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## TWO CHEERS FOR SHIFTING THE PRESUMPTION OF VALIDITY: A REPLY TO PROFESSOR HOPPERTON

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Historically, local government land-use decisions have enjoyed a presumption of validity, and until the 1960s, judicial review of land-use decisions was generally minimal unless there was a clear taking or a violation of a landowner's right to equal protection of the laws. In the past thirty years, many courts have increased their scrutiny of local zoning decisions by shifting the burden of justification to units of local government. These cases have not, however, provided a coherent theory of this heightened scrutiny. Thus, the recent and growing refusal of courts to apply the presumption of validity is both puzzling and significant. In 1992, we wrote an article, *Shifting the Presumption of Constitutionality in Land-Use Law*,<sup>1</sup> which applied the process-based theory of heightened judicial scrutiny developed in the famous footnote 4 of *United States v. Carolene Products*,<sup>2</sup> augmented with modern theories of local government behavior, to explain why courts increasingly shift the burden of justification to communities. The article first traced the tension between the progressive vision of zoning and the reality of local land-use politics. Zoning was originally justified as the application of scientific policy for the betterment of the community, and proponents counseled judicial deference to local governments. This deference was supported both by the Jeffersonian faith in local institutions and the progressive vision that planning experts

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<sup>1</sup> Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

<sup>2</sup> *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

could control the excesses of popular democracy. After years of encouragement of, or indifference to, local politics, courts began to realize that many land-use decisions are often parochial, arbitrary, and inefficient because they fail to give sufficient weight to important interests such as regional balance, neighborhood stability, social policies furthered by the land-use, as well as fundamental fairness to regulated landowners.

The article next surveyed the use of evidentiary presumptions to resolve land-use controversies and the relationship between presumptions and heightened scrutiny of land-use decisions. We criticized the use of evidentiary presumptions in land-use decisions for reasons that we repeat in this article. Nonetheless, we elected to use the presumption framework because presumption shifting is a means of administering heightened scrutiny, especially when courts have not developed a clear and coherent doctrine to determine when heightened scrutiny is appropriate. Courts use a presumption shift both when a clear fundamental constitutional interest is at stake—speech for example—as well as when the Supreme Court has not identified a fundamental interest or suspect class. A good example of the application of this second category to land-use decisions is the use of a presumption shift to correct perceived defects in the zoning process. Spot zoning, downzoning, and shopping center location controversies are examples of presumptive shifts when no fundamental interest or suspect class is at issue.

Our central argument was that *Carolene Products* provides the basis for heightened scrutiny of regulation that subjects fundamental individual constitutional liberties and minorities to the risk of majoritarian tyranny. *Carolene Products* was the basis for Professor John Hart Ely's justly celebrated defense of much of the post-World War II Court's constitutional jurisprudence, *DEMOCRACY AND DISTRUST*.<sup>3</sup> Professor Ely developed a powerful process-based theory of the judicial role to reconcile judicial review with our democratic form of government. The central judicial inquiry is whether a relevant group has been prejudiced by its exclusion from the political process.<sup>4</sup> Pro-

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<sup>3</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>4</sup> The most recent and striking example of the application of Professor Ely's theory is *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996) (States may not adopt laws which prohibit local governments from extending anti-discrimination laws to homosexual relationships because, "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

fessor Ely's theory has been challenged as insensitive to the limits of judicial action, incorrect in that his reading of the constitution is substantive rather than procedural, and too narrow in its focus on insular rather than more diffuse minorities. However, we concluded that Professor Ely's focus on political process failure, which he calls an anti-trust theory of constitutional adjudication, is especially relevant to local governments and that many of the criticisms which render its application problematic at the federal level do not exist at the local level. The risk of group exclusion is greater at the local level than at the federal and state levels because process failure is more embedded in local political institutions. However, the application of *Carolene Products* to land-use requires a major revision of the footnote's assumptions about local politics.

The major difference between local and high level governments stems from the consequences of territoriality. Territorial limits define the demographic and socioeconomic character of the local government. "These characteristics in turn define the interest groups that compete in the local political process to form political coalitions. . . . [H]ow these coalitions organize, their strength in the bargaining process, their ability to demand political recognition, and the government settings in which they operate determine the character of the local political process as it affects land-use regulation."<sup>5</sup> We set out three categories of local governments: (1) pluralist, (2) captured pluralist, and (3) consensus non-pluralist.

Local governments fail to conform to pluralist norms in two situations. First, a dominant land-use coalition may capture the community and exclude other interests. Second, the land-use interests in the community may ignore larger regional interests. Capture theory, developed in the 1960s to explain why federal administrative agencies were unresponsive to new interests such as consumer and environmental protection, provides a justification for shifting the presumption of validity. A captured pluralist community was defined as one in which a relatively permanent coalition, likely anti-development, dominates the community. Non-captured communities are characterized by rapid shifts in coalitions. We argued that these process failures can inform the law of presumption shifts, and sought to expand the justification for presumption shifting beyond land-use controls which infringe on a fundamental constitutional right. The extensive use of

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<sup>5</sup> Mandelker & Tarlock, *supra* note 1, at 31.

presumption shifts to protect constitutional rights has resulted in the constitutionalization of land-use controls in a way that is erratic and often insufficiently responsive to local land-use concerns. The two approaches can, however, be married by the least-restrictive-alternative-means-of-regulation standard articulated by Justice Powell in his concurring opinion in *Young v. American Mini Theaters*.<sup>6</sup>

*Shifting the Presumption of Constitutionality in Land-Use Law* endorsed a presumption shift to protect inherently vulnerable land uses excluded from the political process, such as when a community's political process is not representative of the pluralist nature of the surrounding population, or when a political process has been captured. The first category of land uses can be identified both by the criteria that the Court has used to protect vulnerable minorities against majoritarian prejudice and by new types of prejudice, such as that found in the cases involving LULUs (locally undesirable land uses). Presumption shifting is also justified when pluralist bargaining does not occur in homogeneous communities. The problem here is not discrimination against community residents, but rather against non-residents excluded from political bargaining. Communities can be identified by factors such as size, projected metropolitan growth, and land availability. Capture theory is, of course, a difficult category to apply because the idea is slippery. Federal and state constitutions guarantee voters the right to change political direction. Thus, it is not easy to distinguish a capture from properly functioning representative government. We proposed two possible tests for this form of malfunction to reconcile a presumption shift with representative government. Courts can use facially suspect land-use patterns, such as spot zoning or poorly justified departures from a community comprehensive plan, as a basis for shifting the presumption.

Professor Robert J. Hopperton's recent article in this journal, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*,<sup>7</sup> takes issue with our analysis of the use of presumption shifts to facilitate judicial review of suspect zoning decisions. Professor Hopperton's article does not dispute the need for greater judicial control over local land-use, but he argues that the concept of a presumption shift is a doctrinal dead-end and takes us to task for failing to ask the right question: what justifies heightened judicial review?<sup>8</sup> His basic argument is that

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<sup>6</sup> *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78-79 (1976).

<sup>7</sup> 23 B.C. ENVTL. AFF. L. REV. 301 (1996).

<sup>8</sup> See *id.* at 324 & n.174.

heightened judicial review, divorced from the presumption of validity, will provide courts with clear standards of non-constitutional judicial review. *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion* is a welcome contribution to land-use literature because it recognizes that there is more to land-use law than parsing Supreme Court takings opinions. Professor Hopperton's article highlights the confusion that surrounds the important question of judicial review of the vast majority of land-use decisions that do not violate the First, Fifth, or Fourteenth Amendments.

We agree that there is a need for much more analysis of the standards of judicial review that courts should apply to land-use decisions where there is no clear violation of constitutional rights. However, we remain unconvinced that clarity and consistency will follow "[i]f courts can be persuaded to abandon presumptions . . ."<sup>9</sup> The ultimate issue that land-use challenges raise is, of course, what is the appropriate level of judicial scrutiny of a local legislative or administrative decision? Based on our collective seventy-plus years of struggling with land-use controls law, we find this an almost intractable question which can be approached but not "solved." Our modest argument in *Shifting the Presumption of Validity* boils down to this: the emphasis on the occasions when courts should shift the presumption of validity or constitutionality, i.e., to place a *greater* burden of justification on the local government, has two primary merits. First, it is a positive theory. It helps explain what courts are in fact doing. Second, it also is a useful normative *starting point* to construct a theory of judicial review because it focuses attention on the crucial issue in land-use litigation: what level of justification for a decision should be expected from a local government when a court suspects a process failure?

This said, we concede that the merits of presumption analysis are marginal and subtle. But, compared to other available approaches, we think that they are substantial and merit judicial attention. The fit between classic presumption law and land-use litigation is not ideal. As we and Professor Hopperton point out, the use of a procedural device to supply gaps in evidence is ill-suited for the mixed questions of fact and judgment that characterize land-use decisions. However, we believe that a presumption-based analysis offers a better road map to the end Professor Hopperton seeks, heightened judicial review, than heightened review divorced from presumptions. We offer three reasons for our defense of our reliance on presumptions.

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<sup>9</sup> *Id.* at 325.

First, the presumption of validity is constitutionally-based and thus is a permanent feature of land-use law. Both principles of separation of powers and the theory of republican government compel deference to the decisions of elected officials or their delegates. Our experience teaching and practicing in the land-use and environmental fields convinces us that effective government requires a relatively high tolerance for judgment based on less than ideal data. Like Professor Hopperton, we do not endorse the nihilistic public choice theories which presume that all government action is evil, unjustifiable wealth redistribution, or ineffective, as embraced by some members of the Supreme Court<sup>10</sup> and many lower federal judges. Thus, all land-use decisions should start from the assumption that a fair and efficient decision was reached. The presumption of validity seems to capture the initial position as well as any one concept, and the idea of a presumption shift captures the idea that a local government's burden of justification has increased.

Second, abuse happens and thus, if one accepts the utility of some form of land-use controls, the big puzzle in land-use law is the background standard that a court should use in judicial review. There is no agreed-upon ideal theory of the urban or rural landscape that a court can use to test the reasonableness of a decision. However, heightened or hard-look judicial review only works if there is a background standard. In the absence of a clear background standard, two obvious candidates suggest themselves: rational decision-making and fundamental rights theory. Courts have, in fact, made extensive use of these theories to invalidate local land-use decisions. Courts have demanded less conclusory justifications from local jurisdictions and used the First and Fifth Amendments to protect minorities against majority tyranny. In our article, we sought to go beyond these cases and explain judicial intervention where the level of explanation was not "wooden"<sup>11</sup> and there was no First or Fifth Amendment violation.

Professor Hopperton illustrates his thesis that strict scrutiny, rather than a presumption shift, is the best standard of judicial review with two land cases which he claims are models of non-equal protection strict scrutiny. We are somewhat puzzled by his use of these two

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<sup>10</sup> *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>11</sup> The phrase comes from Professor Gerald Gunther's searching classroom questions in *Constitutional Law* at Stanford Law School, some thirty-two years before *United States v. Lopez*, 115 S. Ct. 1624 (1995), probing the limits of the Commerce Clause as the basis for the proposed civil rights acts to prevent racial discrimination in public accommodations.

cases to illustrate the benefits of non-reliance on a presumption shift. They are not "pure" cases in which the court relied on the heightened standard of judicial review, rather than a presumption shift, to discipline local land-use decision-making. In fact, both cases rely explicitly on a presumption shift to achieve their objective. The first is a leading Oregon case, *Fasano v. Board of Commissioners of Washington County*.<sup>12</sup> *Fasano* is one of the first cases to hold that small-scale re-zonings are adjudicative rather than legislative decisions. The underlying rationale, such as it is, for the decision, is the need to shift a higher burden of justification to local authorities. *Fasano* largely confirmed an earlier Oregon opinion which advocated this approach as a means of preventing municipalities from granting re-zonings as special favors.<sup>13</sup> *Fasano's* rationale has been questioned as unsupported by the Supreme Court's due process jurisprudence and, contrary to what Professor Hopperton concludes, provides little guidance to local authorities other than a warning to be more rational. Judicial review in Oregon has proceeded not under *Fasano* but under the state planning goals of the state land-use planning act.<sup>14</sup>

Professor Hopperton's second paradigm of proper judicial review is *Board of County Commissioners of Brevard County v. Snyder*.<sup>15</sup> *Snyder* followed *Fasano's* characterization of re-zonings as quasi-judicial proceedings. The Florida Supreme Court used this characterization to sustain an intermediate court of appeals opinion which held that a city cannot deny a re-zoning request consistent with a comprehensive plan unless it demonstrates that the existing zoning

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<sup>12</sup> 507 P.2d 23 (Or. 1973).

<sup>13</sup> *Roseta v. County of Washington*, 458 P.2d 405 (Or. 1969). This decision relied in part on an early article by Professor Tarlock entitled *Kentucky Planning and Land-Use Control Enabling Legislation: An Analysis of the 1966 Revision of K.R.S. Chapter 100*, 56 Ky. L.J. 556 (1968), which reflected a rather dim view of local zoning based on his close observation of the continued frustration of planning objectives by elected and appointed officials in Lexington, Kentucky in the mid-1960s. *Fasano* reflected an equally dark view of local governments, also inadvertently influenced by Professor Tarlock's view that the level of post-New Deal judicial control was too low. The *Fasano* court had before it a long background clerk's memorandum, prepared by a former student of Professor Tarlock's from Indiana University, Bloomington, which strongly advocated a presumption shift to send the message that the court was disappointed at the level of planning actually practiced by Oregon municipalities. The memorandum's analysis is reflected in the holding and encapsulated in the opinion's cryptic sentences: "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 . . ."

<sup>14</sup> See generally DANIEL R. MANDELKER & RODGER CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 871-78 (1995).

<sup>15</sup> 627 So. 2d 469 (Fla. 1993).

classification "accomplishes a legitimate public purpose."<sup>16</sup> The intermediate court of appeals had held that a landowner was entitled to a re-zoning unless the governmental body demonstrated by clear and convincing evidence that a more restricted use was necessary. The Florida Supreme Court, however, held that proof of consistency alone did not entitle the landowner to relief. At one point in the opinion, the Florida Supreme Court spoke of the necessity for a standard of strict scrutiny different from federal equal protection strict scrutiny, but the crux of the court's holding was a presumption shift: once the landowner demonstrates that the re-zoning is consistent with reasonable procedural requirements and the comprehensive plan, "the burden shifts to the government board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose."<sup>17</sup>

This leads us to the root of our dispute with Professor Hopperton and our third reason for disagreeing with his veneration of heightened scrutiny.<sup>18</sup> Heightened judicial scrutiny is ultimately grounded in constitutional concerns, and thus works best with a rights analysis. But, unless one adopts Professor Epstein's view that almost all zoning is unconstitutional,<sup>19</sup> it is difficult to develop a rights analysis for zoning. For example, many cases protect neighbors' interests, although the neighbors generally lack any constitutional interest. Courts have developed some non-constitutional interests, such as the interest in the consistent application of a comprehensive plan. As the intermediate appellate court opinion in *Snyder* illustrates, heightened or non-constitutional strict scrutiny, if there is such a concept, works best if there is an applicable comprehensive plan. In that case, however, a court might be better served applying the consistency doctrine directly rather than indirectly. In short, heightened scrutiny does not work in most cases.

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<sup>16</sup> *Id.* at 476.

<sup>17</sup> *Id.* at 476. Earlier, the court cited our article, *Shifting the Presumption of Constitutionality in Land-Use Decisions*, 24 URB. LAW. 1 (1992).

<sup>18</sup> Professor Hopperton does not ultimately endorse any standard of judicial review other than to call for heightened scrutiny. Two possible models for standards consistent with his analysis are Professor Gerald Gunther's intermediate equal protection standard of "strengthened 'rationality' scrutiny," *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972), or the hard-look doctrine applied in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>19</sup> See generally RICHARD A. EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

The issue in disputed land-use cases is the level of justification that the local government must provide, not the interest of the party challenging the decision. The use of a presumption shift, imperfect as it is, can both "teach" local governments how to do it correctly and provide a necessary basis for both landowners and third parties to challenge a local decision when a local government cannot adequately explain a decision that is at variance with accepted planning theory and practice.

Bad zoning is not quite as self-evident as pornography, but sensible state judges, who often have extensive experience with municipal politics, have a good sense when something is amiss.<sup>20</sup> Judicial review of zoning decisions is filled with traps such as the prohibition against inquiry into legislative motive and the lack of clear entitlements to any given outcome. Naked heightened scrutiny directly exposes courts to these traps. On the other hand, the ability to shift the presumption of justification allows a court to intervene when there is evidence that the process failed, to see if the city can justify its decision. Our objective was to develop a theory of judicial review that would constrain but not chill local initiatives.<sup>21</sup> We think the focus on a heightened burden of justification moves further in that direction than the new and undefined non- or quasi-constitutional theory of heightened scrutiny proposed by Professor Hopperton.

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<sup>20</sup> Perhaps we are idealizing the power of judges, and while we do not endorse judicial zoning, we remain convinced that the disciplined, skeptical, and dispassionate judge, exemplified by the late Learned Hand, can play a constructive role in improving the administration of land-use controls. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994). In his path-breaking analysis of zoning practice, *THE ZONING GAME* 111 (1966), the late Richard F. Babcock urged judges to move away from the presumption of validity "to turn zoning from the petty, parochial device it now is to a viable tool of land-use policy." *Id.* Dick Babcock's words still ring true today.

<sup>21</sup> Cf. Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45 (1994). The article recasts the rationale for zoning as "a kind of 'prior appropriation' over the neighborhood commons," which allows developers to purchase entitlements through negotiations administered by those neighbors elected to represent the neighborhood. This rationale for participatory zoning demands the kind of policing that we advocate through the use of a presumption shift because too many cases reflect low-level mob planning.