applies the presumption of rationality to an ordinance designed to deny all reasonable access to speech and allowed a city to mask a moral decision as a planning one.

B. *Presumption Shifting or Substantive Reform of Land-Use Law: Courts vs. Legislatures*

A decision that political malfunction requires the reform of land-use law does not necessarily mean that this reform should be carried out by the courts or that it should be carried out by shifting the presumption of constitutionality. Many land-use issues the courts resolve by shifting the presumption against government can also be handled through substantive reform of land-use law. Exclusionary zoning, for example, can be prohibited through a substantive reform that requires municipalities to make adequate provision for affordable housing.

A related question is whether the legislature or the judiciary is the preferred agency for either presumption-shifting or substantive reform. The constraints on judicial intervention in legislative policymaking are well-known and well-catalogued by Professor Komesar in his commentary on the *Carolene Products* Footnote.[150] The preference for majoritarian dominance in American politics, and limitations on the judiciary's

147. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).
148. *Id.* at 73 (Powell, J., concurring).
149. 475 U.S. 41 (1986) (upholding zoning ordinance restricting location of adult businesses).
150. Komesar, *A Job for the Judges*, *supra* note 72, at 699-21.

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ability to supervise the legislative process, suggest that courts may not always be the appropriate agency for substantive reform.

These concerns do not apply to presumption-shifting. It is the duty of courts to allocate litigation burdens, and presumption-shifting is one way of accomplishing this objective. Presumption-shifting by the courts can also be highly beneficial in land-use cases when the political process has malfunctioned. Shifting the presumption protects land-use interests who were excluded from political decision making, and requires the coalition that controlled the decision to explain in court why their neglect of an excluded interest is acceptable.

In addition, presumption-shifting avoids the difficulties of implementing per se substantive rules. The New Jersey Supreme Court's rule requiring each municipality to accept its fair share of the region's affordable housing need[151] is an example. It did not work until the legislature mandated and financed it. Presumption-shifting also gives cities an ability to offer justifications for their policies. The resulting dialogue will eventually enter the political process and there may be changes in outcomes.[152] There is no need for legislation reversing the presumption of constitutionality in land-use litigation, as a presidential commission once proposed.[153] Allocating litigation presumptions is a task for the courts, not the legislature, and courts are perfectly capable of carrying out this responsibility.[154]

Judicial reform through a change in substantive legal principles rather than through a shift in the presumption of constitutionality may be a preferred alternative in some cases, although the results are the same. Courts can sometimes carry out necessary substantive reforms without passing the boundaries of judicial effectiveness and, in some cases, without reaching difficult constitutional questions. Courts in the group

151. *See* Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I), 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

152. The National Environmental Policy Act (NEPA) provides an analogous example. The environmental review and analysis the Act requires of federal agencies has led to a greater consideration of environmental values in agency decision making. For an excellent study of NEPA's modification of agency behavior, see SERGE TAYLOR, MAKING BUREAUCRACIES THINK (1984).

153. A commission on housing appointed by President Reagan made a proposal of this kind but limited presumption reversal to zoning regulations denying or limiting the development of housing. THE REPORT OF THE PRESIDENT'S COMM'N ON HOUSING 200 (1982). *See* Douglas W. Kmiec, *Protecting Vital and Pressing Governmental Interests—A Proposal for a New Zoning Enabling Act*, 30 WASH. U.J. URB. & CONTEMP. L. 19 (1986) (arguing in support of proposal).

154. *See* Daniel R. Mandelker, *Reversing the Presumption of Constitutionality in Land Use Law: Is Legislative Action Necessary?*, 30 WASH. U.J. URB. & CONTEMP. L. 5 (1986).

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home cases, for example, can avoid constitutional problems by interpreting the definition of "family" in a zoning ordinance to include group homes or by basing the decision on state legislative policies.[155]

Substantive reform of land-use law through legislation is generally the best way to control local discretion, and a presumption shift may promote the preferred institutional solution. Legislation that prohibits municipalities from adopting restrictive zoning regulations for group homes and manufactured housing is a good example of a desirable reform.[156] This legislation may specify what restrictions are permitted, such as spacing requirements.[157] Judicial modification of the presumption of constitutionality and this type of substantive legislative reform are mutually supportive rather than alternative means of reforming the land-use system, as New Jersey's response to exclusionary zoning illustrates. After the New Jersey Supreme Court shifted the presumption of constitutionality,[158] reform legislation followed to create more effective incentives for the construction of low- and moderate-income housing.

C. *Shifting the Presumption in Land-Use Litigation When Political Malfunction Occurs*[159]

1. INHERENTLY VULNERABLE LAND USES

As noted earlier, one reason for political malfunction is that some groups do not have the organizational resources or capacity to participate effectively in the political process.[160] The basis for a presumption

155. *See* LAND USE LAW, *supra* note 11, §§ 5.04–5.07.

156. *See, e.g.*, Robert J. Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URB. L. ANN. 47 (1980); Molly A. Sellman, *Equal Treatment of Housing: A Proposed Model Code for Manufactured Housing*, 20 URB. LAW. 73 (1988).

157. Congress has also adopted requirements in the Fair Housing Act that prohibit municipalities from discriminating against group homes for the handicapped. 42 U.S.C.A. §§ 3602(h), 3604(f)(1) (West Supp. 1991). The legislative history indicates that this legislation applies to zoning ordinances. FEDERAL LAND USE LAW, *supra* note 30, § 3.08. *But see* Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991) (spacing requirement for group homes does not violate federal act).

158. *See* Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. REV. 623 (1987).

159. For other approaches to the problem of presumption reversal in land-use law, see Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the Takings Trilogy*, 44 ARK. L. REV. 65 (1991); Peter M. Carter, Comment, *Judicial Deference and the Perpetuation of Exclusionary Zoning: A Case Study, Theoretical Overview, and a Proposal for Change*, 37 BUFF. L. REV. 863 (1988–89).

160. *See supra* text accompanying note 135.

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shift in this type of case is the vulnerability of these groups and their exclusion from the political process. Courts should shift the presumption of constitutionality to protect these groups.[161] The hard question is how these groups can be identified.

Courts can identify groups entitled to presumption-shifting because of exclusion from the political process through easily applied distress indicators which are consistent with the courts' historic twentieth century role in promoting civic tolerance. Some of the indicators, such as public prejudice, that lead the Supreme Court to classify groups as vulnerable to suspect or quasi-suspect classifications can also assist courts in deciding whether a group is excluded from the political process.[162] Guidance can also be found in state court decisions that protect land-use interests that are vulnerable in the political process from discriminatory land-use restrictions. Group homes and other LULUs are an example. The theoretical constitutional basis for these state court decisions is not always clear, but the analogue to the federal fundamental rights and suspect classification cases is apparent.

Plaintiffs can also provide an evidentiary showing that some land use interests are unable to organize and participate effectively in the local political process. An analysis of a community's land-use decision record can provide the basis for this conclusion. It might show, for example, that group homes for the mentally retarded are never approved, no matter where they plan to locate. A record of land-use decisions that is consistently negative for a particular land-use interest is an indication that this interest is excluded from political decision making.

2. COMMUNITIES WHERE PLURALIST BARGAINING CANNOT OCCUR

Pluralist bargaining is not possible when a community contains a largely homogenous population not representative of the pluralist character of the surrounding area. Presumption-shifting is necessary in these communities because they are structurally incapable of having a plural-

161. Some vulnerable land uses may be quite capable of financing and sustaining the extended participation in the political process that is necessary for coalition-building. Manufacturers of prefabricated or modular housing may be in this category. These land uses may still be entitled to protection through presumption-shifting because they are unable to find effective local allies in a coalition-building process.

162. In San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court defined the "traditional indicia of suspectness" as occurring when "the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28.

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ist bargaining process.[163] As in the case of the disenfranchised land-use interest, there is an interest representation problem here but for a different reason. The problem is not political malfunction that destroys political pluralism and coalition-building. There is consensus in the community, and the political process functions easily and well. The problem is that this consensus can produce a land-use program that negatively affects nonresident interests that do not have a voice in the local political process.

The problem in these communities is external, not internal. The political process meets pluralist requirements internally, but the community fails pluralist bargaining requirements when its political system is viewed in its regional setting. What this means is that *Carolene Products* carries a political imperative that condemns the political isolation that makes pluralist bargaining impossible.

Courts can identify communities in this category through tests that indicate presumptively when a range of interests wide enough to create a system of pluralist bargaining is absent. These tests can identify a number of factors courts can apply to make this determination. Size is one indicator. A small community is not likely to have a range of land-use interests wide enough to produce pluralist bargaining. A court can draw the same conclusion if the land-use composition of the community is too restricted. The single-family residence "bedroom" community is an example, but exclusion is a risk in more diverse communities as well.

These factors are similar to factors the Pennsylvania Supreme Court applies to determine which communities must meet the court's requirement that communities make adequate provision through zoning for affordable housing. The court applies a number of factors, such as projected metropolitan growth and land availability, to determine which communities are subject to this requirement.[164] A similar approach can be applied to determine communities whose deficiency in interest group representation has led to the exclusion of commercial and industrial uses.[165]

163. For discussion of a typology of suburban political regimes that includes discussion of suburban growth management programs, see DiGaetano & Klemanski, *supra* note 131, at 140; *see also* Neil K. Komesar, *Housing, Zoning, and the Public Interest*, *in* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 218, 227–29 (B. Weisbrod et al., eds. 1978) (on the potential for conflict between ecological values and the potential for exclusion in growth management programs).

164. *See* Surrick v. Zoning Hearing Bd., 382 A.2d 105 (Pa. 1977).

165. The Pennsylvania Supreme Court reverses the presumption of constitutionality when a municipality excludes a legitimate business activity. Beaver Gasoline Co. v. Zoning Hearing Bd., 285 A.2d 501 (Pa. 1971).

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3. THE CAPTURED PLURALIST COMMUNITY

A final case is the community that is sufficiently diverse so that pluralist bargaining can occur, but which is captured by a minority interest or coalition of interests that dominates the land-use decision-making process. Political malfunction occurs because a political process that could function in an optimal manner is prevented from doing so.

The problem is to distinguish political capture, which indicates political malfunction, from the normal ebb and flow of the republican process at work in pluralist governments that may first favor one land-use interest and then another. Continuity in decision making is one factor that can indicate political malfunction and should not be difficult to detect.[166] Yet continuity in decision making is not enough of a trait to indicate political malfunction because pluralist bargaining can also produce continuity. An example is a land-use issue which is forcefully bargained each time but with the same result.

Because outcomes in a local political process can give mixed signals, a court will have more difficulty deciding whether to reverse the presumption of constitutionality when the issue is impaired bargaining rather than structural inability to bargain or permanent disadvantage of vulnerable interests. There are several ways out of this dilemma. One is to reverse the presumption when land-use decisions are facially suspect. Single-tract "spot" rezonings that intensify the uses allowed by the zoning ordinance are one example. The pressure on legislative bodies in these rezoning cases can be severe, and like the map in *Gomillion v. Lightfoot*,[167] the physical manifestations are obvious. Capture is suspect whether the outcome favors the developer who proposes a more intense use or neighbors who oppose it. Courts already recognize this by effectively shifting the presumption of constitutionality in these cases.[168]

Another approach for detecting political malfunction through capture links presumption-shifting to a community's comprehensive plan. A land-use decision that is consistent with a comprehensive plan is presumed constitutional. A land-use decision that is inconsistent with a comprehensive plan is presumed unconstitutional. A few courts have

166. *See supra* text accompanying notes 131–35.

167. 364 U.S. 339 (1960) (invalidating as violation of Fifteenth Amendment a strangely irregular deannexation from Alabama city that removed almost all blacks from the city's territory). An interesting article, Lea S. VanderVelde, *Local Knowledge, Legal Knowledge and Zoning Law*, 75 IOWA L. REV. 1057 (1990), observes that "[b]ecause the result of local government is verifiable, and because when there is a contradiction between text and result it is often glaring, it is possible to work backwards from these concrete facts to appraise the effect of law." *Id.* at 1064.

168. *See supra* text accompanying note 19.

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already taken this step.[169] The advantage of this approach is that it allows a court to avoid making an independent judgment on a local government's political process as the basis for presumption-shifting. Instead, the court can rely on the comprehensive plan as the basis for deciding whether the presumption should shift. The objection to this approach is that reliance on the plan is not justified if it is also produced by a process that malfunctions politically.[170]

There are, of course, no easy answers to this problem, but there are some possibilities. One is that courts can reserve judicial deference only for plans produced in an open planning process that meets pluralist requirements.[171] This means that pluralist decision making requirements will be applied to the plan-making as well as the land-use decision-making process.

Legislatures can help ensure a pluralist plan-making process by defining comprehensive plan elements so that dominance through political capture is precluded. Courts can then discipline the planning process by applying the statutory requirements rigorously. This has happened in California, which by statute has mandated comprehensive planning that includes an extensive affordable housing element.[172] A statutory requirement, that the elements of a plan must be internally consistent, will also help prevent biased plan making. It is difficult, for example, to justify a comprehensive plan as internally consistent if it shows a growing demand for low-cost housing but does not designate the land necessary for this housing.[173]

Even in the absence of a statute, courts can adopt rules that can help discipline the comprehensive planning process. This happened in New Hampshire, where the supreme court adopted criteria to guide the preparation of local growth management plans.[174] The legislature eventually codified these criteria.[175]

169. *See supra* note 25.

170. *See supra* text accompanying note 128.

171. *See supra* note 128.

172. *See* Buena Vista Garden Apartments Ass'n v. City of San Diego Planning Dep't, 220 Cal. Rptr. 732 (Cal. Ct. App. 1985).

173. *See, e.g.*, Concerned Citizens of Calaveras County v. Calaveras County Bd. of Supervisors, 212 Cal. Rptr. 273 (Cal. Ct. App. 1985).

174. *See* Beck v. Town of Raymond, 394 A.2d 847, 852 (N.H. 1978) (dictum) (growth controls must be reasonable and nondiscriminatory, the product of careful study, the object of constant reexamination with a view to relaxing or lifting the controls, accompanied by good faith efforts to augment services, and not adopted simply to exclude outsiders, especially disadvantaged social or economic outside groups).

175. New Hampshire's legislature later enacted a statute authorizing local growth management ordinances but requiring that they "be adopted only after . . . adoption . . . of a master and a capital improvement program and shall be based on a growth

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A final method for detecting political malfunction is to reverse the presumption of constitutionality when a land-use decision is inconsistent with established land-use patterns. This solution does not rely on the policies of a comprehensive plan but on the long-established and appropriate use of zoning to ensure the compatibility of land uses. If an established pattern of land uses has matured in a community, it can be assumed it meets the land-use compatibility standard the community applies through its zoning ordinance. Deviations from this standard in a land-use decision may indicate that a particular land use is excluded from the decision-making process.

A well-known New York case, *Udell v. Haas*,[176] is an example. A suburban community on Long Island for years had a zoning policy that allowed commercial uses on its major thoroughfares.[177] In response to neighborhood opposition to commercial development, the legislative body quickly downzoned a tract of land from commercial to residential in an area the community's zoning policy had long identified for this type of use.[178] The court invalidated the downzoning and held a rezoning should not conflict with fundamental land-use policies and development plans a community has adopted.[179] As an alternative, the court could have reversed the presumption of constitutionality against the local government and found the community did not have acceptable reasons that could overcome the presumption reversal.

Courts can apply the same approach when a landowner applies for a rezoning. If a landowner is denied a rezoning that is compatible with surrounding land uses, the presumption should shift because a court can assume that neighborhood interests which have captured the decision-making process are responsible for the denial. Spot zoning cases, where the courts test the rezoned use for compatibility with the surrounding area, are also amenable to presumption-shifting. If a landowner secures a rezoning that is incompatible with the surrounding area, a court can reverse the presumption because it can assume developer interests have captured the decision-making process.

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management process intended to assess and balance community development needs and consider regional development needs.'' N.H. REV. STAT. ANN. § 674:22 (1986). New Hampshire's Supreme Court later held that the statute codified the *Beck* dictum, and applied its principles. *See* Rancourt v. Town of Barnstead, 523 A.2d 55 (N.H. 1986).

176. 235 N.E.2d 897 (N.Y. 1968); *see also* City of Birmingham v. Morris, 396 So. 2d 53 (Ala. 1981) (residential zoning held invalid as applied to plaintiff's property when municipality changed character of area by approving a large number of commercial uses).

177. *See Udell*, 235 N.E.2d at 898–99.

178. *See id.*

179. *See id.* at 900.

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VIII. Conclusion

History knows periods of transition and great change. In land-use law, this is one of them. The presumption of constitutionality, once the vaunted paradigm of land-use law, no longer holds this position. Courts, once concerned to give deference to municipal decision making in land-use questions, have modified their position and reversed the presumption of constitutionality across a wide range of land-use issues. This Article has reviewed these changes and has proposed a revised basis for shifting the presumption of constitutionality in land-use law that should provide a better framework for judicial review of land-use problems. The question now is whether, and how, the courts will respond.

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