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Identifying Values in Land Use Regulation

Adam J. MacLeod

INTRODUCTION

Land use regulation has become increasingly complex over the last several decades. The rules governing the lawfulness of land use decisions have not kept pace with the growing complexity and are now confused. The Supreme Court's landmark land use decision, Village of Euclid v. Ambler Realty Co., took land use regulation to be legislative in nature—ex ante, generally-applicable, and securing reciprocity of advantage among citizens within the community. But land use regulation seldom operates that way now. Having had zoning codes in place for many decades, today's land use planners rarely legislate on a clean slate. Instead, they frequently make exceptions, amendments, and exemptions in particular cases, and they enter into bilateral agreements with private developers, often with little or no advance public input. Not surprisingly, these practices give rise to widespread corruption, arbitrary decision-making, and sometimes even outright discrimination.

Despite all this, federal and state courts continue to apply 1920s review standards to twenty-first century land use decisions. Furthermore, courts generally fail to distinguish between facial and as-applied challenges, between generally-applicable regulations and individualized assessments, and between public and private interests. Perhaps as a result, lawyers do not always clearly articulate the grounds on which they challenge land use decisions. An aggrieved claimant will generally "alleg[e] a myriad of facts under an undecipherable legal theory." Often one cannot tell

1 Associate Professor of Law, Faulkner University, Jones School of Law; Visiting Fellow, Princeton University, James Madison Program in American Ideals and Institutions, 2012-13. Thanks to John Garman, Andy Olree, Ashira Pelman Ostrow, and Shelley Ross Saxer for their helpful comments, and to Jorja Loftin and Jordan Blankenship Davis for their very capable research assistance. The errors are my own.
4 Id. at 600-01.
5 Id. at 594.
6 See infra Part III.A.1.
8 Romero v. Watson, No. 1:08 CV 217-SPM-AK, 2009 WL 1361714, at *2 (N.D. Fla. May
which claim has been brought or which standard is being applied." As one United States District Court noted with apparent frustration, "confusion abounds." In the face of this confusion, most courts simply adopt a deferential posture. As a result, land use regulators enjoy broad freedom to exercise their regulatory discretion in arbitrary ways, untrammelled by meaningful judicial oversight.

This paper begins with a survey of the current state of judicial review of land use regulatory decisions. Striking trends emerge from this survey. For one, though the Supreme Court has provided doctrinal guidance for distinguishing among various types of challenges to land use decisions, courts, including the Supreme Court itself, have largely ignored the guidance. Next, though state courts continue to parrot the language of Village of Euclid, they sometimes in fact depart from Village of Euclid and review as-applied challenges and appeals from individualized assessments with heightened scrutiny. Finally, state courts generally fail to articulate what standard of review they are actually using in such cases; the Village of Euclid language masks the heightened standard that is doing the work in those opinions. As a result, no clear doctrine of judicial review has emerged from the case law.

This muddle obviously poses a threat to landowners, land users, and their neighbors who cannot count on state-law protection from arbitrary government actions. Less obviously, it also poses a threat to local governments, which risk relinquishing their land use authority. Congress has already legislated in response to arbitrary and abusive land use regulations in discrete areas. Some scholars are calling for expanded national control of land use regulation, while other scholars have suggested that the power of local governments to engage in master planning be curtailed.

9 Eide, 908 F.2d at 722.
10 Romero, 2009 WL 1361714 at *2.
11 See infra Part II.
12 See infra Part II.C-D.
13 See infra Part II.C-D.
14 See infra Part II.C-D.
17 See, e.g., Report of the President's Commission on Housing 177–79 (1982); Robert C. Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385, 474–
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states get their local governments under control, these calls are likely to gain increased support.

This paper suggests a new approach to the problem of judicial review of land use regulation. When examined closely, the canonical police powers listed in Village of Euclid suggest that some human goods are proper ends of land use regulation and that other ends are not valid. The articulation of the proper goods as ends generally suggests which means are appropriate for achieving which ends. For these reasons, state legislatures should amend their enabling acts to require local governments to articulate specific means–ends justifications for land use decisions. States would do well to (1) identify which ends are legitimate, substantial, and compelling and (2) require land use regulators to identify the particular police powers that they are exercising in each regulatory decision.¹⁸

Requiring local governments to articulate specific means–ends justifications for their decisions that are grounded in intelligible human goods would force local officials to reason more carefully about, and explain, their decisions. This would reduce opportunities for favoritism and arbitrary action. Local officials would be obliged to justify their actions with reference to particular, rational objectives that are not offered post facto as arbitrary rationalizations but guide and motivate official action from the beginning. This process of articulating the community’s goals and values would bring some order and much needed rationality to discretionary land use decisions.

Meanwhile, by specifying interests of various degrees of importance and tying those interests to the objective, intelligible goods to which they correspond, legislatures would enable reviewing courts to perform the essential means–ends tailoring analysis for which courts are well-suited. Without intruding upon legislatures’ prerogative to articulate community values, courts could hold local governments accountable to state standards of decision–making. In other words, courts would be equipped to root out arbitrary exercises of the police power without resorting to dreaded judicial activism.

I. JUDICIAL REVIEW OF LAND–USE DECISIONS: EXTENSIVE–BUT–INCONSISTENT DEFERENCE

A. Four Components of Judicial Review

To understand the problem, it is necessary to examine why judicial review as currently practiced is inadequate. For present purposes, judicial

¹⁸ See infra Parts III.C and IV.

review of a land use regulatory decision can be understood to have four distinct components or features. Each standard of judicial review consists of (1) a presumption of validity or invalidity, (2) identification of a state interest that serves as the end (or purpose, or objective) of the regulation, (3) review of the nexus between the end and the chosen regulatory means, and (4) a presumption about the validity or invalidity of the regulator’s factual findings. This is not meant to be an exhaustive taxonomy. Various courts and scholars identify and arrange the features of judicial review in very different ways in order to emphasize different operations of judicial review. But for reasons that should become clear, thinking of judicial review in this way provides a helpful framework for the purposes of this article.

Each of the components of judicial review works differently in various types of land use disputes. For illustrative purposes, this article considers the operation of judicial review primarily in three contexts: facial challenges to generally applicable regulations, as-applied challenges to generally-applicable regulations, and as-applied challenges to individualized assessments. Facial challenges to generally-applicable regulations arise when a landowner challenges a zoning ordinance or regulation in the abstract, divorced from a particular development proposal. As-applied challenges to generally-applicable regulations arise when the landowner challenges the application of an ex ante regulation to his own land or development proposal and that regulation has general application within some larger zone of the community and can be expected to secure reciprocity of advantage between some number of land users within the community. As-applied challenges to individualized assessments arise when a land use decision rests not upon straightforward application of general rules to a particular parcel but rather upon some discretionary official act. Common individualized assessments include decisions about conditional use permits, variances, and spot re-zoning. Finally, for purposes of comparison the article will also consider reviews of exactions.


21 See, e.g., Cnty. Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 164 (3d Cir. 2006).

22 See, e.g., Id. at 166.

claimed burdens on fundamental constitutional rights, and other unique judicial review standards.

1. Legal Presumption.—First, each court begins with a legal presumption that a decision is either presumptively valid or presumptively invalid under applicable law. Exactly what law applies and how the applicable law affects the legal presumption will vary according to the case. For example, a land use decision that burdens merely a property right will enjoy a more deferential presumption than one that burdens both a property right and a fundamental right, such as speech or religious exercise. Though these presumptions are rebuttable, the legal presumption with which a court begins often disposes the issue. Any ambiguity or uncertainty about who ought to prevail will be resolved in favor of the party that enjoys the presumption; thus the other party faces the significant challenge of convincing the court that its proposal is justified.

2. Identification of State Interest.—Second, every standard of judicial review contains a prong requiring the court to examine the government actor’s purposes or ends. This is the familiar identification of a state interest that is legitimate, substantial, or compelling. State courts and lower federal courts tend to be rather reticent to opine on the legitimacy and substantiality of state interests, with good reason. As will be explained below, this task is largely one of identifying communal values and is best left to lawmakers. But state lawmakers (and scholars) have largely ignored this element.

3. Review of Means.—Third, judicial review entails a review of the means that the government has adopted to achieve its end, and the rationality or tailoring of the means to the end. This is the familiar analysis of the rational or substantial relationship, or narrow tailoring, of the regulation to the state interest. Here courts are on firmer ground and the case law reflects closer attention to this component. But as this article will demonstrate, courts take very different approaches to reviewing the ends–means relationship even in similar cases. And they sometimes use different standards even as they purport to use uniform standards, and vice versa.

4. Factual Presumption.—Fourth, judicial review involves what might be called a factual presumption. This includes the burden of proof but also has other aspects. Who bears the burden of introducing evidence, how much support the regulatory decision must have in the record, and where the

24 See Mandelker & Tarlock, supra note 19 (calling attention to the power and operation of these principles).
26 Id. at 219–20.
27 See id. at 212–14.
government actors are permitted to look for evidence are all questions that
courts must resolve, either expressly or implicitly, in passing on the validity
of a land use decision.

Land use disputes present many of the same factual and evidentiary
challenges as other civil lawsuits. They are hotly contested by parties with
widely divergent perspectives. They require factual findings based upon
imperfect evidence and facts that point toward more than one possible
inference.

Land use disputes also present additional challenges. Passing judgment
on the efficacy of a land use decision requires extensive speculation about
proposed future actions. Unlike disputes about liability for past actions such
as nuisance and trespass claims, zoning disputes present largely counter-
factual fact questions. A landowner who must overcome the presumption
in favor of the government’s “factual” findings might have no way to
demonstrate that the future will not turn out the way the local government
officials predict. For all of these reasons the factual presumption pushes
heavily in favor of the party who enjoys it.

B. Facial Challenges to General Enactments—
Dispositive Deference Since Euclid

1. The Foundations of Deference.—In its landmark decision in Village of
Euclid v. Ambler Realty Co., the Supreme Court famously rejected a
facial challenge to a comprehensive land use regulatory scheme. The
Court insisted that, under facial review, any zoning decision that is “fairly
debatable” must be upheld. Thus, a claimant could not expect a court to
declare a zoning ordinance unconstitutional unless the relevant provisions
were “clearly arbitrary and unreasonable, having no substantial relation to
the public health, safety, morals, or general welfare.”

Though the Euclid Court allowed for the possibility that some as-
applied challenges might fare better, the Court was not inclined to review

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28 See, e.g., Goldblatt v. Town of Hempstead 369 U.S. 590 (1962). The Supreme Court
rejected an as-applied challenge to a zoning regulation affecting dredging and excavation.
Id. at 590. Acknowledging that the record contained “a dearth of relevant evidence” on the
questions of (the necessarily speculative) potential harm to the town and potential loss by the
claimant, the Court ruled for the town on the ground that the claimant bore the “burden” on
the question of reasonableness. Id. at 595–96.
30 Id. at 388.
31 Id. at 395.
32 The Court’s discussion of this point, though familiar, is worth quoting at length be-
cause it is so often overlooked or taken for granted.

It is true that when, if ever, the provisions set forth in the ordinance . . . come
to be concretely applied to particular premises . . . or to particular conditions, or
to be considered in connection with specific complaints, some of them, or even
many of them, may be found to be clearly arbitrary and unreasonable. But where
legislative determinations in gross. Thus, when an action is challenged facially under *Euclid*, the governing authority is entitled to every possible presumption and those presumptions are nearly insuperable. The reviewing court will not question the reasoning for the zoning decision unless a specific, inexplicable irrationality is brought to its attention.

2. Protection for Separation of Powers.—A deferential standard is appropriate for judicial review of general legislative enactments. As Justice Harlan noted decades before *Euclid* in *Mugler v. Kansas*, separation of powers cannot function if a court is willing to substitute its own judgment for that of legislators, even as to enactments that destroy the value of a property or business interest, such as Mugler's brewery. Who gets to decide when a threat to the health or morals of the city justifies coercive state action? Justice Harlan answered

Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do so as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are adopted or needful for the protection of the public morals, the public health, or the public safety.

That the legislative branch holds this power necessarily entails that the judicial branch must not interfere with its exercise. This is "a fundamental principle in our institutions, indispensable to the preservation of public liberty." If legislators in Kansas determined that the sale of alcohol threatened the public morals or health, then the courts should not substitute their own views of the matter.

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*Id.* at 395–96. As this passage demonstrates, it should matter what type of challenge the landowner brings.

34 *Id.* at 660.
35 *Id.* at 660–61.
36 *Id.* at 662.
37 *Id.* State courts and lower federal courts have followed Justice Harlan's lead on this point. "This judicial deference to legislative discretion in the enactment of laws, zoning or
The lesson to be gleaned from Efclid and Mugler is that legislatures exercise the police powers because the community articulates and defends its objectives—its goals and values—through its democratic institutions. Promulgation entails identification of both abstract and particular ends and adoption of regulatory means that are reasonably aimed toward those ends. Judgment by a court, by contrast, entails review of a specific factual history, identification of an enforceable right of obligation, and a finding that one party has failed to conform his conduct or proposal to what the law requires. By limiting courts to the latter function, deferential standards of review secure the legislative role against judicial usurpation.

The Eleventh Circuit explained how judicial deference works in the land use context. "Federal courts do not sit as zoning boards of appeals ..." Updating the claims that are available to a landowner under extant law, the court noted, "[i]nsofar as the Constitution is concerned, a municipal government may control the use of land within its jurisdiction for what it perceives to be the common good, subject only to four restrictions." The four types of constitutional claims that a landowner may use to challenge regulation of its land are: (1) a just compensation claim under the Takings Clause; (2) a regulatory takings claim; (3) a claim of arbitrary or capricious regulation under principles of substantive due...
process; and (4) a claim under the Equal Protection Clause. Subject only to these limitations, "the Constitution does not prevent a local government from restricting, controlling, or limiting the development of land to promote what it perceives to be the general welfare interests of the community as a whole." In short, unless the government has taken title to the land or has violated equal protection, the Due Process Clause will control. And the Due Process Clause requires courts to defer to rational exercises of the police power.

3. Widespread Use in State Courts.—Not surprisingly, the Euclid standard of review predominates among both federal and state courts. Whether

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41 Id. at 1374.
42 Id.
43 Following Euclid, the Supreme Court re-affirmed its deferential stance in Zahn v. Bd. of Pub. Works, 274 U.S. 325 (1927) and Gorich v. Fox, 274 U.S. 603 (1927). See also, e.g., Triomphe Investors v. City of Northwood, 49 P.3d 198, 201 (6th Cir. 1995); Mackenzie, 920 F.2d at 1558-59; Jackson Court Condos., Inc. v. City of New Orleans, 874 F.2d 1070, 1074 (5th Cir. 1989).
referred to as a “fairly debatable,” "arbitrary and capricious," "abuse of discretion," "substantial relation," "reasonable relation(ship)," "reasonable basis," or “rational basis” test, this standard of review operates the same way. The land use decision is presumed to be both


46 Mackenzie, 920 F.2d at 1558-59 (citing Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989)); Homewood Citizens Ass’n, 548 So. 2d at 143; Hayward v. Gaston, 542 A.2d 760, 769 (Del. 1988); E & G Enters., 373 N.W.2d at 649; McNaughton, 414 P.2d at 780 (quoting Lillions v. Gibbs, 289 P.2d 203, 205 (Wash. 1955)).


48 E & G Enters., 373 N.W.2d at 694 (quoting Anderson v. City of Cedar Rapids, 168 N.W.2d 739, 742 (Iowa 1969)); Bosworth v. City of Lexington, 125 S.W.2d 995, 1000 (Ky. 1939) (internal quotation omitted); Hernandez v. City of Lafayette, 399 So. 2d 1179, 1183 (La. Ct. App. 1981) (citing West v. City of Lake Charles, 375 So. 2d 206, 209 (La. Ct. App. 1979)); City of Brewer, 434 A.2d at 23; Glissmann, 39 N.W.2d at 835 (quoting Lombardo v. City of Dallas, 47 S.W.2d 495, 497 (Tex. App. 1932)).


52 But see Hall v. Jefferson Cnty., 450 So. 2d 792, 796 (Ala. 1984) ("The ‘fairly debatable’ standard is a rule of procedure or application" and does not excuse the zoning authority from substantively grounding its decision in a "reasonable and substantial relationship to the promotion of public health, safety, morals, or general welfare"); City of Boca Raton v. Boca Villas Corp., 271 So. 2d 154, 159 (Fla. Dist. Ct. App. 1979).
legally legitimate and factually supported by the evidence, and the reviewing court defers to both the local government’s statement of purpose and the means chosen to protect that state interest, unless some irrationality, which is inexplicable on the record, unambiguously presents itself. In cases that employ Euclid-type deference, landowners receive little protection.


55 In the words of one court, the irrationality must be “plain and palpable.” Meyers, 185 So. 2d at 282; see also Grayson, 173 So. 2d at 70 (stating that courts will defer to local government’s enactment unless “invalid or obnoxious”); McQuail, 183 A.2d at 578 (stating action will be upheld unless there is an abuse of discretion); McCormick, 216 So. 2d at 789 (citing City of Miami Beach v. Hogan, 63 So. 2d 493 (Fla. 1953)) (stating doubt of ordinance’s validity should be resolved in favor of ordinance); E & G Enters., 373 N.W.2d at 694 (quoting Anderson, 168 N.W.2d at 742) (stating ordinance will not be stricken down unless shown to be clearly arbitrary); Dings, 701 P.2d at 963 (quoting Combined Inv. Co., 605 P.2d at 541) (stating court will not strike down act “unless clearly compelled to do so by the evidence”); Hardy v. Mayor of Eunice, 348 So.2d 143, 148 (La. Ct. App. 1977) (internal citation omitted) (stating that the court will uphold action unless there is an excessive use of power); City of Omaha v. Glissmann, 39 N.W.2d 828, 835 (Neb. 1949) (quoting Dundee Realty Co. v. City of Omaha, 13 N.W.2d 634 (Neb. 1944)) (stating abuse of discretion must be clearly shown for court to intervene).

56 Florida briefly employed a more rigorous review standard, but later abandoned it. The Florida Supreme Court discussed its “fairly debatable” standard at some length in City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953) (“An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.”). Then, in Burritt v. Harris, 166 So. 2d 168, (Fla. Dist. Ct. App. 1964) [hereinafter Burritt], in the course of upholding a zoning board decision, the court of appeal indicated that the burden might
C. As-Applied Challenges to General Enactments—The Lawful End Requirement

That a general zoning enactment is valid on its face does not entail that it is valid as applied to a particular landowner.57 As-applied challenges to land use regulations sometimes prompt more exacting review.58 The Supreme Court laid the doctrinal foundation for heightened scrutiny shortly after it handed down the Euclid decision, in Nectow v. City of Cambridge.59

Significantly, the Supreme Court used the language of deferential review;60 however, as applied to Nectow the ordinance was examined rather closely.61 Rather than presume a legitimate state interest, the Court searched the record and failed to discern “any reason” for the zoning decision with respect to Nectow’s tract.62 The zoning decision deprived Nectow of his property in violation of the Due Process Clause.63 The Nectow Court thus created a precedent for heightened scrutiny, a skeptical review of the lawfulness of the local government’s asserted ends.

The most remarkable thing about the Nectow ruling is how seldom it appears in subsequent decisions resolving as-applied challenges. Even rest upon the local government to justify any land use regulations that “deprive a person of his property without due process.” Id. at 172–73 (internal citation omitted). The Florida Supreme Court reversed, and expressly ruled that the municipality had “not established” that the zoning action “bears substantially on the public health, morals, safety or welfare of the community.” Burritt, 172 So. 2d at 822 [hereinafter Burritt II].

Citing this authority, an intermediate Florida appellate court in Lawley v. Town of Gulfview, 174 So. 2d 276 (Fla. Dist. Ct. App. 1965) noted that the Burritt II court had introduced an “innovation in the zoning law of Florida by casting on the zoning authority the burden of establishing by a preponderance of evidence that the zoning restrictions under attack ‘bear substantially’ on [a public interest].” Id. at 270. Other courts appear to have shared this understanding. See City of St. Petersburg v. Aikin, 208 So. 2d 268, 270, 272 (Fla. Dist. Ct. App. 1968). In 1968, the Florida Supreme Court insisted that its Burritt II decision had been wrongly construed, and that the fairly debatable standard, taken from Euclid, had been the law all along. City of St. Petersburg v. Aikin, 217 So. 2d 315, 316 (Fla. 1968). As a result, the “fairly debatable doctrine is now restored” in Florida law. McCormick, 216 So. 2d at 789.

57 “Although a zoning ordinance may be valid in its general aspects, it may nevertheless be invalid as applied to particular piece of property or a particular set of facts.” Ziman v. Vill. of Glencoe, 275 N.E.2d 168, 171 (Ill. App. Ct. 1971) (citing Joseph Lumber Co. v. City of Chi., 83 N.E.2d 592 (Ill. 1949)).


60 Id. at 187–88 (quoting Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

61 This inconsistency between what the Court claimed to be doing and the review that it actually exercised is mirrored in the practices of state and lower federal courts. See infra Part II.C–D.

62 Nectow, 277 U.S. at 188. The master had found as a matter of fact that the zoning decision did not promote any lawful end. That fact–finding determined the outcome of the case.

63 Id. at 188–89.
when claimants bring as-applied challenges to specific provisions of zoning regulations, courts generally invoke the *Euclid* standard and look no further than the local government’s asserted interest and rationale. In

64 Bell v. City of Waco, 835 S.W.2d 211, 214 (Tex. App. 1992) (stating that *Euclid* deference applies whether ordinance is challenged “generally or as to particular property”); see also La Salle Nat’l Bank of Chi. v. City of Chi., 125 N.E.2d 609, 612 (Ill. 1955) (stating “reasonable relation” standard of review applies for a particular property); Zimmerman v. Bd. of Cnty. Comm’rs of Wabaunsee Cnty., 605 P.3d 533, 541 (Kan. 1980)) (stating need to determine if act is reasonable as applied to a particular property); Golden v. City of Overland Park, 584 P.2d 130, 134–35 (Kan. 1978) (stating need to determine if action is arbitrary with regard to a particular property); Bourbon County Estates, Inc. v. St. James Parish, 611 So. 2d 180, 182–83 (La. Ct. App. 1992) (internal citation omitted) (stating that as applied challenges to a particular property are subject to arbitrary standard of review); Hernandez v. City of Lafayette, 399 So. 2d 1179, 1181–82 (La. Ct. App. 1981); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14, 23 (Me. 1981) (citing Barnard v. Zoning Bd. of Appeals, 313 A.2d 741, 744 (Me. 1974)) (stating that appropriate standard of review is “substantial relation”); Wright v. Michaud, 200 A.2d 543, 547 (Me. 1964)) (stating as applied challenges to ordinance is subject to “substantial relation” test); Caires v. Bldg. Comm’r of Hingham, 83 N.E.2d 306, 310 (N.C. 1949); Duggar v. City of Santa Fe, 834 P.2d 424, 430 (N.M. Ct. App. 1992) (stating that as applied challenges are subject to “reasonable relation” standard of review); Winney v. Sutton, 53 S.E.2d 306, 310 (N.C. 1949); Soderfelt v. City of Drayton, 59 N.W.2d 500, 507 (N.D. 1953) (stating that as applied challenges are subject to “fairly debatable” standard); Clary v. Okla. City, 322 P.2d 1383, 1384–85 (Okla. 1957) (citing McNair v. Okla. City, 490 P.2d 1364, 1367 (Okla. 1971); City of Tulsa v. Mobley, 454 P.2d 601 (Okla. 1969)) (stating as applied challenges are subject to “fairly debatable” standard of review); Layne v. Zoning Bd. of Adjustment, 460 A.2d 1088, 1089 (Pa. 1983) (stating that as applied challenges are subject to “substantial relationship” standard); Rush v. City of Greenville, 143 S.E.2d 527, 531 (S.C. 1965) (stating that as applied challenges are subject to “arbitrary, unreasonable, or ... obvious abuse of ... discretion” standard of review); Davidson Cnty. v. Rogers, 198 S.W.2d 812, 814–15 (Tenn. 1947) (stating as applied challenges are subject to *Euclid* standard of review); Galanes v. Town of Brattleboro, 388 A.2d 406, 409–10 (Vt. 1978) (stating that as applied challenges are subject to “reasonable relation” standard of review); Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 727 (Wyo. 1985) (stating that as applied challenges are subject to “reasonable basis” standard of review).

such cases, the local government enjoys all favorable presumptions and the claimant bears correspondingly high burdens of proof and persuasion. Indeed, in reviewing as-applied challenges during the decades after Nectow, the Supreme Court itself granted presumptions of legal and factual validity to regulators and placed the burdens of proof and persuasion on the claimants.

One possible explanation for this neglect of Nectow is that, since West Coast Hotel and Carolene Products, courts simply are reticent to substitute their own judgments for legislative determinations when reviewing economic regulations and other burdens on property. But another interpretation of events also presents itself: The Euclid and Nectow Courts took pains to distinguish the facial challenge asserted in Euclid from the as-applied challenge in Nectow; unlike Nectow, Ambler Realty had made no specific land use proposals when it brought its claim against the City of Euclid and its tract was then vacant. In contrast, the vast majority of state court decisions draw no distinctions between facial and as-applied challenges to zoning regulations.

Some lower courts have suggested that Nectow might have life, that as-applied challenges to general enactments might be entitled to slightly more attention than facial challenges, particularly as to the government’s objective. Though these courts seldom explain why they are employing

(internal citation omitted).

66 Flippen Alliance, 601 S.E.2d at 109-10; Plaza Recreational Ctr, 111 N.W.2d at 762-63; Clabaugh, 306 N.W.2d at 755-56; Dings, 701 P.2d at 965; Hernandez, 399 So. 2d at 1180-83; City of Univ. Park v. Benner, 485 S.W.2d 772, 778-79 (Tex. 1972).


68 W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).


70 I am grateful to Andy Olree for raising this possibility.


72 Lessons from RLUIPA, supra note 58, at 759.


74 Simi Inv. Co., v. Harris Cnty., 236 F.3d 240, 251, 253 (5th Cir. 2000) (finding no “rational basis” for county’s decision); City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154, 159 (Fla. Dist. Ct. App. 1979) (employing presumption of validity but affirming trial court’s ruling that zoning action was unconstitutional); Henry Cnty. v. Tim Jones Prop., Inc., 539 S.E.2d 167, 168, 170 (Ga. 2000) (finding that the landowner met burden of presenting “clear and convincing evidence to rebut the presumption that the zoning classification is constitutional”); City of McDonough v. Tusk Partners, 492 S.E.2d 206, 208-09 (Ga. 1997) (holding the trial court did not clearly err by finding, based on conflicting evidence, that zoning designation was “unsubstantially related to the public health, safety and welfare”); City of Atlanta v. Standish, 353 S.E.2d 489, 491 (Ga. 1987) (using “clearly erroneous” standard but overturning city’s refusal to rezone); Ziman v. Vill. of Glencoe, 275 N.E.2d 168, 171 (Ill. App. Ct. 1971) (“Although a zoning ordinance may be valid in its general aspects, it may nevertheless be invalid as applied
heightened lawful-end scrutiny, it appears that they are largely concerned about arbitrariness in the ends that local governments have chosen to pursue.\(^5\) In particular, they seem worried that land use regulators are acting to promote primarily private interests rather than promoting the common good of the community.\(^6\)

Other courts also have taken a skeptical view of the lawfulness, authenticity, or rationality of municipalities' asserted objectives when reviewing as-applied challenges, even as they have purported to exercise "fairly-debatable" review.\(^7\) These decisions demonstrate that, like the


\(^5\) See, e.g., Simi Inv. Co., v. Harris Cnty., 236 F.3d 240, 251 (5th Cir. 2000) (affirming the district court's finding that the County acted on "an illegitimate plan to benefit the private interests of" a neighboring landowner; ruling that the County "acted arbitrarily...and, thus, without a rational basis").

\(^6\) For example, the Delaware Superior Court sustained an as-applied challenge to an ordinance prohibiting the construction of a filling station within 200 feet of any other tract that already contained a filling station. Mobil Oil Corp. v. Bd. of Adjustment, 283 A.2d 837, 838 (Del. Super. Ct. 1971). The court insisted that zoning authorities enjoy "wide and liberal discretion," and their decisions can be overturned only if the claimant meets its burden of showing the decision to be "arbitrary and unreasonable." Id. at 839. Yet the court did not credit the town's asserted justification, that it was concerned about "traffic problems and the danger of fire and explosions." Id. The court found the town's justification "difficult to understand," and speculated that the ordinance was enacted to protect the economic interests of established gas station owners, an objective that did not serve "the public interest." Id.

\(^7\) Simi Invest. Co., 236 F.3d at 251, 254 (affirming trial court's finding that arbitrary decision by County constituted "an illegitimate plan to benefit the private interests of neighboring landowners, who also occupied positions of power in the County) whose properties were financially benefited by" the decision); Tim Jones Prop., Inc., 539 S.E.2d at 170 (finding County produced no evidence of "public benefit" from its zoning decision); Task Partners, 492 S.E.2d at 208-09; Standish, 353 S.E.2d at 491 (finding insufficient "public benefit" from the zoning decision); Tillitson v. City of Urbana, 193 N.E.2d 1, 4 (Ill. 1963); La Salle Nat. Bank of Chic. v. City of Chi., 125 N.E.2d 609, 612-13 (Ill. 1955) (applying a fairly debatable standard, but as applied to claimant's land on heavily trafficked street in Chicago, zoning ordinance amendment lowering allowed heights of apartment buildings in the zone was unreasonable and arbitrary); Ziman, 275 N.E.2d at 171; Golden v. City of Overland Park, 584 P.2d 130, 134, 137-38 (Kan. 1978) (using fairly-debatable standard, but finding city's refusal to re-zone tract unreasonable; decision left landowner with no economically feasible use, and officials provided reasons for their decision only after the fact); Los-Green, Inc., 156 A.D.2d at 994 (stating the purpose of the comprehensive plan requirement, which town violated, is to "ensure that the [zoning] amendment is calculated to benefit the entire community, not individual or special interests"); Cent. Motors Corp. v. City of Pepper Pike, 409 N.E.2d 258, 271-77 (Ohio Ct. App. 1979).
Supreme Court, lower courts sometimes tend to doubt that the land use regulatory powers are being exercised reasonably, for a common good. Because these courts recite the standard of deferential review passed down to them from the Euclid Court, they do not explain their heightened scrutiny of local government objectives but they scrutinize the objectives just the same.

In Illinois and Kansas the state supreme courts have enumerated particular factors that must be considered when reviewing as-applied challenges to land use decisions. The Kansas court has stressed that judicial review will be more uniform and effective if land use officials state the ultimate reasons on which their decisions are based. "Reviewing courts, then, will have a record to review and act upon." Enumeration of permissible objectives thus facilitates the type of lawful-end review modeled in Nectow.

D. Individualized Assessments—Second Order
Rational Basis Review (Sometimes)

1. The Problem: Unfettered Discretion.—As noted above, a fundamental principle of constitutional governance holds that courts should not

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78 The common good consists of plural (but not infinitely plural) human goods in the instantiation of which humans participate individually and cooperatively, and which accrue to the benefit of all. It is not quantified in a utilitarian sense as the greatest aggregate of individual values or preferences for the greatest number. See infra Part III.C.i-2.

79 In Illinois the factors are:

1. The existing uses and zoning of nearby property;
2. The extent to which property values are diminished by the particular zoning restrictions;
3. The extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public;
4. The relative gain to the public as compared to the hardship imposed upon the individual property owner;
5. The suitability of the subject property for the zoned purposes; and
6. The length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the subject property.


In Kansas the primary factors are:

1. The character of the neighborhood;
2. The zoning and uses of properties nearby;
3. The suitability of the subject property for the uses to which it has been restricted;
4. The extent to which removal of the restrictions will detrimentally affect nearby property;
5. The length of time the subject property has remained vacant as zoned; and
6. The relative gain to the public health, safety, and welfare by the destruction of the value of plaintiff's property as compared to the hardship imposed upon the individual landowner.

Golden, 584 P.2d at 136. Additional factors include recommendations of professional staff, conformance to the master plan, and, significantly, any additional factors that the state legislature might enumerate. Id.

80 Golden, 584 P.2d at 137.

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usurp legislative actions whenever those actions have some intelligible grounding in a lawful, public, legitimate end. But what if some land use decisions represent not the considered judgment of those who live within the community, acting through their elected representatives, but rather the raw exercise of bureaucratic discretion? What if that discretion is not guided by ex ante rules, and is instead exercised on a case-by-case basis? A land use regulator who is authorized to make such discretionary decisions actually poses a threat to the separation of powers. He or she combines the legislative and judicial powers in one office. When a reviewing court defers to the discretionary decision of such an official, as happens in deferential judicial review of an individualized assessment, that court becomes complicit in the arrogation of power.

Equally troubling is the freedom that land use regulators have to choose among values when discretionary decisions are entrusted to them. Under rational basis review, the legislature decides what interests the state will pursue and the reviewing court defers to the official's determination that the chosen interest is legitimate. In theory, this feature of judicial review ought to serve the separation of powers by leaving to local governments the legislative task of determining what ends the community values. But in practice, objectives are selected not through the democratic means appropriate to legislative choices but rather through discretionary official actions. There is thus no guarantee that the resulting decision reflects or represents the values of the community. Though judicial deference regarding the legitimacy of an asserted interest is justifiable as a mechanism for separating legislative powers from judicial powers, in a regime of discretionary land use decisions, it can actually enable land use regulators to amass and consolidate those powers.

Because not all land use regulatory action is ex ante, prospective, democratic, and generally-applicable, many land use decisions, especially individualized assessments, are prone toward arbitrariness. For this reason, despite continuing to use the language of judicial deference, some courts are deferring less. As Mandelker and Tarlock have observed, judicial deference to certain types of land use decisions has eroded as courts have awakened to the arbitrary nature of many of these decisions and have sought to ensure "more open and considered decisions."

2. The Solution: Second-Order Rational Basis Review.—Some state courts have reviewed individualized assessments with a heightened degree of

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83 Id. at 686.
84 Mandelker and Tarlock, supra note 19, at 5–6.
85 Id. at 2.
rigor, as even as they have parroted the deferential language of Euclid. Though they have not been explicit about it, these courts often use what might be considered second-order rational basis scrutiny. Some common features emerge from these decisions. Many states treat individualized determinations as if they were administrative decisions. Though they have not been explicit about it, these courts often use what might be considered second-order rational basis scrutiny. Some common features emerge from these decisions. Many states treat individualized determinations as if they were administrative decisions.
implications, this means that the court will not always defer to the zoning authority's interpretation of an ordinance. Also, the evidence supporting the zoning authority's decision must be "substantial," though in many of these states any amount of evidence in support of the findings will be deemed substantial.

Beyond these observable traits there is little uniformity. Indeed, divergent standards can be found even in the same state. Some states use the same "lawful-ends" standard that applies to as-applied challenges to general laws. Some place the burden on local governments to justify their individualized assessments or to demonstrate that the zoning provision authorizing the individualized assessment contains sufficiently definite standards to ensure uniform exercise of the power to grant or deny. In Minnesota, a failure by a zoning authority to record the reasons for its decision creates a presumption that the decision is arbitrary.

Some states employ bright lines, such as categorical bars against spot zoning or rules permitting re-zoning only to correct a mistake in the

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94 Quality Sand and Gravel, Inc., 738 A.2d at 11162.

95 See City of Roswell v. Fellowship Christian School, Inc., 642 S.E.2d 824, 825 (Ga. 2007) (holding that an abuse of discretion review means the court will affirm where there is "any evidence supporting the decision").

96 Compare Cyclone Sand & Gravel Co. v. Zoning Bd. of Adjustment, 351 N.W.2d 778, 783-84 (Iowa 1984), with Rock Island, 112 N.W.2d at 854-55.


98 Bauer v. City of Wheat Ridge, 513 P.2d 203, 205 (Colo. 1973); Faubel v. Zoning Comm'n, 224 A.2d 538, 543 (Conn. 1966); City of Naples v. Cent. Plaza of Naples, Inc., 303 So. 2d 423 (Fla. Dist. Ct. App. 1974) (overruling the decision of city council because council was not permitted to base its decision on traffic conditions and other criteria not stated in the ordinance); Easter v. Mayor of Baltimore, 73 A.2d 491, 492 (Md. 1950).


100 Holasek v. Vill. of Medina, 226 N.W.2d 900, 902-03 (Minn. 1975); Zylka v. City of Crystal, 167 N.W.2d 45, 50 (Minn. 1969); Commc'ns Props., Inc. v. Cnty. of Steele, 506 N.W.2d 670, 672 (Minn. Ct. App. 1993). This requirement is designed "to prevent the municipal body from offering after-the-fact justifications for its decision which are totally unrelated to the actual reasons for the initial decision." Uniprop Manufactured Hous., Inc. v. City of Lakeville, 474 N.W.2d 375, 379 (Minn. Ct. App. 1991).

101 Griswold v. City of Homer, 925 P.2d 1015, 1020 n.6 (Alaska 1996); Lum Yip Kee, Ltd. v. City of Honolulu, 767 P.2d 815, 816 (Haw. 1989) ("[S]pot zoning is an arbitrary zoning action by which a small area within a large area is singled out and specially zoned for a use classification different from and inconsistent with the classification of the surrounding area and not in accord with a comprehensive plan."); Life of the Land, Inc. v. City Council of Honolulu, 606 P.2d 866, 890 (Haw. 1980); Gullickson v. Stark County Bd. of Cnty. Comm'rs, 474 N.W.2d 890,
original code or to correspond to changes in conditions. Other states permit spot zoning (or so-called “piecemeal zoning”), and many states even place the burdens of proof and persuasion on the claimant challenging a spot zoning decision.

Indeed, many state courts treat individualized assessments no differently than challenges to generalized zoning laws, even when they expressly acknowledge that they are performing as-applied review of an individualized determination. If the government provides any reason for its decision and the persuasiveness of that reason is fairly debatable, then the government wins.

894 (N.D. 1991); Pierce v. King Cnty., 382 P.2d 628, 638 (Wash. 1963).

102 Malafronte v. Planning & Zoning Bd., 230 A.2d 606, 609 (Conn. 1967); Clayman v. Prince George’s Cnty., 292 A.2d 689, 693–94 (Md. 1972); Smith v. Wash. Cnty., 406 P.2d 545, 547–48 (Or. 1965). In addition to any substantive requirements, a split appears to have developed between those states that adhere to the traditional rule, which treats re-zoning decisions as legislative actions, and “a substantial minority of jurisdictions [which] now imposes greater procedural requirements on the re-zoning process.”

DOUGLAS W. KMIEC, ZONING AND PLANNING DESKBOOK § 7.17 (2d ed. 2011).


106 Cyclone Sand and Gravel Co., 351 N.W.2d at 781; Coronet Homes, 439 P.2d at 223; see McPherson Landfill, Inc., 49 P.3d at 534; Zengerle, 276 A.2d at 654.

107 M & N Mobile Home Park, Inc., 916 S.W.2d at 100–02; Sprenger, Grubb & Assoc., 903 P.2d
Another difficulty arising out of current judicial review standards is distinguishing individualized assessments from generalized zoning laws. There appears to be no clear test. For example, Idaho has employed three different definitions within just the last few years. Idaho's Local Land Use Planning Act provides a meaningful right of judicial review to a landowner who is denied an application or aggrieved by an individualized land use decision. The grant or denial of an application must specify the “ordinance and standards used in evaluating the application,” the “reasons” for the decision, and “[t]he actions, if any, that the applicant could take to obtain a permit.” The decision is then subjected to the same judicial review as the decision of a government agency under Idaho's Administrative Procedure Act.

Until recently the Idaho Supreme Court interpreted this provision to cover any quasi-judicial land use decision, distinguishing only between “enacting general zoning legislation” and “applying existing legislation and policy to specific, individual interests as in a proceeding on an application for rezone of particular property.” But in 2008, the court narrowed the availability of judicial review; only applications for permits that could authorize development triggered the right. The Idaho legislature responded in 2010 by expressly extending the right of judicial review to applications for zoning changes, spot zoning, variances, special use permits, and “other similar applications.” It still remains unclear which applications count as “similar.”

at 748-49; Jaffe, 179 N.W.2d at 555-57; R.A. Putnam & Assoc., v. City of Mendota Heights, 510 N.W.2d 264, 267-68 (Minn. Ct. App. 1994); see Cyclone Sand and Gravel Co., 351 N.W.2d at 783-84; Hardy, 348 So. 2d at 148; Coronet Homes, 439 P.2d at 224-25.


110 Id.

111 Id.; see also Neighbors for a Healthy Gold Fork v. Valley Cnty., 176 P.3d 126, 131 (Idaho 2007).


115 Holinka, supra note 112, at 20.

116 Id.
3. Lessons from City of Cleburne.—States courts are not the only judicial bodies to have rediscovered limitations on the regulatory authority of local governments in recent decades. The Supreme Court employed second-order rational basis review in City of Cleburne v. Cleburne Living Center.\footnote{117} That case involved an equal protection challenge to the denial of a special use permit for the operation of a group home for the mentally retarded.\footnote{118} Other multiple-dwelling facilities, including boarding and lodging houses, fraternities and sororities, hospitals, and nursing homes, were allowed in the zone as of right.\footnote{119}

Rejecting the argument that mental retardation is a suspect or quasi-suspect classification, the Supreme Court employed rational basis review.\footnote{120} Under this review, the Court held that the ordinance was irrational as applied to the Center; the mentally retarded posed no special threats to the city’s legitimate interests.\footnote{121} The City’s inferences that local residents harbored fear toward the mentally retarded and that nearby school pupils might harass residents of the Center were not grounded in record facts “cognizable in a zoning proceeding.”\footnote{122} As justification for its denial, the city cited the fact that the proposed site was located within a five-hundred year flood plain; that the city might bear legal responsibility for actions of the Center’s residents; that a large number of residents would occupy the Center; and that the Center would increase traffic congestion. The Court discounted these proposed justifications reasoning that none of them distinguished the Center from the nursing homes, hospitals, boarding houses, fraternity and sorority houses, and the other uses that were permitted within the zone.\footnote{123} The Court concluded that the special use permit requirement rested upon “irrational prejudice against the mentally retarded.”\footnote{124}

Despite its insistence that it was employing traditional rational basis review, the Cleburne Court deferred little to the city. Had the Court afforded the ordinance a presumption of constitutional validity, the city’s proffered justifications for the ordinance would have sufficed.\footnote{125} Thus it is clear that the city actually bore the burden of persuasion. The Court assumed that the city’s stated interests were legitimate, but the means that the city used to achieve its ends did not stand similarly shielded from scrutiny. Also, the

\footnotetext{117}{City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).}  
\footnotetext{118}{Id. at 436–37.}  
\footnotetext{119}{Id. at 447.}  
\footnotetext{120}{Id. at 439–47.}  
\footnotetext{121}{Id. at 448.}  
\footnotetext{122}{Id. at 448–49.}  
\footnotetext{123}{Id. at 449–50.}  
\footnotetext{124}{Id. at 450.}  
\footnotetext{125}{Id. at 456 (Marshall, J., concurring in part and dissenting in part).}
Court extended to the Cleburne Living Center, rather than the city, the benefit of the factual presumption.\textsuperscript{126}

These features of the majority's reasoning did not escape Justice Marshall, who wrote separately to object to the Court's "narrow, as-applied remedy."\textsuperscript{127} Though the Court insisted that it was not using heightened scrutiny, the city's ordinance would "surely" have survived traditional rational basis review.\textsuperscript{128} Marshall faulted the majority for failing to articulate the justification for applying what he labeled "second-order" rational basis review,\textsuperscript{129} a form of heightened scrutiny that he asserted "actually [led]" to the holding.\textsuperscript{130} He opined that the Court's lack of transparency left no principled ground to distinguish cases in which more searching inquiry was warranted.\textsuperscript{131}

Marshall was surely correct that the \textit{Cleburne} majority employed some heightened level of review. But when Cleburne Living Center's claim is viewed as an as-applied challenge to an individualized assessment a principled ground for the Court's rigorous review emerges. One might infer that the Court declined to extend to the city's ordinance the deference due to legislative enactments because, as applied to the Cleburne Living Center, the ordinance acted less like legislation and more like adjudication.\textsuperscript{132} In cases of individualized assessments, such as \textit{Cleburne}, it makes sense to review the municipality's decision as if it were a decision of a lower court or an adjudication of a regulatory agency.\textsuperscript{133}

Viewed this way, it is irrelevant that \textit{Cleburne} involved an equal protection challenge rather than a due process challenge.\textsuperscript{134} While it is true that the \textit{Cleburne} Court was primarily concerned with irrational

\textsuperscript{126} The Court faulted the city for making factual claims for which the Court found no support in the record. \textit{Id.} at 448–50 (majority opinion).

\textsuperscript{127} \textit{Id.} at 456 (Marshall, J., concurring in part and dissenting in part).

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.} at 458. Marshall observed that traditional rational basis review permitted local governments to take incremental steps to address perceived dangers, even to the point of singling out one land use from analogous uses. \textit{Id.} Also, a court employing rational basis review would not "sift through the record" in search of a factual foundation for the local government's action. \textit{Id.} Finally, the majority departed from traditional rational review by placing the burden on the city to prove that its distinctions were sensible. \textit{Id.} at 459.

\textsuperscript{130} \textit{Id.} at 456.

\textsuperscript{131} \textit{Id.} at 460.


\textsuperscript{133} 3 ARDEN H. RATHKOFF ET AL., THE LAW OF ZONING AND PLANNING § 40, at 40–12 to –63 (4th ed. 2011) (comparing re-zonings as legislative acts with re-zonings as quasi-judicial acts); \textit{Lessons from RLUIPA, supra} note 58, at 733–37.

\textsuperscript{134} \textit{But see} Hayward v. Gaston, 542 A.2d 760 (Del. 1988) (holding that equal protection was not violated when no group homes were allowed, regardless of disability).
discrimination against a class of citizens, it was the irrationality of the discrimination, not any special or suspect status of the class, which gave the claim its weight. The permit denial would have been arbitrary and irrational no matter which constitutional provision Cleburne Living Center asserted. Heightened scrutiny was justified not because Cleburne Living Center chose to assert an equal protection claim, but rather because the city exercised its discretion arbitrarily, unmoored from rational objectives.

4. Failure to Articulate Reasonable Ends.—This cursory review of the case law concerning individualized assessments should be sufficient to demonstrate that work remains to be done in this area. But the way forward opens to view. As with “fairly-debatable” review under Euclid and “lawful-ends” review under Nectow, an examination of the way in which courts use second-order rational basis review demonstrates that courts are uneasy about the objectives or ends that local governments articulate in justifying their decisions.

For example, the Indiana high court overturned a town’s rejection of a petition for construction of a church. The court rejected the justification the town offered for its decision—that the church would bring children into a neighborhood of predominantly child-less residents. The court declared that exclusion of children was an invalid purpose. Private interests “should not outweigh” general public welfare. The court then provided a lesson in the proper ends and objectives toward which the police powers may be directed:

Zoning ordinances must find and support their validity in the police power of the state, which can only be exercised in the general public interest of safety, health and morals. Rights to the use of private property may not be restricted except upon such basis. It was never intended that zoning laws should be used for the purpose of creating special privileges or private rights in property which result from creating an exclusive community.

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135 Triomphe Investors v. City of Northwood, 49 F.3d 198, 202 (6th Cir. 1995).
136 Cleburne Living Ctr., 473 U.S. at 439-47.
137 Hall v. Jefferson Cnty., 450 So. 2d 792, 795–96 (Ala. 1984) (overturning unreasonable refusal to rezone claimant’s tract; that claimant could make productive use of property without re-zoning was not a reason satisfying the County’s required threshold showing that the refusal had a “substantial relation to a legitimate public purpose”); City of Naples v. Cent. Plaza of Naples, Inc., 303 So. 2d 423, 425 (Fla. Dist. Ct. App. 1974) (holding that city council acted unreasonably by basing its decision on criteria not stated in the zoning ordinance).
139 Id. at 42.
140 Id.
141 Id. at 43.
Other courts have expressed similar skepticism about the authenticity or legitimacy of local governments' asserted objectives where the local governments have exercised discretion to make individualized assessments. In reviews of spot zoning decisions, for example, Illinois requires that the government show that the decision was made "for the public good" and not "in deference to the wishes of certain individuals." In one early case arising out of Illinois, a zoning ordinance amendment changed half of one block in Chicago, including the claimant's land, from apartment designation to single-family residential. The court purported to employ "fairly-debatable" review and to place the ordinance behind the "bulwark of presumptive validity." Nevertheless, the court scoured the record for an explanation for the burden placed on the individual claimant's land. The court found on the record "no actual or reasonable connection" between the re-zoning decision and the "public health, safety, comfort, morals, or welfare."

Much like the Nectow Court, the Illinois court appears to have used exacting review in large part because it was skeptical about the city's purposes. The re-zoning decision, the court concluded, was "not made for the public good, but was made only for the benefit of those residents of the block who desired to exclude" the church. The court gave no credence to the city's asserted interest in preserving the block as "an oasis of gracious family living."

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142 W. Paving Const. Co. v. Boulder Cnty., 506 P.2d 1230, 1232 (Colo. 1973) (stating that the county's proffered justification "tax[es] credulity"); Concerned Citizens for McHenry, Inc. v. City of McHenry, 395 N.E.2d 944, 950 (Ill. App. Ct. 1979); Golden v. City of Overland Park, 584 P.2d 130, 135-37 (Kan. 1978); MacGibbon v. Bd. of Appeals, 255 N.E.2d 347, 351 (Mass. 1970); Holasek v. Vill. of Medina, 226 N.W.2d 900, 903 (Minn. 1975); Commc'ns Props., Inc. v. Cnty. of Steele, 506 N.W.2d 670, 672-73 (Minn. Ct. App. 1993); Fasano v. Bd. of Cnty. Comm'r's, 507 P.2d 23, 30 (Or. 1973) (en banc); Bd. of Cnty. Sup'rs v. Carper, 107 S.E.2d 390, 395-96 (Va. 1959) (re-zoning served "private rather than public interests"); see Four States Realty Co., Inc. v. City of Baton Rouge, 309 So. 2d 659, 672-74 (La. 1975) ("A review of this record shows clearly that the original motivation for seeking the re-zoning of the subject property was the selfish interest of the intervenor and perhaps a few other nearby property owners."); Page v. City of Portland, 165 P.2d 280, 282-86 (Or. 1946) (holding an amendatory zoning ordinance to be an invalid exercise of police power where no legally sufficient reason was shown by the City Council in re-zoning two lots in a predominantly residential neighborhood for commercial use).


144 Trust Co. of Chi., 96 N.E.2d at 502.

145 Id. at 504.

146 Id. at 504-05.

147 Id. at 505.

148 Id.

149 Id. at 502.
the meaning and reach of the police powers, which authorize burdens upon property rights only "when public welfare demands."150

New Hampshire once addressed this concern by statute. An older version of New Hampshire's zoning enabling act accorded no deference to a zoning board determination and authorized a trial judge to overturn the determination "when he is persuaded by a balance of probabilities, on the evidence before the court, that the order or decision is unjust or unreasonable."151 It is not immediately clear why New Hampshire amended this statute.152

E. Burdens on Constitutional Rights—Limited Heightened Scrutiny

In some instances, when a regulatory burden on property rights also burdens a fundamental constitutional right or denies to some landowner the equal protection of the laws, the regulation is subjected to heightened scrutiny. Of course, in such cases the regulation is scrutinized not as a burden on land use but rather as a burden on the other protected constitutional right at stake. Nevertheless, if the exercise of the protected constitutional right involves the use of land, the heightened scrutiny will benefit the claimant as a land user.

A prominent and controversial example of this heightened scrutiny is the prophylactic protection required by the substantial burden provision of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").153 This provision requires strict scrutiny review of land use regulations that substantially burden religious exercise.154 Thus, where

150 Id. at 502–03.
154 One might reasonably expect RLUIPA's substantial burden provision to provide significant protection for religious exercises performed on land. But courts have gone to extreme lengths to avoid giving the substantial burden provision its normal reading and intended reach. Adam J. MacLeod, Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA, 40 REAL EST. L.J. 115, 137–47 (2011) [hereinafter, Resurrecting the Bogeyman]. This is understandable in light of the conflict between Congress and the Supreme Court on the validity of religious exemptions. See City of Boerne v. Flores, 521 U.S. 507, 513–37 (1997) (holding RFRA exceeded Congress' remedial authority under the Fourteenth Amendment and was unconstitutional). For a sense of the controversy surrounding RLUIPA's substantial burden provision and other Congressional attempts to restore religious liberty exemptions, see Angela Carmella, RLUIPA: Linking Religion, Land Use, Ownership, and the Common Good, 2 ALBANY GOV'T L. REV. 485, 500, 511, 525–36 (2009) (advocating that even though varying
applicable, RLUIPA requires that courts afford no deference to land use regulators; rather, land use regulators are required to articulate compelling interests, persuade the court that the articulated interests are their actual objectives, and demonstrate that the regulations are the least restrictive means of achieving their objectives. When it works properly, RLUIPA is quite effective at rooting out latent discrimination.

Interpretations of the substantial burden test in the RLUIPA exist, the overall purpose of the RLUIPA is served; Marci A. Hamilton, The Unintended Consequences RLUIPA Has Visited on Residential Neighborhoods, in RLUIPA Reader: Religious Land Uses, Zoning, and the Courts 61, 68–69 (Michael S. Giaimo & Lora A. Lucero eds., American Bar Association 2009); Douglas Laycock, Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty, 118 Harv. L. Rev. 155, 200–13 (2004) (discussing the history of religious land use regulation laws and test before the RLUIPA and how the substantial burden test from the RLUIPA incorporates some of the previous rules, but ultimately advocating that religious liberty is maximized most when governmental interference is minimized); Douglas Laycock, State RFRA's and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 764–70 (1999); Shelley Ross Saxer, Faith in Action: Religious Accessory Uses and Land Use Regulation, 308 Utah L. Rev. 593, 621–27 (2008) (discussing the substantial burden test in RLUIPA and, in consequence of Congress not defining what a substantial burden is, the result is a wide variety of interpretations ranging from a broad interpretation of burdens to a narrow reading at both the federal and state level). Compare Robert W. Tuttle, How Firm a Foundation? Protecting Religious Land Uses After Boerne, 68 Geo. Wash. L. Rev. 861, 862–64, 880–89, 892–97, 922–24 (2000) (providing an extensive review of religious land use and issues surrounding the different acts enacted by Congress, and test developed by the courts over time, ultimately advocating in favor of protection the free speech and equal protection in lieu of RLUIPA), with Marci A. Hamilton, Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act, 78 Ind. L.J. 311, 323–24, 332–41, 348–53 (2003) (arguing that RLUIPA bears a skeptical legislative history because the states were not properly consulted and presenting a more pointed plan of action that land use regulation is matter best left to the states rather than Congress because each state has a different “master plan” regarding zoning and separate reasoning for its zoning ordinances and restrictions). But the effects have been unfortunate. See Resurrecting the Bogeyman, supra, at 137–47. In particular, the courts’ contortions of RLUIPA's plain language have rendered the statute largely ineffectual for identifying latent discrimination. As currently interpreted, RLUIPA generally leaves local governments free to act for unlawful ends, as long as they do not express their discriminatory motives.


156 See, e.g., Rocky Mountain Christian Church v. Boulder Cnty, 612 F. Supp. 2d 1163, 1170–71, 1174–76, 1184–90 (D. Colo. 2009) (holding the Church had been treated on unequal terms as a non-religious institution and that the Board of Commissioners had violated RLUIPA); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1221–24, 1226–32 (C.D. Cal. 2002) (holding Cottonwood had met the substantial burden requirement in 42 U.S.C. § 2000cc(a)(1) and that when the City was unable to show a furtherance of a government interest, or that it was the most restrictive means, allowing the City to proceed under their proffered reasoning would permit discrimination and Cottonwood was entitled to a preliminary injunction).
Some other types of land use disputes should be examined cursorily for present purposes. First, the Supreme Court cut a narrow path into the thicket of Euclidean deference in two cases, *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. In these cases, the Supreme Court applied the "unconstitutional conditions" doctrine to land use regulation. In this context the doctrine holds that the government cannot require a landowner to relinquish his rights under the Takings Clause in exchange for a discretionary benefit "where the benefit sought has little or no relationship to the property." From the combination of the *Nollan* and *Dolan* decisions emerged the so-called "essential nexus" and "rough proportionality" tests. Taken together, these tests produce the rule that, if the government exacts a property interest in consideration of restoring some property interest taken by a previous regulation, then the exaction must substantially advance and be roughly proportional to a legitimate state interest. The *Nollan* and *Dolan* decisions provide a mechanism "for making [an] as applied challenges[.] to a land use requirement which does not substantially advance a legitimate governmental interest." Because the basis for a *Nollan–Dolan* claim is the Takings Clause, not the Due Process Clause, the landowner's remedy is not invalidity of the decision but rather just compensation.

While the doctrinal force of *Nectow* and *Cleburne* has largely been left unexplored, *Nollan* and *Dolan* have received lavish attention, both critical and favorable. For present purposes, two brief observations will suffice. First, despite the presumption of invalidity, any asserted state

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159 Id. at 385; see also David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. Rev. 1243, 1245 (1997) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989)).
160 Dolan, 512 U.S. at 385.
161 Id. at 386.
162 Id. at 391.
163 2 KMIEC, supra note 102, at § 7:19.
164 See id.
165 See, e.g., Dana, supra note 159 at 1245–46; Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 Iowa L. Rev. 1, 27–41 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Takings Clarity and the Consequences of Certainty*, 92 Cal. L. Rev. 609, 667–68 (2004); see also Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 Denve. U. L. Rev. 989, 998 (1995) (discussing the doctrine of unconstitutional conditions to argue that through conditions "a state is permitted to do indirectly what it may not do directly").
interest will suffice to justify the regulation. Here, as in the other instances of judicial review examined above, the regulator has discretion to decide what ends it will pursue. The reviewing court defers to that decision, even as it fulfills the role for which it is better suited, namely scrutinizing the relationship between means and end. Second, Nollan and Dolan illustrate the Court's renewed interest in articulating the rational boundaries of local government power. It is worth observing the implicit acknowledgment that local governments' power to place conditions upon land use cannot be exercised arbitrarily without implicating the Takings Clause.

Another type of claim that illustrates the idiosyncratic judicial review of land use decisions is the non-exaction regulatory takings claim. At least in theory, regulatory takings cases are not about the validity or invalidity of the state action. Just as a local government must pay just compensation under the Takings Clause of the Fifth Amendment if it takes title by eminent domain, if the local government in the exercise of its police powers regulates possession, use, or exploitation of property but, in Justice Holmes's words, goes "too far," then it can be required to pay just compensation. Either way, the state action is deemed valid and the only remedy available to the claimant is compensation for the property rights lawfully taken by the government.

The Court has accordingly devised a regulatory takings test that does not measure the relationship between means and end. The logic of that test is nearly inscrutable. Meanwhile, some states have gone their own way.

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169 In the absence of an appropriation of title or a permanent physical occupation, the now-familiar formula for ascertaining when a regulatory taking has occurred requires the reviewing court to: (1) balance the public interest vindicated by the regulation against the fraction of economically-valuable uses lost by the owner, which have market value and are not prohibited by background principles of property law; (2) ascertain whether the state action looks more like an exercise of the eminent domain power or the police powers; and (3) measure the extent of interference with the owner's investment-backed expectations. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982); see also Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–32 (1978). The fraction in the first factor contains yet another level of complication, the so-called denominator problem. The denominator in the loss fraction is the total amount of use of the property taken as a whole; conceptual severance is not allowed. Id. at 130–31. But if the interests in the asset have actually been severed each might be considered separately. See Pa. Coal Co., 260 U.S. at 414–15. If the claim is for a per se taking then the denominator is all uses measured over all time. See Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'1 Planning Agency, 535 U.S. 302, 337–38 (2002). But if the Penn Central formula or some other takings test comes out in favor of just compensation, then the claim can succeed even if the deprivation is temporary. First Evangelical Lutheran Church v. L.A. Cnty., 482 U.S. 304, 318 (1987).

Just when one is reasonably certain that one has sorted all of this out, one must attempt to explain it to first-year law students.
These states employ some form of presumption–means–ends test when reviewing regulatory claims. These tests often mimic the Euclid test. A third type of claim that illustrates how judicial review works in the land use context arises out of the Telecommunications Act of 1996 ("TCA") which employs a unique mechanism for compelling local communities to accommodate cell phone towers. Any state or local government that forbids the placement of a wireless service facility must state its reasons in writing and must support its reasoning with "substantial evidence." It must not "unreasonably discriminate" among providers and its regulations must not have the effect of prohibiting wireless service.

Judicial review under the TCA differs from traditional review of land use regulations in three respects. First, the provisions of the TCA change the presumption of factual validity so that the local government bears the burden of proof; if the local government must show its reasoning and provide substantial evidence, there is a greater likelihood that the reviewing court will discover shortcomings in the record. Second, the TCA takes certain asserted state interests off the table; for example, a state or local government may not intend to favor one provider over another. Third, an appropriate claim of discrimination or impeding service under the TCA might invite de novo judicial review.

In other important respects, judicial review under the TCA is just as deferential as review of a decision by an administrative agency; the court is authorized neither to make its own fact-findings nor to substitute its own

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170 See, e.g., Bickerstaff Clay Prods. Co., v. Harris Cnty., 89 F.3d 1481, 1488 (11th Cir. 1996) (finding regulatory taking under Georgia constitution if "zoning decision presents a significant detriment to the landowner and is insubstantially related to the public health, safety, morality and welfare").


175 See Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 493 (2d Cir. 1999).


177 See, e.g., Town of Oyster Bay, 166 F.3d at 495; PrimeCo, 26 F. Supp. 2d at 1064.


179 Town of Amherst v. Omnipoint Commc’n’s Enters., Inc., 173 F.3d 9, 16 n.7 (1st Cir. 1999).
judgments for reasonable determinations of the local government. The TCA leaves the police powers intact and deems the traditional justifications for land use regulation, including aesthetics, to be reasonable. The TCA thus suggests a model for judicial review, adumbrating the proposal in Part IV below. It strikes a considered balance between requiring local government transparency and preserving deference to local regulatory objectives.

Finally, procedural due process doctrine places restrictions on land use regulatory authority, but "[b]ecause courts generally characterize land use allocations as 'legislative' rather than 'quasi-judicial,' the procedural protections . . . are limited." 183

II. A PERFECTIONIST THEORY OF THE POLICE POWERS

A. The Objectives of the Police Powers

1. The Problem of Abdication to Local Governments.—The deferential standard of review set out by the Supreme Court in Village of Euclid and Nectow presupposes that local governments will generally exercise their land use regulatory powers for some common or public good, and not arbitrarily. State courts generally imitate this deference as to the legitimacy and importance of the local government's asserted objectives, even when those assertions are so broad and ambiguous as to provide no reasonable limitation on the exercise of police power. 184

Significantly, many state legislatures have adopted the canonical formulation of the police powers articulated in Mugler and Village of Euclid. Nearly all state zoning enabling acts authorize land use regulations to promote the public health, safety, and general welfare. 185 Most states

180 Town of Oyster Bay, 166 F.3d at 494; see also Sw. Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 58-59 (1st Cir. 2001) (interpreting "substantial evidence" review under the TCA as requiring reliance on local government's findings of fact, from which reasonable inferences should be based).

181 See Nagle, supra note 172, at 557-58.

182 See AT & T Wireless, 155 F.3d at 427-28.

183 2 Knie, supra note 102, at § 7:17.

184 For example, many state courts have ruled that local governments that claim to act for the maintenance of property values are serving the "general welfare," without further inquiry. See Plaza Recreational Ctr. v. Sioux City, 111 N.W.2d 758, 763 (Iowa 1961); E & G Enters. v. City of Mount Vernon, 373 N.W.2d 693, 694-95 (Iowa Ct. App. 1985) (citing Anderson v. City of Cedar Rapids 168 N.W.2d 739 (Iowa 1969); Plaza Recreational Ctr., 111 N.W.2d at 762). Promoting "peace and good order" is deemed a valid end, Freeman v. Bd. of Adjustment, 34 P.2d 534, 539 (Mont. 1934), as is concentration of stores into shopping centers, which constitute a "convenience, if not a necessity." Anderson, 168 N.W.2d at 743-44.

add morals to the list. Some states add additional broad values, such as convenience and comfort; prosperity; peace or order; appearance

186 For example, Delaware’s statute reads:

For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.


or aesthetics; fundamental fairness; privacy; and the protection of life, families, property, and constitutional rights.

Some states are more specific in identifying their objectives and interests. Connecticut, for example, permits regulation “to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements.” Vermont seeks through its zoning act “to encourage development of a rich cultural environment and to foster the arts.” Michigan authorizes land use regulation in order “to meet the needs of the state’s citizens for food, fiber, energy, and other natural resources.

As these examples illustrate, a handful of states have identified distinct values and enumerated specific state interests that follow from those values. Unfortunately, neither local governments nor courts pay much attention to these state-specific distinctions. Like vegetables cooked in a crock pot, objectives enumerated by state legislatures emerge from the land use planning process a drab, indistinct mush—devoid of any distinct flavor.

This is a particular deficiency in judicial review of land use regulations; courts treat the statements of objectives in enabling acts as pro forma exercises, signifying nothing. Thus, even where state legislatures have made an effort to require the pursuit of plural and distinct values, courts defeat any attempt to hold local governments to the mandates.


Subject to the constitution and general laws of this state, every city is empowered:

1. To regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purposes to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, in accord with a well considered plan.

Most state legislatures make no such attempt to articulate clear standards. Two states completely abdicate to local governments the authority to define the police powers by authorizing them to draft their own comprehensive plans to identify their own legitimate ends. Under such a scheme, the adopted comprehensive plan itself is supposed to "guard against prejudice, arbitrary decision making, and improper motives" by providing substantive standards against which to measure individual zoning decisions.

States are thus, on the whole, no more specific in their enumeration of valid ends than are federal courts. Local governments are trusted to direct their regulatory powers toward rational ends and they often do. Still, it is all too common for local governments to exercise their land use authority in arbitrary ways. Decision-makers frequently fail to ground their decisions in rational objectives and sometimes act for private gain. Corruption is a prevalent problem in land use regulation. As individualized assessments, discretionary zoning, and bilateral development agreements have become more common, opportunities for favoritism and for arbitrary, unconstitutional action have increased. Citizens are largely
shutdown out of bilateral negotiations; as a result, development agreements are often created with minimal public input, without public accountability, and without regard for constitutional constraints. The use of development agreements "facilitates unfair dealing by providing real estate developers special access to local officials at a critical stage of the land use and development process." Individualized assessments often result in ad hoc decisions that are divorced from long-term planning goals and are sometimes used to discriminate in unlawful ways.

Municipal lawyers can help officials avoid common legal errors, but their advice is only as strong as what the law requires; they represent the government's interest, not the interests of citizens. When citizens suffer adverse consequences as a result of local government corruption, landowners, neighbors, and other members of the community are often without recourse. Because courts largely treat privately negotiated development deals with the same deference extended to generalized zoning laws, such deals are often ratified without scrutiny. Disputes over alleged improprieties are "decided overwhelmingly in favor of municipal officers." This does not indicate that alleged misconduct is ethically reasonable or free of impropriety, only that the law does not currently prohibit the conduct alleged. Where, as is common, land use decisions affect less than a majority of a municipality's population, aggrieved citizens are unlikely to muster the political will to change the law. And landowners

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209 Mustering the Missing Voices, supra note 207, at 42.

210 Id. at 53-56.

211 Laycock, supra note 154, at 767.

212 Mustering the Missing Voices, supra note 207, at 65-66; Ellickson & Bern, supra note 204, at 302-03, 349.


214 Id.
are not entirely free to vote against corrupt officials with their feet; even if they move, they cannot take with them their land, schools, churches, social groups, and other rooted aspects of their lives.215

One of the reasons for this arbitrariness might be that local governments are not presently required to keep any rational end clearly in sight as they regulate. The generalities of many enabling acts and the loose review standards established by Euclid and its progeny allow regulatory officials to state ambiguous justifications for their actions after the fact. Land use regulators are thus excused from identifying and articulating particular ends before adopting regulatory means. Without having a clear objective in mind, land use regulators are also unlikely to adopt rational means.

2. The Rationality of State Interests.—Because state interests are understood to be non–arbitrary, they must have some foundation in reason. Even states like California that authorize local governments to define their own legitimate ends require that exercises of the police power be “reasonable in object.”216 It is not sufficient for a local government to articulate any end for its actions; some ends are valuable, others are not.217 Yet state courts almost never declaim with any clarity where the boundaries lie. As demonstrated in Part II, courts are more comfortable scrutinizing the rationality of regulatory means than they are questioning objectives or ends. They recognize that the act of choosing objectives from among plural values is an inherently legislative action. Selection of legitimate ends entails articulation of the community’s purposes and values.218 This function should be left to democratic processes.219

217 See Dawson Enter., Inc. v. Blaine Cnty., 567 P.2d 1257 (Idaho 1977); Trust Co. of Chi. v. City of Chi., 96 N.E.2d 499 (Ill. 1951); Kimball v. Blanchard, 7 A.2d 394, 396 (N.H. 1939) (condemning a zoning enactment as “purely a wastebasket process, absolutely arbitrary and unreasonable”).
218 JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 150–53 (1980) [hereinafter NATURAL LAW AND NATURAL RIGHTS]; JEAN PORTER, MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY 258–66 (2010). Obviously, there are limits. Some values ought to be, and are, enshrined in constitutional doctrines so as to be out of reach of legislative enactments. Those are beyond the scope of this article.
219 “The definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well–nigh conclusive.” Berman v. Parker, 348 U.S. 26, 32 (1954). As a state court expressed it, “we bear in mind the general rule that the courts will not and cannot inquire into motives of members of a municipal governing body or other zoning authority where the validity of zoning plans or laws is
within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

So the problem is clear. Only if police powers are exercised in favor of intelligible values—goods whose value will be recognizable to all reasonable minds—can they be authoritative. Yet courts are rightly reticent to scrutinize legislative ends. The sensible solution is that state lawmakers must do the work of articulating which ends are rational (and which are not) and of distinguishing the important and fundamental ends from the less important, or less fundamental ends. The balance of this article is devoted to this solution. It considers two approaches in turn.

First, we will consider whether it is possible and advisable to draw the line between individual rights, which are grounded in individual interests, and collective interests. Liberal theories often draw some distinction like this in order to determine when rights that conflict with collective interests are inviolable and when they must be sacrificed. Because the ultimate ends of human choice and action are incommensurable, when the interests at stake are ultimate ends this approach proves unworkable and should not be pursued.

Second, we will consider whether it is possible to avoid the dichotomy between individual and collective interests in instances of ultimate ends. This will require us to identify truly common goods that are good for all and the value of which is knowable by all. To allow for the rich variety of the aspects of human flourishing, these goods must be realized in plural and various forms. To avoid the problem of incommensurability, these goods must be instantiated not as a compromise of individual interests for some “greater” collective good, but rather for the benefit of all those living together in communities.

B. The False Dichotomy Between Individual Rights and Collective Interests

One understanding of the proper objects of the police powers might be sought in the dichotomy between individual property rights and collective interests. On this account, property rights are limited by some form of collectivism, which seeks to maximize the preferences or interests of the greatest number at the occasional expense of individual property owners. This account rests upon consequentialist reasoning. It presupposes that all human goods can be compared on a single scale and that political decision-makers are at least sometimes more competent than landowners to maximize human values. From this view, the state has the authority to

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220 Berman, 348 U.S. at 33.
burden property rights because lawmakers must have power to produce the greatest collective good for the greatest number of people.

Eduardo M. Peñalver is among the many prominent scholars who have defended a collectivist account of property law.221 He would authorize state usurpation of property rights when “collective decision making” can be expected to “generate outcomes superior to individually determined conduct.”222 Other prominent property scholars also assert on collectivist grounds that property is something to be managed by the state.223 They doubt that property owners can be trusted to use assets wisely for the greater good and would like, therefore, to give law and government a strong deliberative role in determining the uses of property.224 On their view, property-owner sovereignty should survive as an institution only to the extent that it can be shown to be more effective than regulation directed at promoting collective ends.225

A competing account of property law is found on the other side of the divide between the state and the individual. Law and economics scholars tend, on the whole, to favor individual property-owner sovereignty because economics teaches that private property is generally better than collective decision-making at managing resources. On this ground, contemporary property rights theorists defend a strong core of owner sovereignty, which enjoys justificatory priority to the state.226 They observe that the law protects this core with strong sanctions; the owner has a right to exclude, enforceable against the whole world. They argue that property rights must be robust if property is to serve as a coordination device, efficiently assigning rights and responsibilities for the disposition of assets among individuals.

At first glance, the collectivists account and the economic account appear to be in direct opposition to each other. On closer examination, however,

221 See Eduardo M. Peñalver, Land Virtues, 94 Cornell L. Rev. 821 (2009).
222 Id. at 870.
225 Peñalver, supra note 221, at 870.
they share much in common. Both are essentially consequentialist accounts of the institution of property. Both pose a dichotomy between the interests of individual property owners and the collective interests of the state. Even those law and economics scholars who defend property-owner sovereignty seem to accept that property and human virtue are in some tension with each other.227 Though they sometimes speak of “the moral nature” of property rights, they do not claim that moral intuitions about property are true, only that those intuitions are useful.228

These two consequentialist accounts of property predominate in contemporary property scholarship.229 Thus, it should not surprise that consequentialist accounts of the police powers have found considerable favor in state law.230 For example, in the famous case State v. Shack,231 the New Jersey Supreme Court declined to enforce a criminal trespass provision against two men, Tejeras and Shack, who entered a farm without the farmer’s permission for the purpose of providing medical and legal services to migrant workers who were residing there.232 The text of the statute clearly prohibited any trespass by one who was forbidden to enter by the owner of the land,233 though it did not foreclose the argument that Tejeras and Shack might be considered invitees of the migrant workers, and therefore not trespassers. But the court insisted that “Property rights serve human values”234 and that “[a] man’s right in his real property of course is not absolute.”235 The maxim that one should use his property so as not to injure others expresses the “inevitable proposition that rights

230 The state enabling acts in Hawaii and Michigan require that the zoning powers be exercised “to ensure the greatest benefit” for or to “the State as a whole.” HAW. REV. STAT. §§ 6-4(a) (West 2012); MICH. COMP. LAWS § 324.30510 (2012).
232 Id. at 370.
233 Id.
234 Id. at 372.
235 Id. at 373.
are relative and there must be an accommodation when they meet.” Of course this is true, but the court did not make any effort to examine what human values the landowner might be serving by exercising his right to exclude. No doubt the court reasonably inferred that the landowner did not have the best interests of his employees at heart. But the court did not reveal the calculus underlying its conclusion that allowing the trespass better served the greatest good for the greatest number.

The high court of Illinois has also accepted the putative dichotomy between individual rights and collective interests. In reversing a city’s refusal to re-zone a tract from residential to commercial, the court offered a consequentialist calculation as justification. The landowner-claimant sought to sell his tracts to an oil company that would build an automobile service station. The court ruled that the city’s refusal to re-zone was contrary to the “public interest” in light of the “uses and zoning of nearby property,” the diminution of property values, “the benefits sought to be attained by the ordinance,” and “the relative gain to the public as compared to the hardship imposed upon the property owner.” The court saw its task as one of calculating the net collective gain or loss from the land use decision: “If the public gain is small when compared with the hardship imposed upon the individual property owner, the restriction constitutes an unreasonable exercise of the police power.”

Oddly, however, the court made no attempt to perform the actual calculation. The court did not quantify the potential gains or losses caused by the refusal to re-zone. It would seem reasonable to infer that converting the tracts from residential use to use as a fuel and service station would result in a substantial increase in traffic. But the court did not require the landowner to rebut this inference; it held that the city had made no “showing that the residential classification is necessary... from a traffic standpoint.” The court then summarily declaimed that “the public interest to be served is either nonexistent or insignificant when compared with the injury [to the landowner].”

Because the court declined to show its figures and calculations, its reasoning might remain opaque were it not for a throw-away line in the

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236 Id.
238 Tillitson, 193 N.E.2d at 2-4.
239 Id. at 3.
240 Id. at 3-4.
241 Id. at 4 (internal citations omitted). This sort of balancing is reminiscent of that mandated by the Court for regulatory takings cases in Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
242 Tillitson, 193 N.E.2d at 4.
243 Id.
middle of the opinion. The court inferred from the record “that plaintiff's property is being accorded different treatment from other property similarly situated.” The record showed “neither uniformity, nor a long-established adherence to the residential classification” in the neighborhood. This is, of course, not a conclusion reached as a result of measuring costs against benefits. It is not a matter of whether the landowner's property rights should be sacrificed for some greater, collective good. This is instead a judgment about equal protection or fundamental fairness. So it appears that the Illinois court set up a pretense of consequentialist calculations. The real reason for its decision appears to have been some fundamental principle of justice. This is a principle which stands apart from consequentialist accounts of property.

Indeed, there is much about the institution of property that collectivist and purely economic accounts of property fail to explain, particular with respect to ultimate ends. Collectivism cannot explain property's robust pluralism. Property serves the common good in as many different ways as there are property owners. Just as one person's notion of the good life differs from his neighbor's notion, one person's use of his assets to pursue the good life differs from his neighbor's use. Most choices about the use of property are governed by pre-moral considerations. That is, absent some moral constraint, one may choose among a variety of equally reasonable uses of property. Some people use property to raise and support families; others use property to pursue education and knowledge; others donate property to charitable causes. That different people use property to pursue different aspects of the good is one of property's great strengths. Property is, in this sense, one of the truly pluralistic institutions in American law.

Meanwhile, economic accounts of property cannot explain the rationality of regulatory limitations upon property rights for non-economic ends, even where they concede the value of such limitations. Economists cannot fully explain aesthetic regulation. Nor can they explain moral harm. Accepting that one should not use one's property to injure another person, to destroy the natural environment, to expose children to obscenity, or to harm another's property rights even (or especially) if it would be most efficient to do so is to accept a normative claim which must appeal to some reason beyond efficiency.

Any theory that reduces ultimate values to individual interests or collective aggregates of interests will also pay insufficient attention to practices and institutions directed toward realizing truly common goods. Property serves common goods in part by creating space for communities to collaborate. Property is owned and used not only by individuals but also by communities—businesses, unions, churches, and social clubs. Even

244 Id.
245 Id.
individual property owners can and do choose to use their property for the benefit not only of themselves but also of others: children benefit from the property ownership of their parents; the destitute benefit from charitable gifts; employees benefit from capital investments in the corporations that employ them.

These examples illustrate that the dichotomy between allowing individuals to serve their own interests and authorizing the state to promote collective interests is incomplete. Even as it enables pluralism, property-owner sovereignty serves a truly common good, which is reducible neither to individual interests nor to collective political decisions. Participation in the common good is an exercise of practical reasonableness, with implications for both pre-moral and moral choosing. In other words, there is a lot more going on in property than consequentialists recognize.

The failure of consequentialist accounts of property to account for much of the work that property law is really doing should not be surprising, for consequentialism has been discredited in moral and legal philosophy as a way of measuring ultimate ends. The best jurisprudential thinkers from both the liberal tradition and the natural law tradition agree that basic human values are plural and incommensurable, and a choice between basic human goods is thus undetermined by reason. It makes no sense to compare the value of, say, a human life with the value of knowledge. There is no common scale on which such basic, fundamental human values can be compared with each other. Thus, as a strategy of answering the question, What ought to be done?, “utilitarianism or consequentialism is irrational.”

C. A Theory of Police Powers

1. Lessons From Contemporary Perfectionist Jurisprudence.—Because the individual–collective distinction is not helpful for understanding ultimate reasons for action, it is productive to examine another theory of state interests. This theory is drawn from an old tradition which has enjoyed a contemporary revitalization in the work of a variety of legal philosophers.


248 This is known as the incommensurability thesis, and it has been most persuasively defended by Joseph Raz and John Finnis. See, e.g., MORALITY OF FREEDOM, supra note 246, chs. 11–13; NATURAL LAW AND NATURAL RIGHTS, supra note 218, at 112–18.

249 NATURAL LAW AND NATURAL RIGHTS, supra note 218, at 112
VALUES IN LAND USE REGULATION

that includes the liberals Ronald Dworkin\textsuperscript{250} and Joseph Raz\textsuperscript{251} as well as natural lawyer John Finnis.\textsuperscript{252} This older tradition is sometimes called "perfectionism,"\textsuperscript{253} and sometimes the "Central Tradition."\textsuperscript{254} The basic idea underlying the older tradition is that human action can be rationally grounded in human goods that are both good for all and intelligible to all. These common goods ground the rationality not only of individual choices but also of political actions and law. They also make sense of communal actions through intermediary institutions, such as marriage, family, trade guilds, and, importantly, property ownership.

Though no list of human goods enjoys universal assent, the list of basic goods identified by John Finnis represents the most comprehensive inventory.\textsuperscript{255} In his landmark work, Finnis identified seven human goods that are common to all and good for all, the value of which is self-evident and therefore known to all. He enumerated life (including health), knowledge, play, aesthetic experience, sociability (or friendship, or community, or, as Joseph Raz would put it, "living in a society")\textsuperscript{256}, practical reasonableness, and order with ultimate reality (what Finnis, "summarily and lamely" in his words, called "religion").\textsuperscript{257}

The value of a basic good is not absolute but it is intrinsic, meaning that it is not contingent upon anything more basic than itself. From the basic goods all other human goods derive their value. So, for example, money, which is not a basic good, has rational, instrumental value insofar as it enables one to instantiate one or more of the basic goods. Money buys food, which supports life. It is effective to purchase health care, which serves the good of health.\textsuperscript{258} And so on. The value of instrumental goods, such as

\textsuperscript{250} See generally Ronald Dworkin, Justice for Hedgehogs (2011).
\textsuperscript{251} Morality of Freedom, supra note 246, at 203-07.
\textsuperscript{252} Natural Law and Natural Rights, supra note 218.
\textsuperscript{254} Id.
\textsuperscript{255} Natural Law and Natural Rights, supra note 218.
\textsuperscript{256} Morality of Freedom, supra note 246, at 206.
\textsuperscript{257} Id. In a later writing, Finnis provided a slightly modified list, identifying the basic goods as (1) knowledge; (2) skillful performance in work and play; (3) bodily life and the components of its fullness, such as health and safety; (4) friendship and association between persons; (5) conjugal marriage; (6) practical reasonableness; and (7) "harmony with the widest reaches and most ultimate source of all reality, including meaning and value." John Finnis, Liberalism and Natural Law Theory, 45 Mercer L. Rev. 687, 691-92 (1994) [hereinafter Liberalism and Natural Law].
\textsuperscript{258} This basic goods approach provides a superior explanation of the State v. Shack, 277 A.2d 369 (N.J. 1971) case, discussed supra Part III.B. That Tejeras and Shack entered the farm to provide medical and legal services suggests that they intended to serve the health of the migrant workers there, and to protect their rights. Health is of course an aspect of the basic good of life. Justice is entailed in the requirements of practical reasonableness. Natural Law & Natural Rights, supra note 218, at chs. 7 & 8. Owner sovereignty gives way when it is used
money, is thus contingent upon its use to realize the value of more basic goods, such as life and health. The basic goods thus supply the ultimate rationality of every human action.

Just as every rational human action is ultimately grounded in one or more basic goods, every rational state action finds its ultimate rationality in creating or protecting the conditions in which the basic goods can be realized. Traffic regulations promote order on the highways. Order instrumentally serves the basic goods of life and community. State schools are designed to promote knowledge, while subsidies for the arts support the creation of beautiful works, enabling aesthetic experience.

Land use regulations are no different in this respect. The state interests identified in Village of Euclid—health, safety, morals, and general welfare—and the state interests identified in various state enabling acts are rational because they are directed toward (1) the coordinated action within the community which establishes the conditions in which property use promotes the common good, and (2) protection of the human goods that irresponsible land use is most likely to jeopardize—particularly human life, bodily health, and practical reasonableness (especially the moral character of children). To this list many states add aesthetics, notwithstanding

to threaten basic human goods, such as health and practical reasonableness.


260 City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364, 367 (Fla. 1941) (stating that in certain communities, aesthetics are so necessary to the public welfare that aesthetic reasons alone justify zoning regulations); Warren v. City of Marietta, 288 S.E.2d 562, 564 (Ga. 1982); State v. Diamond Motors, Inc., 429 P.2d 825, 827 (Haw. 1967) (holding a zoning ordinance is valid if reasonably necessary and appropriate for accomplishment of an aesthetic objective; the ordinance does not need to also be based on economics, health, safety, or morality); R.H. Gump Revocable Trust v. City of Wichita, 131 P.3d 1268, 1275-76 (Kan. Ct. App. 2006); John Donnelly & Sons v. Outdoor Adver. Bd., 339 N.E.2d 709, 717 (Mass. 1975); Asselin v. Town of Conway, 628 A.2d 247, 250 (N.H. 1993); Westfield Motor Sales Co. v. Town of Westfield, 324 A.2d 113, 119 (N.J. Super. Ct. Law Div. 1974); Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565, 571 (N.M. 1982) (holding aesthetics are “intricately intertwined” with general welfare, and alone, aesthetics provide a valid basis for zoning regulations); People v. Stover, 191 N.E.2d 272, 275 (N.Y. 1963); State v. Jones, 290 S.E.2d 675, 681 (N.C. 1982); Vill. of Hudson v. Albrecht, Inc., 458 N.E.2d 852, 856 (Ohio 1984). But see, e.g., Estate v. Kievenman, 165 A. 661, 664 (Conn. 1933) (stating a board may create zoning ordinances relying on aesthetic considerations in connection with other, recognized police powers); La Salle Nat’l Bank v. City of Evanston, 312 N.E.2d 625, 634 (Ill. 1974) (stating that aesthetic considerations have been recognized, but alone, are not controlling in zoning cases); Stoner McCr. Sys. v. City of Des Moines, 78 N.W.2d 843, 848 (Iowa 1956) (“Aesthetic consideration can be said to enter into the matter as an auxiliary consideration where the zoning regulation has a real or reason-
the difficulty inherent in defining and regulating architectural beauty. Other states identify as values the basic goods of life and community in family. Still other states identify instrumental goods that are directly derived from basic goods. Fundamental fairness is a constituent aspect of practical reasonableness or morality. Peace and good order are essential preconditions of the realization of complex basic goods, such as friendship and aesthetic experience.

State action in protection of these goods is not arbitrary but rationally grounded in goods that are shared by all whom the state governs, both those whom any particular state action appears to benefit and those whose actions the state action restricts. If life is better than death, and health is better than sickness, one who is coercively restrained from polluting water sources is coerced into living in a community that is objectively better both for everyone else and for him as a result of the coercive state action.

The basic good of health supplies the rationality of many land use regulations. Segregating industrial enterprises (such as electric power generation plants and sewage treatment plants) from public assembly spaces (such as schools, churches, and concert halls) minimizes the general population's exposure to toxins and pollutants. Building codes, ordinances requiring traffic safety devices in residential developments, flood plain restrictions, and a host of other local laws prevent harm to the health of citizens. The state must have the power to enact all of these land use controls.

Just as important, the state should not have the power to act for ends that have no intelligible grounding in basic goods or, worse, actually impede the realization of basic goods. All things being equal, a zoning code

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262 HAW. REV. STAT. §§ 46-1.5(13), 4(a) (West 2012).

263 WIS. STAT. ANN. § 59.69 (West 2011).

264 UTAH CODE ANN. § 10-9a-102(1) (LexisNexis 2007).

that excluded theaters or music halls would be arbitrary and irrational. This is not because people have a fundamental constitutional right to attend theatrical or musical productions. Rather, the limitation is inherent in the police powers themselves. A zoning code that arbitrarily prevents citizens from realizing the basic good of aesthetic experience defies reason.

2. Answering Some Critics.—The most common criticism of the Central Tradition is that it wrongly attempts to derive the right from a prior account of the good. People disagree about what is good, the criticism goes, so how can any list of universal goods be discerned which will be fair to all? If we were to articulate principles of justice on which all would agree, and if we were to do so on neutral terms in a position of equality, we would not consider any “conceptions of the good.” Any attempt to derive rights from a robust account of goods must privilege the goods of some people over the goods of others in violation of fundamental fairness. Instead, people must be free to create or determine their own values.

This so-called “anti-perfectionist” criticism has a number of fatal problems. First, it rests upon a misapprehension of the claim to which it is supposed to respond. Perfectionists do not claim that everyone actually agrees that knowledge, life, religion, and the rest are basic goods. Perfectionists instead claim that anyone can perceive the intelligible value of these goods for their own sake (without reference to any goods more fundamental than themselves) and can therefore perceive the rationality of acting in pursuit of them. Though any individual certainly need not agree with every instantiation of religion, for example (one might find the claims of Islam more plausible than the claims of Scientology), any person can see the rationality of making an effort to answer ultimate questions about existence and meaning in the universe. One who makes no attempt to answer those questions is, in a sense, missing out on a rich, worthwhile experience. In other words, though one can reasonably claim that certain basic goods are more reasonably instantiated in some forms than in others, no one can reasonably claim that ignorance is better than knowledge, that chaos is better than order, that sickness is better than health.

Additionally, the anti-perfectionist criticism misunderstands perfectionist jurisprudential claims about the common good. Perfectionism actually provides a much stronger foundation for pluralism than does anti-perfectionism. That some goods are intrinsically and objectively valuable does not entail that those goods must be instantiated or realized in every action. Basic goods provide ultimate reasons for action—they supply

267 The reader will recognize this necessarily short summary as a (crude) statement of the position of anti-perfectionist liberals, such as John Rawls and David A.J. Richards. See also MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).
268 GEORGE, supra note 253, at ch. 5; MORALITY OF FREEDOM, supra note 246, at ch. 5.
intelligible ends toward which to aim one’s actions. But though basic goods are intrinsically valuable, they are not absolute. That some good is intrinsically valuable—basically good—does not mean that it must always be realized or even preserved. It does entail, however, that one always can articulate a reason to realize or preserve it, that one has an obligation to refrain from deliberately destroying it, and that one ought to respect another’s participation in it.

The anti-perfectionist critics fundamentally misconceive the nature of pluralism. Strict neutrality is impossible in political life. Thus, the anti-perfectionist attempt to build a theory of justice on neutral grounds is itself not neutral as between competing conceptions of human persons and the good. A better approach is to recognize that human goods are varied and plural and that basic human goods are all equally basic. Thus, all human goods provide equally compelling reasons for action, even when one cannot pursue all of them in one choice or act. For this reason, different life plans can be, and are, equally reasonable and valuable. Yet it is also true that some choices and actions are simply not reasonable, not valuable, because they are not made consistent with a reasonable respect for the good. These choices can be eliminated (even coercively) consistent

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269 So, for example, John Keown has helpfully explained the difference between a principle of “vitalism,” which holds that it is always wrong either to shorten the life of a human being or to fail to strive to lengthen it, and a “sanctity of life” principle, which holds that human life has intrinsic value and is entitled to protection from unjust attack. John Keown, The Legal Revolution: From “Sanctity of Life” to “Quality of Life” and “Autonomy”, 14 J. CONTEMP. HEALTH L. & POL’Y 253, 256-57 (1998). Whereas the vitalism principle requires that human life be preserved at all costs, and is therefore ethically untenable and physically unrealistic, the principle of the sanctity of human life forbids the deliberate destruction of innocent human life. Id. at 256-58.

270 See generally FINNIS, supra note 218.

271 Morality of Freedom, supra note 246, at 117-30.

272 GEORGE, supra note 253, at 130-39. George explains the root of the problem:

The practical reasoning of parties in [Rawls’] original position turns out to be distinctively anti-perfectionist liberal practical reasoning: practical reasoning which treats wants as reason. The ‘persons’ in the original position are persons precisely as they are conceived by anti-perfectionist liberalism. A person conceived otherwise would (or at least could) act, not on sheer wants, but on what critics of anti-perfectionism take to be basic reasons [including basic goods] (that are not reducible to wants). ... [B]asic reason for action are provided by those intelligible benefits (which, from the perspective of the person acting, or contemplating action, to realize them, are intelligible purposes) which fulfill human persons, thus constituting the human good.

Id. at 137-38. George notes that “the question, ‘Is it always good for one to get what one wants?’ is a genuine question (and need not use some narrowly ‘moral’ sense of good).” Id. at 138.

273 Natural Law and Natural Rights, supra note 218, at 92-95.

274 Id. at 93-94; Morality of Freedom, supra note 246, at 133, 359-99.

275 Natural Law and Natural Rights, supra note 218, at 100-27; Morality of Freedom, supra note 246, at 380-81.
with the demands of pluralism and of personal autonomy.\footnote{276} Thus, far from being absolutist, the basic goods (or common good) approach provides the strongest explanation and justification for both human freedom (which collectivism cannot explain) and constraints on individual autonomy (which individualist accounts cannot explain).

Finally, anti-perfectionist critics fail to consider how knowledge of goods is attained.\footnote{277} Finnis and others affirm that the value of the basic goods can be grasped through non-inferential acts of human reasoning;\footnote{278} the value of basic goods cannot be deduced or inferred from more fundamental ends because there \textit{are} no more fundamental ends. “Each [good] is a basic, irreducible form of human opportunity, good for its own sake.”\footnote{279} That the intrinsic value of basic goods such as knowledge is self-evident means that the value of these goods cannot be demonstrated,\footnote{280} but it also entails that their value needs no demonstration.\footnote{281} The knowledge of the value of basic goods is thus non-inferential.\footnote{282} Everyone knows that knowledge, for example, simply is better than ignorance. No amount of rationalization for any particular act of hostility or indifference to knowledge can erase knowledge’s intrinsic value.

Finnis observes that, in moving from an inclination toward knowledge to a grasp of its self-evident value, “[o]ne finds oneself reflecting that ignorance and muddle are to be avoided, simply as such and not merely in relation to a closed list of questions that one has raised.”\footnote{283} One recognizes that a “well-informed and clear-headed person” is well-off, not merely because he can make instrumental use of his knowledge and profit from it, but simply because it is good for everyone to know.\footnote{284} This holds not merely for oneself and one’s own interests, “but at large.”\footnote{285}

The intrinsic value of knowledge explains why no one can reasonably question the rationality of state actions that effectively provide for the education of children. An exercise of the police powers that is reasonably

\footnote{276} \textit{Morality of Freedom}, \textit{supra} note 246, at 380–81.
\footnote{277} Rawls objected to utilitarianism not on the ground that basic human goods are incommensurable, but rather that the intelligibility of common goods is an illusion. He insisted, “[s]imply because we do in fact make what we call interpersonal comparisons of well-being does not mean that we understand the basis of these comparisons or that we should accept them as sound.” \textit{Rawls}, \textit{supra} note 266, at 78. Rawls set out his thin conception of the good—derived from his so-called “primary social goods”—in order to “establish objective grounds for interpersonal comparisons.” \textit{Id.} at 79.
\footnote{278} \textit{Natural Law and Natural Rights}, \textit{supra} note 218, at 64–69.
\footnote{279} \textit{Liberalism and Natural Law}, \textit{supra} note 257, at 691.
\footnote{280} \textit{Natural Law and Natural Rights}, \textit{supra} note 218, at 65.
\footnote{281} \textit{Id.}
\footnote{282} \textit{Id.} at 65–69.
\footnote{283} \textit{Id.} at 61.
\footnote{284} \textit{Id.}
\footnote{285} \textit{Id.}
directed toward the basic good of knowledge appeals to rational minds. And knowledge is valuable for everyone in the community, not merely for those who can make the most profitable use of it.

It is worthwhile to observe here that natural law philosophers are not alone in defending the unconditional, universal value of at least some basic goods. Like Finnis, the perfectionist liberal philosopher Joseph Raz also holds that some goods are both common and intrinsically good. "At the very least," insists Raz, the common good of living in society "is on this view intrinsically good." Social living is thus a good equally as basic as personal autonomy; the value of one is not derived from, and is therefore not contingent upon, the value of the other. Raz believes that the ideal of personal autonomy is for this reason "incompatible with moral individualism."

Because basic goods are plural but not individualistic, courts and citizens can grasp the rationality of laws that promote coordinated action within communities. Zoning codes that segregate residential neighborhoods from industrial uses, permit provisions that provide for schools and public assemblies, and reservations that set aside space for parks and common areas all promote a truly common good.

Apart from anti-perfectionist worries, a second, stronger criticism of the Central Tradition is that the basic goods approach is insufficiently attuned to the plurality of moral values. Perhaps some things truly are better than others, these critics concede. Perhaps knowledge, for example, truly is better than ignorance. But people should still choose. The value of basic goods is realized through the exercise of personal autonomy, and coercive action, by destroying personal autonomy, destroys the other basic goods as well. One must be free to choose good ends; otherwise those ends are not good. A life lived autonomously simply is better than a life lived without autonomy, these critics contend. People must therefore be free to make their own lives, consistent with the demands of moral pluralism.

This second criticism, one predicated on moral pluralism, presupposes that the value of all basic goods is contingent upon those goods being freely chosen. But this is not true. While some goods—e.g. friendship, religion—can be realized only through the exercise of personal autonomy, other goods are valuable whether or not freely chosen. The value of goods such

286 Morality of Freedom, supra note 246, at 206.
287 Id.
288 Id.
289 See Dworkin, supra note 250, at 205–06.
292 Id. at 395–99.
293 Adam J. MacLeod, The (Contingent) Value of Autonomy and the Reflexivity of (Some) Basic
as life and knowledge is not conditional, not contingent upon any exercise of personal autonomy. For this reason, states have built many coercive laws around the protection of these goods.\textsuperscript{294}

The moral pluralism criticism also misunderstands what it means that the basic goods are common goods. The basic goods are common in more than one sense. Finnis observes that all human societies show concern for these goods, or some forms or instantiations of these goods, and the practical principles that guide their realization.\textsuperscript{295} Though no value is recognized at all times, in all places, \textit{in the same way}, anthropologists find with “striking unanimity” that the basic goods are known to all societies in some way.\textsuperscript{296} The basic goods are “good for any and every person.”\textsuperscript{297}

The basic goods are also common in the sense that participation in them is not an exclusively individual project, but rather something that a human being does together with other human beings, in community, for his own good and for the good of the others.\textsuperscript{298} Realization of the basic goods is a project of cooperation and common commitment among people.\textsuperscript{299} Thus, the “common good” is not collective in the utilitarian sense of the greatest aggregate good for the greatest number\textsuperscript{300} which necessarily contradicts or overrides the goods (and personal autonomy) of individuals.\textsuperscript{301} Rather,

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\textit{Goods, 5 J. Jurisprudence, Jan. 2009, at 11, 38.}\textsuperscript{294} See generally Adam J. MacLeod, \textit{The Mystery of Life in the Laboratory of Democracy: Personal Autonomy in State Law}, 59 CLEV. ST. L. REV. 589 (2011).\textsuperscript{295} \textit{Natural Law and Natural Rights, supra note 218, at 83-84.}\textsuperscript{296} \textit{Id. at 83; see also C.S. Lewis, The Abolition of Man app. 56–64 (Geoffery Blessing 1946).}\textsuperscript{297} \textit{Natural Law and Natural Rights, supra note 218, at 155.}\textsuperscript{298} \textit{Id. at 154–56. The mutuality of basic goods is seen clearly in the basic good of friendship. “For [A] to be [B]’s friend, [A] must act (at least in substantial part) for the sake of [B]’s well-being, and must value [B]’s well-being for the sake of [B]. [A] must treat [B]’s well-being as an aspect of his [A’s] own well-being.” Id. at 142–43. But the same is also true of B. “It follows that A must value A’s own well-being for the sake of B, while B must value B’s own well-being for the sake of A. And so on. The reciprocity of love does not come to rest at either pole.” Id. at 143.}\textsuperscript{299} \textit{Id. at 134–60.}\textsuperscript{300} \textit{Id. at 154. Because the basic goods are incommensurable, this consequentialist calculation is unworkable, incoherent, and irrational. Id. at 111–18; Morality of Freedom, supra note 246, at 321–66.}\textsuperscript{301} For example, the good of an individual party to a promise is not distinct from, but rather is part of, the common good of all parties who have an interest in the promise. Finnis explains:}

\begin{quote}
\textit{One acts most appropriately for the common good, not by trying to estimate the needs of the common good ‘at large’ but by performing one’s contractual undertakings, and fulfilling one’s other responsibilities, to ascertained individuals, i.e. to those who have particular rights correlative to his duties. Fulfilling one’s particular obligations in justice, even within the restricted sphere of private contracts, family responsibilities, etc., is necessary if one is to respect and favour the common good, not because ‘otherwise everyone suffers’, or because non-fulfilment would diminish ‘overall net good’ in some impossible utilitarian computation, or even because it would ‘set a bad example’ and thus weaken a useful practice, but simply}
\end{quote}
the “common good” refers to “the factor or set of factors . . . which, as considerations in someone’s practical reasoning, would make sense of or give reason for that individual’s collaboration with others and would likewise, from their point of view, give reason for their collaboration with each other and with that individual.” In political communities, the common good, which consists of communal participation in the basic goods, is a “justified meaning of the phrases ‘the general welfare’ or ‘the public interest.’”

3. State Interests Grounded in Basic Goods.—If indeed the “common good of communities” is a reasonable way to understand what courts mean by the phrases “the general welfare” and “the public interest,” then it is not a stretch to infer that the police powers are most justifiable when exercised in defense or preservation of the common good. Just as individual persons and private associations have rational interests in instantiating basic goods, states have rational interests in protecting and preserving “a set of conditions which enables the members of a community to attain for themselves reasonable objectives,” which have their intelligible value in the human goods of “life, knowledge, play, aesthetic experience, friendship, religion, and freedom in practical reasonableness”—basic goods which are “good for any and every person.”

One perceives traces of this common-good account of state police powers in pre–Euclid United States Supreme Court decisions and in post–Euclid state law. Revisiting the Mugler decision, one finds Justice Harlan affirming the power of the state to exercise the police powers not for the interests of the state itself, nor for the collective benefit of the greatest number at the expense of individual rights, but to protect from injury the “interests of the community,” to “promote the common good.” Harlan recognized that the state does not have power over all actions that legislation might reach. Of course, the Constitution imposes external limits, but Harlan asserted that the police powers contained their own

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NATURAL LAW AND NATURAL RIGHTS, supra note 218, at 305.

302 Id. at 154.

303 Id. at 156.

304 This is the justification for private property in the first instance. See Adam J. MacLeod, Private Property and Human Flourishing, PUBLIC DISCOURSE (October 25, 2011), http://www.thepublicdiscourse.com/2011/10/3648.

305 NATURAL LAW AND NATURAL RIGHTS, supra note 218, at 155.


307 Id. at 663.

308 “It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go.” Id. at 661.

309 Id.
internal limitations; they were limited by reason. The police powers are limited to certain intelligible interests that all within the community share and that all can recognize—interests in "the public morals, the public health, or the public safety." The state cannot rightly enact a law that has "no real or substantial relation to those objects."

By implication, the state does not enjoy unfettered discretion to decide what is best for the community. It is bound by reason, the same reason that citizens governed by the state exercise to ascertain what is good. So how does one explain the need for coercive legislation if both the state and its citizens are bound by reason? In short, not all citizens act fully reasonably all the time. For example, some people pollute. Harlan expected threats to the state's interest to come from those who do not follow reason, who do not respect universal common goods and who regard "only their own appetites or passions."

The Court in Euclid did not take Harlan's conception of the police powers as wholly axiomatic. But nothing in the Euclid decision detracted from the force of Justice Harlan's observations about the proper purposes of, and limitations on, the police powers. Indeed, insofar as the Euclid Court allowed for the possibility of as-applied challenges, it implicitly recognized that a particular exercise of a police power might be so unreasonable as to be unlawful, or might cease to be an exercise of the police power and become some other act, such as an act of eminent domain.

State courts also appeal to a common good, which is reducible neither to private, individual interests nor to some collective good—nor to the greatest-number. In striking down a regulation that excluded from a child-free residential neighborhood a church where children would attend, the Indiana high court stated that "[t]he education, morally and spiritually of children, is a matter of great public concern" and that the interests of children

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310 Id.
311 Id.
312 Harlan suggested that the authority to coerce presupposes reasonable grounds for the coercion. "No one may rightfully do that which the law—making power, upon reasonable grounds, declares to be prejudicial to the general welfare." Id. at 663.
313 Id. at 660.
314 For one thing, Justice Sutherland insisted that reasonableness and unreasonableness had as much to do with context as with what he termed "abstract consideration of ... the thing considered apart." Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). He colorfully remarked, "[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." Id. This is consistent with the perfectionist theory advanced in this article, which holds that not all rational choices are fully reasonable. Reasonableness requires consideration of all relevant considerations. For a property owner, one important consideration is the effect one's use of one's property will have on one's neighbors.
315 This happens when the government action goes "too far," a limitation at which Justice Holmes hinted in Block v. Hirsh, 256 U.S. 135, 156 (1921) and which he adopted while writing for the Court in Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).
constitute the "interest of the common good and general welfare." The education and moral development of children is a good shared by all people who live in the community, including those who do not like having children around. The court quoted the state constitution which "reminds the General Assembly" of a self-evident truth, namely "that 'Knowledge and learning, generally diffused throughout community'" is an essential value. State lawmakers thus have an obligation to "encourage, by all suitable means," moral and intellectual improvement.

4. Substantiality of Interest Tied to Basic Goods.—As discussed above, land use controls are sometimes deemed unlawful when they infringe constitutionally-protected rights for purposes that are less than substantial, or when they burden fundamental rights for reasons that are less than compelling. Thus, any account of the state interests that underlie the police powers must also explain the weightiness or substantiality of those interests. The basic goods approach supplies a ready framework for this work.

A robust examination of the common good reveals not only the rationality of state interests but also why some state interests are considered more compelling than others. Because basic goods are all equally basic, it is incoherent to rank any basic good against any other basic good; the basic goods are incommensurable. But basic goods can rationally be compared to non–basic goods, those ends of human choice and action that are not valuable in themselves but are merely instrumental in securing the more fundamental goods from which they derive their value.

For example, human life is immeasurably more valuable than money. For this reason it makes sense to claim that a municipality has a stronger, weightier interest in preserving human life than it does in securing tax revenues. Generating tax revenues is a rational state interest because money is an instrumental good that enables the local government to protect and secure basic goods, including human life. But revenue generation is not by itself a substantial or compelling interest. By contrast, human life is itself
a basic good and the state therefore has a compelling interest in preserving it for its own sake.\textsuperscript{321}

We might hypothesize that compelling interests are those interests that a municipality has in the direct protection and preservation of basic, as opposed to non–basic (merely instrumental), human goods. It is instructive that the interests that courts have found compelling generally focus around the promotion and protection of basic goods.\textsuperscript{322} The more direct and managing the depletion of natural resources are likewise not compelling interests. Rocky Mountain Christian Church v. Boulder Cnty., 612 F. Supp. 2d 1163, 1175 (D. Colo. 2009).


\textsuperscript{322} Compelling interests include several interests of local and state governments that are related to the promotion and protection of aesthetics, education, morality, and religious exercise, which are instances of basic human goods of aesthetic experience, knowledge, practical reasonableness, and religion, respectively. Ashcroft v. ACLU, 542 U.S. at 675 (2004) (Stevens, J. concurring) (protecting minors from exposure to sexual content); Burson v. Freeman, 504 U.S. 191, 199 (1992) (preserving the integrity of the electoral process and of the citizenry's confidence in the electoral system); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59 (1990) (preventing corruption); Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (students' learning); ACLU v. Mukasey, 534 F.3d 181, 190 (3d Cir. 2008) (protecting minors from exposure to sexual content on the internet); Reliable Consultants, Inc. v. Earle, 517 E3d 738, 746 (5th Cir. 2008) (protecting minors from exposure to sexual content); Jenevein v. Willing, 493 F.3d 551, 559 (5th Cir. 2007) (preserving the integrity of the judiciary); Entm't Software Ass'n v. Blagojevich, 459 F.3d 641, 646 (7th Cir. 2006) (protecting minors from exposure to sexual content); Goodall v. Stafford Cnty. Sch. Bd., 930 F.2d 363, 370 (4th Cir. 1991) (avoiding the establishment of religion); United States v. Bd. of Educ., 911 F.2d 882, 889 (3d Cir. 1990) (avoiding the establishment of religion); Murphy v. Arkansas, 852 F.2d 1039, 1042 (8th Cir. 1988) (adequately educating young citizens); Person v. Ass'n of the Bar of N.Y., 554 F.2d 334, 538 (2d Cir. 1977) (regulating the conduct of professionals); Mancuso v. Taft, 476 F.2d 187, 198 (1st Cir. 1973) (preserving the integrity of government and public servants); Harston v. Ky. Transp. Cabinet, — S.W.3d —, 2011 WL 744542,*7 (Ky. Ct. App. 2011) (unpublished) (Kentucky billboard restrictions supported by compelling state interests in promoting highway safety and aesthetics). But see Midwest Media Prop., LLC v. Symmes Twp., Ohio, 503 F.3d 456, 476–78 (6th Cir. 2007) (no compelling interest in preservation of aesthetic and historic structures); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1268 (11th Cir. 2005) (dicta) (no compelling interest in preservation of aesthetic and historic structures); Whitton v. City of Gladstone, 54 F.3d 1400, 1408 (8th Cir. 1995) (no compelling interest in preservation of aesthetic and historic structures); City of Santa Fe v. Gamble–Skogmo, Inc., 389 P.2d 13, 17 (N.M. 1964); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 185 (Wash. 1992) (no compelling interest in preservation of aesthetic and historic structures). One reason why courts hesitate to declare aesthetics compelling might be that aesthetics are so difficult to
the connection between the asserted state interest and the basic good that supplies the ultimate rationality of the state action, the more compelling the asserted state interest.

Contrast a community's interest in protecting its citizens from fatal toxins with its interest in promoting economic growth. No one can reasonably doubt that both interests are important, but are those interests equally compelling? Protecting citizens from fatal toxins by (for example) segregating sewage treatment plants from public assembly spaces directly serves the basic good of health. Health is a basic good, intelligible as a reason for action in itself and without reference to any more fundamental end. It would be surprising for a court to find that a municipality's interest in segregating sewage treatment plants from meeting halls—churches, synagogues, Kiwanis clubs, etc.—was less than compelling.

By contrast, excluding a church from a business district in order to increase the number of liquor licenses in that district might serve the good of economic prosperity, but prosperity is not a basic good. One cannot rationally claim to pursue money for its own sake. The intelligible value of money rests in its exchange value, its capacity to enable its possessor to acquire other, more fundamental ends, such as food or serviceable roads. If this explains what courts are doing, we should not be surprised that courts decline to recognize the increase of tax revenue as a compelling state interest (or even a per se legitimate interest), particularly when that interest is pitted against protection of a basic good such as religious exercise.

This is not to suggest that a community's interest in the preservation of any particular instrumental good is unimportant. However, the case for a state interest in the protection of a merely instrumental good is more attenuated than that for protection of a basic good. One can conceive of unlawful discrimination. But there is reason to believe that aesthetic considerations can be objectively measured where they are tied to the specification of particular architectural designs and styles.

323 Griswold v. City of Homer, 925 P.2d 1015, 1023 n.9 (Alaska 1996); Concerned Citizens for McHenry, Inc. v. City of McHenry, 395 N.E.2d 944, 950 (Ill. App. Ct. 1979) (“We emphatically state that an increase in the tax base is not sufficient of itself to support re-zoning.”).

324 Cottonwood Christian Ctr., 218 F. Supp. 2d at 1228 (citing Jacobi v. Zoning Bd. of Adjustment, 196 A.2d 742, 745 (Pa. 1964)).

325 Local authorities perhaps have a slightly less compelling interest in protecting a church's neighbors from spillover parking and traffic hazards. See Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 190 (D. Conn. 2001). Douglas Laycock "would concede that a community has a compelling interest in not permitting a church (or any other place of assembly) to regularly take over all the street parking in a neighborhood, making it difficult or impossible for people to have guests or to park in front of their own homes. In the case of a church that provides wholly inadequate parking for its membership, the compelling interest test is easy to apply." Laycock, supra note 154, at 766.
of cases where increasing tax revenues might be compelling, as where a city is going broke and is in danger of having to suspend basic services, such as police and fire protection. But note that the compelling nature of the city’s interest in this hypothetical does not rest on the value of the tax revenues themselves but rather on the value of the more basic ends—life and health—that the increased tax revenues is necessary instrumentally to serve.

The basic goods account also makes sense of the judiciary’s puzzlement over aesthetic regulations. Consider a municipality’s interest in ensuring uniformity of building design in a commercial zone. Preserving visual uniformity is not, in itself, a rational state interest. If the municipality requires commercial establishments to be uniformly drab, uniformly hideous, or uniformly distracting to passing motorists, then the municipality has acted irrationally. Only if the uniformity serves an intelligible end, such as making the commercial zone aesthetically pleasing, and thus serving the basic good of beauty, can visual uniformity be said to be a rational state interest. Indeed, the United States Supreme Court has repeatedly identified aesthetic appearance of a city as a substantial state interest. Uniformity thus derives its value in its service to beauty, the more basic good that it instrumentally serves. The substantiality of the municipality’s interest in visual uniformity varies according to how well the regulations make the commercial zone more beautiful. Because courts are not in a position to make this assessment they sometimes express reticence to endorse aesthetic regulations. But they need not allow indeterminacy with respect to means to cast doubt upon the substantiality of the state’s interest in the asserted end.


Controlling traffic is one of the land use regulator’s common goals. Euclid, 272 U.S. at 392 (Density provisions, segregation of uses, and other zoning ordinances rest on the community’s interest in traffic safety). But see Solentic, LLC, 410 F.3d at 1268 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981)) (Traffic safety is at least one step removed from a basic good such as health or life; traffic control is instrumentally valuable for securing more basic ends, but is not an end in itself. And traffic safety has been deemed a substantial, but not necessarily compelling, interest); see also Bonita Media Enters. v. Collier Cnty. Code Enforcement Bd., No. 2:07-CV-411-FJM-29DNF, 2008 WL 423449 (M.D. Fla. Feb. 13, 2008); Savigo v. Vill. of New Paltz, 214 F. Supp. 2d 252, 259 (N.D.N.Y. 2002). Traffic safety might become a compelling interest for a community that suffers a disproportionate number of fatal traffic accidents. However, that circumstance would present a fact question; the degree of compulsion would depend upon the directness between the harm to life and the regulation adopted.

5. Basic Goods and Standards of Review.—Perfectionist theory pays yet more dividends. In addition to explaining the rationality and substantiality of state interests it also explains the means prong of judicial review. Just as the substantiality of any particular state interest derives from the directness with which it serves a basic good, the rationality of any particular regulation adopted to serve the state interest derives from the directness of its efficacy. Narrow tailoring, which is required in strict scrutiny review, involves a very close connection between the regulatory means chosen and the human good that the government is trying to preserve. Rational relation, which is required in rational basis review, can involve a much more attenuated connection. Thus, on this theory, both the ends prongs and the means prongs of the various judicial review standards are designed to measure the directness between the community's stated goals and the objective, intelligible ends of human choice and action to which those goals correspond.

There remains, of course, the question of presumptions and burdens. Three decades ago, the President's Commission on Housing recommended that, "to increase the production of housing and lower its cost," states should amend their enabling acts to require that any zoning regulation denying or limiting the development of housing rest upon a "vital and pressing governmental interest" and to place the burden of proof on the government. That proposal is commendable and is perhaps more consistent with constitutional principles than the rules used today. But the proposal outlined here need not go that far. The idea here is that, whatever the standard of review and operating presumption, articulation of a particular police power objective will make the land use decision more transparent upon judicial review.

III. A Brief Sketch of a Proposal

Accepting the premise of basic human goods, what might states then do to promote a truly common good and to avoid the confusion that results from posing a false dichotomy between individual rights and collective interests? I hope in a future article to create a proposed template that state legislatures might follow. For now it must suffice to point to a few laudable efforts that are already embodied in state law. States can enact meaningful reform simply by amending the enabling acts that they already have.

Following Minnesota, states should require regulatory authorities to state the reasons for their decisions contemporaneous with their decisions and might attach to any subsequently-promulgated regulations without

327 Kmiec, supra note 207, at 20.
328 Id. at 21–24.
329 I leave for future articles the task of teasing out the concrete implications for judicial review.
an accompanying statement a presumption of arbitrariness. Following Arkansas, states should distinguish between land use decisions that are truly general legislative enactments and those that are more judicial in nature, particularly individualized assessments. As New Hampshire used to do, states might allow trial courts to review individualized assessments without any presumption of reasonableness.

In addition, following the New Hampshire legislature and the courts of Kansas, state legislatures should articulate specific objectives that land use regulators may pursue when acting in a truly legislative capacity. These objectives should correspond to those conditions that states can create and preserve to enable citizens to realize a truly common good. Because basic goods are incommensurable, states should follow the lead of Rhode Island and afford "equal priority" to the protection of each basic value and allow local governments some freedom to prioritize objectives in their respective master plans. On the other hand, states should also make some effort to identify which objectives it considers compelling, which it considers substantial, and which it considers legitimate (and perhaps even those it does not consider legitimate) according to the directness with which each objective serves a basic human good. Finally, following Ohio, states should make some effort to identify which regulatory means it considers best tailored to which legitimate regulatory objectives.

CONCLUSION

State legislatures would do courts, citizens, and themselves a favor by articulating specific objectives for exercises of the police powers that regulate land use. Specifying legitimate, substantial, and compelling interests that correspond to the plural forms of the common good and requiring local governments to identify which of those interests they are pursuing in each regulatory act would make land use decisions more transparent, enable courts to provide more meaningful and consistent judicial review, and would protect citizens from arbitrary government actions.

330 Zylka v. City of Crystal, 167 N.W.2d 45, 50 (Minn. 1969); see also Uniprop Manufactured Hous., Inc. v. City of Lakeville, 474 N.W.2d 375, 379 (Minn. Ct. App. 1991).
336 Id.