MARYLAND ZONING — THE COURT
AND ITS CRITICS

By George W. Liebmann*

One who holds to the view that "you cannot understand the famous unless you feel the pulse of the obscure"\(^1\) or who shares with Arnold Bennett the conviction that history is the experience of ordinary people in extraordinary times\(^2\) is likely to have his impression confirmed by inspection of the articles on Maryland zoning in the Review's last winter issue and in a recent issue of The American Political Science Review.\(^3\)

For their authors have managed to reflect in a few pages on a remote subject intellectual tendencies which are having a wide (and in the view of this writer largely pernicious) effect on other more vital areas of American law, politics and "political science." If the legal commentator may be charged with nothing worse than a somewhat uncritical acceptance of the wisdom and propriety of judicial policy making in the land use field, less charity may be shown to the political scientist. That scholar has been true to prevailing (or at least nascent) fashions in his preference of the quantitative over the rational approach to analysis of judicial decisions; in a taste for statistical techniques and a distaste for data drawn from history and disciplines other than that purportedly utilized and in an unfortunate willingness to indulge in sweeping generalizations on the basis of fragmentary or nonexistent evidence.

Mr. Sickels begins his assault on the performance of the Maryland Court of Appeals in zoning cases with an attack on the court as an institution and on its organization, personnel and internal operation. His essential thesis is that Maryland zoning doctrine is merely a facade behind which judges indulge their vagrant prejudices as to community development or the merits of particular zoning applications.\(^4\) Cases are assigned at random to shifting panels of the court, which slavishly accepts the decision of the member assigned to write the opinion. The result, we are told, is an inconsistency in decision-making that contravenes legal and political values. By contrast, decisions of the United States Supreme Court, a representative body made up of men with "diversity of background, philosophy and temperament"\(^5\) are more defensible, since the court "is highly consistent in the general run of its business, because the tendencies of each of its members are known

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* A.B. 1960, Dartmouth College; J.D. 1963, University of Chicago; Law Clerk for Chief Judge Brune of the Maryland Court of Appeals, 1963–1964; Associate, Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland.

1. Buttinger, In the Twilight of Socialism I (1953).
4. Mr. Sickels states: "Protestations notwithstanding, the tools of activism are well honed and ready at hand in Maryland. The frequency of their use refutes the Court's claim of judicial restraint. . . ." Sickels, at 102.
5. Id. at 101.
with some accuracy and the prediction of majority positions often follows by simple arithmetic. 6

Let us now look at Mr. Sickels’ data to see whether it effectively supports these strong strictures or whether it may be dismissed as another example of what has elsewhere been described as “putting jurisprudential doctrine to political ends: a pragmatic utilization of academic tools.” 7

Mr. Sickels portrays the Maryland court as an intellectually moribund institution, lacking “a penchant for lively dissent.” Indeed, the reader is likely to gain the impression that dissent is virtually unknown in Maryland, for the author’s Table 1 informs us that in Maryland the “Number of Cases with Dissent” is “0.” 8 It is regrettable that the data in the author’s table involves a sample of only 25 cases and that no distinction is made between courts with mandatory jurisdiction and those that can pick and choose their cases. Those familiar with the work of the Maryland court in recent years will recall numerous instances of vigorous and at times acrimonious dissent, dissent not confined to non-zoning cases. 9

Mr. Sickels undertakes to document his assertion that “The Court of Appeals has acquiesced a system of decision which rests on the vicissitudes of case assignment,” by reference to the opinions of two of the court’s judges: Judges Hall Hammond and William L. Henderson. Confining his decision to 89 cases in which the Court of Appeals passed upon grants of zoning variances by boards, Mr. Sickels noted that “Judge Hammond has written opinions of the Court nine to one in favor of sustaining the local zoning action and Judge Henderson has recorded nine cases to two against the local authority.” 10 We are told that this shows that the judges differed, “one favoring flexibility and the other stability.” 11 It is not clear whether the supposed difference between the judges relates to their willingness to allow dispensations from original zoning or to their attitude toward the weight to be given to zoning board decisions. Since the cases in which the court has considered appeals from denial of zoning dispensations are left to one side by his article, little is done to clarify this important ambiguity. To arrive at his statistics, Mr. Sickels had to rule out cases turning on procedural points, thereby eliminating a case in which Judge Hammond wrote the opinion to reverse a grant of amendment by the zoning

6. Id. at 104.
7. Kurland, Book Review, 28 U. CHI. L. Rev. 580, 582 (1961). [Note: the author has secured from Mr. Sickels the lists of cases on which his article is based.]
8. Sickels, at 100 n.3.
9. See, e.g., Finney v. Halle, 241 Md. 224, 216 A.2d 530 (1966); MacDonald v. Board of County Comm’rs, 238 Md. 549, 210 A.2d 325 (1965); Jobar Corp. v. Rodgers Forge Community Ass’n, 236 Md. 106, 202 A.2d 612 (1964); Yorkdale Corp. v. Powell, 237 Md. 121, 205 A.2d 279 (1964); Restivo v. Princeton Constr. Co., 223 Md. 516, 165 A.2d 766 (1960); Mayor & City Council v. Berg, 216 Md. 292, 139 A.2d 703, concurring opinion, 140 A.2d 663 (1958); Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27 (1953); Mayor and City Council v. Byrd, 191 Md. 632, 62 A.2d 588 (1948); Norwood Heights Improvement Ass’n v. Mayor and City Council, 191 Md. 155, 60 A.2d 192 (1948). The first few cases were unavailable to Mr. Sickels, but all the cases in this list involved major issues of zoning policy.
10. Sickels, at 102.
11. Ibid.
Concurring and dissenting votes are likewise ignored even where the court was split. In the important early case of *Wakefield v. Kraft*, Judge Henderson joined Judge Hammond's opinion affirming grant of a reclassification in preference to the dissenting opinion of Judge Sobeloff urging more intensive judicial review of the weight, as well as the substantiality of the evidence. That concurrence hardly squares with Mr. Sickels' portrait of Judge Henderson as a judge favoring rigid stability in zoning and/or intensive judicial review of decisions by local authorities.

The cases in which the court has reversed denials of reclassifications by zoning boards also raise difficulties for Mr. Sickels' critique of the court. If on the one hand his thesis is that the judges differ greatly in their deference to zoning boards ("zoning actions are practically certain to be upheld by Judge Hall Hammond"), then he would seem under a duty to consider among other opinions that judge's decision in *Board of County Comm'rs v. Oak Hill Farms*, a decision which drew wider public interest than almost any other recent Maryland zoning case. In that case, the court was called upon to construe the unique Prince George's County ordinance, since repealed, directing the courts to "weigh" the evidence in zoning cases. The validity of the ordinance was challenged on the basis that it imposed legislative functions on the courts and hence contravened the separation of powers. The court found it unnecessary to reach this question holding that the District Council's refusal to rezone was properly reversed as "arbitrary and capricious" even under the "substantial evidence on the whole record" test conventionally applied by the court. The controversial part of the opinion was the repeated statement that "the line between the test of substantiality of evidence on the whole record and that of weight on the evidence is thin and difficult to delineate," thus suggesting that under either test the courts have considerable leeway to weigh evidence and are freed from the limitations of the traditional substantial evidence rule. That case was sharply criticized, both by a press concerned with possible increase in instability in zoning and by legal commentators, who charged the court with misunderstanding the teaching of the well-known *Universal Camera* case. The Maryland Court has since retreated from its language in the *Oak Hill Farms* decision, as to the meaning of the substantial evidence on a whole record rule.

13. 202 Md. 136, 96 A.2d 27 (1953). See Judge Henderson's dissenting opinion in Norwood Heights Improvement Ass'n v. Mayor and City Council, 191 Md. 155, 163, 60 A.2d 192, 195 (1948), where he voted to affirm a board decision granting an apartment house permit, the majority of the court voting to reverse.
20. Board of County Comm'rs v. Farr, 242 Md. 315, 322, 218 A.2d 923, 927 (1966); Board of County Comm'rs v. Meltzer, 239 Md. 144, 155, 210 A.2d 505, 511-12 (1965); Dal Maso v. Board of County Comm'rs, 238 Md. 333, 340, 209 A.2d 62, 66
but that opinion, whatever its merits, hardly squares with Mr. Sickels' picture of Judge Hammond as a judge favoring extreme deference to zoning board decisions. If on the other hand, Mr. Sickels' thesis is that the judges' differences relate primarily to the degree of their preference for stability in zoning then he would also have done well to examine the several opinions of Judge Henderson reversing board denials of zoning amendments. Finally, another recent case (unavailable to Mr. Sickels) deserving of study in reference to both of the alternate theses is *Jobar Corporation v. Rodgers Forge Community Ass'n*,\(^2\) where the court reinstated a board decision granting a zoning reclassification. The scathing dissenting opinion of Judge Hammond ought to put to rest the view that zoning actions are "practically certain to be upheld" by him because of a supposed extreme preference for flexibility in zoning and deference to local boards. Furthermore, the fact that, as in *Wakefield v. Kraft* and as in the more recent case of *Yorkdale v. Powell*,\(^3\) the two judges were on the same side of a divided court may also reflect on the notion that they stood "at extremes." The fortuitous and insignificant nature of the statistical evidence adduced by Mr. Sickels is further demonstrated by the cases appearing subsequent to his study, for five of Judge Hammond's more recent determinations reversed board decisions.\(^4\)

The above discussion should dispose of the political scientist's view that Maryland zoning opinions have been dependent upon the vagaries of case assignment. While the court is known to assign most cases at random in advance of argument, there is no warrant for the suggestion that there is little collegial deliberation in the court. Not only is there a vote by the five judges after argument and before the opinion is written, but also "each one of the . . . opinions has to be read in the presence of the other judges by the judge who has written the opinion, and again there may be suggestions of changes . . ." before being released as the opinion of the court.

The suggestion that inconsistency reigns in part because since 1960 "Maryland has had the equivalent in another way of several


\(^{3}\) 237 Md. 121, 205 A.2d 269 (1964).


\(^{25}\) 64 TRANSACTIONS OF MD. STATE BAR ASS'N 293 (1959) (remarks of Judge Stedman Prescott).
Courts of Appeals with overlapping memberships,\textsuperscript{26} is equally unfounded. By reason of the provisions for reargument,\textsuperscript{27} it is impossible for loss of a vote (as distinct from loss of the persuasion) of a non-sitting member to change a result, a system which does more to insure consistency than either a certiorari system or the panel systems extant in several federal courts of appeal. The peculiar 1960 amendment creating the panel system (an amendment not favored by most of the Court of Appeals judges themselves)\textsuperscript{28} derived from a desire to preserve to litigants in the face of an expanding case load the benefit of the state constitutional tradition\textsuperscript{29} of full plenary consideration and swift final decision by the state's highest court. However unsound the amendment may be in terms of judicial administration, encouragement of a tendency toward inconsistency in decision is the last ground on which it should be criticised.

Examination of the record of the Maryland court in dealing with the substance of zoning problems, will hopefully make clear that its record in zoning cases is both reasonably creditable and reasonably consistent, and certainly undeserving of special stricture.\textsuperscript{30} The causes of difficulty in Maryland zoning law must be found elsewhere than in the behavior of particular judges, and the reasons for it are of more interest to thoughtful legal commentators and political scientists.

The Maryland court's record in zoning cases cannot be fairly appraised without an awareness of the three great sources of difficulty that have given American zoning law, and particularly the law applicable to reclassification, its frequently complex and confusing character. First, there is great tension between conventional doctrines of judicial deference to administrative agencies developed in non-zoning contexts and the pressure for more intensive judicial review which arises from the subservience to the construction industry characteristic of many zoning boards. It has been pointed out (most persistently by Professor Myres McDougal of Yale)\textsuperscript{31} that zoning law is essentially a contest between the nation's largest industry and weak local boards, largely unequipped with investigative facilities of their own and unaided by any countervailing force other than that supplied by spontaneous

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31. See, \textit{e.g.}, McDougal, \textit{Book Review}, 54 Harv. L. Rev. 526, 530 (1941).
\end{footnotes}
ous protests by neighbors. To express a preference for local (or in many instances state) regulation of industries is no doubt to express a preference for a measure of laissez-faire.

At times the Maryland court has been urged to rectify by means of intensified judicial review and modification of the substantial evidence rule the seeming imbalance between the contestants in zoning cases just as the United States Supreme Court has on occasion been charged with applying a more intensive standard of review to agencies thought to be industry dominated. The dissenting opinion of Judge Sobeloff in *Wakefield v. Kraft*, and perhaps the opinion of Judge Hammond in the *Oak Hill Farms* case, succumbs to this temptation. However, the Maryland court in *Wakefield* and in the cases decided before and since *Oak Hill Farms* has declined to play favorites among administrative agencies. By applying the conventional substantial evidence rule the court has refused to act as the judge of whether the public is better served by loose or more stringent regulation of building construction. It is in fact true that the public is not always badly served by lax or flexible public regulation and that more thorough enforcement of zoning restrictions might have been productive of shortages and unmet needs in a period of rapidly expanding suburban population. The considerations justifying loose regulation in zoning are similar to those retrospectively advanced in defense of laissez-faire in manufacturing industries during the nineteenth century period of industrial expansion. No doubt there is much to be said against "suburban sprawl." Nonetheless, the writings of some "community planners" and critics of the preferences given to uncontrolled single-family housing by zoning and tax law call to mind E. M. Forster's doleful, if wry, observations:

The feudal ownership of land did bring dignity, whereas the modern ownership of movables is reducing as again to a nomadic horde. We are reverting to the civilization of luggage, and historians of the future will note how the middle classes accreted possessions without taking root in the earth, and may find in this the secret of their imaginative poverty. The Schlegels were certainly the poorer for the loss of Wickham Place. It had helped to balance their lives and almost to counsel them. Nor is their ground-landlord spiritually the richer. He has built flats on its site, his motor-cars grow swifter, his exposures of Socialism move trenchant. But he has split the precious distillation of the years, and no chemistry of his can give it back to society again.

The contemporary Maryland court has taken the view that more stringent regulation should be the product of legislative, not judicial

32. Davis, Administrative Law § 251 (1951).
33. See cases cited note 20 supra.
action. But unlike earlier courts it has imposed no constitutional barriers to such action when it has been forthcoming, as it was, at least for a while, in Prince George's County.

Second, a major source of difficulty arises from the fact that many zoning determinations, especially reclassifications of particular lots by legislative bodies, stand at the borderline between legislative and administrative action. As Judge Schaefer recently observed for the Illinois court, "a zoning ordinance is a unique type of legislation in that it must be comprehensive in the sense that it applies to all property within the municipality and yet the regulations it prescribes are not uniform." This observation applies with even greater force to zoning amendments. Two questions have plagued American courts: (1) Should the standards of review properly applicable to reclassification partake of the strong presumption of validity attached to most economic legislation, or should courts scrutinize the evidence in support of the reclassifications? (2) Should the zoning amendment process be accorded the normal freedom from constitutional requirements of notice and hearing accorded legislative decisions or should it be held subject to the standards of due process required where administrative agencies adjudicate the rights of particular persons?

The first of these questions most American courts have answered by "adopt[ing] the method which effectively discourages zoning litigation in other states, i.e., upholding the zoning in almost every case." The presumption of validity accorded spot reclassification affecting only a particular builder and immediate neighbors is frequently equivalent to that accorded economic legislation of statewide impact: "[A] zoning classification is presumed to be valid and should be disturbed only if by clear and affirmative evidence it is shown to be arbitrary or unreasonable. Since the board of supervisors is a legislative body, precise standards to govern its determinations are not required." The Maryland court, as both commentators noted, extends no such presumption of validity to spot reclassifications, as distinct from comprehensive revisions, taking the view in Mandel and Southern Properties, Inc. v. Board of County Comm'rs that "one test for determining whether action by a commission is legislative where vested rights of liberty and property are not involved is whether there is laid down a rule of future action which affects a group and not the direct appli-

39. Kotrich v. DuPage, 19 Ill. 2d 181, 166 N.E.2d 601 (1960). This is also the theme of the dissenting opinion of Judge Barnes in MacDonald v. Board of County Comm'rs, 238 Md. 549, 557, 210 A.2d 325, 329 (1965). The Illinois court allows both amendments in favor of particular uses and amendments of district lines on a virtually unrestricted basis. The Maryland court condemns the former outright (see note 57 infra) and allows the latter only on a showing of change or mistake.
40. 238 Md. 208, 216, 208 A.2d 710, 715 (1965) (Oppenheimer, J.), quoting from Albert v. Public Serv. Comm'n, 209 Md. 27, 36-37, 120 A.2d 346, 350 (1956), which in turn cites from Oppenheimer, Administrative Law in Maryland, 2 Md. L. Rev. 185, 204 (1938).
cation of policy or discretion to a specific individual." The Maryland rule on reclassifications has recently been reaffirmed over the dissent of Judge Barnes in *MacDonald v. Board of County Comm'rs.*

The second question posed has been answered by the Maryland court by applying its distinction between legislative and administrative acts established in the *Mandel* and *Albert v. Public Serv. Comm'n* cases to later cases which hold that reclassifications may in some instances be treated as judicial decisions for purposes of determining the availability of cross examination and the applicability of the doctrine of res judicata. This result is in accord with the approach adopted by Justice Holmes for the Supreme Court in *Bi-Metallic Co. v. State Board of Equalization,* where the issue dealt with the extent to which property owners had a right to a hearing on tax ordinances. The *Bi-Metallic* rule rests on a realization that where regulations affect large numbers of people, political, as distinct from judicial, checks are more likely to be adequate. Professor Kenneth Davis has emphasized a different factor: "no matter how numerous the parties, a trial usually is the expedient device for resolving factual controversies that relate to an individual, and no matter how few the parties, a trial is usually unnecessary for developing general facts."  

The Maryland court has been criticized by Judge Barnes and by this journal's commentator, Mr. Goldman, for not subjecting the "spot zoning" implicit in so-called "floating zone" provisions to scrutiny as intensive as that applied to reclassifications, the court having instead analogized such "floating zones" to special exceptions. The distinction between reclassifications and "floating zones" has been persuasively defended, however:

The notice provided by an ordinance setting up special exceptions is that certain specified uses will be permitted upon application, subject to conditions, in specified zones from which they would be excluded absent such approval. This degree of notice, however, is also provided by the instant (floating zone) ordinance, its

42. 209 Md. 27, 120 A.2d 346 (1956).
44. I DAVIS, ADMINISTRATIVE LAW § 6.05 (1958). See the distinction made by the Maryland court between Mayor and City Council v. Byrd, 191 Md. 632, 62 A.2d 588 (1948); County Comm'rs v. Ward, 186 Md. 330, 46 A.2d 684 (1946), discussed at notes 57-61 infra.
enactment informs the residents that restricted industrial uses would be selectively permitted subject to conditions.\textsuperscript{46}

The Court of Appeals has similarly stressed the importance of notice in promulgating its rule against conditional grants of reclassifications or so-called "contract zoning":

\[\text{[R]}\text{estrictions in a particular zone should not be left to ex-}\]
\[\text{trinsic evidence.}\]

\[\ldots\text{The peculiar circumstances which must be shown to sup-}\]
\[\text{port a variance from the basic plan \ldots distinguish them from facts such as those in the instant case, where the action taken is based solely upon collateral promises. The former types of exception are by their very nature, self-limiting; the latter has no inherent restriction.}\textsuperscript{47}\]

Judge Barnes, unpersuaded, prefers the New York approach of indulgence toward both reclassifications and floating zones,\textsuperscript{48} and Judge Henderson would have preferred an approach of hostility toward both,\textsuperscript{49} but whatever the merits of the Maryland court's distinction between "spot reclassifications" and "floating zones," its approach remains far more defensible than that, say, of the Pennsylvania court, which condemns "floating zones,"\textsuperscript{50} while continuing to view spot reclassifications with indulgence.\textsuperscript{61} Likewise, the hostility of the New Jersey courts\textsuperscript{52} and of two Illinois judges\textsuperscript{53} to arrangements which go beyond the floating zone in providing for permit grants "not \ldots based on an advance determination of use categories, but on the quite different principle that compatibility should be determined in terms of individual users and in light of circumstances existing at the time the new use is proposed"\textsuperscript{54} has been unaccompanied by increased scrutiny by courts in these states of spot reclassifications,\textsuperscript{55} which are subject in considerable degree to the same vice.

The Maryland court has consistently chosen to look at substance rather than form in determining whether local enactments are or are

\textsuperscript{46} Haar and Hering, The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?, 74 HARV. L. REV. 1552, 1569 (1961).
\textsuperscript{49} See Huff v. Board of Zoning Appeals, 214 Md. 48, 64, 133 A.2d 83, 92 (1957) (dissenting opinion).
\textsuperscript{50} Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960).
\textsuperscript{52} Rockhill v. Township of Chesterfield, 23 N.J. 117, 128 A.2d 473 (1957).
\textsuperscript{54} Haar and Hering, supra note 46, at 1572.
\textsuperscript{55} See Bruber v. Mayor and Township Committee, 39 N.J. 1, 186 A.2d 489 (1962); Trust Co. of Chicago v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499 (1951).
not essentially legislative in character, so as to be entitled to the presumption of validity attaching to comprehensive plans. Consistent with this view it has held that any major departure from schemes based on advance notice to property owners of zone lines toward a scheme resembling the British requirement of planning permission will require revision of the state enabling act requiring zoning according to a comprehensive plan; and this has invalidated ordinances which exempt particular pieces of property from prohibitions imposed on all property throughout a municipality. In its hostility toward spot reclassifications, the Maryland court has similarly taken the view that the zoning enabling act embodies a requirement of what Professor Haar has referred to as "the rule of law in the Hayekian sense."

Where it has departed from its hostility toward spot reclassifications as in the floating zone cases and the dubious cases involving "buffing" revisions at the margin of zones, the Maryland court has been at pains to show that violence has not been done to the values of notice and equality underlying the traditional demand for uniform rules laid down in advance. It likewise took pains to make such a demonstration in County Comm'r's v. Ward, where it upheld partial zoning of a municipality against the objection that zoning was not sufficiently comprehensive if portions of the political subdivision were omitted from the plan. This writer doubts that the court can be charged with misreading the intentions of the legislature in this respect, when the history of the requirement of comprehensiveness in the standard zoning enabling acts is considered. The fact that "ideas had changed" would not justify the court in disregarding the fact that the change might only be one in the thinking of the planners, not in that of the legislature. The law does, must, and should, for reasons fully elucidated elsewhere, lag somewhat behind the avant garde if the democratic will is to be respected and the prospect of swift and dangerous political reaction resulting from alienation from the processes of government avoided. It is best that we curb our sympathy for the impatient exclamations of the planners and their allies in the legal profession that "new theories of planning are useless if they cannot be carried forth due to outmoded zoning law."

58. Haar and Hering, supra note 46, at 1563.
59. See cases cited note 55 supra.
62. Id. at 1154-58.
63. Goldman, at 52.
66. Goldman, at 55.
Third, an additional source of difficulty is provided by the fact that Maryland courts like those elsewhere have been troubled by the problems arising from the lack of metropolitan government around large cities. In an era of exploding population, the efforts of suburban areas to exclude low-cost housing,\textsuperscript{67} apartment houses, and such other uses as trailer parks from their borders have aroused great controversy.\textsuperscript{68} It is fair to suggest that what has been described as the "Negro Revolution" will cause this controversy to intensify rather than abate in future years.\textsuperscript{69} Courts elsewhere have been urged to invalidate local suburban ordinances such as those excluding trailer parks on the basis that they are out of tune with the spirit of the age and go beyond the police power when viewed in the light not of local but of statewide or metropolitan needs.\textsuperscript{70} Against this, Professor Haar has observed: "To those who regard the division of powers as a great contribution of the American political system, the expense of such inefficiency is a price well paid for the advantages of decentralized government power . . . or, again, it may mean that different types of consumer wants are being satisfied and a greater range of choice for the individual as to types and costs of governmental services preserved."

Likewise, it has been observed:

\[\text{T}\]he most pernicious effect of exclusionary zoning in a segmented metropolitan area — retrogressive local taxation which limits the members of each economic class to the community facilities for which they can afford to pay on a per capita basis — might be attacked by fiscal reform, rather than by zoning reform. The problem could be relieved, for example, if a greater portion of the revenues needed for vital community services, such as education, were provided through grants-in-aid through funds obtained through progressive taxation at the state or federal level.\textsuperscript{72}

Some courts have begun to inch toward holding that the validity of local legislative acts, including the acts of municipalities with home


\textsuperscript{68} See Babcock and Bosselman, \textit{supra} note 53, at 1059–74.

\textsuperscript{69} See Haar, \textit{supra} note 67, at 1063 n.41; 37 Calif. L. Rev. 493 (1949).

\textsuperscript{70} Cf. \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 390 (1926).


\textsuperscript{72} Sullivan, \textit{Flexibility and the Rule of Law in American Zoning Administration, Law and Land} 129, 156–57 (Haar ed. 1964). It is noteworthy that this perhaps more politically promising approach is embodied in the recent Cooper-Hughes Report. \textit{Interim Report of the Maryland Commission State and County Finance} (1965). It is also ironic that success of this approach may be thwarted by the reapportionment of state legislatures which many defenders of "activism in a known direction" (to use Mr. Sickels' not disapproving phrase) advocate and celebrate. Reapportionment, in Maryland if not elsewhere, seems as likely to exacerbate as to cure metropolitan problems, since its prime beneficiaries are the more prosperous suburban counties, whose representatives may be expected to oppose tax equalizing schemes (as well as zoning reform, municipal taxing powers, and "fair housing" legislation). See Dixon, \textit{Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation}, 63 Mich. L. Rev. 209, 222–30 (1964).
rule, should be tested by their reasonableness as exercises of state rather than local legislative power,\textsuperscript{73} and some commentators have gone so far as to urge the Supreme Court to do for — or to — the zoning powers of municipalities what it has already done for — or to — many if not most of the independent decision-making powers of state governments,\textsuperscript{74} thus overriding the long established view that “it is for the State to determine its political subdivisions, the number and size of its municipal corporations and their territorial extent. These are matters of a local nature, in which the nation as a whole is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling.”\textsuperscript{75}

In Maryland, the pressure on the court has not involved efforts to invalidate suburban zoning regulations, but rather to induce the court to broaden the “error or change” rule in reclassification cases by holding that increased metropolitan population constitutes a “change” sufficient to warrant a board granting a zoning amendment. Thus Mr. Goldman laments that “factors such as increased population and other socio-economic changes would not be included.”\textsuperscript{76} The Maryland court has been receptive to arguments based on population increase only in cases involving reclassifications in favor of convenience facilities — gasoline stations, and shopping centers — necessary to serve the increased population in the suburban area itself. The court, save for one or two unfortunate lapses from grace involving “buffing” cases or cases where there were physical change and the administrative record (including, in some instances, planning commission findings) was unusually strong,\textsuperscript{77} has maintained an attitude of relentless hostility toward reclassifications in favor of suburban apartment developments. Its attitude in these and similar cases is most fully expressed in \textit{Alvey v. Michaels}, where the court affirmed a trial court’s reversal of a reclassification grant in favor of a marina. The decision stressed that:

\begin{quote}
The need for marinas in the locality . . . [is] not a local need, but one to accommodate non-resident boating enthusiasts.
\end{quote}

As to the question that this would be spot zoning legally permissible under the circumstances, we have held that such is legal when there is a need for a service in the area for the accom-


\textsuperscript{74} See Babcock and Bosselman, \textit{supra} note 53; Haar, \textit{supra} note 67, 66 Harv. L. Rev. 1063 (1953).

\textsuperscript{75} Forsyth v. Hammond, 166 U.S. 506, 518 (1897). The traditional view went even further in stressing the autonomy of municipal corporations and in analogizing them to voluntary associations. Charters were granted and boundaries defined on the basis of private petitions: “As the burdens of municipal government must rest upon (the corporators’) shoulders * * * it seems eminently proper that their voice shall be heard on the question of their incorporation.” \textit{Cooley, Constitutional Limitations} 123 (2d ed. 1871).

\textsuperscript{76} Goldman, at 52.

accommodation and convenience of the residents of the residential zone, such as grocery stores, drug stores, barber shops, etc. . . . We do not find on the record that another marina within this area would come within this category.\(^7^8\)

This case was followed in the recent case of *Board of Commr's v. Kines*.\(^7^9\)

The Maryland court has thus declined to make itself the judge of whether restrictions on suburban apartment construction are wise public policy. If suburban zoning is to be compelled to mesh with city needs the compulsion must come, in the court's view, from action by the state legislature authorizing and requiring a greater measure of regional planning, not from ukases by the court in dealing with particular applications. That may seem a conservative approach, but its wisdom should be apparent. To begin with, it is by no means clear that indulgence toward suburban construction is even wise public policy. The increased availability of suburban building sites may operate to discourage apartment construction in the deteriorating cores of the central city. Moreover, most of such zoning proposals, at least to date, involve apartment housing aimed at upper and middle income brackets.\(^8^0\) The effect of exclusion may be, not to prevent the arrival of deprived groups in the suburbs but to prevent the further exodus of portions of the remaining urban middle class. It may also result in a diversion of builders' energies toward construction of lower-middle income apartment housing in the cities in preference to concentration on types of housing already approaching oversupply. But apart from these arguable policy considerations, and apart from the effects on the legal values of equality and notice alluded to in an earlier portion of this article and the values of maintaining suburban self-government and civic pride, it is plain that piecemeal granting of zoning reclassifications would operate as a discouragement rather than aid to any fundamental reforms that may be needed in metropolitan zoning. So long as builders can readily obtain reclassifications or believe they can do so, little political pressure will be generated for comprehensive legislative revision of the ordinances. If such pressure were generated, it is fair to suggest that the economic self-interest of the construction industry would carry at least as much weight in the making of public policy as the preferences or prejudices of local residents. There is something to be said in this context for the old saw

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\(^7^9\) 239 Md. 119, 125, 210 A.2d 367, 370 (1965). Parenthetically, it may be noted that the opinion in the *Kines* case upsetting a reclassification grant was written by Judge Hammond, the supposed advocate of flexibility in zoning and for deference to local boards. See also Alvey v. Hedin, 243 Md. 334, 221 A.2d (1966), reaffirming Alvey v. Michaels on the same facts. Recent apartment house cases include Board of County Comm'rs v. Kay, 240 Md. 690, 215 A.2d 206 (1966); Baker v. Montgomery County Council, 241 Md. 178, 215 A.2d 831 (1965); Board of County Comm'rs v. Edmonds, 240 Md. 681, 215 A.2d 209 (1965); Sampson Bros. v. Board, 240 Md. 116, 213 A.2d 289 (1965).

\(^8^0\) As to this case, see Babcock and Bosselman, *supra* note 53, at 1053-55.
that the best way to change a bad law is to enforce it. And that there is, in fact, at least some possibility that legislatures will act to foster metropolitan zoning is sufficiently suggested by the movement toward earnings taxes and tax equalization and by the fact that the Maryland legislature has already joined in moves in this direction respecting zoning in the Washington metropolitan area, and that its actions have been upheld by the court.

In its approach to these metropolitan problems, as in its maintenance of the substantial evidence rule and its refusal to allow zoning boards to substitute planning for zoning techniques without legislative authorization, the Maryland court has pursued a course, not of erratic activism, but of "genuine judicial restraint" as Mr. Sickels defines it. We have seen in our discussion of these three issues that the court has declined to make major innovations in zoning law to reflect its views as to wise public policy. It correlative can be shown that the court, unlike those of many other states, has placed few obstacles in the way of legislative acceptance of new zoning tools and techniques.

One commentator has identified six issues which may be used to test attitudes of state courts toward legislative power in zoning matters. He has shown that the Michigan and New Jersey Supreme Courts differ greatly in their willingness to allow total exclusion of unpopular uses from municipalities, in their willingness to allow non-cumulative use districts or "floating zones," in the extent to which they are prepared to accept the compulsory amortization of non-conforming uses, in their decisions on validity of ordinances establishing minimum lot sizes and minimum house sizes, and in the extent to which they are willing to allow aesthetic considerations to be taken into consideration in zoning. The New Jersey court allows scope to such experiments; the Michigan court does not. Maryland has chosen to align itself with New Jersey. Its court has squarely upheld the validity of floating zones and compulsory amortization of non-conforming uses, and has also shown signs of indulgence towards area restrictions, zoning for aesthetic purposes, and total exclusion of dis-
favored uses.\(^9\) If that is not "genuine restraint," it is hard to see what would be.

Mr. Goldman's appeal for judicial consideration of "changed viewpoints as to the needs and interests of the whole community"\(^9\) would thus seem misguided. It has recently been observed:

[T]he kind of law that is made depends significantly on the kind of law-making agency that is employed. The courts are well adapted to weigh the competing claims of individual litigants; but they are poorly equipped to resolve broad issues of policy involving, for example, the reallocation of resources among large social groups or classes. Judicial lawmaking in the latter areas is confronted by a dual peril; it may ignore considerations relevant to intelligent policy formulation, or, in taking them into account, it may inspire doubts about the integrity of the judicial process. [Ernst] Freund, writing half a century ago, saw the first as the primary danger. Recent developments in our public law illustrate that today the latter may also be a source of concern.\(^9\)

It is true that deference to legislative bodies and the principles of prior cases, as distinct from partisanship between classes and persons, may possibly lead to what Mr. Sickels describes as a "low level of determinacy and predictability from the point of view of the litigant, whose interest is in results."\(^9\) Of course, the legal trains do not always

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Royalties Corp. v. Mayor and City Council, 235 Md. 74, 88, 200 A.2d 652, 659 (1964); Grant v. Mayor and City Council, 212 Md. 301, 129 A.2d 363 (1957); Feldstein v. Kammuf, 209 Md. 479, 121 A.2d 716 (1956); Laque v. State, 207 Md. 242, 113 A.2d 893 (1955). The new provisions of the state zoning enabling act authorizing historical preservation districts are as yet untested in the courts (see Md. Code Ann. art. 66B, §§ 38-50 (1957)), though two early cases appear to uphold such zoning. See Cochran v. Preston, 108 Md. 220, 229, 70 Atl. 113, 114 (1908); Garrett v. Janes, 65 Md. 260, 267, 3 Atl. 597, 600 (1886). The Maryland cases and statute of law on aesthetics thus follow the approach urged by Ernst Freund:

[I]t is undesirable to force by law upon the community standards of taste which a representative legislative body may happen to approve of, and compulsion with that end in view would be justly resented as inconsistent with a traditional spirit of individualism. But it is a different question whether the state may not protect the works of nature or the achievements of art or the associations of history from being wilfully marred. In other words, emphasis should be laid on the character of the place as having an established claim to consideration and upon the idea of disfigurement as distinguished from the falling short of some standard of beauty.

FREUND, STANDARDS OF AMERICAN LEGISLATION 115-16 (1917).

89. No Maryland cases involving total exclusion from a municipality have been discovered, but the court has been indulgent toward exclusions of specified uses from residential districts. See Grant v. Mayor and City Council, 212 Md. 301, 129 A.2d 363 (1957) (billboards); Kahl v. Consolidated Gas Electric Light and Power Co., 191 Md. 249, 60 A.2d 754 (1948) (6-2 decision) (overheard lines); Ulrich v. State, 186 Md. 353, 46 A.2d 637 (1946) (funeral homes). Cf. Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 (1965) (corner posts).


92. Sickels, at 104.
run on time when the courts abjure the comforts and certainties of rule by fiat. Professor Haar reminds us of "other traditional concepts which are perhaps more important than zoning principles, old or new. Notice, equality under the law and all that makes up our notion of fairness may be wrongly sacrificed in the name of progress."93 Mr. Goldman takes the view that "until it [the "mistake or change" rule] is discarded for a more modern test, progress in Maryland will be retarded."94 In upholding the floating zone decisions, he observes, "of course, property values may fall, but this is usually not a legitimate zoning concern."95 This plausible observation, however, begs many important questions. Evidence as to effects on values has long been admissible in zoning determinations. Some commentators have urged that maximization of property values is the real, and should be the avowed, purpose of zoning.96 And, of course, one effect of stability in zoning is to encourage investment and development — purposes themselves proper objects of zoning.

Whatever our answers to these problems, we shall not join in condemning a court and its attendant press and legal commentators for keeping "alive a presumption against the significance of judicial individuality."97 Nor should we assail as reactionary a body of legal doctrine which clearly defines present law while leaving the way open to the unobstructed enactment of modern reforms by the legislature. It would not seem improper to close this brief commentary with the words of Judge Learned Hand: "let the judges be brought to book when they go wrong, but by those who take the trouble to understand them."98

94. Goldman, at 55.
95. Id. at 60-61.
97. Sickels, at 102.
98. Learned Hand, How Far Is a Judge Free in Rendering a Decision, The Spirit of Liberty 103, 110 (Dilliard 3d ed. 1953). Judge Hand also supplied the best answer to the title of Mr. Sickels' article, with its reference to "the illusion of judicial consensus":

[1]t is well for us to pause and consider how important in the days ahead may be his attempt to keep alive at the end, as he did at the beginning, the tradition of detachment and aloofness without which, I am persuaded, courts and judges will fail. And make no mistake, that tradition is under attack, even if it be not a frontal attack. We are assured that only the unsophisticated and naive will believe in the reality of detachment and aloofness in judges, or in anyone else. These philosophers believe that they have burrowed too far into the visceral origins of all beliefs and of all convictions to be fobbed off by the ingenuous assumptions of a simpler age. None of us can ever escape covertly seeking our interests; our disguises, be they ever so ingenious, are easily penetrated; our shams are readily exposed. Let us not underrate the power of this attack; let us remember how desperately in our own youth we too dreaded appearing to be without guile; how we longed to be reckoned astute and enfranchised; and let us not forget that youth is the same now as then. Therefore it is fitting for us to meet here today in grateful commemoration of the life of this stalwart, true-hearted, steadfast champion of a faith whose disappearance will in the end bring with it a relapse into the reign of the tooth and claw.