

particularly troublesome in the U.S. Supreme Court's ruling in *Buckeye* is its continued view that there is nothing constitutionally suspect in permitting legislative or administrative matters to be submitted to referendum. The Court stated:

In *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S., at 672, 675, 96 S. Ct. 2358, we made clear that because all power stems from the people, "[a] referendum cannot . . . be characterized as a delegation of power," unlawful unless accompanied by "discernible standards." The people retain the power to govern through referendum " 'with respect to any matter, legislative or administrative, within the realm of local affairs.' " *Id.*, at 674, n. 9, 96 S. Ct. 2358.²⁵

25. *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 123 S. Ct. 1329, 1396 (2003).

Under the Court's theory, a disgruntled civil service employee could put a less-than-favorable annual performance evaluation—an administrative matter—up for referendum, and that would be okay.

The Ohio Supreme Court has, wisely enough, recognized differences between legislative and administrative action and has created different decision rules for them—rules that could not be sidestepped in a federal action. The *Buckeye* plaintiffs persisted in state court, where they ultimately prevailed when the Ohio high court finally recognized what really was at issue in the case: the essentially arbitrary and capricious nature of a referendum on a site-specific land-use action. Sadly, the U.S. Supreme Court has turned a blind eye to the consequences of such referenda.

Hiding in Plain Sight: Private Prejudice, State Action, and "Devotion to Democracy"

By John M. Payne

State action has proven a treacherous constitutional field in recent decades, with the U.S. Supreme Court all too frequently confusing state action analysis with the merits of the constitutional claim. *Buckeye* continues this unhelpful trend. Logically, state action analysis should be undertaken first, and without regard to the merits, because if the state is not responsible for the conduct complained of, either directly or by entanglement with private actors, then the Fourteenth Amendment cannot be invoked at all.

In *Buckeye*, however, Justice O'Connor jumps ahead of this logical starting point and begins with proof of intent to discriminate. She acknowledges the alleged discriminatory motives of those who opposed Buckeye's housing development and sought to defeat it by referendum, but contrasts those motives with the "facially neutral" referendum procedure and the absence of proof that the various public officials administering the referendum procedures were themselves motivated by racial animus. Then, but only then, she jogs back to the state action question. Given the progression of her thoughts, it comes as no surprise that she finds no state action present. Relying on *Blum v. Yaretsky*,¹ she rejects Buckeye's contention that the "private motives [that] triggered the referendum drive can fairly be attributable to the state."

Had Justice O'Connor started at the beginning, she might more readily have recognized that *Blum v. Yaretsky* is wildly off-point. There, the plaintiffs were attempting to inject consti-

tutional due process requirements into an essentially private setting (nursing home care), using Medicaid funding as the state action "hook." The *Blum* Court followed a line of cases holding that, absent coercion by the state as to the decisions made, neither public funding nor routine paperwork accountability was sufficient to "entangle" private actors with the state for purposes of invoking the Fourteenth Amendment.

In *Buckeye*, by contrast, the city was hardly standing passively in the background, but instead provided a uniquely public and coercive mechanism to facilitate private discrimination: the referendum. Buckeye Community Hope Foundation simply could not put a shovel into the ground until the city gave it permission to do so. In this context, it is no more relevant that Cuyahoga Falls' referendum ordinance is "facially neutral" than was the similarly neutral state court apparatus in *Shelley v. Kraemer*² when enforcement of a private, racially restrictive covenant came before that body. (Justice O'Connor cites, but does not pause to analyze, *Shelley*.) As in *Shelley*, Cuyahoga Falls has put the weight of the state behind enforcement of its citizens' racially discriminatory decisions.

Justice O'Connor then muddles state action doctrine further by gratuitously reminding us that private citizens have First Amendment rights, citing *Texas v. Johnson*,³ the flag burning case. Of course they do, just as the property owners in *Shelley* had a right to express their odious views on segregated neighborhoods and a right (pre-Title VIII) to effectuate those views in their private affairs. The First Amendment does not protect the effectuation of those views in state action, however, nor in the end does Justice

John M. Payne is Professor of Law and Justice Frederick Hall Scholar at Rutgers School of Law–Newark, and is the co-author (with Professor Daniel R. Mandelker) of *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* (5th Ed., Michie 2001).

1. 457 U.S. 991, 1002-03 (1982).

2. 334 U.S. 1 (1948).

3. 491 U.S. 397 (1989).

Commentary

O'Connor argue to the contrary, once free speech has served her rhetorical purpose. Indeed, she emphasizes that if and when private discriminatory views are embodied in regulation, whether by the legislature or by the people through a referendum, that enactment is fully subject to Fourteenth Amendment scrutiny. *Buckeye's* problem, she says, is that the allegedly unconstitutional action embodied in the referendum proposal never became law, and therefore cannot be complained of.

Justice O'Connor's approach reflects the "devotion to democracy" theory of *James v. Valtierra*⁴—an approach that has made it virtually impossible to challenge land use referenda. That rationale seriously misses the mark in *Buckeye*, however, where the procedure itself was part of the problem. As land developers forcefully remind us at every opportunity, time is money in the land use game. A referendum is not an insignificant hurdle for any developer to confront, but that hurdle can be particularly daunting for the typical nonprofit housing venture, whose thinner capitalization may fade away as the delays pile up. (The *Buckeye* process took from 1995 until 2003 to run its course.) Had it been given the chance, *Buckeye* might or might not have been able to establish that the referendum drive was tainted by discriminatory intent. But if it did prove discrimination and damages, its constitutional rights would have been violated quite apart from Justice O'Connor's concern (the outcome of the referendum), and that harm would certainly have been the product of state action.

4. 402 U.S. 137, 141 (1971).

Valtierra was not litigated as a racial discrimination case, and so there was no reason for the Court to apply strict scrutiny there. Nor was there any issue in *Valtierra* about state action, which was assumed. By contrast, the very essence of *Buckeye's* complaint is racial animus, which the Court nonetheless lets die on state action grounds without any searching inquiry at all. This is, to say the least, an astonishing misapplication of the core teaching of *U.S. v. Carolene Products*: "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."⁵ In other words, devotion to democracy need not be blind devotion, and discriminatory state action can be found in process as well as result.

Buckeye's state action analysis provides a dispiriting roadmap for how to use "direct democracy" as a tactic of discrimination, so long as the race talk is kept in the private sector. While there does not appear to be any turning back from the Court's "devotion to democracy" dictum, the irony of the *Buckeye* case may be that the only remaining defense against the misuse of democratic process in land use referenda is the democratic process itself—that is to say, the democratic process that produced Title VIII in 1968. Housing advocates should perhaps count themselves lucky that these Justices chose not to reach that question in *Buckeye*.

5. 304 U.S. 144, 152-53 (1938) (footnote 4).

The Hidden Agenda (?): *Buckeye* and Due Process Review of Land Use Decisions

By Peter Buchsbaum

For those sensible states that do not allow land use referenda (approximately half of the total), *City of Cuyahoga Falls v. Buckeye Community Hope Foundation* may seem to be someone else's problem. After all, in our calmer, saner jurisdictions (mainly in the East), we have, as a matter of state law, decided that land use referenda are an affront to good planning. In fact, the *Buckeye* facts themselves demonstrate the wisdom ultimately attained by the Ohio Supreme Court when it voided the referendum: it gets ugly when the electorate votes up or down on particular land use measures.

Peter Buchsbaum chairs the Land Use Practice Group of the Woodbridge, New Jersey, law firm of Greenbaum, Rowe, Smith, Ravin, Davis & Himmel. He has consulted with APA's Growing Smart project, has served in several land use roles with the American Bar Association's Section on State & Local Government Law, and is currently mayor of his hometown of West Amwell, N.J.

Nonetheless, *Buckeye* has something even for those jurisdictions that are immune from initiative-itis.

The Buckeye Community Hope Foundation did not merely challenge the referendum as being discriminatory. It also alleged that the referendum constituted a denial of substantive due process of law, arguing that once the city council approved the site plan for its housing project, it was constitutionally entitled to get a building permit and build the project.

This substantive due process theory has found its way into much case law. Most often, it is used as an alternative to a takings claim. Thus, a developer might argue that even if a particular local action did not take its property, the action was nonetheless so arbitrary and capricious that it violated the due process clause of the constitution.

This claim has percolated in both the federal and state courts. Many U.S. Circuit Courts of Appeals have been resistant to these claims. Some have held they don't exist, on the