Restoring Accountability at the Municipal Level: The "Save Miami Beach" Zoning Referendum

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I. INTRODUCTION

At the southern tip of the island of Miami Beach, Florida, a 44-story, 228 apartment building known as Portofino Tower shoots upward toward the endless blue sky. While this $52.7 million testament to modern engineering resides peacefully among other neon and pastel Art Deco style buildings, it has become the epí-center of a bitter controversy.

To some, Portofino Tower symbolizes the revitalization of a once blighted section of Miami Beach. The high-rise represents growth and prosperity and is the crown jewel of Miami Beach’s renaissance.1 To others, Portofino is a case study of how political mismanagement and the power of a well-funded lobby can destroy the aesthetic harmony of a subtropical paradise.

The construction of Portofino Tower underscored a growing concern among the citizens of Miami Beach about the weaknesses of their representative government. The approval of the building of Portofino Tower revealed to many residents their inability to communicate effectively with their elected officials and to participate in the future development of their city. To repair the lines of communication with their elected officials and to restore the sense of empowerment by direct participation in the decision-making process,2 the citizens of Miami Beach amended their city charter to require a referendum vote, rather than a city commission vote, to approve the rezoning of any waterfront property.3

This article explores the validity for the citizens of Miami Beach of using the referendum procedure to approve or reject rezoning requests. Part II discusses the history of the referendum as a source of citizen participation in the exercise of legislative power and how the referendum process arose in the saga known as the “Save Miami Beach” zoning

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1. See generally Mark Kurlansky, Miami Beach on Road Back to Lost Grandeur, CH. TRIB., Oct. 19, 1986, at 18 (discussing Miami Beach's “renaissance” in the later 1980s).
3. See MIAMI BEACH, FLA., RES. 97-22413 (June 4, 1997).
referendum. Part III discusses the constitutionality of the referendum procedure, both generally and with respect to zoning, based on federal constitutional grounds. Part IV focuses on whether subjecting rezoning requests to voter approval is a valid exercise of the referendum power in Florida and in Miami Beach. Part V concludes with a final analysis of why the “Save Miami Beach” zoning referendum is a disturbing example of how federal and state case law may prevent communities from empowering themselves through the referendum process with regard to land use decisions.

II. A Little History Lesson

A. The Rise of the Referendum

Since the beginning of the American republic in 1789, Americans have progressed steadfastly toward a more perfect democracy. No concept has embodied this progression nor had a more “profound influence upon the political thought of America” than the town meeting. The town meeting, a type of direct legislation “expressing the ‘will of the people’ has had a certain legitimacy in America since the 1640s, when all or most of the freemen in New England villages assembled to make the laws by which they would be regulated.”

The sense of empowerment stemming from direct communication with elected officials and direct participation in the decision-making process “bred a self-confidence and a civic culture that generally whetted the appetite for more.”

As the United States entered the nineteenth century, the growth of large cities revealed the town meeting as an unsuitable “mode of government.” The town meeting was a distinctively rural institution. With the growing predominance of urban and national problems, the issues involved in running the government “were of an extent too vast and the population was too widely dispersed” to make the town meeting and its

4. DeLos F. Wilcox, Government by All the People, The Initiative, the Referendum, and the Recall as Instruments of Democracy 5 (1912). The concept of the town meeting, which had been around since the days of Athens, “attracted the attention and excited the admiration of statesmen and publicists.” Id. The Framers captured the essence of the town meeting by including in the First Amendment that “Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. amend. I. While it may be true that the Founding Fathers “did not give pure democracy a serious thought as a mode of government in the nation or in the separate states” since the “areas involved were of an extent too vast and the population was too widely dispersed,” the Founding Fathers did intend to preserve some power to the people. Wilcox, supra.


6. Id. at 12.

7. Wilcox, supra note 4, at 5.

8. Id.
direct legislation component a viable option. Regardless of the social or political phenomenon that led to the decline of the town meeting, Americans reconciled its diminishing importance as an acceptable side effect of growth and prosperity.

By the end of the nineteenth century, however, machine politics and business domination of government left Americans feeling disenchanted with the political system. Americans "were increasingly convinced that powerful, organized, self-seeking interests shaped legislative outcomes at the expense of the public interest." Feeding off this bitterness, reform-minded Progressives garnered support by campaigning "to open up the system of government and restore more power to the people." Progressives believed that unless "the machine and its bosses could be broken, unless the corrupt alliance between greedy corporate interests and the machines could be smashed, it seemed that no lasting improvement could be achieved." To achieve lasting improvement, the Progressives favored the implementation of "direct democracy devices," which would "neutraliz[e] the power of flagrant special interests." The remedy for the evils of democracy was, simply, more democracy.

Searching for political devices to accomplish their reforms, the Progressives sought to implement mechanisms associated with direct legislation where the people, "rather than the government, [were] the

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9. Id.
10. See CRONIN, supra note 5, at 54. Cronin accurately points out that Muckrakers, such as Lincoln Steffens, Frank Norris, Gustavus Myers, Ida Tarbell, Ray Stannard Baker, and Upton Sinclair, shifted American attitudes by bringing to light the fact that businesses and party bosses, such as the Tweed Ring, controlled government. Id. at 55. Another expression of this hostility was the popularity of the term "robber baron" to describe the leaders of industry such as Andrew Carnegie, John D. Rockefeller, Andrew W. Mellon, and Henry Ford, who had incredible wealth, even by today's standards, and could influence people with their purse strings. See generally MARY BETH NORTON ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 311 (1991). Arguably, most of these men became philanthropic because of the bad publicity they received during the Progressive Era.
11. CRONIN, supra note 5, at 56.
12. Id. at 56.
13. Id. at 56. The Populist Party had a brief existence. Created in 1891, the party disappeared after their candidate, William Jennings Bryan, lost the 1896 presidential election. See NORTON, supra note 10, at 356-57. The Populist Party believed that Eastern industrialists and bankers controlled both the Democratic and Republican parties. See id. at 345. They sought to reform the election system by the direct election of Senators and the use of a graduated income tax system. See id. The Progressive Movement was the successor to the Populist Party. See id. at 372. Lasting from 1901 until 1921, Progressives sought a broad base of reforms similar to and exceeding those sought by the Populists only a decade before. See id. Ultimately, the Progressives nominated Theodore Roosevelt as their candidate, under the "Bull Moose" ticket, in an unsuccessful effort to win the U.S. Presidential election of 1912. See id. at 372.
organism.” The town meeting was an example of “actual self-government” that could bring lasting change to American politics. However, the Progressives realized that “the town meeting . . . proved to work admirably” when “communities were themselves simple and homogeneous.” By the beginning of the twentieth century, the people “from one end of the country to the other, [were] not homogeneous but composite, their interests varied and extended, their life complex and intricate.” The diversity within American society made “town meetings . . . out of the question.” Reformists understood that they needed a political device that had the same principles inherent in the town meeting, one that encouraged direct communication and contribution to the decision-making process while at the same time making elected officials accountable to voters and not to special interests. The referendum would prove to be the perfect solution.

The referendum represented the next stage of development of the town meeting. The referendum procedure could function regardless of geographical size and societal composition. More importantly, the referendum procedure retained all of the pure democracy and direct legislation elements found in the town meeting. For example, by addressing “issues rather than personalities,” the referendum could provide greater objectivity, which would lead to “greater accuracy in expressing the public will.” Furthermore, the referendum could “effectively check[ ] the corruption of legislatures by . . . special interest groups” since the “people [could] effectuate their will on a specific issue.” Finally, the exercise of a referendum could restore “voter involvement” and “public debate” that the New England town meeting once nurtured in abundance.

With the Progressive movement gaining strength, the referendum quickly increased in popularity. While not entirely new to American

15. Id.
17. Wilson, supra note 15, at 72.
18. Id. at 72-73.
19. Id. at 73.
22. Hahn & Morton, supra note 21, at 939.
23. Id. at 939-40.
politics, the referendum grew in popularity "due to the failure of the representative bodies really to represent the people," as well as "the inevitable consequence of the gross betrayal of [the people's] trust by various representatives." In 1898, South Dakota became the first state to adopt the referendum. By the end of the Progressive Era in 1921, twenty-one additional states followed South Dakota in amending their state constitutions to grant voters the use of the referendum.

B. The "Save Miami Beach" Saga, a Parallel Story

With the dawning of the jet-age in the 1950s, Miami Beach became a sub-tropical paradise to Americans and Europeans. Cheaper airfare and quicker travel time made Miami Beach a favorite to those wanting to escape the cold winters. To accommodate all of the tourists that arrived each winter for warm sunny days and sandy beaches, new hotels and high-rises developed almost overnight. Hotels such as the Fountainebleau and the Eden Roc quickly reached legendary status as winter homes to rich and famous individuals such as Frank Sinatra, Jackie Gleason, Desi Arnez, Myer Lansky, and Elizabeth Taylor. By the 1970s and early 1980s, however, the real estate and tourist industries collapsed, and a drastic rise in drug trafficking and violent crime decisively ended Miami Beach's reign as a tourist and celebrity destination.

By the late 1980s, there was a renewed interest in South Miami Beach. Fashion photographers began to use the warm sunny climate and the "backdrop of the Art Deco buildings on South Beach to produce trend setting magazine spreads." With photographs of models and celebrities set against the Art Deco landscape constantly gracing the covers of national and international magazines, South Beach became a

24. See Cronin, supra note 5, at 12.
25. Munro, supra note 21, at 62.
26. See id. at 51.
27. See id. The states that followed South Dakota were Utah (1900), Oregon (1902), Nevada (1904), Montana (1906), Oklahoma (1907), Maine (1908), Missouri (1908), Arkansas (1910), Colorado (1910), Arizona (1911), California (1911), New Mexico (1911), Idaho (1912), Nebraska (1912), Ohio (1912), Washington (1912), Michigan (1913), North Dakota (1914), Kentucky (1915), Maryland (1915), and Massachusetts (1918). See id. As of 1992, initiatives and referendums may decide statutory as well as constitutional proposals in about seventy-five percent of the states. See Rourke, supra note 2, at 42.
29. See Kurlansky, supra note 1, at 18.
30. See id.
32. See Barbara DeLollis, Reaching Condo Capacity, MIAMI HERALD, Jan. 11, 1997, at 1F.
33. See id.
worldwide destination.\textsuperscript{35}

The renewed interest in Miami Beach led the city to once again become the focus of developers. With land values being so low, developers saw the waterfront as a potential gold mine. However, during the twenty years when Miami Beach fell in disfavor with developers and tourist dollars, the residents' attitude toward development on the island changed. The "[c]ycles of boom-and-bust speculation left South Florida a patchwork of opulence contrasted with decay."\textsuperscript{36} The effects of the condominium glut of the 1970s, which resulted in the collapse of the real estate market in South Florida, left many residents with a bitter feeling toward development.\textsuperscript{37} More importantly, residents feared that new high-rises would create a concrete canyon along the waterfront impairing pristine views of the ocean while at the same time dampening the historic beauty of the low-rise art deco landscape.

Nevertheless, in the late 1980s and in the early 1990s, high-rise development projects received approval in growing numbers. As the number and size of the projects multiplied, the hostility of the citizens toward their elected officials grew.\textsuperscript{38} When the city of Miami Beach finalized a land swap deal so that developer Thomas Kramer and his Portofino Group could build at least five new skyscrapers on the tip of South Beach, the citizens of Miami Beach acted.\textsuperscript{39} Miami Beach residents felt that "they [were not] represented well . . . in City Hall."\textsuperscript{40} Like the reform-minded Progressives, they experienced similar disenchantment with the political system and feared the same inability to hold their elected officials accountable to the voters, rather than to special interests.\textsuperscript{41} Many residents felt the need to implement a political device that would encourage direct communication and voter contribution to the decision-making process, while increasing the accountability of their elected officials.\textsuperscript{42}

In November of 1996, a group calling itself "Save Miami Beach" began to collect the signatures of ten percent of the city's 39,548 regis-
tered voters in order to take the first step toward placing an amendment to the city charter on the next ballot. Rather than requiring developers to seek the approval of the Miami Beach City Commission when requesting a zoning increase, the amendment would require "developers to seek voters' approval in order to change the amount of allowable development on waterfront properties." In the weeks preceding the citywide vote, the referendum issue "spawned a brawling campaign marked by a blitz of television and radio ads that have become almost as controversial as the zoning vote itself." Raising less than $15,000 and "outspent nearly 100 to 1," the "Save Miami Beach" campaign won the approval of fifty-seven percent of the voters by "striking a chord with residents fed up with congestion and the surge of new skyscrapers tentatively approved for South Beach." With voter approval of the zoning referendum, the stage has been set for a battle between developers who believe in land use and the citizens of Miami Beach who decry what they perceive to be land abuse. Although most of the land along the waterfront of Miami Beach has been developed, a great deal of land and money remain at stake. Older properties built under more restrictive zoning laws, in addition to undeveloped properties, could become targets of developers seeking the potential financial windfall a new high-rise luxury condominium would provide. Because a substantial amount of undeveloped property and older property ripe for redevelopment sit along the Miami Beach waterfront, the Miami Beach zoning referendum has the potential to make or break the future development of the City of Miami Beach. To some, the referendum will curb a surge that has "turned into a stampede in which big-money developers are running roughshod over city officials and residents alike, bringing too much growth too fast." The consequences of


44. Semple, supra note 43. What the voters approved and what is the subject of this article is the following: "Shall the City of Miami Beach Charter be amended to include a requirement for public vote prior to any increase in floor area ratio of property adjacent to the waterfront, which requirement shall be in effect from January 31, 1997?" MIAMI BEACH, FLA., RES. 97-22413 (June 4, 1997).

45. Mike Williams, Miami Beach at Odds Over Zoning Blitz, ATLANTA J. & CONST., May 30, 1997, at 6B.

46. Wisckol, supra note 39.

47. See Semple, supra note 43. With "almost 99 percent of the land developed . . . reinvestment in the same land use is the pattern." MIAMI BEACH, FLA., YEAR 2000 COMPREHENSIVE PLAN, PART I: DATA AND ANALYSIS I-2 (1996).

48. See Patricia Leigh Brown, A Broken Home, CHI. TRIB., July 23, 1989, at 15. In 1989, 200 of the 800 registered Art Deco low-rise buildings were recently restored or newly painted.

49. Williams, supra note 45.
slow or no growth at all would be better than unchecked or unbridled growth. To others, the referendum would stem “the tidal wave of redevelopment that [has brought] luxury high-rise buildings and upscale buyers to the city.” 50 Allowing the citizens to approve rezoning issues most likely would stop any development, cause a loss of jobs, and decrease a tax base desperately in need of new revenue.

III. THE CONSTITUTIONALITY OF THE REFERENDUM

A. Referendum Defined

A referendum enables voters “to have an act passed by the legislative body submitted for their approval or rejection.” 51 A referendum has the “power to stop things, but not to make them go. It is an instrument of negation.” 52 With regard to the issue of this article, the Miami Beach zoning referendum could be more accurately classified as a mandatory referendum. A mandatory referendum “obligates the legislative body to seek voter approval prior to specified measures becoming effective.” 53 If a property owner wants the city commission to rezone the owner’s waterfront property, the commission must seek voter approval before the rezoning can become effective. 54

B. Referendums: Constitutional or Unconstitutional?

The inherent purpose of the referendum as a political device enabling greater democracy seems, on its face, ideal. Referendums would foster greater citizen participation in government by generating public debate. This increased participation would lead to a better-educated electorate. Moreover, referendums would effectively check the influence that minority special interest groups have over elected officials. All of these factors would result in a more perfect democracy.

While the goals of the referendum appear heroic, a closer analysis raises many concerns. Is the whole of society best served “by the expressions of an amorphous popular will” on complex issues and with

50. Id.
51. 5 Eugene McQuillen, The Law of Municipal Corporations § 16.53 (3d ed. rev. 1996). Munro provides a more detailed definition, yet it expresses the same concept that a referendum is “the right of a stated percentage of voters to demand that measures passed by the ordinary lawmaking bodies of the state or municipality shall be submitted to the whole body of voters for acceptance or rejection.” Munro, supra note 21, at 1.
52. Wilcox, supra note 4, at 131.
54. See Miami Beach, Fla., Res. 97-22413 (June 4, 1997).
numerous measures placed on a ballot? Will this type of direct legislation render "intelligent decision making by the voters" a reality? Will direct legislation by way of referendum necessarily stop special interest groups from "oiling" the direct legislation machinery to get the desired results just as they did under the representative system? Will the quality of legislators remain the same?

The concerns surrounding the exercise of the referendum process are secondary. Vesting power in the people, which would allow citizens to supersede the legislators' right to approve or reject legislation, raises the ultimate question: Is it constitutional to allow the electorate to make governmental decisions through direct legislation devices such as the referendum?

1. UNCHALLENGED AND UNQUESTIONED DURING THE BIRTH OF THE REPUBLIC

In the early years of the republic, no one questioned the use of referendums. Many states used the referendum to ratify the federal constitution and their own state constitutions. Notwithstanding, most Revolutionary leaders and thinkers were "profoundly skeptical of direct or pure democracy on a large scale. They had read about the rise and decline of Athens and other ancient city-states that preached and practiced early versions of democracy." The general feeling among many of the Founding Fathers was that they fought "not to establish a democracy but to establish a republic." Ultimately, many of the Framers believed that "public opinion, properly harnessed, would serve, at least in normal times, as one of the prime guides for government lawmaking and leadership." Public opinion would steer lawmaking but not com-

55. Hahn & Morton, supra note 21, at 940; cf. Cronin, supra note 5, at 208-09 (discussing the general problems with direct legislation procedures).
56. HAHN & MORTON, supra note 21, at 941; see also CRONIN, supra note 5, at 61 (questioning voter competence).
57. Wilson, supra note 15, at 69-70; see also, Cronin, supra note 5, at 99.
58. See Munro, supra note 21, at 25. Wide spread use of direct legislative methods, such as the referendum, might lead to a decrease in the quality of legislators commensurate with the decline in the responsibility borne by the legislature. See CRONIN, supra note 5, at 211.
59. See Munro, supra note 21, at 5.
60. CRONIN, supra note 5, at 13. Many revolutionary leaders were like John Adams who, while "pleased that his own Massachusetts submitted its 1780 constitution for popular debate and consideration at the open town meetings throughout the commonwealth," believed that the "frailties and passions of ordinary men made them incapable of responsible participation in government. The power should be delegated from the many to the prudent and virtuous few." Id.
61. Id. at 12.
62. Id. at 18. James Madison "extolled the virtues of representative government and decried the dangers of mobocracy and factionalism inherent in popular democracy." David James Jordan, Constitutional Constraints on Initiative and Referendum, 32 VAND. L. REV. 1143 (1979) (quoting THE FEDERALIST No. 10 (J. Madison)).
mand lawmakers. Although the Founding Fathers disapproved of the referendum process, the question of its use remained unchallenged for nearly eighty years.

2. JUDICIAL REVIEW DECLINED BUT DISCUSSED APPROVINGLY IN DICTA

With the rise of the Populist and Progressive movements in the last quarter of the nineteenth century, the Supreme Court had its first opportunity to address the constitutionality of the referendum process. Rather than take up the issue, the Court initially found alternate grounds to dismiss each challenge and ultimately evaded the issue by relegating any attack on the referendum issue to the more generalized constraints of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In 1875, the Supreme Court was asked to determine the validity of the retrocession of part of the District of Columbia by Congress to the State of Virginia. While the Court evaded the ultimate question of whether a citizen voting on legislative matters by referendum was constitutional, the majority's opinion did provide some insight into its feelings on the referendum issue.

In addressing the referendum issue, the Court stated that if the plaintiff in error's contentions "were maintained in the length and breadth insisted upon, serious consequences would follow." The majority outlined a list of potential horrors that would result if the Court supported the plaintiff's contentions because every state law "passed since the retrocession, [regarding] the county of Alexandria, [would be] void." More importantly, the Court stated that a decision in favor of

64. In 1846, Congress "passed an act . . . [authorizing] a vote to be taken by the people of Alexandria County to determine whether the county should be retroceded to the State of Virginia." Phillips, 92 U.S. at 131. In 1789, "Virginia . . . ceded to the United States that part of her territory . . . which Congress set apart as the seat of the government of the United States, and organized as the District of Columbia." Id. The majority of the voters of Alexandria County chose to rejoin Virginia. More than two decades after the retrocession by referendum, a resident of Alexandria County brought an action against the Alexandria County tax collector claiming that "the act of Congress of 1846, . . . [and] everything done under it," as well as "the law of Virginia reannexing the county to the State and extending her jurisdiction over it, [were] contrary to the Constitution of the United States, and illegal and void." Id. at 133. The Court held that "Virginia [was] de facto in possession of the territory in question. [The State had] been in possession, and . . . title and possession [had] been undisputed, since [Virginia] resumed possession in 1847." Id. at 133. The Court found it particularly relevant that since the vote nearly thirty years ago, "no murmur of discontent [had] been heard." Id. Based on this silence, the Court felt that the "plaintiff in error [was] estopped from raising the point" that the state and federal government's actions were illegal and void. Id. at 134.
65. 92 U.S. at 133.
66. The Court listed the potential offspring of a contrary decision:
the plaintiff in error's contention would have far-reaching national implications. The potential list of horrors feared by the Court in the Phillips case would come to pass in almost every state and at the federal level because nearly every state used the referendum procedure to approve the federal constitution as well as their own state constitutions.

While listing a parade of horrors is not a resounding legal endorsement, the Court did provide more sound legal reasoning for approving of the referendum process. In discussing on the right to waive constitutional provisions, the majority stated that it “[did] not [need to] invoke [to] their aid... other arguments such as the fact that “under certain circumstances, a constitutional provision may . . . be waived by a party entitled to insist upon it.” In Phillips, the plaintiff in error challenged the action taken by Congress in 1846 to annex or retrocede a portion of Alexandria County. Congress authorized the retrocession based on its interpretation of the U.S. Constitution. Because Congress had the power to annex land necessary to form the capital, it would seem logical that Congress had an implied power to retrocede annexed land that they deemed superfluous. Therefore, because Congress had the power to retrocede annexed land, Congress was a “party entitled” to waive a right reserved to them in a constitutional provision.

At the end of the nineteenth century, the Progressives’ call for greater use of direct democracy methods in government led to a wave of states amending their state constitutions so as to authorize the use of the referendum. In the early 1900s, the Court again had a chance to address the constitutionality of the referendum process, but, like in

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Taxes [would] have been illegally assessed and collected; the election of public officers, and the payment of their salaries, [would have been] without warrant of law; public accounts [would] have been improperly settled; all sentences, judgments, and decrees of the courts [would have been] nullities, and those who carried them into execution [would have been] liable civilly, and perhaps criminally, according to the nature of what they [had] severally done. Phillips, 92 U.S. at 133.

67. See id.
68. See Munro, supra note 21, at 15.
69. Phillips, 92 U.S. at 133 (emphasis added).
70. Id. at 132.
71. See U.S. Const. art. I, § 8, cl. 17. “The Congress shall have Power . . . To exercise Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States and the Acceptance of Congress, become the Seat of the Government of the United States.”
72. This statement also could imply that if the people of a state reserve the right to approve or reject legislation, they may do so since they are a “party entitled to insist upon it.” Phillips, 92 U.S. at 132.
73. See discussion infra Part II.A.
74. See Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). In this case, the Supreme Court considered a Guaranty Clause challenge to a tax statute enacted pursuant to a
Phillips, the Court avoided ruling directly on the constitutionality of the referendum procedure by finding other grounds to dismiss the case. Because the majority refused to pass upon the constitutionality of direct legislation methods, whether it be an initiative or referendum, the decision in Pacific relegated any attack on the use of the referendum to the more generalized constraints of the Due Process and Equal Protection Clauses of the Fourteenth Amendment for the next half century.

3. REASSESSMENT REGARDING JUDICIAL REVIEW AND VALIDATION OF THE REFERENDUM PROCESS

Interest in the referendum diminished with the Progressive movement's decline in 1921. For the next forty years, no new states added the procedure. However, during the 1960s and 1970s, there was a renewed interest in the exercise of direct legislation methods such as the referendum. This rise in popularity was due largely to the fact that citizens wanted to employ direct legislation methods as a form of expression and protest. It was during this period that the Supreme Court, through a series of opinions, reassessed its role regarding judicial review of referendum-generated state law.

In Reitman v. Mulkey, the Court was asked to decide the constitutionality of California's Proposition 14. The majority rejected Propo-
sition 14 because the state constitutional amendment significantly encouraged and involved "the State in private racial discriminations to an unconstitutional degree." While the Court invoked the Equal Protection Clause of the Fourteenth Amendment to invalidate Proposition 14 as it had in past decisions, Reitman marked a reversal in policy. The Court no longer invoked the political question designation with regard to actions challenging direct legislation methods.

Two years later, the Court examined the constitutionality of an amendment to a city charter that was approved by referendum. While striking down the charter amendment as a violation of the Equal Protection Clause, the majority found that because, under constitutional assumptions, all power derives from the people, the people may retain for themselves the power to deal directly with matters which might otherwise be assigned to the legislature.

Two years after Hunter, the Supreme Court continued to move closer to fully analyzing the constitutionality of the referendum. In James, the Court pointed out that referendum provisions "demonstrate devotion to democracy, not to bias, discrimination, or prejudice" by giving citizens "a voice on questions of public policy." The referendum process "ensures that all the people of a community will have a voice in a decision." Such a mechanism "gives [citizens] a voice in decisions that will affect the future development of their own community."

Finally, in City of Eastlake v. Forest City Enterprises, Inc., the Court resoundingly validated the constitutionality of the referendum pro-
cess. Chief Justice Warren Burger, on behalf of the majority, "defended the power of the people to legislate via referendum as a basic democratic right." In "establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature," because, under "our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create."

The majority further held that the reservation of power by the people "is the basis for the town meeting, a tradition which continues to this day in some states as both a practical and symbolic part of our democratic processes." Like the town meeting, the referendum "is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies."

4. CONSTITUTIONALITY OF THE ZONING REFERENDUM

In addition to validating the exercise of the referendum process generally, the *Eastlake* majority also validated the use of the referendum process on zoning matters. At the heart of the opinion was whether a city charter provision requiring fifty-five percent of the voters to approve proposed land use changes violated the due process rights of a landowner who applied for a zoning change. The Court found that the city’s charter provision did not violate the landowner’s due process rights since the exercise of the referendum provision was properly reserved in the state constitution.

C. How to Properly Reserve and Exercise a Zoning Referendum

While the Supreme Court has advocated the referendum as a "basic instrument of democratic government," the Court’s endorsement does not suggest that the referendum power is always an option for citizens in every state, county, or municipality. In order to determine whether the referendum mechanism is a viable option for citizens, it is necessary to examine fully the *Eastlake* case.

In 1971, the respondent applied to the City Planning Commission

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90. *Rourke*, *supra* note 2, at 155.
91. *Eastlake*, 426 U.S. at 672 (quoting Hunter v. Erickson, 393 U.S. 385, 392 (1969)).
94. *Id.* By comparing the referendum to the town meeting, the Chief Justice’s statement bestowed an extra measure of legitimacy to the constitutionality of the referendum because of the special place that the town meeting has in the “national memory.” *Wilcox*, *supra* note 4, at 5.
95. See *Eastlake*, 426 U.S. at 670.
96. *Id.* at 679.
97. *Id.*
for a zoning change to permit construction of a multifamily, high-rise apartment building on an eight-acre parcel of real estate zoned for "light industrial" use. However, the city charter provided that any changes in land use agreed to by the City Planning Commission had to be approved in a referendum vote. The respondent asserted that this city charter provision violated his due process rights.

For a referendum to satisfy federal constitutional requirements, the Court established a two-prong test. First, the people had to reserve to themselves the power to approve or reject rezoning issues. Second, the subject matter of the referendum had to deal directly with matters that might otherwise be assigned to the legislature.

1. Reservation in State Constitution

As already discussed, the Supreme Court of the United States presumed, according to constitutional interpretation, that all power derives from the people. In establishing legislative bodies, the people delegated their inherent power—that is, surrendered their power to make decisions. To approve or reject legislative measures, "the people must reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." What the people gave away in initially creating their legislative body, they must take back. Thus, not only must the citizens of a county or municipality reserve the referendum in their governing body's charter, but to meet federal due process requirements, there must be a reservation of the referendum procedure in the state constitution.

To determine if the people reserved any power to approve or reject legislation, the Court in Eastlake examined the Ohio Constitution. The Court concluded that "the people of Ohio specifically reserved the power of referendum to the people of each municipality within the State."
The Supreme Court undertook the same analysis in another zoning referendum case only a few years earlier. In upholding the constitutionality of a restrictive zoning ordinance that prevented the development, construction, or acquisition of low-rent housing “until the project was approved by a majority of those voting at a community election,” the Court, in James v. Valtierra, began its analysis by addressing whether the citizens of San Jose and San Mateo County had reserved the right to use the referendum procedure. The Court stated that “the California Constitution [Article IV, § 1] had for many years reserved to the State’s people the power to initiate legislation and to reject or approve by referendum any Act passed by the legislature.” Because “the California Constitution ... reserved to the State’s people the power ... to reject or approve ... acts of local governmental bodies,” the citizens of San Jose and San Mateo County could use the referendum process.

2. WITHIN THE SCOPE OF MATTERS ASSIGNED TO THE LEGISLATURE

Although the “people can reserve to themselves [the] power” to approve or reject governmental actions, the power is not without limitations. After all, the “sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.” One condition imposed by the federal constitution is that the people use the referendum process for matters “within the scope of the legislative power.” Because the people created the legislative body, and only the legislative body, with their inherent power, the people have standing to reserve the power to deal directly with matters only assigned to the legislature.

With regard to whether the Eastlake referendum was within the scope of matters assigned to the legislative body, the Court stated that it was prevented from determining whether the Eastlake charter amend-

107. 402 U.S. 136, 139 (1971). In essence, the ordinance “required a referendum to approve de facto economic segregation through low-income housing projections.” Rourke, supra note 2, at 154. Although this ordinance served the same purpose as the ordinances in Hunter and Reitman, the Court allowed “zoning ordinances to stand if they turned on economic rather than racial distinctions.” Id.

108. 402 U.S. at 138. In addition, the Court stated that “California’s entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy. A referendum provision was included in the first state constitution, Cal. Const. of 1849, Art. VIII, and referendums have been a commonplace occurrence in the State’s active political life.” Id. at 141.


112. Eastlake, 426 U.S. at 673.
ment was a legislative matter. Because the Ohio Supreme Court concluded that rezoning was a legislative function, the determination of the state court would be "binding" on the Supreme Court's interpretation of state law.113

Overall, while the Eastlake case represented an instance when the Court squarely considered the constitutionality of municipal systems combining zoning and referendum approval, "Eastlake has not served as a great impetus for the adoption of referendum zoning."114 Because of the decision of the Supreme Court to defer to the determination made by state courts with regard to the second inquiry, "state law has been substantially more influential" in determining the ultimate fate of the referendum process.115 The ultimate fate of a referendum decision rests not on federal constitutional grounds but on how the state court will label the action that is subject to a referendum. This binding determination establishes the standard of review a court will apply when a referendum decision is challenged. If a state court determines that the action subject to a referendum is legislative, the court will give great deference to the decision by the people.116 After all, a decision by the people through referendum would be the same as if the legislature had made the decision. In essence, should a state court determine that a referendum is legislative, the referendum will receive the blessing of the court in almost every instance.117 By contrast, if a state court determines that the action subject to a referendum is quasi-judicial/administrative, the court will insist on the presence of a greater amount of due process rights.118 Should a state court determine that a referendum is quasi-judicial/administrative, the referendum will be the subject of a Grand Inquisition with a significantly greater chance of reversing an adverse referendum decision.119

113. Id. at 674 n.9. It is important to note that the Court, in dicta, stated that the power of initiative or referendum may be "reserved or conferred with respect to any matter, legislative or administrative, within the realm of local affairs." Id. (citing 5 EUGENE MCGUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 16.54 (3d ed. 1969)). This statement conveys the Court's support of the referendum, but, as will be discussed, the decision of the state court will ultimately determine whether the fate of the referendum.
115. Id.
116. See generally Euclid v. Ambler Co., 272 U.S. 365 (1926) (subjecting legislative decisions to a limited review and allowing them to be attacked upon constitutional grounds for an arbitrary abuse of authority).
117. See id. at 388 ("If the validity of the legislative classification for zoning purposes be debatable, the legislative judgment must be allowed to control.").
118. See Fasano v. Board of County Comm'rs, 507 P.2d 23, 26 (Or. 1973) ("A determination whether the permissible use of specific use of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test.").
119. See id. at 26, 29 (subjecting quasi-judicial/administrative decisions to stricter scrutiny).
D. A Note About Due Process Rights and Referendums

As already discussed, the "sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."\(^{120}\) The courts have held that "a congressional delegation of power to a regulatory entity must be accompanied by discernible standards so that the delegatee's action can be measured for its fidelity to the legislative will."\(^{121}\) Such discernible standards would prevent the potential for arbitrariness in the process.\(^{122}\)

A question relevant to this article and an issue at the heart of the *Eastlake* case was whether the submission of a zoning change for approval by the citizens of a community lacked the standards necessary to ensure due process.\(^{123}\) The Supreme Court addressed two due process arguments. The first issue it addressed was whether the referendum procedure violated federal due process rights because any substantive result of a referendum would be clearly arbitrary and unreasonable—that is, having no substantial relation to the public health, safety, morals, or general welfare.\(^{124}\) Although the landowner in *Eastlake* did not challenge the referendum decision as arbitrary and unreasonable, the Court concluded that a restriction resulting from an adverse referendum decision would be "open to challenge in state court, where the scope of the state remedy available to respondent would be determined as a matter of state law, as well as under Fourteenth Amendment standards."\(^{125}\) Because a referendum decision would not prevent access to the courts and because state law would provide a remedy for an adverse decision, federal due process rights were not implicated by an adverse decision.

The second issue the Court addressed was whether the referendum process, generally, was a standardless delegation of power to a limited group of property owners and, thus, in violation of the Due Process Clause.\(^{126}\) In *Eubank v. Richmond*\(^{127}\) and *Washington ex rel. Seattle Title Trust Co. v. Roberge*,\(^{128}\) the Supreme Court condemned the standardless delegation of power to the people at large, but in the *Eastlake* case, the Court refused to extend these previous decisions to


\(^{122}\) *See Eastlake*, 426 U.S. at 675.

\(^{123}\) *See id.*

\(^{124}\) *Id. at 676.*

\(^{125}\) *Id. at 677.*

\(^{126}\) *Id.* at 679.

\(^{127}\) 226 U.S. 137 (1912).

\(^{128}\) 278 U.S. 116 (1928).
the referendum process.\textsuperscript{129}

A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.\textsuperscript{130}

Ultimately, the\textsuperscript{131} \textit{Eastlake} court rejected the argument that zoning referendums, or for that matter referendums generally, violated the Due Process Clause of the Fourteenth Amendment. The referendum procedure, which “demonstrate[s] devotion to democracy,”\textsuperscript{132} ensures that “all the people of a community will have a voice in a decision.”\textsuperscript{133} The referendum process is not fundamentally unfair to landowners because an adverse referendum decision is open to challenge in state court where relief mechanisms are available.\textsuperscript{133}

IV. \textbf{THE MIAMI BEACH ZONING REFERENDUM, IS IT A VIABLE OPTION?}

With the Supreme Court giving a constitutional seal of approval for the referendum and explaining how to properly reserve the right to use the referendum power to meet the federal constitutional requirements, it is now possible to address whether the citizens of Miami Beach have reserved the right to implement a zoning referendum.

A. \textit{Reservation in Constitution}

1. \textbf{FEDERAL CONSTITUTIONAL REQUIREMENTS OF RESERVATION IN THE STATE CONSTITUTION}

To satisfy the federal constitutional requirements, the citizens of Florida must reserve the referendum procedure in the state constitution in order to exercise the referendum mechanism.\textsuperscript{134} While Florida’s history does not demonstrate “the repeated use of referendums to give citizens a voice on questions of public policy” like California,\textsuperscript{135} this did

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{129} \textit{Eastlake}, 426 U.S. at 679.
\item \textsuperscript{130} See id. at 668 (citation omitted).
\item \textsuperscript{131} James v. Valtierra, 402 U.S. 137, 141 (1971).
\item \textsuperscript{132} Id. at 143.
\item \textsuperscript{133} See \textit{Eastlake}, 426 U.S. at 679 n.13 (1976). In addition to challenging any action under the \textit{Euclid} “fairly debatable standard,” there is administrative relief in hardship cases. \textit{Id.} The Court noted that “the very purpose of ‘variances’ allowed by zoning officials is to avoid ‘practical difficulties and unnecessary hardship.’” \textit{Id.} (citing EUGENE McQUILLIN, \textit{THE LAW OF MUNICIPAL CORPORATIONS} § 25.16 (3d ed. rev. 1996)).
\item \textsuperscript{134} See \textit{James}, 402 U.S. 137; see also City of \textit{Eastlake} v. Forest City Enter., Inc., 426 U.S. 668 (1976).
\item \textsuperscript{135} \textit{James}, 402 U.S. at 141.
\end{enumerate}
\end{footnotesize}
not preclude the Florida Supreme Court, in Florida Land Co. v. City of Winter Springs, from unequivocally finding that the citizens of Florida reserved the right to use the referendum in the state constitution. The court found that as far back as 1885, the Florida Constitution envisioned the use of the referendum. While the 1885 constitution allowed the referendum for select situations, such as being part of the procedure necessary to issue bonds or finalize the passage of special or local laws, the people reserved the right to use the referendum procedure in a more general fashion in the 1968 state constitution. The citizens of Florida, in adopting the 1968 constitution, "reserved certain powers to themselves, choosing to deal directly with some governmental measures. The referendum, then, is the essence of a reserved power." Overall, a reading of the relevant sections of the constitution made it "abundantly clear" to the court that the citizens of Florida reserved the referendum power as a means of approving or rejecting legislation.

2. RESERVATION IN THE MIAMI BEACH CHARTER

The Florida Supreme Court stated that "[o]nce the referendum power is reserved, particularly as done in [Florida's] current constitution, this power can be exercised wherever the people through their legislative bodies decide that it should be used." Because of the general nature of the language in the Florida Constitution, a reservation in the charter of the local governing body is a necessity. Thus, the citizens of Miami Beach must have properly reserved the referendum procedure under their city charter to pass federal constitutional scrutiny.

136. 427 So. 2d 170 (Fla. 1983).
137. See id. at 172 n.4.
138. Id. at 172.
139. Id. "ARTICLE I. SECTION 1. Political power. — All political power is inherent in the people. The enunciation herein of certain property rights shall not be construed to deny or impair others retained by the people." FLA. CONST. art. I, § 1 (1968).

"ARTICLE VI, SECTION 5. General and special elections. — Special elections and referenda shall be held as provided by law." FLA. CONST. art. VI, § 5 (1968).

140. Florida Land, 427 So. 2d at 172-73.

141. See Holzendorf v. Bell, 606 So. 2d 645, 648-49 (Fla. 1st DCA 1992) ("Unless some provision of the [city] charter grants to the electorate the right of referendum ... the electorate has no authority" to subject the a city council's actions to a referendum.).

142. See, e.g., Florida Land, 427 So. 2d at 173 (finding submission of a City of Winter Springs ordinance effecting a change in zoning for a specific parcel of land to a referendum vote constitutional because the charter of Winter Springs provided that qualified voters had the power to require an ordinance to be submitted to the citizens for the "purpose of commencing referendum proceedings"); City of Coral Gables v. Carmichael, 256 So. 2d 404, 408 (Fla. 1972) (The "right to [a] referendum [was] provided for duly" by the city charter of Coral Gables, Florida;); Scott v. City of Orlando, 173 So. 2d 501, 502 (Fla. 2d DCA 1959) (finding that citizens properly reserved the initiative and referendum power because the city charter provided that any ordinance "may be submitted to the council by a petition" for a council vote or may "be submitted
The "Save Miami Beach" Charter Amendment is a clear statement by the citizens of Miami Beach that they are reserving the referendum power. The language of the "Save Miami Beach" Charter Amendment—"requiring voter approval prior to [any] floor area ratio increase of waterfront-adjacent property"—would unquestionably satisfy federal or state constitutional scrutiny. However, the real issue is whether the citizens of Miami Beach properly, or even had the right in the first place, to alter the city charter to include this type of zoning amendment.

Section 51 of the Miami Beach Charter specifically outlines the procedure for altering and amending the city charter. According to this section, whenever citizens submit petitions proposing amendments to the city charter, "the city commission shall without delay give the electors the right to vote on such amendments." While the voters have the right to vote on amendments to the charter, § 51 imposes two limitations. First, a vote by the electors on any amendment or alteration must be in accordance with § 5.03 of the Metropolitan Home Rule Charter of Miami-Dade County. Second, any amendment or alteration of the city charter must be in accordance with chapter 166 of the Florida Statutes.

The incorporation of § 5.03 and chapter 166 demonstrates that the original drafters of the Miami Beach charter envisioned the citizens of Miami Beach using the referendum as a mechanism for altering or amending the city charter because both provisions discuss what conditions are necessary to properly submit an amendment or alteration of a city charter to the voters. Section 5.03 provides that only "after [the adoption of] a resolution or after the certification of a petition of ten (10) percent of the qualified electors of the municipality" may a proposal be submitted to the electors of a municipality to determine whether to adopt, amend, or revoke a city charter. Chapter 166, in particular

143. MIAMI BEACH, FLA., RES. 97-22413 (June 4, 1997). See note 148 listing cases where Florida courts deemed language similar to that found in the "Save Miami Beach" Charter Amendment as a proper reservation of the referendum power.

144. MIAMI BEACH, FLA., CHARTER § 51, Alteration and amendment of Charter (1964) (emphasis added).

145. MIAMI-DADE COUNTY, FLA., HOME RULE CHARTER § 5.03, Municipal charters (1993). During the writing of this article, the name of Dade County was changed to Miami-Dade County. Thus, there may be situations, such as in older cases or in older ordinances, where Miami-Dade County is referred to as Dade County.

146. The city charter actually provides that the charter may be altered or amended in accordance with chapter 6940 of the Laws of Florida; however, this chapter subsequently was replaced with chapter 166, Florida Statutes (1999).

147. MIAMI-DADE COUNTY, FLA., HOME RULE CHARTER § 5.03 (1993).
§ 166.031(1), maintains that the governing body of a municipality may, by ordinance or by petition signed by ten percent of the registered electors, "submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality."\textsuperscript{148}

Section 26 of the Miami Beach Charter further supports the notion that the original drafters of the Miami Beach charter envisioned the citizens of Miami Beach using the referendum. This section provides that "referendum petitions shall be forwarded . . . for completion of a certificate as to the petition's sufficiency."\textsuperscript{149} Overall, these sections expressly provide how and when a proposed amendment or alteration of the city charter is submitted to the voters.\textsuperscript{150}

An argument could be raised that the citizens of Miami Beach may not use the referendum process because the city charter specifically withholds the referendum power with regard to zoning functions. Sections 28 through 39 collectively form Article VI, the Zoning Enabling Act, of the Miami Beach Charter. In particular, § 32 of the Zoning Enabling Act provides that "no such amendment, supplement, change, modification or repeal" regarding zoning, "shall become effective except by the favorable vote of five-sevenths of all of the members of the city commission after notice and public hearing."\textsuperscript{151} Moreover, § 37 provides that if "the provisions of this Act shall conflict with any powers or limitations contained in the Charter of said City of Miami Beach, Florida, then such provisions of said Charter shall remain in force except as so far as they may be destructive of the provisions of this Act."\textsuperscript{152}

Because §§ 51 and 26 generally allow Miami Beach citizens to amend the city charter through the referendum, these sections may be used to potentially destroy the Zoning Enabling Act. The "Save Miami Beach" Charter Amendment, which employed §§ 51 and 26, would destroy § 32 because it would not only limit but completely supplant the power of the city commission to amend, supplement, change, modify, or repeal any

\textsuperscript{148} FLA. STAT. § 166.031(1) (1999).
\textsuperscript{149} MIAMI BEACH, FLA., CHARTER § 26, Codification of ordinances; passage of ordinances by petition of electorate; procedure for filing petitions (1964) (emphasis added).
\textsuperscript{150} See generally Scott v. City of Orlando, 173 So. 2d 501, 502 (Fla. 2d DCA 1959) (finding that citizens properly reserved the initiative and referendum power because the city charter provided that any proposed ordinance "shall be submitted to the qualified voters of [the] city"). The language in the Orlando City Charter, which the court found as a proper reservation of the referendum procedure, is similar to the language found in the Miami Beach Charter providing that after certificate, "the city commission . . . must . . . submit the [measure] to its electorate." MIAMI BEACH, FLA., CHARTER § 26.
\textsuperscript{151} MIAMI BEACH, FLA., CHARTER § 32, Method of amending, etc., regulations, etc. (1964).
\textsuperscript{152} MIAMI BEACH, FLA., CHARTER § 37 (1964).
zoning regulation or restriction with the voters. To prevent this limitation in power, § 37 would function to nullify the "Save Miami Beach" Charter Amendment thus leaving § 32 and the power of the commission intact.

While §§ 32 and 37 appear to nullify the "Save Miami Beach" Charter Amendment, in 1989, Miami Beach repealed the Zoning Enabling Act and replaced it with Ordinance 89-2665, the Zoning Ordinance of Miami Beach, Florida. In adopting the Zoning Ordinance, the citizens delegated their inherent powers and the ability to use the referendum to the City Commission in the interest of "conserving the value of Buildings and encouraging the most appropriate use of land" throughout Miami Beach.153 The Zoning Ordinance evidences this delegation of power because, like its predecessor, the City Commission must approve any amendment or change of the Zoning Ordinance.154 For the "Save Miami Beach" Charter Amendment to be valid, it must have been approved by the City Commission.

Ultimately, it appears that the citizens of Miami Beach properly amended the Zoning Ordinance. As part of the requirement to amend the Zoning Ordinance, "Save Miami Beach" petitioned the Miami Beach City Commission to submit the "Save Miami Beach" Charter Amendment to the electors. Qualifying as a petition under § 14-1(B),155 the petition was read by title or in full on at least two separate days and, at least ten days prior to adoption, it was noticed in a newspaper of general circulation.156 Following a public hearing at the second reading, the City Commission voted to adopt the petition.157 The City Commission

154. See MIAMI BEACH, FLA., ORDINANCE 89-2665 § 14-3(C) (1989) ("An affirmative vote of 5/7ths of all members of the City Commission shall be necessary in order to enact any amendment to this Ordinance."). Section 14 outlines the procedures for changes and amendments to the Zoning Ordinance. Section 14-1 outlines the petition for changes and amendments. With regard to this article, § 14-1 outlines the petition for changes and amendments. Section 14-3 outlines the action the City Commission should take with regard to petitions filed under § 14-1.
155. MIAMI BEACH, FLA., ORDINANCE 89-2665 § 14-1(B), Petition for changes and amendments (1989) ("A request to amend the Zoning Ordinance or Comprehensive Plan which does not rezone private parcels or real property or substantially change permitted Use categories may be submitted.").
156. See Miami Beach, City Attorney Letter to Commission Initiative Petition Mandating Public Vote for Increase in Waterfront Floor Area Ratio-Referendum of Zoning-Related Issues (Mar. 5, 1997) (Public hearing held and motion made directing the City Attorney to prepare a resolution placing the petition initiative on the ballot); see also MIAMI BEACH, FLA., ORDINANCE 89-2665 § 14-3(B), Action by City Commission (1989).
157. See Miami Beach, City Attorney Commission Memorandum No. 237-97 (April 2, 1997) (approving resolution calling for a special election to be held on June 3, 1997, for the purpose of submitting to the electorate of Miami Beach an Amendment to the Miami Beach City Charter requiring voter approval prior to an increase in the floor area ratio of property adjacent to the waterfront).
adopted a resolution forwarding the referendum petition to the Miami-Dade County Elections Department for completion of a certificate as to the sufficiency of the petition.\footnote{158. See Miami Beach, Fla., Res. 97-22346 (April 2, 1997); see also Miami Beach, Fla., Charter § 26 (1964) ("Initiative or referendum petitions shall be forwarded... for completion of a certificate as to the petition’s sufficiency."); Miami-Dade County, Fla., Home Rule Charter § 5.03 (1993) ("After adopting a resolution or after the certification of a petition of ten (10) percent of the qualified electors of the municipality," the proposed charter amendment "shall be submitted to the electors... at a special election.").} After a special election\footnote{159. A special election was necessary because no election was scheduled within sixty to 120 days after the drafting of the proposed charter amendment. See Miami-Dade County, Fla., Home Rule Charter § 5.03 (1993).} in which the voters overwhelmingly approved of the amendment, the City Commission followed procedure and had the election results certified.\footnote{160. See Miami Beach, Fla., Charter § 26 (1964); see also Miami Beach, Fla., Res. 97-22413 (June 4, 1997).}

By adhering to the protocol outlined in § 26 of the Miami Beach Charter, § 5.03 of the Miami-Dade County Code, chapter 166 of the Florida Statutes, and, most importantly, § 14-3 of the Miami Beach Zoning Ordinance, the "Save Miami Beach" group successfully amended the Zoning Ordinance to allow the citizens of Miami Beach the right to approve zoning changes through referendum.

B. Legislative or Not Legislative, That is the Question

The fate of the "Save Miami Beach" Charter Amendment ultimately rests on whether increasing the floor area ratio of waterfront-adjacent property is a legislative action or a quasi-judicial action. If a court deems this action to be within the scope of the legislative power, a Florida court will more than likely uphold the right of the people to reserve this power to themselves because a legislative action will be sustained as long as it is fairly debatable.\footnote{161. See Eastlake, 426 U.S. at 673; see also Nance v. Town of Indialantic, 419 So. 2d 1041 (Fla. 1982); City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941); Hirt v. Polk County Bd. of County Comm’rs, 578 So. 2d 415 (Fla. 2d DCA 1991).} If a court deems this action to be quasi-judicial, a Florida court will more than likely overrule or seriously scrutinize the right of the people to exercise the referendum power in this instance because quasi-judicial actions require the local governing body to "make findings of fact and record of its proceedings, sufficient for judicial review" to determine "the legal sufficiency of the findings of fact supporting the reasons given and the legal adequacy, under applicable law."\footnote{162. Board of County Comm’rs of Brevard County v. Snyder, 627 So. 2d 469, 471 (Fla. 1993). See generally DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957) (stating that rulings of a board acting in its quasi-judicial capacity will be upheld only if they are supported by substantial competent evidence).} The ultimate fate of the "Save Miami Beach" Charter Amendment rests on this determination because a referendum,
by its very nature, is an action taken without any findings being made or any reason being given for supporting the decision, and only a legislative body has the discretion to undertake an action without any findings or any reasons supporting the decision.\footnote{See Snyder v. Board of County Comm'rs, 595 So. 2d 65, 68 (Fla. 5th DCA 1991).}

Florida always has considered the enactment of original zoning ordinances a legislative function.\footnote{See Snyder, 627 So. 2d at 474; see also Euclid v. Ambler Co., 272 U.S. 365, 388 (1926); Gulf & E. Dev. Corp. v. City of Ft. Lauderdale, 354 So. 2d 57 (Fla. 1978); County of Pasco v. J. Dico, Inc., 343 So. 2d 83 (Fla. 2d DCA 1977).} Moreover, rezoning, whether it involved a specific individual property or the amendment of an official zoning map or comprehensive land use map, also acquired legislative classification by the courts.\footnote{See Snyder, 627 So. 2d at 474; see also Florida Land Co. v. City of Winter Springs, 427 So. 2d 170 (Fla. 1983) (holding that a rezoning application, which described an amendment to the city's official zoning map and comprehensive land use map, was legislative); Palm Beach County v. Tinnerman, 517 So. 2d 699, 700 (Fla. 4th DCA 1987) (holding that a board's action on a specific rezoning application of an individual property owner was legislative); City of Jacksonville Beach v. Grubbs, 461 So. 2d 160, 163 (Fla. 1st DCA 1984) (same).}

During the 1960s and 1970s, there was an increasing need for reforming local zoning decision making. The lack of cooperation between municipal, county, and state governments began to impact the physical, social, environmental, and fiscal development of the state. In response, Florida enacted legislation\footnote{See Fla. Stat. §§ 163.3161-163.3215, Local Government Comprehensive Planning and Land Development Regulation Act (1995).} requiring that counties and municipalities adopt a local plan that would include "principles, guidelines, and standards for the orderly and balanced future . . . development" of the local government's jurisdictional area.\footnote{FLA. STAT. §§ 163.3177(1) (1991).} No longer would decisions be made on an "ad hoc, sloppy and self-serving" basis.\footnote{Daniel R. Mandelker & A. Dan Tarlock, Shifting the Presumption of Constitutionality in Land-Use Law, 24 Urb. Law 1, 2 (1992).} Pursuant to § 166.3171, the future land use plan had to be based on adequate data and analysis concerning the local jurisdiction, and each development approved by the local government had to be consistent with the adopted local plan.\footnote{FLA. STAT. §§ 163.3177(6)(a) (1995).}

The enactment of § 166.3171 led some district courts to reconsider whether rezoning was still a purely legislative function.\footnote{See, e.g., Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959); Snyder v. Board of County Comm'rs, 595 So. 2d 65 (Fla. 5th DCA 1991); Palm Beach County v. Tinnerman, 517 So. 2d 699, 700 (Fla. 4th DCA 1987); City of Jacksonville Beach v. Grubbs, 461 So. 2d 160 (Fla. 1st DCA 1984).} By requiring that each governmental zoning decision be consistent with the goals, policies, and measurable objectives incorporated in the future land use...
map and including established standards to be utilized to control and distribute densities and intensities of development in an effort to promote balanced and orderly growth, it appeared that § 166.3171 conferred some modicum of due process protection to those seeking a local zoning decision.

With § 166.3171 beginning to impact district court decisions, the Florida Supreme Court, in 1993, granted certiorari to reconsider the legislative/quasi-judicial distinction with regard to rezoning actions. In Board of County Commissioners of Brevard County v. Snyder, the appellees, Jack and Gail Snyder, filed an application to rezone their property, which the board of county commissions denied without stating a reason. Brevard County argued that case law supports the proposition that rezoning decisions are legislative, and thus, it was within the discretion of the board to decide whether to make findings of fact or to provide a reason for denial. The Snyders argued that “the rationale for the early decisions that rezonings are legislative in nature had changed” by the enactment of § 166.3171. To ensure that local governments followed the principles enunciated in their comprehensive plans, the Snyders maintained that it was necessary for the courts to impose a stricter scrutiny than would be provided under the fairly debatable rule, which would require the Brevard County Board of Commissioners to support its zoning decision with findings.

While the supreme court still recognized enactments of original zoning ordinances as legislative, the court moved away from the position that if “the original act [was] wholly legislative, an amendment to it partook of the same character.” On the contrary, the court found

172. See Board of County Comm’rs of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993).
173. See id. The Snyders owned a one-half acre parcel of property zoned GU (general use). See id. at 471. Rather than constructing a single-family residence, the Snyders filed an application to rezone their property to RU-2-15, which allows the construction of fifteen units per acre. See id. After initially denying the application because the property was located in a one-hundred-year flood plain, which permitted a maximum of two units per acre reviewing the application, the Brevard County Planning and Zoning staff voted to approve the rezoning request because development of the property would raised to the point where the flood plain restriction would no longer be applicable. See id. Upon presentation to the board of county commissions, the commission denied the rezoning request without stating a reason. See id.
174. See Snyder, 627 So. 2d at 472 (quoting Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991)).
175. Snyder, 627 So. 2d at 472.
176. See id.
177. Fasano v. Board of County Comm’rs, 507 P.2d 23, 26 (Or. 1973) (stating that the court “would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded full presumption of validity and shielded from less than constitutional scrutiny by the separation of powers”); cf. City of Coral Gables v. Carmichael, 256 So. 2d 404, 408 (Fla. 1972) (holding that “the enactment of the original zoning ordinance was a
that “the character of the hearing” determines whether a board’s action is legislative or quasi-judicial. In applying this principle, the court found that comprehensive rezonings affecting a large portion of the public are legislative in nature. In contrast, rezoning actions will be categorized as quasi-judicial, non-legislative, if three elements are present. First, the rezoning action has an affect on a limited number of property owners. Second, a rezoning action is quasi-judicial if the outcome is contingent on a fact or facts presented at a hearing. Third, the rezoning action can be functionally viewed as the application of a policy rather than the setting of a policy.

Based on this new standard, the court found that the action taken on the Snyder’s application was quasi-judicial. First, the rezoning of the Snyder’s property affected a finite number of people. Second, the outcome of the Snyder’s rezoning application was contingent upon several facts, which came out during two public hearings. These facts included the recommendation of the county planning department, the opinions of local residents, and the overall impact of the development on the infrastructure. Third, the denial of the rezoning request involved applying the request to the standards set forth in the county’s comprehensive plan.

Because the action taken on the Snyder’s rezoning application was legislative function and we cannot reason that the amendment of it was of different character.”); Schauer v. City of Miami Beach, 112 So. 2d 838, 839 (Fla. 1959).

178. Snyder, 627 So. 2d at 474.
179. See id.
180. Snyder, 627 So. 2d at 474.
181. See Snyder, 627 So. 2d at 474 (quoting Snyder v. Board of County Comm’rs of Brevard County, 595 So. 2d 65, 78 (Fla. 5th DCA 1992)).
182. See id.
183. See id.
184. Snyder, 627 So. 2d at 474.
185. See Snyder, 595 So. 2d at 69-70.
186. See id.
187. See id.
quasi-judicial, the review of the action was subject to strict scrutiny.¹⁸⁸ In order to uphold a board’s action, the court required that there be a showing of “competent substantial evidence” supporting the board’s decision.¹⁸⁹ Because of the board’s lack of findings and failure to provide a reason for denying the petition, the court ordered that the county allow the Snyders to refile their petition without prejudice.¹⁹⁰

Following the Snyder decision, the appellate courts of Florida had a chance to ponder the new standard of how to determine whether a land use decision is legislative or quasi-judicial in nature.¹⁹¹ In Section 28 Partnership, Ltd. v. Martin County, the Fourth District Court of Appeal mulled over the third prong of the Snyder court analysis, which is examining whether the action complained of resulted in the formulation of a general rule of policy or in the application of a rule.¹⁹² In employing this factor, the court respected the Snyder court’s declaration that a court should consider whether the proposed zoning was consistent with the existing plan should be a significant factor.¹⁹³ Applying this rationale, the court found that Section 28’s application would not be consistent with the existing county comprehensive plan. In fact, Section 28’s request for an ACUSA designation would require the amendment of the county comprehensive plan. In fact, Section 28’s request for an ACUSA designation would require the amendment of the county comprehensive plan to provide for this zoning category.¹⁹⁴ Thus, because “an ACUSA would be a new classification of property which [was] not presently in the comprehensive plan,” the court found that the county’s decision was “a ‘formulation of a general rule of policy.’”¹⁹⁵ The county’s decision “would not be the application of policy because there [were] no provisions under the existing plan for the creation of ACUSAs.”¹⁹⁶

¹⁸⁸. *See* Snyder, 627 So. 2d at 474-75. The court was careful in emphasizing that review by strict scrutiny in land use decisions is different from the type of strict scrutiny review afforded in constitutional cases. The term strict scrutiny arises from the necessity of strict compliance with the comprehensive plan. *See* Lee County v. Sunbelt Equities, II, Ltd. Partnerships, 619 So. 2d 996 (Fla. 2d DCA 1993).
¹⁸⁹. *Snyder*, 627 So. 2d at 476.
¹⁹⁰. *Id.*
¹⁹¹. Because they are beyond the scope of this article, there will be no discussion regarding decisions of local government on building permits, site plans, and other development orders. The Florida Supreme Court has determined that these actions are quasi-judicial and therefore subject to certiorari review by the courts because no legislative discretion is involved in determining whether a property owner complied with the regulations set out in applicable local ordinance. *See* Park of Commerce Assocs. v. City of Delray Beach, 636 So. 2d 12, 15 (Fla. 1994).
¹⁹². 642 So. 2d 609, 612 (Fla. 4th DCA 1994).
¹⁹³. *Id.* at 612.
¹⁹⁴. *See id.* ACUSA stands for “Adjacent County Urban Service Area.”
¹⁹⁵. *Id.; see also* City Envtl. Servs. Landfill, Inc. v. Holmes County, 677 So. 2d 1327, 1328-29 (Fla. 1st DCA 1996) (finding that amending the Future Land Use Map to include the new category of “Landfill” would be a formulation of a general rule of policy).
¹⁹⁶. *Id.*
Section 28 maintained that the ACUSA request was a site specific, owner-initiated rezoning request, which was policy application, not policy making. The court rejected this argument because "the fact that [the development was] site specific, however, [was] not necessarily determinative of the issue." What was determinative was whether the comprehensive rezoning affected a large portion of the public. Considering the pristine nature of the land in the park and around the river, the size of the park, and the use of it by the public, the court held that the changes sought here involved matters of policy, subject to review under the fairly debatable standard.

In Board of County Commissioners of Sarasota County v. Karp, the Second District Court of Appeal had a chance to address whether the "character of the hearing" standard referred to the due process aspects of the hearing and in doing so, the court rejected this notion. The Snyder criteria did not refer to the due process aspects of the hearing to determine whether an action was legislative or quasi-judicial. Rather, a court was to apply the criteria to determine whether a county's action was a formulation of a general policy or the application of a previously determined policy. Applying this rationale, the court found that the development plan, affecting some 179 acres of land, including forty-eight separate parcels, was the formulation of a general policy rather than the application of a previously determined policy. Moreover, although the corridor plan directly affected a finite number of parcels, the number was fairly substantial.

In Kahana v. City of Tampa, the court quashed the decision of the trial court, which misconstrued the test in Snyder. In this case, an owner of a parcel zoned YC-1 filed a petition to rezone the parcel to allow for the sale of alcohol. Under the comprehensive zoning plan, such a rezoning did not change the YC-1 central commercial core status. Instead, it added a wetzone designation to the property's classification. The Second District Court of Appeal stated that the rezoning of

197. See id.
198. Id.
199. See id. (citing Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 466, 474 (Fla. 1993)).
200. Id. at 612.
201. 662 So. 2d 718 (Fla. 2d DCA 1995).
202. See id. at 720.
203. See id.
204. Id. The property owner, in this case, requested that his property be designated as commercial parkway rather than office. See id. at 718.
205. See id.
206. 683 So. 2d 618, 619-20 (Fla. 2d DCA 1996).
207. See id. at 619.
208. See id.
a single parcel was not legislative simply because the neighborhood in question was densely populated with residents who were up in arms about the proposed land use change.\textsuperscript{209} The test was whether the city council's decision on the petition formulated a "general rule of policy" and, thus, affected many people, or whether it merely applied an existing general rule of policy to a specific parcel.\textsuperscript{210} The record was unclear whether the city formulated any general rule of policy in denying the wetzoning petition.\textsuperscript{211} In remanding the action, the court did state that this action appeared to be similar in nature to the denial of a site plan, which is quasi-judicial.\textsuperscript{212}

In \textit{Hernando County v. Leisure Hills, Inc.},\textsuperscript{213} the Fifth District Court of Appeal had a chance to apply the \textit{Snyder} criteria. In this case, Leisure Hills proposed the development of a subdivision.\textsuperscript{214} After receiving conditional plat approval and spending nearly $500,000 to develop the subdivision in accordance with its approved plans and specifications, the Hernando County Commission rejected the plat.\textsuperscript{215} The court stated that although the record indicated the county commission was looking for a way to deny the plat based on rising community resistance, the overall action taken by the commission was legislative.\textsuperscript{216} The county commission "did not merely apply existing policy to a particular property; it changed its policy in order to disqualify the subject property and all other similar property from plat approval in the future."\textsuperscript{217} Because the commission did not apply an existing policy but in fact changed and created a new policy in order to disqualify the plat, the action by the commission qualified as a legislative action.

Finally, in \textit{Martin County v. Yusem},\textsuperscript{218} the supreme court had a chance to revisit the \textit{Snyder} decision. In \textit{Yusem}, the court concluded that "amendments to comprehensive land use plans are legislative decisions."\textsuperscript{219} Moreover, the court noted that this conclusion was "not affected by the fact that the amendments to comprehensive land use plans are being sought as part of a rezoning application in respect to one
The court found that it could dispense with Snyder's functional analysis in rezoning cases because amending a comprehensive plan resulted in policy reformulation. Furthermore, amendments to comprehensive plans are legislative decisions because an amendment of the comprehensive plan is evaluated on several levels of government to ensure consistency with the Local Government Comprehensive Planning and Land Development Regulation Act. On its face, it would appear that the "Save Miami Beach" Charter Amendment would not survive Snyder and its progeny. To survive judicial scrutiny, only legislative actions could be subject to the charter amendment's referendum requirement. However, Snyder and its progeny appear to classify fewer rezoning actions as legislative. The progeny of Snyder have, in the last five years, limited the legislative qualification to rezoning actions that affect the public at large or amend the comprehensive plan.

With regard to which rezoning actions affect the public at large, one could argue that the "Save Miami Beach" Charter Amendment applies only rezoning actions that affect the public, and not a finite number of people. One could argue that Miami Beach, as a whole, is similarly situated as the property discussed in the Section 28 case. In Section 28, the property in question was bordered on two sides by a state park and a preserve area. Considering the pristine nature of these lands, the size of the park, and the use of the park by the public, the court there found that any resulting rezoning involved matters of policy, subject to review under the fairly debatable standard. Here, the city is located on a seven-mile barrier island. Furthermore, not only is Miami Beach located in a designated 100 year floodplain, but a great deal of the city is classified as a high hazard area in the floodplain. Moreover, the tidal surge that occurs when hurricanes approach the South Florida coast is such a danger that all of Miami Beach is a mandatory evacuation zone. Thus, any development would have an

220. Id.
221. Id. at 1293-94.
222. See id. at 1294.
223. See Snyder, 627 So. 2d at 474; accord Martin County v. Yusem, 690 So. 2d 1288, 1292 (Fla. 1997); Battaglia Properties, Ltd. v. Florida Land & Water Adjudicatory Comm’n, 629 So. 2d 161, 164 (Fla. 5th DCA 1993); Lee County v. Sunbelt Equities, II, Ltd. Partnerships, 619 So. 2d 996, 1000 (Fla. 2d DCA 1993). The Yusem court equated amending the comprehensive plan with formulating, or more appropriately, reformulating general policy. 690 So. 2d at 1293.
224. See 642 So. 2d at 612.
225. Id.
impact on the city’s population because it would increase the densities and intensities of development on the island. Uncontrolled growth on the island would increase the amount of traffic and thus hamper the facilitation of a hurricane evacuation. As a pristine area, any increase in the floor area ratio of waterfront-adjacent property would decrease access to light, air, and views, decrease or restrain public access to the beaches, and tax the city’s delicate infrastructure and environment. Thus, any decision to increase the floor area ratio of a waterfront-adjacent property would amount to a legislative action subject to a referendum.228

With regard to which rezoning actions affect the public at large, it appears that the Florida Legislature has gotten involved and may have ultimately preempted the “Save Miami Beach” Charter Amendment. While the Snyder progeny detail a growing battle between the district courts over whether size matters, the Legislature has located where the line will be drawn. The Legislature determined that the referendum or initiative process is prohibited “in regard to any development order or in regard to any local comprehensive plan amendment or map amendment that affects five or fewer parcels of land.”229

The question remains as to whether the Legislature has the right to make this determination. Is this law a violation of due process or equal protection? Is this law a violation of separation of powers? Is this law consistent with the United States Supreme Court’s holding in the Eastlake case that the people may reserve the power to use the referendum process230 and with the Florida Supreme Court’s holding in the Florida Land Co. case that the referendum power was reserved by the people in the state constitution and “can be exercised wherever the people through their legislative bodies decide that it should be used.”231 One could argue that the Legislature is free to determine when the referendum process can be employed because the Florida Constitution provides that “referendum shall be held as provided by law.”232 Because the courts repeatedly have concluded that zoning is subject matter within a legislature’s powers and because zoning laws will be valid as long as there is a rational basis,233 it would appear that the Florida Legislature may withhold the referendum process under § 163.3167(12) in the interest of the public safety, health, and welfare.

With regard to qualifying as a legislative action because the rezoning action seeks to amend the comprehensive plan, the “Save Miami Beach” Charter Amendment faces the problem of § 163.3167(12) and the problem that the Miami Beach Comprehensive Plan contains nearly every imaginable zoning classification.\textsuperscript{234} Even if a court should strike down § 163.3167, a party seeking to rezone their waterfront-adjacent property would likely find some envisioned land use classification without the need to request an amendment of the comprehensive plan. Thus, rather than formulating a general rule with regard to some new zoning classification, a court would find that the denial of a rezoning application would be quasi-judicial and reviewable by certiorari. This is because the referendum vote was an application of a general rule to a specific individual or interest.

V. Conclusion

Ultimately, the Supreme Court’s decision to let the states decide whether a land use action is legislative or quasi-judicial could signify the demise of the referendum procedure. Although the Supreme Court has maintained that the referendum procedure is “a basic instrument of democratic government,” state court decisions finding rezoning actions to be quasi-judicial could undermine the long-term life of the referendum.\textsuperscript{235} Because a referendum, by its very nature, is an action taken without any findings of fact being made or any reasons given for the result, a referendum always would fail to meet the requirement of competent substantial evidence necessary to meet the strict scrutiny standard of certiorari review. The “Save Miami Beach” Charter Amendment could become the first of many failed attempts by concerned citizens to regain control over their own growth and prosperity by the referendum process.

At one time, the Supreme Court believed it had the authority to declare its opinion on the standard of review to be applied to zoning decisions.\textsuperscript{236} Unless the Supreme Court returns to the attitude established in the \textit{Euclid} case, that the Court does have the authority to declare its opinion on the standard of review to be applied to zoning decisions, the most democratic of processes, the referendum, could be in danger of becoming extinct.

\textbf{Brian L. Lerner}


\textsuperscript{235} Eastlake, 426 U.S. at 679.

\textsuperscript{236} See \textit{Euclid} v. Ambler Co., 272 U.S. 365 (1926) (holding that legislative decisions were subject to limited review and may be attacked upon constitutional grounds for an arbitrary abuse of authority).