1977

Amoco Oil Co. v. Environmental Protection Agency

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RECENT DEVELOPMENTS

AMOCO OIL CO. v. ENVIRONMENTAL PROTECTION AGENCY

VICARIOUS LIABILITY—Clean Air Amendments of 1970—Contamination of unleaded gasoline—Branded oil refiners may not be held vicariously liable for the negligent contamination of unleaded gasoline by their lessee-retailers. 543 F.2d 270 (D.C. Cir. 1976).

In a review of administrative regulations promulgated by the Environmental Protection Agency,1 the Court of Appeals for the District of Columbia Circuit held, in a 2-1 decision, that the EPA could not impose vicarious liability on branded oil refiners2 when contaminated unleaded gasoline was offered for sale by their lessee-retailers.3 In so holding, the court effectively emasculated a regulation designed to implement the policies of section 211(c) of the Clean Air Amendments of 1970.4 The majority based its decision on the belief that the regulations went “well beyond the bounds of traditional vicarious liability.”5 Thus, the decision raises the question of the appropriateness of using common law tests of vicarious liability in statutory situations which bear little resemblance to problems existing at common law, and where to do so tends to defeat the purposes of important social legislation.

The Background of the Case

When Congress enacted the Clean Air Amendments of 1970,6 it plainly intended to combat more aggressively the problem of air pollution, notwithstanding the high cost to industry:

A review of achievements to date . . . make[s] abundantly clear that the strategies which we have pursued in the war

1. 40 C.F.R. § 80.23(b)(2) (1976).
2. The term “branded refiner” refers to those refiners who distribute their brand name gasoline through retail outlets bearing their corporate or brand name.
against air pollution have been inadequate in several important respects, and the methods employed in implementing those strategies often have been slow and less effective than they might have been.\textsuperscript{7}

Section 211(c) gave to the Environmental Protection Administrator the authority, for the first time, to regulate or prohibit the sale "of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine"\textsuperscript{8} which would interfere with the operation of emission control devices developed to reduce air pollution caused by the automobile. The Act imposed a civil penalty of $10,000 per day for violations of any regulations issued pursuant to the statute.\textsuperscript{9} This extensive authority was granted because of Congressional recognition that

[a]utomotive pollution constitutes in excess of 60 percent of our national air pollution problem and such pollution is particularly dangerous in the highly urbanized areas of our country. Therefore, increased attention must be paid to that source of pollution by insisting on the kinds of motor vehicles and fuels which will reduce pollution to minimal levels.\textsuperscript{10}

Pursuant to this authority, the EPA issued regulations in 1973\textsuperscript{11} relating to the sale of unleaded gasoline suitable for use in vehicles equipped with emission control devices, as the functioning of these devices is impaired by the use of leaded gasoline.\textsuperscript{12} Since leaded and unleaded gasoline are shipped in the same distribution system, however, the Agency was confronted at the outset with the problem of assuring that uncontaminated unleaded gasoline reached the pumps.\textsuperscript{13} In order to effectuate the statutory purpose by insuring that the proper standards were met, the liability section of the regulations imposed strict liability on the oil

\textsuperscript{7} H.R. REP. NO. 1146, 91st Cong., 2d Sess. 1, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 5356. It has been noted that the 1970 Amendments represent a legislative policy which for the first time "forces technology to catch up with the newly promulgated standards." Comment, 12 B.C. INDUS. & COM. L. REV., supra note 6, at 581.


\textsuperscript{11} 40 C.F.R. Part 80 (1973).


refiners whenever contaminated unleaded gasoline was offered for sale at branded retail outlets, regardless of where in the distribution system the violation actually occurred. The EPA justified imposing such liability on the ground that “the contamination of unleaded gasoline associated with transportation of the product can best be prevented by the major refiners who have control or the ability to control their distribution networks.”

The first challenge to the liability provisions came in 1974 when sixteen branded oil refiners submitted a petition for review to the Court of Appeals for the District of Columbia Circuit. In an opinion by Judge Wright, the court struck down the liability provisions, noting that while the refiners “conceded that a presumption of liability would be reasonable,” they “must have the opportunity to demonstrate freedom from fault” in certain areas. The court observed that the refiners did not dispute the EPA’s determination that they had the “ability to control” their distribution networks through lease and contract arrangements, which included provisions for extensive quality control procedures and the imposition of penalties when contamination occurred. The refiners argued, however, that they should not be held liable for contamination caused by “an unpreventable breach of contract” by distributors, jobbers or others in the distribution network whose facilities were neither leased nor owned by the refiner. The court indicated its acceptance of this argument, holding that “[a] refiner which can show that its employees, agents, or lessees did not cause the contamination at issue, and that the contamination could not have been prevented by a reasonable program of contractual oversight, may not be held liable . . . .”

This decision, which permitted imposing vicarious liability on the refiners for contamination caused by their lessees, clearly

14. 40 C.F.R. § 80.23(a)(1) (1973). The term “branded retail outlets” refers to those service stations which purchase gasoline exclusively from a branded refiner and sell it under the refiner’s brand name.
17. Id. at 748.
18. Id. at 749.
19. Id. at 748.
20. Id.
21. Id.
22. Id. at 749 (emphasis added).
23. Id. The EPA so interpreted the decision: “It is clear from the Amoco decision that branded refiners may be deemed in violation for the negligent acts of their lessees.”
indicated that the court assumed a difference in the degree of control which the branded refiners could or should exercise over their lessee-retailers as compared with that which they could exercise over others in the distribution network whose facilities were not refiner-owned or leased. Furthermore, it seemed to have agreed with the EPA that refiner liability for the former "[extends] beyond contractual oversight."4 In light of this decision, the EPA revised the liability section and promulgated new regulations relating to refiner liability for contamination of unleaded gasoline occurring at the retail level.25 While the new regulations permitted the refiners numerous affirmative defenses,26 they imposed liability when contaminated unleaded gasoline was offered for sale by directly-supplied retail dealers.27 This liability could be avoided only if the "assets or facilities [of such dealers] are not substantially owned, leased, or controlled by the refiner."28 In short, under the new regulations the branded refiners would always be vicariously liable for the negligent contamination of unleaded gasoline by their lessee-retailers.29

The majority in Amoco Oil, refusing to permit this result,29 overlooked what was really at issue—the fact that the statutory purpose, i.e., the reduction of automotive pollution through the prohibition of the sale of offending fuels, could be achieved only by assuring the purity of unleaded gasoline at the retail level. The EPA argued that this result could be attained only through extensive quality control and monitoring programs, and that the imposition of liability on branded refiners for violations occurring at their branded retail outlets would encourage all refiners to adopt


25. 40 C.F.R. § 80.23 (1976).

26. Liability could be avoided if the violation was caused by a distributor, id. § 80.23(b)(2)(v), (vi); by an indirectly supplied retailer or by a reseller, id. § 80.23(b)(2)(iii); by a directly supplied independent retailer, id. § 80.23(b)(2)(iv); or if the contamination was caused by sabotage or by intentional introduction of leaded gasoline into an automobile requiring unleaded gasoline, id. § 80.23(b)(2)(ii), (e)(i).


30. Amoco Oil Co. v. EPA, 543 F.2d 270, 279 (D.C. Cir. 1976). This Note does not consider the issue of collateral estoppel which was argued by the EPA. Id., Brief for Respondent at 17-20. The issue was also presented by Judge Wright in dissent as a basis for disposing of the case. Id. at 279-80 (Wright, J., dissenting).
such necessarily costly programs. The EPA's determination that the "refiner's responsibility extends beyond contractual oversight when the refiner owns or leases the branded station" was grounded in the notion of "control" as it relates to the realities of the gasoline distribution system. While the nature of this marketing enterprise necessarily requires that the lessee-retailers exercise a relatively high degree of independence as to their customary activities, the refiners' ability to prevent the contamination of unleaded gasoline arises from the structure of the distribution system itself. In this system the branded product is transported from the refinery to retail outlets owned or leased by the refiner, placed in refiner-owned equipment and sold under the branded trademark. The use of quality control techniques throughout the entire distribution system would insure a technical competence in handling both the product and the refiner-owned and supplied equipment, thus reducing the number of contamination incidents at the service station level. The EPA emphasized that at that level

basic decisions respecting the conditions of sale of unleaded gasoline are being made by the owner or lessor of the station and not by the operator. . . . [T]he branded refiners are making the decisions whether to adopt a three-grade marketing system, installing a third pump and underground tank or whether to retain a two-grade marketing system . . . . Where a branded refiner owns or leases a service station, the refiner makes the investment in new equipment.

Since the lessee-retailer is bound by contract to sell only the brand of his lessor-refiner, he is extremely dependent upon his refiner's quality control procedures both as to product and equipment. Thus, regarding the specific problem of contamination, there exists an arguably sufficient degree of refiner control over

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31. Statement by the EPA, 39 Fed. Reg. 13174, 13176-77 (1974). Such a program, which involves periodic testing at all points in the distribution system, had already been initiated by Amoco. Id. at 13176.

32. Statement by the EPA, 39 Fed. Reg. 42356, 42358 (1974). It should be noted that the EPA was bound by the 1974 decision to exclude the class of independent retailers (owner-operators) from the vicarious liability provisions. See Amoco Oil Co. v. EPA, 501 F.2d 722, 748-49 (D.C. Cir. 1974). Exclusion of this class, however, would not seriously have affected the new regulations since owner-operated stations comprise a very small percentage of the total branded outlets. See note 29 supra.


35. Id. at 13176.
lessee-retailers to justify imposing vicarious liability on the refiners for the contamination of unleaded gasoline caused by those retailers.

The Majority Opinion—The Application of the Traditional Common Law Test of Vicarious Liability

In striking down the liability provision as “arbitrary,” the majority applied the common law “control” test to determine whether the relationship between the refiners and their lessee-retailers justified the imposition of vicarious liability. The familiar doctrine of vicarious liability, or respondent superior, permits the imputation of another's negligence to one who has not himself been negligent. The relationship most often associated with the doctrine is that of master and servant (or, in more modern terminology, employer-employee), and the test of this relationship is whether the nonnegligent party has control over, or the right to control, the acts of the negligent party. This control, whether or not it is exercised, must be related to the manner and means of performing the details of the work involved in the relationship. If, however, the control, or the right thereto, relates only to the results ordered and not to the manner of performance, the relationship is deemed to be one of employer-independent contractor, and liability may not be imputed to the employer.

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36. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970), authorizes the reviewing court to “set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” See note 44 infra.


38. 1 Restatement (Second) of Agency § 220(1) (1958); F. Harper & F. James, supra note 37, at § 26.3; W. Prosser, supra note 37, at § 70; Stevens, The Test of the Employment Relation, 38 Mich. L. Rev. 188 (1939). The right to control has also been used as one of many justifications for the doctrine of vicarious liability. F. Harper & F. James, supra at 1366; W. Prosser, supra at 459. However, since the issue in the present case does not involve the validity of the doctrine, but concerns only the test of the relationship which may give rise to the imposition of liability, the right to control will be considered throughout in this latter aspect.

The doctrine of vicarious liability has been treated thoroughly in the literature. See, e.g., T. Baty, Vicarious Liability (1916); Douglas, Vicarious Liability and Administration of Risk, 38 Yale L.J. 584 (1929); Klemme, The Enterprise Liability Theory of Torts, 47 U. Colo. L. Rev. 153 (1976); Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105 (1916).

39. See 1 Restatement (Second) of Agency § 220(1) (1958). It has been noted that in industry today actual control is largely fictitious. Steffen, Independent Contractor and the Good Life, 2 U. Chi. L. Rev. 501, 507 (1935).

40. 2 Restatement (Second) of Torts § 409, Comment b (1965); F. Harper & F. James, supra note 37, at § 26.11; W. Prosser, supra note 37, at § 71; Harper, The Basis
On the basis of these general common law rules, the Amoco Oil majority found that the relationship between the branded refiners and their lessee-retailers did not, in and of itself, present sufficient evidence of control by the refiners to impose vicarious liability on them, and that in this respect the regulations "alter the settled law between lessor and lessee as to their respective responsibilities in tort so as to make the refiner liable for independent lessees as though they were mere subservient employees." Finding no authority in section 211(c) of the Clean Air Act of 1970 for such an exercise of discretion, the majority insisted upon a case-by-case examination of the indicia of control whenever the refiner would be able to raise the defense of lessee-retailer negligence for the contamination of unleaded gasoline, and required that there be shown "a demonstrated link between a lease agreement and a degree of actual control" before vicarious liability could be imposed on the refiner. While the court reserved the question of the extent of control which would be sufficient to impose vicarious liability on the refiners, it is clear that the court applied the traditional common law "control" test of the employment relationship.

Frequently, third-party damage suits are brought against branded refiners for personal injuries sustained through the neglig-
gence of their lessee-retailers. The law relating to the respective legal responsibilities in tort of refiner and retailer is, however, "settled," as the majority suggests, only in the sense that the courts are agreed that in deciding these cases all of the facts will be scrutinized in order to determine the relationship between the parties. The generally accepted test for determining refiner liability is "whether the oil company has retained the right to control the details of the day-to-day operation of the service station; control or influence over results alone being viewed as insufficient." The courts are also in agreement that the terms of the lease will not be dispositive if the evidence in fact indicates control by the oil company. The courts are not in agreement, however, as to the relative weight to be accorded the pertinent factors. And, while the majority of the decisions have found that the lessee-retailer is an independent contractor, thus relieving the oil company of liability, the courts have failed to adopt any general principle other than the "control" test for deciding these cases. At least one court has acknowledged:

The legal relationships arising from the distribution systems of major oil-producing companies are in certain respects unique. . . . "This distribution system has grown up primarily as the result of economic factors and with little relationship to traditional legal concepts in the field of master and servant, so that it is perhaps not surprising that attempts by the court to discuss the relationship in the standard terms have led to some difficulties and confusion."  

48. See cases cited at notes 51-53 infra.
50. See cases cited at notes 51-53 infra.
This confusion in the cases has been criticized not only for the resultant lack of predictability, but also because the independent contractor doctrine is falling into disfavor as an anachronism in the modern economic sphere. Commentators note that this is especially true with respect to the "unique" character of the gasoline distribution system. Indeed, a recent decision by a Maryland court, which permitted evidence of a refiner-retailer agency relationship to go to the jury in a personal injury case, purports to find an emerging trend toward rejecting the independent contractor immunity in refiner-retailer tort cases in favor of using the agency principle of apparent authority:

A.L.R.2d 1282, 1284 (1962)).

55. Harper, 10 IND. L.J., supra note 40, at 499-500; Morris, supra note 40. There are 14 exceptions to the general rule that an employer is not vicariously liable for the torts of an independent contractor. 2 RESTATEMENT (SECOND) OF TORTS §§ 416-429 (1965). These exceptions "have so far eroded the 'general rule,' that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." Id. § 409, Comment b. These exceptions fall into two general categories, the so-called nondelegable duty doctrine and the doctrine of inherently dangerous work, and they have been developed for policy reasons which deny to the employer the independent contractor immunity in cases in which it is felt that the employer has a responsibility which he alone has the duty to discharge properly. "There has been a rather marked tendency, especially in recent years, to extend the scope of many of the rules [of vicarious liability for the torts of independent contractors]. The law is still obviously undergoing a process of development toward limits which are still uncertain." Id., Introductory note at 395. Prosser observes that "[i]t is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another." W. PROSSER, supra note 37, at 471.

While it would seem desirable to bring the gasoline contamination problem within the scope of the nondelegable duty doctrine, this result is foreclosed by the 1974 decision in Amoco Oil Co. v. EPA, 501 F.2d 722, 748-49 (D.C. Cir. 1974). There, the court refused to impose liability on the refiners for contamination caused by several classes of contractors within the distribution system. See text accompanying notes 16-22 supra. In short, the court did not respond to the EPA's argument that "there is a positive duty on the major brand refiner to prevent any violation of the unleaded gasoline standard at his retail outlets. . . ." Statement by the EPA, 38 Fed. Reg. 1254, 1255 (1973).


The authors of a leading treatise note that:

Questions arise mainly where an enterprise makes regular use of individuals (e.g., salesmen or newsboys) or units that would ordinarily be regarded as subordinate to it (such as the filling stations of the great oil companies), in order to get something done which would ordinarily be regarded as a part of its enterprise. . . . [I]t is here that immunity for the conduct of independent contractors tends most to thwart allocation of losses to responsible enterprises, and therefore that the defense of independent contractor meets mounting disfavor.

F. HARPER & F. JAMES, supra note 37, § 26.11, at 1402-03.
We well recognize the significance of this result. We are aware also that traditionally oil companies have been protected from liability by reciprocal leases and simultaneous dealer agreements which have provided a moat between the company and its "independent" operator which could not be bridged by actual agency, express or implied. The use of apparent agency to ford that moat is at best an "emerging doctrine," . . . and is not always accepted by courts when it has been offered.57

Thus, the Amoco Oil majority not only imports into the regulatory scheme the somewhat discredited independent contractor doctrine, but also creates an administrative nightmare by requiring the case-by-case scrutiny of the refiner-lessee relationship which occurs in personal injury cases. This kind of examination, which can range from a determination of the refiner's control over the cleanliness of the rest rooms to its control over the financial operations of the station, is unsuited to the needs of efficient regulatory procedure. By importing this unsettled law into the administrative scheme, the majority indicated an insensitivity to the statutory purpose as well as to the possible scope of the vicarious liability rules.

The Dissent—The Statutory Purpose Must be Served

In his dissent, Judge Wright vigorously questioned the majority's reliance on the traditional common law test of vicarious liability, noting that the test is not "cast in concrete," 58 and that liability does not have to depend in every case "upon the familiar dichotomy between employee and independent contractor." 59 Judge Wright made a critical distinction—indeed, it is the crux of the issue—when he observed:

[The common law test] may well be a serviceable distinction when applied to exonerate the refiner of responsibility for most negligent torts committed by a lessee-retailer or the lessee's employees. But it simply does not apply here. EPA is not trying to hold refiners liable for every personal injury caused by lessees


59. Id.
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or their employees. Its regulations are narrowly focused on one specific evil, and in this limited area, because of the realities of the gasoline distribution system . . . vicarious liability of refiner-lessees is a sensible and permissible control strategy. 60

Judge Wright clarified his dissent, which rested on policy grounds, by referring to the violation at issue as a "new tort," 61 one which was a product of the clash between technology and the public health and welfare. 62 While admitting that the common law vicarious liability rules were "relevant," 63 he refused to consider them "dispositive," 64 and saw no reason why a more realistic standard of vicarious liability should not be used to define the legal responsibilities of refiner and lessee-retailer for this specific statutory purpose. 65 Noting that the issue of liability in the consumer products field has undergone pronounced changes due to the willingness of the courts to respond to the changing economic and technological environment, he urged that similar considerations apply in the present case. 66 Freed from the restrictions of the rules of common law vicarious liability in tort, the EPA would be permitted to fulfill the statutory purpose by establishing standards of liability appropriate to this particular offense:

Perhaps the key to the majority's misapprehension of the real issues in this case lies in its failure to appreciate this distinction between applying given standards and establishing new ones. It repeatedly acts as though Congress had directed EPA to apply—lock, stock, and barrel—the traditional standards of vicarious liability. . . .

One may scan the Clean Air Act in vain for any hint that Congress meant EPA to take such a crabbed view of its role. 67

Judge Wright believed that the control exercised by the branded refiners over their distribution networks in relation to the lessee-stations was sufficient to fall within the relevant vicari-

60. Id.
61. Id. Judge Wright noted that the tort label might not be appropriate because the common law vicarious liability rules would apply if a consumer sued for damage to his emission control device caused by contaminated unleaded gasoline. Id. n.8.
62. Id. at 281.
63. Id. n.7.
64. Id.
65. Id. at 282.
66. Id.
67. Id. at 284 n.12.
ous liability rules for purposes of this regulatory measure.\textsuperscript{68} He reasoned that it was not necessary to hold lessee-retailers "fully independent for all purposes"\textsuperscript{69} merely because they are often found to be independent for purposes of allocating liability for personal injuries.\textsuperscript{70}

\textit{The Independent Contractor and the Statutory Purpose
Doctrine—Retreat from the Common Law}

With the advent of the social legislation of the 1930's, the employment relationship became the focus of judicial concern in an area other than vicarious liability. It became necessary to provide a definitional standard whereby working people would or would not be included within the protection of legislation such as social security, workmen's compensation, fair labor standards and labor relations. Although this legislation differs in substance and scope from the regulatory scheme presently under consideration, the ways in which courts and commentators have dealt with the barrier to statutory fulfillment presented by the common law "control" test are apposite. The cases which will be considered provide, by analogy, an insight into the potential scope of the common law vicarious liability rules as they might be applied to this specific public interest statute as implemented by the EPA regulations.

In a recent case arising under the Fair Labor Standards Act,\textsuperscript{71} the Court of Appeals for the Fifth Circuit held that "[t]he terms 'independent contractor,' 'employee,' and 'employer' are not to be construed in their common law senses when used in federal social welfare legislation."\textsuperscript{72} This doctrine first appeared in a series of Supreme Court cases decided in the 1940's in which the Court announced the "economic reality" test as being a more realistic criterion designed to effectuate the statutory purpose of employee protection.\textsuperscript{73} The Court recognized the fact that while the "control" test was relevant to a determination of the employ-

\begin{itemize}
  \item \textsuperscript{68} \textit{Id. at 282.}
  \item \textsuperscript{69} \textit{Id. at 284.} The majority considered the lessee-retailers to be independent. See text at note 42 \textit{supra.}
  \item \textsuperscript{70} \textit{Id. at 283-84.}
  \item \textsuperscript{71} 29 U.S.C. §§ 201-219 (1970).
  \item \textsuperscript{72} Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299 (5th Cir. 1975).
\end{itemize}
ment relationship, it would, standing alone, seriously constrict the interpretation of that relationship and thus defeat the legislative purposes sought to be achieved by excluding those who should be covered. The new criterion was variously stated, but the essence of it was framed by the Court in *NLRB v. Hearst Publications, Inc.*:

Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute’s purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.\(^7\)

The Court observed that the common law “control” test for determining vicarious liability in tort “has been by no means exclusively controlling in the solution of other problems.”\(^7\) The effect of the new doctrine was to include within the coverage of the statutes people who, in traditional common law terms, were not employees but who fell rather into some intermediate class having characteristics of both employees and independent contractors.\(^7\) This category included those usually referred to as borderline cases.\(^7\)

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\(^7\) 322 U.S. 111, 127 (1944). In subsequent cases the Court restated the proposition, stressing that “in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. . . . *It is the total situation that controls.*” Bartels v. Birmingham, 332 U.S. 126, 130 (1947) (emphasis added). See United States v. Silk, 331 U.S. 704, 719 (1947).


\(^7\) One state court noted that under its Unemployment Compensation Law “[t]he most independent of independent contractors therefore are not included in the class of individuals entitled to benefits, but a class of individuals, who under [the] strict common law concept of independent contractorship were other than employees, are entitled.” Globe Grain & Milling Co. v. Industrial Comm’n, 98 Utah 36, 40, 91 P.2d 512, 514 (1939).

\(^7\) Compare Bartels v. Birmingham, 332 U.S. 126 (1947) (bandleaders) and United States v. Silk, 331 U.S. 704 (1947) (unloaders), with United States v. Silk, 331 U.S. 704 (1947) (driver-owner truckers). The Court consolidated *Silk* with *Harrison v. Greyvan Lines, Inc.* The unloaders in *Silk* were found to be employees, while the truckers in both *Silk* and *Greyvan Lines* were found to be independent contractors. Justices Black, Douglas and Murphy dissented as to the truckers, on the grounds that the new doctrine required a finding that these workers were also employees. United States v. Silk, 331 U.S. at 719. Justice Rutledge would have remanded the cases as to the truckers for reconsideration by the lower courts in light of the new doctrine, observing that “the District Courts and the Circuit Courts of Appeals determined the cases largely if not indeed exclusively by applying the so-called ‘common law control’ test as the criterion. This was clearly wrong, in view of the Court’s present ruling.” *Id.* at 721.
Congress subsequently undermined the Court's decisions by amending the legislation in the area of social security and labor relations to require that the employment relationship be determined by reference to the common law rules, while leaving unchanged the legislation in the fair labor standards area.\textsuperscript{78} There is to this day, however, considerable disagreement over the effect of the legislative amendments and, for example, at least four circuits choose to follow some variation of the reasoning of \textit{NLRB v. Hearst Publications, Inc.},\textsuperscript{79} \textit{United States v. Silk},\textsuperscript{80} and \textit{Bartels v. Birmingham},\textsuperscript{81} deciding close cases arising under the social security laws with reference to the broader criteria announced therein.\textsuperscript{82} Even as to the "control" test itself, as one of the deter-

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78. The pertinent sections now read:
"Employee" includes any individual employed by an employer. . .
[T]he term "employee" means . . . any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. . .
[T]he term "employee" has the meaning assigned to such term by section 3121(d). . .
The term "employee" shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor. . .

Under the Federal Insurance Contributions Act, certain borderline classes of workers, who would have been considered independent contractors at common law, are now specifically included within the coverage of the Act. 26 U.S.C. § 3121(d)(3) (1970). These are agent and commission drivers, salesmen, and home workers. This specific inclusion applies to all but full-time life insurance salesmen and home workers under the Federal Unemployment Tax Act. 26 U.S.C. § 3306(i) (1970).

The amendments to the social security laws were a result of congressional concern that the Supreme Court's guidelines would prove to be too vague and would lodge too much discretion with the administrative agencies in determining coverage under the social security laws. United States v. W.M. Webb, Inc.,\textsuperscript{83} 397 U.S. 179, 187 (1970). This concern is inapposite to the issue presented to the court in the present case. For a discussion of the legislative amendments in the social security area, reaching the conclusion that they did not restrict the scope of the Supreme Court's decisions, see Ringling Bros.—Barnum & Bailey Combined Shows, Inc. v. Higgins, 189 F.2d 865, 867-69 (2d Cir. 1951).
79. 322 U.S. 111 (1944).
80. 331 U.S. 704 (1947).
81. 332 U.S. 126 (1947).
82. Coddens v. Weinberger, 505 F.2d 765 (10th Cir. 1974); Texas Carbonate Co. v. Phinney, 307 F.2d 289 (5th Cir. 1963); Ben v. United States, 139 F. Supp. 883 (N.D.N.Y. 1956), \textit{aff'd per curiam}, 241 F.2d 127 (2d Cir. 1957); Westover v. Stockholders Publishing Co., 237 F.2d 948 (9th Cir. 1956); Ringling Bros.—Barnum & Bailey Combined Shows, Inc. v. Higgins, 189 F.2d 865 (2d Cir. 1951). \textit{Contra}, Air Terminal Cab, Inc. v. United States, 478 F.2d 575 (8th Cir. 1973) (retaining the "control" test).
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minatives of the employment relationship, there is an indication of a continuing relaxation of the rigidity of the common law standard. The 1970 decision of the Supreme Court in United States v. W.M. Webb, Inc., has been interpreted as holding that the standard for the control factor should be the "degree of control that is commonly exercised in that business." There is no question that the "economic reality" test is accepted by the courts in determining the employment relationship under the Fair Labor Standards Act.

The majority in Amoco Oil Co. v. EPA struck down the vicarious liability provisions because it believed that the relationship between the branded refiners and their lessee-retailers did not satisfy the common law "control" test. It is clear, however, that this threshold standard has been judicially eroded, and has been found to be "by no means exclusively controlling" in dealing with problems other than vicarious liability in tort. The courts have used two separate but related approaches: They have redefined the test and have examined closely the purpose for

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85. See, e.g., Mednick v. Albert Enterprises, Inc., 508 F.2d 297 (5th Cir. 1975); Hodgson v. Taylor, 439 F.2d 288 (8th Cir. 1971); Shultz v. Mistletoe Express Serv., Inc., 434 F.2d 1287 (10th Cir. 1970).
86. 543 F.2d 270 (D.C. Cir. 1976).
87. Id. at 276.
which the test is to be used. The court in *Amoco Oil* could have
drawn on this body of precedent to reach a different result. The
complexities of the modern economic and technological world
demand at least this much.

The continued vitality of the doctrine of *Hearst* and *Silk* is
also demonstrated by a growing dissatisfaction with the common
law test of the employment relationship in the area of workmen’s
compensation, an area which traditionally has used the “control”
test to determine coverage.89 Once again there has been a recog-
nized need to use more realistic criteria because “the test of the
employment status should be relevant to the purpose for which
status is being tested.”90 The “relative nature of the work” test,
which is essentially a variant of the “economic reality” test, has
been suggested as a viable alternative to the “control” standard
in the workmen’s compensation field.91 At present, it appears that
only the New Jersey courts have openly adopted the concept,92
but at least one authority believes that the trend is clearly dis-
cernible.93 Reasoning that any test must be relevant to the scope
of the legislation involved, and urging adoption of the suggested
standard, Judge Conford’s dissenting opinion in *Marcus v. East-
ern Agricultural Association, Inc.*, which was adopted by the Su-
preme Court of New Jersey on review, observed:

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89. See, e.g., Bieluczyk v. Crown Petroleum Corp., 134 Conn. 461, 58 A.2d 380 (1948);
    Mid-Continent Petroleum Corp. v. Vicars, 221 Ind. 387, 47 N.E.2d 972 (1943);
    Dawson v. Clark Oil and Refining Corp., 410 S.W. 2d 353 (Mo. App. 1966). But see
    Bowser v. State Indus. Accident Comm’n, 182 Ore. 42, 185 P.2d 891 (1947). While the court in
    Bowser used the “control” test, it cited *Silk* for the proposition that social legislation is to be liberally
    construed to effect the statutory purpose and observed: “That different results or conclusions
    have been arrived at from the same state of facts is only natural. It depends, to some
    degree, upon the purpose sought to be accomplished by the act being administered.”
    Bowser v. State Indus. Accident Comm’n, id. at 45, 185 P.2d at 892. A leading authority
    on workmen’s compensation refers to the doctrine of *Hearst* and *Silk* as the “newer way”
of arriving at a determination of the employment relationship. 1A A. LARSON, WORKMEN’S
    COMPENSATION LAW § 43.41 (1973).

90. 1A A. LARSON, supra note 89, at § 45.32(a).

91. Id. at §§ 43.50, 44.20.

92. Rossnagle v. Capra, 127 N.J. Super. 507, 318 A.2d 25 (1973), aff’d per curiam, 64
    The reversal in *Marcus* was on the grounds of Judge Conford’s dissent in the lower court.

93. Larson has observed in general that “[t]here is therefore beginning to be evinced
    in the decisions a sort of unexpressed conviction that, if the proper scope of workmen’s
    compensation and other remedial enactments is not to be defeated, a different criterion
    based on the realistic nature of the work must be given more weight.” 1 A A. LARSON, supra
    note 89, at § 45.10. See also id. § 43.54.
Patently, where the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent with an independent contractor status might be equally consistent with an employment relationship. In such a situation the factor of control becomes inconclusive, and reorientation toward a correct legal conclusion must be sought by resort to more realistically significant criteria.44

The cases in the field of social legislation clearly indicate that the statutory purpose doctrine compels judicial flexibility. Surely, it is improper to suggest that because certain categories of people are included in the class of employees for purposes of social welfare legislation, their employers would be, in all cases, vicariously liable in tort for any and all of their negligent acts. No such proposition need, nor indeed should, follow. This principle applies with equal force to the legislation presently under consideration. To hold branded oil refiners vicariously liable, under this specific regulatory scheme, for the contamination of unleaded gasoline by their lessee-retailers would not alter the legal responsibilities of refiner and retailer in the law of negligence generally.45

In the leading case on chain store taxation, wherein it was held that a refiner “controlled” its filling stations for purposes of the chain store tax, the court observed:

[T]he determination by the courts that a particular sort of control was meant by the lawmaking body in dealing with one set of circumstances does not require that the same conclusion be reached when a different legislative purpose is to be accomplished.

. . . . We are not called upon to decide the question of tort liability under the agreements in this case . . . and it does not necessarily follow that the plaintiff is liable for the torts of the dealers merely because it has such a control over the stations as to subject it to the chain store tax.46

95. This point was the crux of Judge Wright’s dissent in Amoco Oil Co. v. EPA, 543 F.2d 270, 281 (D.C. Cir. 1976) (Wright J., dissenting). See text accompanying note 60 supra. See also note 61 supra.
These cases reflect primarily a displeasure with the common law "control" test when it tends to defeat the statutory purpose, and most commentators appear to agree with this assessment.\textsuperscript{97} Thus, the law in this area has indeed been in retreat from the rigidity of the common law. It suggests very clearly that the independent contractor immunity should not be raised as a bar to the fulfillment of specific statutory purposes of overriding social importance. The authors of a leading treatise have observed that:

On the whole the tendency has been to resolve doubts in favor of the application of such legislation by extending the class of servant or employee at the expense of the independent contractor in close cases. And while the policies behind these various statutes and rules may not all be the same, no lawyer will be surprised to find that these decisions have influenced each other so as to broaden the class of employees in vicarious liability cases as well.\textsuperscript{98}

It is not suggested here that the majority in\textit{Amoco Oil} should have affixed the label "employee" on the lessee-retailers and so have decided the case in traditional terms. Indeed, the flaw in the court's reasoning lies in the fact that the majority was transfixed by the common law rules of vicarious liability in tort and by the need to decide the issue in those traditional terms. Any attempt to analyze the problem in such a way must end in a frustration of the desired result. Rather, the better way would have been to look to the outer limits of the relevant common law rules, as Judge Wright urged in dissent and as the social legislation cases indicate can be done. Labels can be traps, and it has been observed that:

The realistic judge . . . will not fool himself or anyone else by basing decisions upon circular reasoning from the presence or absence of corporations, conspiracies, property rights, titles, contracts, proximate causes, or other legal derivatives of the judicial decision itself. Rather, he will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, [and] open the courtroom to all evidence that

\textsuperscript{97} Broden, \textit{supra} note 82; Jacobs, \textit{Are "Independent Contractors" Really Independent?}, 3 DePaul L. Rev. 23, 42 (1953); Stevens, \textit{The Test of the Employment Relation}, 38 Mich. L. Rev. 188 (1939); Wolfe, \textit{Determination of Employer-Employee Relationships in Social Legislation}, 41 Colum. L. Rev. 1015 (1941).

\textsuperscript{98} F. Harper & F. James, \textit{supra} note 37, at 1404.
Liability of Oil Refiners

will bring light to this delicate practical task of social adjust-
ment. . . . 99

To label the lessee-retailer an “independent contractor,” the
violation at issue a “tort,” and the dispositive test that of com-
mon law “control,” serves only to mask the delicate practical task
of social adjustment which faced the court in Amoco Oil. The
cases that have been examined clearly indicate that it is possible
to retain the relevant common law rules and at the same time
reshape the tests in order to prevent an undesirable result. Thus,
sound policy reasons require that inquiry be made into the mean-
ing of control or the right to control within a given context. The
question which should have been asked by the Amoco Oil
majority is: Control for what purpose? When so posed, it compels
the result that ought to have been reached. For the purpose of
regulating the sale of unleaded gasoline, the control exercised by
the branded refiners over their lessee-retailers—based upon the
realities of the gasoline distribution system and the nexus be-
tween those realities and the statutory purpose—is clearly suffi-
cient to justify the imposition of vicarious liability on the refiners
when contaminated unleaded gasoline is offered for sale at their
lessee-stations. This question should have been resolved in the
context of the Clean Air Act in order to fulfill the statutory pur-
pose, of which the regulations are a necessary and reasonable
part.

Joan A. King

Rev. 809, 842 (1935).
CITY OF EASTLAKE v. FOREST CITY ENTERPRISES, INC.

ZONING—Constitutional law—City charter provision requiring that a proposed land use change be approved by popular referendum does not violate the due process rights of a landowner who applies for a zoning variance. 96 S. Ct. 2358 (1976).

In City of Eastlake v. Forest City Enterprises, Inc.,¹ the Supreme Court held that the due process right of a property owner to a hearing prior to a decision on his application for a zoning variance is not denied by a municipal ordinance which provides for a mandatory community-wide referendum on zoning variance applications.² The decision reflects a shift in the Court’s methodology: Zoning cases will no longer be analyzed using the language of equal protection but, rather, will focus on the language of due process. The result of the Eastlake decision will be to discourage the construction of much needed housing throughout the country. In addition, the decision erodes the individual’s opportunity to be heard before he is deprived of his property.

The respondent in Eastlake, Forest City Enterprises, was a real estate developer who acquired an eight-acre parcel of land in the city of Eastlake, Ohio, an eastern suburb of Cleveland. At the time of the purchase, the land was zoned for light industrial use and the developer, wanting to construct an apartment building on the site, applied to the local planning commission for a zoning variance to permit such construction. While the application was pending, the citizens of Eastlake, exercising their rights under the Ohio Constitution,³ enacted a provision implementing a mandatory referendum on all proposed land use changes.⁴ The applica-

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¹ 96 S. Ct. 2358 (1976).
² Zoning variances are amendments to the municipality’s comprehensive zoning ordinance. The terms “zoning variance,” “amendments to the zoning ordinance,” “zoning reclassifications” and “proposed land use changes” have the same meaning and are used interchangeably.
³ OHIO CONST. art. II, § 1 (1912, amended 1953), provides in part:
The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls.
⁴ The proposal became part of the Eastlake city charter. EASTLAKE, OHIO, CITY CHARTER art. VII, § 3 (1971). The provision required that an amendment to the zoning
tion was subsequently approved by both the local planning commission and the city council, but was defeated at the referendum. Forest City Enterprises' complaint, alleging that the mandatory referendum provision was unconstitutional, was rejected by the state trial and intermediate appellate courts. The trial court did, however, invalidate the section of the zoning law that required the applicant-landowner to pay the costs of the referendum, and the appellate court affirmed. The Ohio Supreme Court reversed, holding that the entire mandatory referendum scheme was unconstitutional as applied to applications for amendments to the comprehensive zoning ordinance. According to the Ohio Supreme Court, the referendum denied the landowner due process of law because the electorate is not the proper body to decide the merits of zoning variance applications. The use of the referendum in this context, therefore, constituted an "unlawful delegation of legislative power." The city of Eastlake appealed to the United States Supreme Court.

The issue presented to the Court was whether Eastlake's city charter provision, requiring a referendum on all proposed land use changes without providing standards upon which a decision could be reached, violated the due process right of a landowner who applies for a zoning variance. The Court stated that there was no violation of due process, basing its opinion upon the theory that under our system of government all power derives from the people, and the people can retain for themselves any power which they might otherwise delegate to their representatives. This power, the majority explained, is embodied in the writings of the Framers, in the tradition of town meeting government and in the Ohio Constitution. Thus the referendum, the Court
noted in quoting an earlier referendum decision, "'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 to override the views of their elected representatives as to what serves the public interest.'"\(^\text{13}\) In addition, the Court continued, it insures that all voters of a municipality will join in a decision which may necessitate a large expenditure of the municipality's funds in order to finance the increased public services required.\(^\text{14}\) The Court concluded that since the landowner could challenge an unreasonable result of the referendum, the use of the referendum process does not violate the due process clause when applied to zoning variances.\(^\text{15}\)

**BACKGROUND—ZONING PROCESS**

There are two theories of zoning. Under the first, the property value theory, every piece of property should be used in the manner which will give it the greatest value without causing a corresponding decrease in the value of nearby property.\(^\text{16}\) The unqualified adherence to this theory, it is contended, results in a parochialism in land use that cannot be afforded in an age where solutions to land use problems can only be accomplished by regional cooperation.\(^\text{17}\) The second theory, on the other hand, views zoning as primarily a planning tool used to allocate the scarce commodity of land for appropriate land uses within an entire municipality.\(^\text{18}\) The allocations are codified in the municipality's comprehensive zoning ordinance, commonly known as the "master plan." The prominent and perhaps most important feature of the master plan is the provision allowing for zoning variances to meet unforeseen land use needs in the future.\(^\text{19}\) The complexities of the zoning process require the expertise of several professionals, including architecture, regional and urban planning, economics and law. The planning commission or zoning board, the local body responsible for passing on zoning variance applications, is

\(^{13}\) City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2364 (1976) (quoting Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 294 (9th Cir. 1970)).


\(^{15}\) City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2364-65 (1976).


\(^{17}\) Id. at 120.

\(^{18}\) Id.

\(^{19}\) Id.
typically comprised of individuals in these professions or, alternatively, engages these experts as consultants. After consideration of the myriad economic and social factors involved in every zoning variance request, the commission renders a decision designed to make efficient use of the available land in a manner consistent with standards enumerated in the comprehensive zoning plan.20 The issues of a given case are most effectively presented to an adjudicator at a hearing, during which both sides present their arguments. It is this prior hearing which, traditionally, has been the essence of the zoning variance application process.21 State zoning statutes generally specify that decisions in such cases be made by a deliberate governmental body after a hearing at which all parties articulate their views.22 The statutes appear to reflect a belief that the general public does not have the expertise necessary to pass on zoning variance applications—expertise which the organs of government are presumed to exercise.23 Use of the referendum as a means to decide zoning variance applications, therefore, could lead to uninformed, subjective results, the effect of which would be the inefficient allocation of available land, rendering inoperative the master zoning plan and distorting the process of metropolitan growth.24

20. Id. See Udell v. Hass, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); Kent v. Zoning Bd., 74 R.I. 69, 58 A.2d 623 (1948); Cal. Gov't Code § 65906 (West 1964). Cf. Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975). The names and number of the governmental bodies which decide zoning variance cases vary from one locality to the next. The decision may be made by a planning commission, a zoning board, a general municipal legislature or a combination of these. Under Eastlake's master plan, the decision was made by the city council after it had considered the recommendations of the local planning commission.


22. E.g., N.Y. Village Law § 7-738 (McKinney 1973); Fla. Stat. Ann. § 163.215 (West 1972). Both requirements are combined in one section in each of these statutes. See also Cal. Gov't Code §§ 65854, 65905 (West 1964) (hearing requirement), § 65901 (West 1964) (commitment of the decision to a governmental body); Ohio Rev. Code Ann. § 713.12 (Page 1976) (hearing requirement), § 713.02 (Page 1976) (commitment of the decision to a governmental body).


24. R. Babcock, supra note 16, at 150. See Forman v. Eagle Thrifty Drugs & Mkt., Inc., 89 Nev. 533, 516 P.2d 1234 (1973); Township of Sparta v. Spillane, 125 N.J. Super. 519, 525-26, 312 A.2d 154, 157 (1973); Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956). The comprehensive zoning plan is the basic instrument of land use planning, and ordinances are enacted to administer the plan. Fasano v. Board of County Comm'rs, 264 Or. 575, 507 P.2d 23 (1973). The comprehensive plan allocates land uses throughout the community so as to maximize the use of various areas for housing, agriculture, industry and recreation, and at the same time preserve property values and protect the physical environment. R. Babcock, supra note 16, at 120.
The dearness of discussion in the majority opinion concerning zoning is indicative of the majority's complete failure to consider the nature of the zoning process. Instead, the Court focused on the importance and permissible scope of the referendum.\textsuperscript{25} The stated basis for the majority opinion is the belief that the referendum is a means of popular democracy which serves the purpose of giving citizens a voice on questions of public policy.\textsuperscript{26} All power, the Court stated, is derived from the people.\textsuperscript{27} The people can, therefore, reserve to themselves power to deal directly with matters which "might otherwise be assigned to the legislature."\textsuperscript{28} Addressing this issue, the Court in Eastlake relied too heavily on James v. Valtierra,\textsuperscript{29} which upheld the use of the popular referendum against an equal protection challenge.\textsuperscript{30} In so doing, the Court placed undue emphasis on the importance of the referen-

\textsuperscript{25} See City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2363-64 n.11 (1976), where the Court stated that it would consider only the due process and not the zoning issue.

\textsuperscript{26} City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2364 (1976) (citing James v. Valtierra, 402 U.S. 137, 141 (1971)). See text accompanying note 14 \textit{supra}. The rationale behind the use of referenda is a distrust of legislatures. Referenda provide the voting public with the opportunity both to initiate laws the legislature failed to enact and to repeal unpopular laws. West v. City of Portage, 392 Mich. 458, 221 N.W.2d 303 (1974). In Valtierra the Court upheld the use of a mandatory referendum to prevent the local arm of the California state housing authority from applying for federal funds to subsidize the construction of low-income housing in the municipality without prior voter approval. The respondents, persons who qualified for admission into low-income housing projects, claimed that they were denied equal protection. Most referenda, they alleged, are optional, but the referendum on seeking funds for low-income housing is mandatory. As a result, persons seeking public housing are prevented from achieving their objective while groups seeking to influence other public decisions to their advantage do not face this problem. The Court rejected the equal protection claim, stating that all laws disadvantage one or several groups. Noting the long history of the use of referenda in California, the Court concluded that the respondents were not singled out for being subjected to the mandatory referendum. If the equal protection argument were to prevail, the majority added, the Court would be required to examine all government procedures and decide the validity of each on the basis of whether it disadvantages one group or another. This, the Valtierra Court concluded, is pushing the protection afforded by the equal protection clause beyond its limit.

\textsuperscript{27} City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2361 (1976) (citing \textit{The Federalist} No. 39 (J. Madison)). In Ohio, for example, the state constitution reflects the people's desire to reserve the powers of initiative and referendum for themselves. \textit{Ohio Const.} art. II, § 1 (1912).

\textsuperscript{28} City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2361 (1976) (citing Hunter v. Erickson, 393 U.S. 385, 392 (1969)).

\textsuperscript{29} 402 U.S. 137 (1971).

\textsuperscript{30} City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2364 (1976).
dum,31 thereby completely ignoring the need for standards to guide decisionmaking in the area of zoning, even if a referendum is used.32 The unqualified statement that the people can take into their own hands the fate of every piece of proposed legislation by means of the referendum perpetuates the "fallacious assumption" that the mere will of the electorate should prevail.33 This is not the nature of our democracy.34

While it may be true that all power derives from the people,35 one should also be aware that there exists a great danger to individual rights in the unrestrained exercise of power by the people:36

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrumentality of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to . . . .37

Our government is not a popular democracy but a representative one.38 The purpose of this representation is to insure that proposed measures will either pass or fail only after deliberate

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31. Id. at 2366, 2371 (Stevens, J., dissenting). For criticism of the reliance on the referendum in Valtierra, see Lefcoe, The Public Housing Referendum Case, Zoning & The Supreme Court, 59 CALIF. L. REV. 1384 (1971).
33. Otey v. Common Council of the City of Milwaukee, 281 F. Supp. 264, 275 (E.D. Wis. 1968). "It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live. This is a misunderstanding of democracy which still menaces individual liberty . . . ." Id. at 275 (quoting H.L.A. HART, LAW, LIBERTY, & MORALITY 79 (1966)). See Reitman v. Mulkey, 387 U.S. 369, 387 (1967) (Douglas, J., concurring).
34. Ex parte Wall, 48 Cal. 279 (1878). See also City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2370 n.12 (1976) (Stevens, J., dissenting).
37. Id.
38. Ex parte Wall, 48 Cal. 279, 314 (1878). In a popular democracy, the entire community legislates by means of a plebiscite. In a representative democracy, on the other hand, the citizens elect representatives to legislate for them. Although elements of popular democracy exist in our system of government, e.g., the referendum, our democracy is overwhelmingly representative in nature. Evidence for this is the existence of countless legislative and administrative bodies from the municipal to the federal levels of government.
Due Process and Zoning Referenda

and enlightened discussion. Therefore, if issues of public concern are submitted to the people, they must be accompanied by standards to guide and enlighten the decisionmaking process in order to insure a rational result.\textsuperscript{39} Indeed, even those persons present at the traditional town meeting, which the \textit{Eastlake} majority extolled as the precursor of the referendum, were guided by very precise standards in rendering a decision.\textsuperscript{40} In the town meeting, a moderator presided over the gathering, informing the townspeople what factors they were to consider in making their determination. Most importantly, the people were not permitted to decide a case until both sides had presented their arguments.\textsuperscript{41} Thus, the town meeting more accurately parallels the conventional system of deciding zoning variance cases than the referendum process. That is, the determination of the issue is made by a deliberative governmental body after the parties have had an opportunity to be heard. It is naive to think that all the pertinent issues will be exposed by the parties during the campaign preceding the referendum. The issues will not be properly aired by either side in their attempt to persuade the electorate, nor will the contemplative deliberation necessary to make a proper determination be made.\textsuperscript{42}

The Supreme Court has previously noted the lesson learned from town meeting government. In \textit{Eubank v. Richmond}\textsuperscript{43} and in \textit{Washington ex rel. Seattle Trust Co. v. Roberge},\textsuperscript{44} the Court decided that the authority granted to local residents to approve or defeat proposed land use changes had to be governed by articulated standards in order to prevent a decision based upon the arbitrary and capricious whims of the public. The \textit{Eastlake} majority attempted to distinguish these cases

\textsuperscript{39} \textit{Id. Accord, Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928); Eubank v. Richmond, 226 U.S. 137, 144 (1912). See notes 43 & 44 infra.}

\textsuperscript{40} \textit{Ex parte Wall, 48 Cal. 279, 314 (1878).}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Township of Sparta v. Spillane, 125 N.J. Super. 519, 312 A.2d 154 (1973).}

\textsuperscript{43} \textit{226 U.S. 137 (1912). In Eubank the Court struck down an ordinance which allowed two-thirds of the property owners on any street to determine the building line for that street. The property owners had virtual control over the property rights of other nonvoting property owners, and in the absence of standards to guide their action, they could act solely for their own benefit. The Court concluded that this was capricious and therefore held that the standardless delegation of authority from the legislature to the local property owners was invalid.}

\textsuperscript{44} \textit{278 U.S. 116 (1928). In Roberge the Court struck down a statute which gave property owners the power to defeat certain land use reclassifications. The Court reached this result for the same reasons enunciated in Eubank.}
on the ground that they involved the delegation of authority to a narrow segment of the community. On the other hand, the Court reasoned, the referendum mandates that the entire community decide the fate of a proposed change in the existing land use scheme. The majority assumed, evidently without factual support, that the proposed apartment building would require increased public services, the costs of which would be borne by each taxpayer in Eastlake. In addition, the Court noted, the city's tax base would decline since an industrial complex, the use for which the parcel was originally zoned, would now be excluded from the site. Inasmuch as the entire city of Eastlake would be affected by the change in these "environmental factors" caused by the zoning variance and the consequent construction of the apartment complex, the Court held that all the residents of Eastlake had the right to vote on it.

The Court, however, based its decision on the undocumented assumption that the construction of an apartment complex would affect the entire city. While it is commonly accepted that the use to which one piece of property is put has an effect upon adjacent and nearby property, it does not necessarily follow that there will be a city-wide effect. The tendency to limit the number of neighbors who receive notice of a landowner's application for a zoning variance reflects the predominating view that zoning changes affect only a very small area. Justice Stevens noted in his dissenting opinion that there was no factual basis or indica-

46. Id. at 2362 n.7.
47. Id. The Court relied upon James v. Valtierra, 402 U.S. 137 (1971), for this proposition.
50. Compare James v. Valtierra, 402 U.S. 137 (1971), with Thomas Cusak Co. v. City of Chicago, 242 U.S. 526 (1917), and National Lane & Inv. Co. v. Kohn, 419 Pa. 504, 524-31, 215 A.2d 597, 608-12 (1965). In Valtierra the Court assumed that an apartment complex would affect the entire community. Little evidence was provided by the Court for this proposition. In the National Land case, the Pennsylvania court thoroughly examined the alleged community-wide effects of a zoning variance and concluded that the effect of the variance would be very small.
51. R. Babcock, supra note 16, at 140. See Thomas Cusak Co. v. City of Chicago, 242 U.S. 256 (1917). The statute in Cusack required approval or disapproval of proposed land use changes by those property owners most directly affected by the proposed change. See also Cook-Johnson Realty Co. v. Bertolini, 15 Ohio St. 2d 195, 201, 239 N.E.2d 80, 84 (1968) (dictum). The Bertolini court strongly supported the proposition expressed by the statute involved in Cusack.
tion in the record that the developer’s proposed apartment complex would have any effect on the community as a whole. Thus, the lack of evidence that the land use change would entail increased costs for the community, coupled with the view that zoning changes generally affect only a very small area, militate against the use of the referendum which allows the entire community to express its view.

There is one further weakness in the environmental factors approach. Both state and federal courts have recognized that this argument is usually used as a ploy to exclude undesired land uses from a community, even where the undesired land use is consistent with the master zoning plan. Such an attempt to prevent an increase in population and exclude undesired economic burdens has been held to be unconstitutional. One Supreme Court case that offers valuable insight into this area is *Shapiro v. Thompson.* In *Shapiro* the Court held that the requirement that an indigent person reside in a state for one year in order to be eligible for public assistance violated the equal protection clause of the Constitution. Although *Shapiro* did not involve real estate, a clear implication of the case is that all state legislative attempts to exclude future economic burdens are invalid. By supporting the environmental factors argument, then, the *Eastlake* majority has moved away from the trend of cases which reject this approach and has reinforced an argument that will be used to justify opposition to all future residential construction.

In addition to the policy-oriented environmental factors argument, the Court in *Eastlake* relied on a doctrinal distinction between legislative and administrative acts to support its view that applications for zoning variances are subject to the referen-

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53. See notes 50-52 supra.
55. The scope of this Note does not include a discussion of exclusionary zoning. In summary, those statutes whose purposes or effects are to exclude population growth and to avoid future economic burdens (such as increased costs for public services which will be reflected in higher taxes) have been declared unconstitutional. See Southern Burlington County NAACP v. Township of Mount Laurel, 87 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 868 (1976); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). But see Village of Arlington Heights v. Metropolitan Housing Dev. Co., 45 U.S.L.W. 4073 (1977). On the issue of “zoning out” future economic burdens, see Shapiro v. Thompson, 394 U.S. 618 (1969).
57. Id. at 629-32.
58. See note 55 supra.
The master zoning plan can be said to be a legislative act since it establishes a community-wide policy without regard to individual cases. Administrative acts, on the other hand, implement the legislative plan and apply the general rule of conduct to specific cases. It is generally thought that legislative acts and not administrative acts are subject to review by referenda. The master zoning plan establishes a general rule of conduct and is, therefore, clearly a legislative act. The Eastlake majority, citing a long list of decisions (including that of the Ohio Supreme Court in Eastlake) which labeled the grant of zoning variances "legislative acts," concluded from this, without further reasoning, that zoning variances are also legislative acts and are therefore subject to the referendum. The Court's conclusion apparently ignores the clear distinction between the adoption of a comprehensive city-wide plan (legislative action) and the determination of particular issues involving specific uses of individual parcels of land (administrative acts). Despite the fact that public policy questions are involved in the determination, decisions on zoning variance applications are basically adjudicatory and require a prior hearing because of the need for dispassionate expertise, and because they have a far greater impact on one citizen or group of citizens than on the public generally.
A further flaw in the reasoning of the majority is found in its analysis of the nature of the due process right. It is clear that the constitutional right to use one's property to one's own economic advantage, within the restriction of zoning laws, is protected against interference by the state without due process of law.\(^6\) The essence of due process is that an individual be granted a hearing before he is deprived of any significant property interest.\(^6\) One element of due process, perhaps its most basic component, is the notion of fairness.\(^7\)

It is simply not fair, Justice Stevens argued in his dissenting opinion, to deprive a landowner of his right to use his real property to his best advantage unless and until a hearing is held to decide the merits of the case in accordance with particular standards.\(^7\) In order to assure fairness within the meaning of the due process clause, the determination, which is consistent with the spirit of the master zoning plan\(^7\) and takes into consideration all relevant social and economic factors, must

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\(^6\) U.S. 373 (1908). In *Bi-Metallic* the Court held that the appellant did not have a right to a hearing to challenge an increase in the assessed valuation of all taxable property in Denver before it took effect. The action of the Board carried no administrative or legislative label, although the Board was an administrative agency. It was simply described as being of general, community-wide application. In *Londoner* the Court held, again without attaching labels, that where a decision was applicable only to the residents of one block, those residents had a right to a hearing before the decision was put into effect. The residents who would be affected by the decision could inform the Board of individual hardships which it may have overlooked in making its decision. In *Bi-Metallic*, however, the Board had carefully evaluated the general impact of the increased assessment, and there was no evidence the complaining individuals could add to that which the Board had already examined.


\(^6\) Boddie v. Connecticut, 401 U.S. 371 (1971); *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972). *Boddie* did not concern real property but rather the challenge by indigent welfare recipients to a state law which required the payment of court costs in order to obtain a divorce. The Court, however, stated as a general principle that "the right to a meaningful opportunity to be heard within the limits of practicality must be protected" if the mandate of the due process clause is to be satisfied. *Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971). The fact that the particular form of the hearing required by due process varies "does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest . . . ." *Id.* at 379.

\(^7\) *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963).

\(^7\) *City of Eastlake v. Forest City Enterprises*, Inc., 96 S. Ct. 2358, 2371 (1976) (Stevens, J., dissenting). The authority for this proposition is derived from the nature of zoning and the requirements of due process.

\(^7\) See text accompanying notes 16-21 supra. *See also* note 67 supra.
be made before the landowner is deprived of his property. The majority in *Eastlake* stated that the landowner was not deprived of any due process right as long as he had an opportunity to challenge the result of the referendum in state court.\(^{73}\) If this is to be the remedy, the landowner will have no alternative but to await the outcome in order to challenge the result. This falls within the category of unfair practices described by Justice Stevens\(^{74}\) and by existing laws.\(^{75}\) It is insufficient because it denies the landowner due process of law and, furthermore, ignores the practical necessities of zoning.

**The Majority Opinion—A Methodological Approach**

It is puzzling that the Court completely ignored the nature of the zoning process, choosing instead to adopt the environmental factors argument unquestioningly.\(^{76}\) Yet upon examination of the Court’s underlying methodology, the decision becomes somewhat more understandable. Prior to *Eastlake*, challenges to zoning statutes—comprehensive master plans and zoning variance ordinances—were based heavily on equal protection claims.\(^{77}\) It was suggested after *James v. Valtierra*, on which the *Eastlake* majority relied, that the Court sought to move away from analyzing zoning referenda according to equal protection principles.\(^{78}\) All government procedures affect one group more than others, and if the Court were to declare a mandatory referendum provision violative of the equal protection clause, it would have to embark on an endless inquiry of every government action to determine whether a clearly identifiable group had been singled out for special treatment.\(^{79}\) The Court preferred to analyze zoning referenda cases using the language of due process and by weighing the harms caused to the litigants which resulted from the pres-

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74. *Id.* at 2372 (Stevens, J., dissenting).
75. *See* note 22 *supra*.
76. *See* note 46 *supra*. The majority noted that only the specific due process questions addressed by the Ohio Supreme Court would be considered. City of Eastlake v. Forest City Enterprises, Inc., 96 S. Ct. 2358, 2363 n.11 (1976). The Ohio Supreme Court majority opinion did not discuss the practicalities of zoning, although the concurring opinion did.
79. *Id.* at 1390.
ence or absence of the government regulation. 80 The Eastlake decision confirms that this is the path the Court is taking. 81 The Court examines and compares the harm inflicted upon the landowners by the referendum, and the harm to collective public participation in government that would result if there were no mandatory referendum provision. In Eastlake the Court notes that since the landowner bought the parcel with existing restrictions on its use and since he can challenge the result of the referendum in a judicial forum, the harm caused to his interests by the referendum is minimal. 82 On the other hand, in the majority's view, the grave harm caused by eliminating the use of the referendum is the decline of the long-cherished value of popular democracy. 83 When the case is viewed in these terms, the decision becomes comprehensible, though no more acceptable.

Unfortunately, the Court did not weigh all the facts in reaching its decision. Both the realities and purposes of zoning and the collateral due process problem were completely ignored by the Court. Furthermore, in adopting selective facts and in embracing, for example, the environmental factors approach, the Court has dignified an argument which will be used in the future to oppose the construction of housing. 84 Since 1949, Congress has repeatedly emphasized its intent to achieve "as soon as feasible . . . the goal of a decent home and a suitable living environment for every American family . . . ". 85 The Eastlake decision serves only to frustrate this policy.

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80. Id. at 1457-58.
82. Id. at 2365 n.15.
83. See notes 9-13 supra and accompanying text.
84. In Eastlake the electorate attempted and succeeded in preventing the construction of an apartment complex in a community of predominantly single-family homes.