

# CONSTITUTIONAL LIMITATIONS OF STATE GROWTH MANAGEMENT PROGRAMS

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## I. INTRODUCTION

Recent decades have seen an increasing recognition that the traditional model of land use planning, characterized by municipal-level decisionmaking and Euclidean-style zoning, is not meeting the needs of residents living with its results. Some state and local lawmakers have responded with policies designed to correct the problems of traditional planning. They have tried many potential solutions. One common response has been the establishment of new, state-level programs that increase state and regional planning authority and promote more compact, mixed-use patterns of development. These state growth management programs are the subject of this Article.<sup>1</sup>

Fourteen states have currently implemented some form of statewide growth management program.<sup>2</sup> The lack of consensus

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1. Though there are numerous regional and local growth management programs, the scope of this Article is confined to state-level efforts.

2. These states are Delaware, Florida, Georgia, Hawaii, Maine, Maryland, New Jersey, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin. David R. Godschalk, *Smart Growth Efforts Around the Nation*, 66 *Popular Government* 17-18 (2000), available at <http://www.iog.unc.edu/pubs/electronicversions/pg/pgfal00/article2.pdf>. For a listing of most of these programs' governing statutes, see Douglas R. Porter, *State*

about the necessary components a successful program, together with the concessions required to pass growth management legislation, have generated great variety in the goals and legal structure of the state programs. These divergent models provide an opportunity for comparing different alternatives and can prove helpful for the many states considering growth management policies.<sup>3</sup> Learning from the successes and failures of existing programs will be crucial as more state legislatures address the question of growth management in the future. The goal of this Article is to aid policymakers grappling with this issue by examining one under-analyzed facet of growth management efforts. It focuses on their constitutional limitations.

Most analyses of state growth management programs have concentrated on issues related to either the statutory scheme or the actions of agencies administering the program. Obviously, these programs' success depends upon well-crafted statutes and strong implementing regulations. However, the judicial response to growth management efforts can also affect their efficacy. Through their resolution of individual cases, courts have the power to either hinder or thwart the achievement of a program's goals.

There are generally two ways courts can significantly affect the scope of a state growth management regime. The first is through their interpretation of statutes and regulations. For example, the Vermont Supreme Court has construed the definitions of that state's program in a way that lowered the threshold of projects requiring a state-issued permit,<sup>4</sup> thereby subjecting more projects to statewide public and governmental scrutiny. Second, courts can influence these programs' efficacy by their response to state and federal constitutional challenges.

The study of statutory interpretation questions would present several problems. Since most appellate decisions related to growth management programs involve some degree of statutory

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*Framework Laws For Guiding Urban Growth and Conservation in the United States*, 13 PACE ENVTL. L. REV. 547, 548 nn.1-2 (1996). Hawaii's governing statute is located in sections 205-1 to 205-5 of the Hawaii Revised Statutes (2001). Some commentators classify Hawaii's planning regime separate from other state-level efforts, since the historic weakness of local government power has resulted in little tension over the state's usurpation of local land use authority. See James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 489 n.3 (1994). Because the State Land Use Commission, rather than municipal governments, largely controls land use, Hawaii's program has been described as "state-administered, rather than state-sponsored." Dennis E. Gale, *Eight State-Sponsored Growth Management Programs: A Comparative Analysis*, 58 J. AM. PLAN. ASS'N 425, 437 n.1 (1992).

3. See AMERICAN PLANNING ASS'N, PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES (2002), at <http://www.planning.org/growingsmart/>; Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 URB. LAW. 601, 605-35 (1999) (discussing recent state efforts to address problems of growth management and propose state-level solutions).

4. See, e.g., *In re Spring Brook Farm Found., Inc.*, 671 A.2d 315 (Vt. 1995).

interpretation, a colossal number of cases would have to be surveyed. Moreover, constitutional issues are more compelling because of the crippling effect adverse decisions can have upon state growth management programs. By contrast, legislatures can, in theory, overrule decisions based solely upon statutory construction through the passage of new legislation.<sup>5</sup> To that end, this Article focuses on the constitutional limits of state growth management efforts as well as how best to design such a program in order to avoid constitutional difficulties.

Because these state statutes have fundamentally altered the process of land use planning, there are a host of constitutional issues potentially implicated. One concern raised in legal challenges has been whether the authority vested in administrative agencies implementing the program constituted an unlawful delegation of power. Jurisdictional problems related to whether legislative standing provisions violate the constitutional requirements of standing have also developed, and some plaintiffs have brought procedural and substantive due process challenges. A handful of other constitutional issues, like state usurpation of home rule authority and equal protection of the laws, have also arisen from these programs. All of these issues are discussed in this Article.<sup>6</sup>

This Article is organized in the following manner. Part II describes the general structure of the growth management programs established in three states: Florida, Oregon, and Vermont. This study was conducted primarily by surveying case law, with these states serving as the principal focus. When instructive, cases from other states are used selectively to further explore the constitutional issues. Taking this multi-state approach helps to better identify the major constitutional concerns likely to arise from implementation of a growth management program. Nevertheless, policymakers will have to look to their own state's constitution and related jurisprudence to determine the risk of similar problems in their state.

Part III discusses the different constitutional topics. The discussion of each topic begins with a general introduction of the issue and explanation of how the constitutional doctrine relates to growth management programs. Results of the case law are

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5. See *FDA v Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143-56 (2000) (imputing legal meaning to a Congressional failure to act, suggesting that Congress would have acted had its intent been thwarted).

6. One problem that will not be analyzed at length is the issue of regulatory takings. See *infra* Part III. A for the reasons this important constitutional topic has not been included in this study.

presented next, with a discussion of the most important cases for that issue and their implications. Finally, each subsection concludes with an examination of the possible methods by which any identified constitutional deficiencies could be corrected in a manner that best meets the goals of growth management.<sup>7</sup> Part IV offers a brief conclusion.

This Article comes at an exciting time for those interested in land use planning reform. The American Planning Association (APA) recently developed a series of model statutes designed to improve states' planning processes.<sup>8</sup> These statutes represent only the second major effort to improve upon the 1924 Standard Zoning Enabling Act,<sup>9</sup> the statutory model most widely used today, and will hopefully energize planning reform efforts around the country. Accordingly, the presentation of curative measures in relevant sections of Part III includes a discussion of the approach taken by the model statutes. Because the issues discussed in this Article are pertinent to the design of growth management legislation, the Article addresses whether the applicable statutes resolve constitutional concerns without thwarting statewide growth management goals.

## II. STATE GROWTH MANAGEMENT PROGRAMS

The decision by many states to adopt state-level growth management programs represented a rejection of the status quo of localized and uncoordinated planning processes, segregative zoning of uses, and few constraints on development at the urban periphery. Although important for understanding growth management more generally, the historical roots of this movement have been documented elsewhere and thus are not discussed here.<sup>10</sup> However, a brief description of the basic structure of the Vermont, Oregon, and Florida programs is helpful for understanding constitutional challenges to them.

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7. Though not taking a position on the desirability of growth management's goals, this Article assumes that policymakers hope to enact the strongest possible program within constitutional and political constraints. Obviously, policymakers interested in implementing a weaker program will have to approach these issues differently, and may be faced with fewer constitutional difficulties.

8. The model statutes are being published in a legislative guidebook to aid policymakers.

9. The first such effort was the American Law Institute's Model Land Development Code in 1975.

10. See, e.g., George E.H. Gay, *State Solutions to Growth Management: Vermont, Oregon, and a Synthesis*, 10 NAT. RESOURCES & ENV'T 13, 13-16 (1996); James C. Nicholas, *State and Regional Land Use Planning: The Evolving Role of the State*, 73 ST. JOHN'S L. REV. 1069, 1073-74 (1999); Wickersham, *supra* note 2, at 498-509; see generally JOHN M. DEGROVE, *LAND, GROWTH, AND POLITICS* (1984).

There are several reasons why these states represent an ideal sample for examining constitutional problems. First, they are geographically dispersed. Comparisons drawn between these states are more instructive than between neighboring states. Since most growth management programs have clustered in three general regions of the country (the Pacific Northwest, the Southeast, and mid-Atlantic to New England), Vermont, Oregon, and Florida provide an example from each. Geographic diversity also helps to control for the political leanings of a particular state's judiciary.

Second, these states have had the most experience with growth management, with programs in each state more than twenty-five years old. Consequently their case law is more developed case law than in states with newer programs. The programs in Vermont, Oregon, and Florida are also among the strongest in the nation. Because more rigorous programs generally trigger more legal challenges, they provide optimal case studies for the exploration of growth management's constitutional boundaries. Finally, since the structure of the programs in each the three states is very different, this sample better accounts for constitutional issues that might arise from a specific growth management structure. Brief descriptions of the programs are presented below.

#### *A. Vermont*

The centerpiece of Vermont's growth management program is the permitting process created under the 1970 State Land Use and Development Act, popularly known as Act 250.<sup>11</sup> The act requires that developments imposing regional impacts first obtain a state-authorized permit.<sup>12</sup> To acquire an Act 250 permit, an application must be filed with the three-member district environmental commission within whose jurisdiction the subject property lies.<sup>13</sup> There are nine of these commissions throughout the state, with each commission having authority over a particular region.<sup>14</sup> The relevant district commission evaluates a proposed project according to a series of statutorily specified criteria,<sup>15</sup> and decides whether to grant the permit. The commission may deny the project if it would be "detrimental to the public health, safety or general welfare."<sup>16</sup> If any party to the proceeding disagrees with the district commission's

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11. VT. STAT. ANN. tit. 10, §§ 6001-6108 (1997).

12. VT. STAT. ANN. tit. 10, § 6081 (1997).

13. VT. STAT. ANN. tit. 10, § 6083 (1997).

14. VT. STAT. ANN. tit. 10 § 6026 (1997).

15. The criteria are listed at VT. STAT. ANN. tit. 10, § 6086 (1997).

16. VT. STAT. ANN. tit. 10, § 6087(a) (1997).

conclusion,<sup>17</sup> the decision may be appealed to the state-level Environmental Board.<sup>18</sup> The nine-member Board then conducts a de novo review of the application, once again considering the case in light of the relevant criteria, and issues an order.<sup>19</sup> Appeals of the Board's decision are taken to the Vermont Supreme Court.<sup>20</sup>

Many features of the Act 250 permit review process help to make it an effective growth management tool. The threshold required to define a development proposal as one of regional significance is very low, such that even relatively small development projects fall within the definition.<sup>21</sup> In this way, the state has jurisdiction over most projects that significantly affect land use and the environment.<sup>22</sup> The fact that these permits are required before development can proceed also contributes to Act 250's efficacy. Unlike many environmental review processes, such as that mandated by the National Environmental Policy Act (NEPA),<sup>23</sup> the decisions of the district commission or Environmental Board have binding legal consequences on whether or not a project can be implemented. Finally, the permitting process subjects large development projects to significant public scrutiny.

Yet, Act 250, in its current form, is not free from problems. The Act had originally called for the development of a statewide Land Use Plan, but friction between regional factions within the state legislature prevented the Plan from being developed.<sup>24</sup> Ironically, this imperfect form of Act 250, with its focus on review of individual projects without the benefit of an overarching plan, was later endorsed by others. The American Law Institute (ALI) based its Model Land Development Code<sup>25</sup> on Act 250, and the Code became the forerunner to Florida's Environmental Land and Water Management Act.<sup>26</sup> This site-specific model of growth management

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17. Persons entitled to party status are described *infra* at note 125; *see also* VT. STAT. ANN. tit. 10, §§ 6084, 6085(c)(1) (1997).

18. VT. STAT. ANN. tit. 10 § 6089(a)(1) (1997).

19. VT. STAT. ANN. tit. 10 § 6089(a)(3) (1997).

20. VT. STAT. ANN. tit. 10 § 6089(b) (1997).

21. For example, Act 250 applies to "housing projects...with 10 or more units," commercial or industrial "improvements on a tract or tracts of land...involving more than 10 acres," as well as many other types of projects. VT. STAT. ANN. tit. 10, § 6001(3) (1997).

22. *See* Wickersham, *supra* note 2, at 513-14.

23. 42 U.S.C. §§ 4321-4370d (2001).

24. Its authorizing statute was repealed. Jeffrey F. Squires, *Growth Management Redux: Vermont's Act 250 and Act 200, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT: POLICY ISSUES AND PRACTICAL CONCERNS* 11, 14 (Douglas R. Porter ed., 1992).

25. AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE (1976) [hereinafter MLDC].

26. Act effective July 1, 1972, ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012- 380.12 (2000)).

has since fallen out of favor, with programs similar to Oregon's having become far more popular in recent years.<sup>27</sup>

More recently, Vermont has made additional attempts to enact a statewide planning regime. To that end it passed the Growth Management Act (Act 200) in 1988.<sup>28</sup> However, the efficacy of Act 200 was limited soon thereafter when the state legislature passed a subsequent law making compliance with the Act's goals optional.<sup>29</sup> As one observer described Act 200, "there is less than meets the eye."<sup>30</sup> Because Act 200 has had little effect on Vermont's ability to manage growth, Act 250 remains the most important component of its growth management regime.

### B. Oregon

Oregon's growth management program, considered one of the most effective in the nation, began in 1973 with passage of the State Land Use Act.<sup>31</sup> The Act created a state-level Land Conservation and Development Commission (LCDC), which has authority to promulgate statewide land use goals.<sup>32</sup> Nineteen goals have been adopted.<sup>33</sup> Local and regional governments are required to prepare comprehensive plans that are consistent with the statewide goals,<sup>34</sup> and LCDC reviews these plans to ensure goal compliance.<sup>35</sup> In this way, plans throughout the state remain consistent with LCDC's goals.

In addition to this rulemaking aspect of the program, there is also a quasi-judicial element. In order to improve the review of local

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27. See Wickersham, *supra* note 2, at 519, 525. In the Oregon-style model, statewide planning goals or policies are adopted first, and there is a review process to ensure that local comprehensive plans are consistent with state goals. *Id.* at 530-31. Despite the increased popularity of the Oregon-style model, one analyst has suggested that an optimal growth management regime would combine elements of both models. Gay, *supra* note 10 at 73. He recommends using a Vermont-style case-by-case approach in rural areas, while promoting a more planning-oriented approach, such as Oregon's, for urban areas. *Id.* at 73-74.

28. Donald L. Connor et al., *State and Regional Planning: Summary of Selected Recent Acts and Initiatives*, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT, *supra* note 24, at 213, 223.

29. David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197, 202 (1994).

30. Squires, *supra* note 24, at 32.

31. 1973 Or. Laws 80 (codified as amended at OR. REV. STAT. ch. 197 (2001)); GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON* 22 (1992).

32. OR. REV. STAT. §§ 197.030, .040 (2001).

33. See KNAAP & NELSON, *supra* note 31, at 25-27. An updated list of Oregon's nineteen land use goals can be found at the LCDC website, <http://www.lcd.state.or.us/goalhtml/goals.html>.

34. OR. REV. STAT. § 197.175 (2001).

35. OR. REV. STAT. § 197.251 (2001).

government decisions made pursuant to their comprehensive plans, the Oregon legislature created the Land Use Board of Appeals (LUBA) in 1979.<sup>36</sup> LUBA was granted exclusive jurisdiction over review of all land use decisions.<sup>37</sup> Under Oregon law, parties wishing to challenge a local government's land use decision may appeal that decision to LUBA. Appeals from LUBA are taken to the Oregon Court of Appeals.

Beyond the statutory structure of the Oregon program, it has been noted for the restrictiveness of its substantive regulations. Its best-known feature is its creation of urban growth boundaries (UGBs) around municipalities. UGBs demarcate the divide between urban and rural land uses, with only limited development allowed outside the boundaries.<sup>38</sup> These and other stringent rules have enabled Oregon to protect much of its agricultural and forestland from development.

### C. Florida

With characteristics of both the Vermont and Oregon programs, Florida's growth management program represents a hybrid approach.<sup>39</sup> It has two primary components. The first consists of the statutory framework created by the 1972 Florida Environmental Land and Water Management Act (ELWMA).<sup>40</sup> This act, based on the ALI's Model Land Development Code, provided two legal tools for managing growth. The first of these was allowing for the designation of "areas of critical state concern," which are regions within the state whose resources are of statewide importance and in need of special protection.<sup>41</sup> The newly created Department of Community Affairs (DCA), a state planning agency, was charged with recommending appropriate areas for designation. Final

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36. Arthur C. Nelson, *Comparative Judicial Land-Use Appeals Processes*, 27 URB. LAW. 251, 261 (1995). For a discussion of rationales favoring the creation of LUBA, see Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 WILLAMETTE L. REV. 441, 446-48 (2000).

37. Nelson, *supra* note 36, at 261. "Land use decision" is very broadly defined under Oregon law. Its legal definition is as broad as this term's definition in popular use would be. See *infra* note 139; OR. REV. STAT. § 197.015(10) (2001).

38. For a discussion of Oregon's UGBs, see KNAAP & NELSON, *supra* note 31, at 39-68.

39. Having features of both programs has not necessarily led to more effective management of growth. There is no evidence suggesting that Florida's growth management efforts have been more successful than the other states.

40. Act effective July 1, 1972, ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012- 380.12 (2000)).

41. FLA. STAT. § 380.05 (2000). For a description of how the areas of critical state concern designation process originally operated, see Nicholas, *supra* note 10 at 1079-83. For a discussion of changes to this process in the wake of a Florida Supreme Court decision, see *infra* notes 90-98 and accompanying text.

designation decisions were vested in the Administration Commission, which is composed of the governor and cabinet members. Upon designation, local governments within an area were required to prepare a comprehensive plan conforming to development principles issued by the DCA.

The second growth management tool established by the 1972 Act was the “development of regional impact” (DRI) process, in which projects expected to have effects beyond the municipality wherein they are located are subjected to additional review.<sup>42</sup> As with the Act 250 process, a developer must apply for a DRI permit. The regional planning commission then studies the impact of the proposed project and submits a report to the local government, which issues a development order either granting the permit application, denying it, or granting it with conditions.<sup>43</sup> Appeals from the development order are taken to the Administration Commission, which sits as the Land and Water Adjudicatory Commission for the purposes of DRI appeals.<sup>44</sup> The Commission relegates the case to a hearing officer, who holds a trial and makes a recommended decision, which the Commission is free to adopt or reject. Appeals from Commission rulings are taken to the state’s appellate courts.

The second major component of Florida’s growth management program came with the passage of the Growth Management Act in 1985<sup>45</sup> and the accompanying legislatively-adopted State Comprehensive Plan.<sup>46</sup> The 1985 act borrowed many elements from the Oregon planning program, including the adoption of statewide planning goals and a requirement that local and regional comprehensive plans be consistent with the state plan.<sup>47</sup> The DCA undertakes the review of local and regional plans.<sup>48</sup> If it finds that local plans are not in compliance, it may recommend sanctions

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42. FLA. STAT. § 380.06 (2000). The DRI process is currently being phased out, as DRI review is no longer required in municipalities whose comprehensive plans have been adjudged to be in compliance with statewide goals. *See* Wickersham, *supra* note 2, at 519. Despite the imminent twilight of DRI review, it is nevertheless instructive to examine cases arising out of the DRI process for two reasons. First, Vermont continues to use the Act 250 permit process, which is similar to the DRI process. Second, the APA’s new model planning legislation includes provisions for a DRI review process. *See* AM. PLANNING ASS’N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND MANAGEMENT OF CHANGE, §§ 5-301 to 5-315 (2001), at <http://www.planning.org/growingsmart/>.

43. FLA. STAT. § 380.031(3) (2001).

44. FLA. STAT. § 380.07(1) (2001).

45. Act effective May 31, 1985, ch. 85-55, 1985 Fla. Laws 207 (codified as amended at FLA. STAT. §§ 163.3161-.3243 (2000)).

46. Act effective July 1, 1985, ch. 85-57, 1985 Fla. Laws 295 (codified at FLA. STAT. ch. 187 (2000)).

47. FLA. STAT. § 163.3177 (2001).

48. FLA. STAT. § 163.3177(9)(c) (2001).

against the municipality, which the Land and Water Adjudicatory Commission has the authority to impose.<sup>49</sup> Through these means, Florida has created a powerful system to ensure the consistency of local comprehensive plans with the statewide goals.

### III. THE CONSTITUTIONALITY OF STATE GROWTH MANAGEMENT PROGRAMS

#### A. *Relevance of Regulatory Takings*

The issue of regulatory takings is certainly relevant to growth management programs. There is a very real risk that courts could find a program's land use restrictions to be sufficiently severe so as to constitute a taking. The regulatory takings doctrine is the most serious constitutional impediment to growth management and must be carefully considered in adopting a program. However, the takings question is not considered in this Article. Because this field has been so extensively written upon, and since takings issues are ubiquitous to all planning regimes, they are less uniquely relevant to state-level programs than the other constitutional issues addressed in this Article. The regulatory actions of federal, state, regional, and local governments all raise takings concerns. Moreover, given that judges' ideologies often affect the outcome of takings cases, it is extremely difficult to predict how courts would treat a particular land use regulation.

Nevertheless, before moving on to other constitutional topics, it is worth noting that the Florida, Vermont, and Oregon programs, despite facing numerous takings challenges, have not been seriously constrained by adverse decisions. Analyzing the issue somewhat differently, courts in Florida and Oregon have both upheld regulations that either prohibited development on significant proportions of a landowner's property or established large minimum lot sizes.<sup>50</sup> More significantly, the Oregon Supreme Court and Ninth Circuit Court of Appeals have both held that a regulation prohibiting all residential development on a parcel zoned exclusively for forest uses does not constitute a taking.<sup>51</sup> The courts of these

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49. FLA. STAT. § 163.3184(11) (2001).

50. See *Graham v. Estuary Props., Inc.*, 399 So. 2d 1374 (Fla. 1981) (upholding the denial of a DRI application which effectively prohibited development on 4600 acres of a 6500 acre property); *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990) (finding no facial taking from a comprehensive plan restricting development to small areas of plaintiffs' properties); *Oregonians in Action v. LCDC*, 854 P.2d 1010 (Or. Ct. App. 1993) (finding that LCDC's order mandating 80 acre minimum lot sizes did not constitute a taking).

51. *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (rejecting taking claim under the United States Constitution); *Dodd v. Hood River County*, 855 P.2d 608 (Or. 1993) (rejecting taking claim under the Oregon Constitution). In rejecting the taking claim, the

states have been generally sympathetic to the growth management programs in other takings challenges as well.<sup>52</sup> Despite the relative success these programs have enjoyed against takings challenges, the increased judicial hostility to land use regulations in recent years puts effective growth management programs at risk of constitutional violations. Policymakers would be wise to consider the use of less restrictive regulatory tools, such as Transferable Development Rights (TDRs), in accomplishing the protection of undeveloped land.<sup>53</sup> A carefully designed program that follows the contours of state and federal case law should succeed in avoiding adverse takings decisions.

### *B. Unlawful Delegation of Power*

The nondelegation doctrine is rooted in the principle of separation of powers: the legislative, executive, and judicial branches may not assume the functions of another branch. Separation of powers concerns have most commonly developed when the legislature delegates its legislative powers to administrative agencies.<sup>54</sup> They can also arise when administrative agencies perform quasi-judicial functions, an activity that potentially encroaches on the judicial power vested in the court system. At the federal level, the nondelegation doctrine's textual foundation are the grants of power to Congress under Article I,<sup>55</sup> while fears of

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Oregon Supreme Court was persuaded by the fact that a substantial beneficial use, timber harvesting, remained on the property. The Ninth Circuit applied issue preclusion to the categorical taking, considering it to be same issue that had been litigated in state court, and proceeded to apply the three-pronged test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Under this test, the court found that no taking had occurred. *Dodd*, 136 F.3d at 1229-30.

52. See, e.g., *Battaglia Props., Ltd. v. Florida Land & Water Adjudicatory Comm'n*, 629 So. 2d 161 (Fla. 5th DCA 1993); *Dunn v. City of Redmond*, 735 P.2d 609 (Or. 1987); *Killington, Ltd. v. State*, 668 A.2d 1278 (Vt. 1995). But see *Alexander v. Town of Jupiter*, 640 So. 2d 79 (Fla. 4th DCA 1994). See also *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994) (finding, in light of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the city's conditioning of its approval of a parcel partition on the landowner's dedication of a right-of-way to be a taking).

53. Note, however, that a minority of the Supreme Court has even called into question the validity of TDRs as a technique that avoids takings problems. See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 724, 745-50 (1997) (Scalia, J., concurring).

54. Application of the non-delegation doctrine resulted in the United States Supreme Court's invalidation of the National Industrial Recovery Act, a New Deal program, in two cases decided in 1935. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). However, the Court has not used the doctrine to invalidate a federal law since, and currently the doctrine, as applied in federal court, merely requires that Congress provide an "intelligible principle" to which administrative agencies must conform. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The Court recently reaffirmed the current weakness of the doctrine in *Whitman v. American Trucking Associations*, 531 U.S. 457, 474-76 (2001).

55. Article I states that "[a]ll legislative powers...shall be vested in [the] Congress." U.S.

administrative encroachment on the courts stem from Article III's grant of "judicial Power" to the federal courts.<sup>56</sup> Similar provisions in state constitutions can create delegation of powers problems for state growth management programs.<sup>57</sup>

Despite its decreasing relevance at the federal level, "the nondelegation doctrine has continued to play a significant role in state land use cases."<sup>58</sup> The majority of nondelegation cases that have arisen in state courts involve delegations of authority from local legislative bodies, like city councils, to administrative bodies, such as planning commissions. But state growth management programs also present nondelegation questions. Because these programs necessarily require significant delegations of power to administrative agencies, there is a risk of courts finding that power to have been unlawfully delegated from the legislative to the executive branch. Although courts have rarely abrogated planning statutes or agency decisions on this ground, there can be substantial effects when a nondelegation violation is found.

The most significant growth management case involving an unlawful delegation of authority was *Askew v. Cross Key Waterways*,<sup>59</sup> wherein the Florida Supreme Court invalidated the Administration Commission's designation of the Green Swamp and Florida Keys as areas of critical state concern. The court concluded that ELWMA did not provide sufficiently specific criteria to guide the Commission in designating these areas,<sup>60</sup> thereby effecting an unconstitutional delegation of legislative power to an administrative body.<sup>61</sup> Its decision was based largely on the fact that section 380.05(2), *Florida Statutes*, which listed the types of resources that were eligible to be designated, "reposit[ed] in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection."<sup>62</sup> By failing to establish priorities to aid the Commission in deciding which areas were of critical concern, the state legislature had "unconditionally delegated to an agency of the executive branch the

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CONST. art. I, § 1.

56. U.S. CONST. art. III, § 1.

57. The federal separation of powers doctrine is not applicable at the state level. *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902). The doctrine's application at the state level is based on requirements specified in a state's constitution.

58. BRIAN W. BLAESSER ET AL., *LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE* 17 (1989).

59. 372 So. 2d 913 (Fla. 1978).

60. *Id.* at 919.

61. See FLA. CONST. art. II, § 3: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

62. *Askew*, 372 So. 2d at 919.

policy function of designating the geographic area” to be subjected to that agency’s development regulations.<sup>63</sup>

Despite the rigidity with which the nondelegation doctrine was used to strike down the statutory scheme in *Askew*, two considerations suggest that separation of powers problems are generally less serious than this case might indicate. First, the Florida Constitution’s express grant of power to the three branches of government raises greater separation of powers concerns than other constitutions do. The *Askew* court pointed out that Florida’s constitution, unlike its federal counterpart, contains “an express limitation upon the exercise by a member of one branch of any powers appertaining to either of the other branches of government.”<sup>64</sup> It not only delineates the branches of government, but also circumscribes the extent to which they can exercise powers rooted elsewhere, thereby necessitating greater separation than required in other states. It was this limitation that led the court to reject an argument, based on the ideas of Professor Kenneth Culp Davis, that the need for strict legislative standards could be relaxed as long as administrative actions were tempered with adequate procedural safeguards.<sup>65</sup>

A more typical response is that of Oregon, where the authority of LCDC and LUBA, the two most important agencies in its growth management scheme, were challenged on separation of powers grounds. In *Meyer v. Lord*,<sup>66</sup> the Oregon Court of Appeals considered whether LCDC’s authority to establish statewide planning goals presented nondelegation problems.<sup>67</sup> The court found that it did not, since the “delegation of legislative authority to an administrative agency does not violate the Oregon Constitution.”<sup>68</sup> It observed that while standards are relevant in determining whether a delegation is lawful, “the existence of safeguards for those whose interests may be affected is

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63. *Id.* at 920.

64. *Id.* at 924.

65. *Id.* at 922-924.

66. 586 P.2d 367 (Or. Ct. App. 1978).

67. See OR. CONST. art. III, § 1: “The powers of the Government shall be divided into three separate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided;” art. IV, § 1: “The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.”

68. *Meyer*, 586 P.2d at 371. This statement is all the more notable given the limitation circumscribing the exercise of powers of different branches contained in Article III, a provision similar to Florida’s.

determinative.”<sup>69</sup> The LCDC’s promulgation of planning goals featured both standards and safeguards, and accordingly caused no constitutional difficulties.<sup>70</sup> The Oregon courts’ endorsement of a less rigid, more pragmatic view of the separation of powers doctrine is also reflected in *Wright v. KECH-TV*,<sup>71</sup> where the Oregon Supreme Court upheld the constitutionality of LUBA’s performance of quasi-judicial functions. The court summarily disposed of the issue, holding that separation of powers did not preclude LUBA from ensuring local government adherence to land use laws “through case-by-case decisionmaking in a quasi-judicial setting.”<sup>72</sup>

Courts in other states have similarly refused to thwart the performance of quasi-legislative and quasi-judicial functions by administrative agencies,<sup>73</sup> and have accordingly recognized the need for “a certain amount of overlap of the powers exercised by the different branches.”<sup>74</sup> In *Diehl v. Mason County*,<sup>75</sup> the Washington Court of Appeals Division 2, considered a separation of powers argument arising from a hearings board’s invalidation of Mason County’s comprehensive growth management plan. The county challenged the authority of the board, an administrative tribunal, to abrogate a legislative act by a local government. The court dismissed this argument, noting that “it is well established that such agencies can constitutionally act in a quasi-judicial capacity,” and that the legislature can delegate to an agency the power “to determine facts and interpret the laws it is charged with administering.”<sup>76</sup>

Second, the Florida courts’ jurisprudence in the years since *Askew* indicate that even in Florida separation of powers concerns

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69. *Id.*

70. *See also* *Oregonians in Action v. Land Conservation & Dev. Comm’n*, 809 P.2d 718 (Or. Ct. App. 1991) (reaffirming the constitutionality of LCDC’s authority to adopt statewide planning goals).

71. 707 P.2d 1232 (Or. 1985).

72. *Id.* at 1236.

73. *See, e.g.*, *Milardo v. Coastal Res. Mgmt. Council*, 434 A.2d 266, 270-72 (R.I. 1981) (upholding the legislature’s delegation of legislative power authorizing the Council to manage coastal development).

74. *Chioffi v. Winooski Zoning Bd.*, 556 A.2d 103, 105 (Vt. 1989). In contrast to most separation of powers cases arising under land use laws, the *Chioffi* plaintiffs argued that the legislature had unlawfully delegated authority to the judicial branch by allowing courts to hold de novo trials of zoning variance decisions. The Vermont Supreme Court ruled that courts have the constitutional authority to hold a trial de novo when an administrative agency’s decisions arose from a quasi-judicial proceeding. *Id.* In so doing, the court articulated that state’s rule for analyzing separation of power questions: “when...one branch exercis[es] powers inherent to another branch, ‘these powers must be such as are incidental to the discharge of the functions of the department exercising them....’” *Id.* (quoting *In re Constitutionality of House Bill 88*, 64 A.2d 169, 172 (Vt. 1949)).

75. 972 P.2d 543 (Wash. Ct. App. 1999).

76. *Id.* at 551.

have not been an intractable obstacle to effective growth management.<sup>77</sup> In *Fox v. Treasure Coast Regional Planning Council*,<sup>78</sup> the First District Court of Appeal considered a nondelegation challenge raised in response to a decision of the Land and Water Adjudicatory Commission. As previously discussed, the Commission hears appeals from local government development orders related to DRIs. The court held that the power delegated to the Commission was not a constitutionally impermissible delegation of power “allowing a standardless review of local government DRI development orders.”<sup>79</sup> The court reached this determination even though the Commission is granted wide discretion under the ELWMA to make policy decisions in order to implement the legislative purposes of the Act.<sup>80</sup> Those broad purposes were sufficient to guide the Commission’s appellate review, notwithstanding the Florida Supreme Court’s holding in *Askew*.

In *Brown v. Apalachee Regional Planning Council*,<sup>81</sup> the Florida Supreme Court held that a regional planning council’s imposition of fees for review of a DRI proposal was not an unlawful delegation of power. The court’s reasoning here evinces its ease with broad delegations of authority. It first noted that under other chapters of the Florida statutes,<sup>82</sup> the Council had the authority to levy fees where “appropriate.”<sup>83</sup> Under the ELWMA, it had authority to “adopt additional rules...to promote efficient review of developments-of-regional-impact applications.”<sup>84</sup> Thus, the court reasoned, since imposition of fees to recover the costs of reviewing DRIs promoted efficient review, they were appropriate.<sup>85</sup> Other provisions of the ELWMA challenged on nondelegation grounds

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77. Not even the *Askew* decision itself completely precluded the designation of areas of critical state concern. In response, the Florida Legislature rewrote the constitutionally deficient provisions of Chapter 380, *Florida Statutes*. See *infra* notes 93-95 and accompanying text.

78. 442 So. 2d 221 (Fla. 1st DCA 1983).

79. *Id.* at 227.

80. *Id.* Section 380.021, *Florida Statutes*, reads, in part:

It is the legislative intent that, in order to protect the natural resources and environment of this state as provided in s. 7, Art. II of the State Constitution, ensure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state, it is necessary adequately to plan for and guide growth and development within this state.

81. 560 So. 2d 782 (Fla. 1990).

82. FLA. STAT. §§ 160.02(12), 163.01(5)(h)(1988).

83. *Brown*, 560 So. 2d at 785.

84. FLA. STAT. § 380.06(22)(c)(1988).

85. *Brown*, 560 So. 2d at 785. The court accordingly viewed the fees as “a technical matter of implementation rather than a fundamental policy decision.” *Id.*

have also been upheld by the Florida courts,<sup>86</sup> and the Growth Management Act has similarly withstood nondelegation challenges.<sup>87</sup>

Several lessons can be drawn from this examination of constitutional challenges based on separation of power grounds. First, a well-designed statutory scheme will generally withstand nondelegation challenges. Like their federal counterparts, while state courts continue to proclaim the viability of this doctrine, in practice they have rarely invalidated agency actions on these grounds. It appears that broad and relatively vague delegations of power, such as those at issue in the *Fox* and *Brown* cases, are valid even in light of the *Askew* precedent. As for *Askew* itself, the result likely turned on the additional clause in the Florida Constitution limiting each branch from exercising the powers of the others. Moreover, similar language in Article III of the Oregon Constitution did not prevent its courts from upholding an arguably broader delegation where the legislature authorized LCDC to adopt statewide planning goals. Except for *Askew's* effects, none of the states' growth management efforts have been severely impeded.

Nevertheless, policymakers can insulate growth management regimes from nondelegation attacks by examining the language providing for separate branches of government in a state's constitution, as well as the state courts' interpretation of those provisions. Growth management legislation must be precise in states with an aggressive nondelegation jurisprudence. Legislation should carefully present the criteria to be used by agencies in making land use determinations, which will also assure better implementation of the program's goals. Yet even minimal standards are likely to withstand constitutional scrutiny.<sup>88</sup> Essentially, only truly standardless delegations of legislative power would be at risk of invalidation. So legislators would do well to eschew growth management legislation "so lacking in guidelines that neither the

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86. See, e.g., *Rathkamp v. Dep't of Cmty. Affairs*, 740 So. 2d 1209 (Fla. 3d DCA 1999); *Friends of the Everglade v. Zoning Bd., Monroe County*, 478 So. 2d 1126 (Fla. 1st DCA 1985); *Transgulf Pipeline Co. v. Bd. of Comm'rs*, 438 So. 2d 876 (Fla. 1st DCA 1983).

87. A statutory provision under the Growth Management Act, section 163.3184(11), *Florida Statutes*, survived a nondelegation challenge in *Florida League of Cities v. Administration Commission*, 586 So. 2d 397 (Fla. 1st DCA 1991). That statute granted discretionary authority to the Administration Commission to impose sanctions upon local governments that fail to timely submit comprehensive plans in compliance with statutory requirements. The court, in rejecting the plaintiff's argument, found that the statute had expressly limited the type of sanctions that could be imposed, and had put forth implied limits to the duration any sanctions could last. *Id.* at 411-12.

88. See *Milardo*, 434 A.2d at 271 (noting that the Rhode Island Supreme Court had "upheld delegations that provided general directions to the administrative agencies").

agency nor the courts can determine whether the agency is carrying out the intent of the legislature....”<sup>89</sup>

The *Askew* case, as the only example of a nondelegation challenge significantly impacting the efficacy of a growth management program, merits special attention for the legislature’s resolution of the constitutional defect found by the Florida Supreme Court. In the decision, the court observed that “the legislature need only exercise its constitutional prerogative and duty to identify and designate those resources and facilities” in need of special protection.<sup>90</sup> It went on to state that this could be done by legislatively identifying a general area requiring protection, or “through [legislative] ratification of administratively developed recommendations....”<sup>91</sup> In a supplemental opinion, the court made clear that the legislature was not limited to these two alternatives. What was needed, though, was some kind of “legislative delineation of priorities among competing areas and resources which require protection....”<sup>92</sup> In the following year, the Florida Legislature responded to *Askew* through passage of a bill that both provided more detailed criteria for the designation of areas of critical state concern,<sup>93</sup> as well as required legislative approval of the designation.<sup>94</sup> It also specifically designated the Green Swamp and Florida Keys as areas of critical state concern.<sup>95</sup>

Though the Florida Legislature managed to cure the constitutional defects found in *Askew*, in another sense its response can be seen as a failure of Florida’s growth management program and an indication of the potentially devastating effect of exceeding constitutional limits. The requirement of legislative approval of each area to be designated created an additional barrier to protecting imperiled natural resources. Moreover, allocating authority for designation approval to the legislative branch allowed specific designation proposals to be subjected to intense political

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89. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1978); *see also Brown*, 560 So. 2d at 784.

90. *Askew*, 372 So. 2d at 925.

91. *Id.* at 925.

92. *Id.* at 919. At the time of the decision, section 380.05(2)(a), *Florida Statutes*, merely required that “[a]n area of critical state concern may be designated ... for ... An area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance.” The original Florida statute governing areas of critical state concern was essentially identical to Section 7-201 of the American Law Institute’s (ALI) Model Land Development Code. MLDC, *supra* note 25, art. 7, § 7-201 257-59 (1976).

93. Act effective July 1, 1979, ch. 79-73, § 4, 1979 Fla. Laws 390, 394 (codified as FLA. STAT. § 380.05(2) (1979)).

94. Act effective July 1, 1979, ch. 79-73, § 4, 1979 Fla. Laws 390, 393 (codified as FLA. STAT. § 380.05(1)(c) (1979)).

95. Act effective July 1, 1979, ch. 79-73, §§ 5-6, 1979 Fla. Laws 390, 399-400 (codified as FLA. STAT. § 380.051, § 380.0551 (1979)).

pressure from the targeted opposition of a handful of legislators, thereby decreasing the probability of designation.<sup>96</sup> It subsequently became extremely difficult to designate additional areas.<sup>97</sup> Since the passage of the 1979 legislation, only one additional area of state critical concern has been established.<sup>98</sup>

Unfortunately, the APA's newly developed model statutes have adopted a similar approach for states, like Florida, where there is greater judicial scrutiny of delegations of legislative authority. It does so in large part based on its misreading of the *Askew* decision. In the commentary accompanying the model statute, the APA notes that "the legislature must approve designations of areas of critical state concern, since ... [*Askew*] ... held that it is unconstitutional for a legislature to delegate that power to the executive branch."<sup>99</sup> But *Askew* did not foreclose delegation of the designation power; it merely required "a legislative delineation of priorities," which could presumably be accomplished by either prioritizing regions of the state for protection, or prioritization of the types of natural and historic resources most in need of state protection.<sup>100</sup> By allowing the ultimate designation decision to be made by the state legislature, as recommended for Florida and other states with

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96. Administrative law scholars have noted that delegating decisional authority to the executive branch can allow administrators to make decisions that promote the overall public good but contravene the aims of certain interest groups. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 90-91, 95-98 (1985); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541-43 (1992). Under favorable circumstances, decisions made within the executive branch can better represent the interests of citizens statewide, rather than allowing narrower local interests to triumph, as often occurs in the legislative branch through the practice of "logrolling."

The ossifying effect of requiring legislative approval can easily be seen at the national level. An example of this is the designation of federal wilderness areas, for which there is widespread popular support. See THE Wilderness Society, *Roadless Protection Favored by Overwhelming Majority of Americans* (July 27, 2000), at <http://www.wilderness.org/newsroom/roadlesspoll/national.htm>. While Congress made very few wilderness designations in the 1990s, the Clinton Administration succeeded, through its rulemaking authority and national monument declarations, in accomplishing what the legislative branch could not. These land protection actions, which were in accordance with the desires of most Americans, would have stood little chance of succeeding had Congressional approval been necessary. Another example can be seen with the issue of military base closures, which have become more difficult due to Congressional opposition from legislators seeking to thwart the closure of bases in their districts. See CNN, *Rumsfeld won't recommend veto of defense bill* (Dec. 15, 2001), at <http://www.cnn.com/2001/US/12/15/rumsfeld.bush/index.html>; see also Seidenfeld, *supra* note 96, at 1541-43 (discussing the example of military base closures).

97. See ROBERT G. HEALY & JOHN S. ROSENBERG, *LAND USE AND THE STATES* 142-43 (2d ed. 1979); Nicholas, *supra* note 10, at 1079-82.

98. See FLA. STAT. § 380.055 ("Apalachicola Bay Area Protection Act").

99. AM. PLANNING ASS'N, *supra* note 42, at 5-40 to 5-41.

100. *Askew v Cross Keys Waterways*, 372 So. 2d 913, 919 (Fla. 1978).

similar jurisprudence, the model statutes could render this statutory provision, practically speaking, a nullity.<sup>101</sup>

Yet there are two alternatives that would avoid subjecting specific designations to the political pressures of the legislature without running afoul of the principles articulated in *Askew*. These alternatives would be providing greater specificity, as well as a hierarchy of priorities, between either (1) different kinds of resources or (2) different geographic regions, in the designation criteria.<sup>102</sup> For example, areas containing endangered species habitat might be given higher priority than historical sites, or areas facing great development pressures could have a higher priority than slow-growing locales.

In rejecting the complete surrender of designation procedures to the executive branch, the Florida Supreme Court distinguished multiple cases from other states in which the designations of particular types of resources or geographic regions have sustained nondelegation challenges.<sup>103</sup> These designations were often quite broad, such as the coastal zone in California, wetlands in Rhode Island, the coastal area of New Jersey, or the Martha's Vineyard area of Massachusetts. Though there is dicta in *Askew* suggesting the Florida Supreme Court's preference for granting agencies "discretion to act only in a geographical area well-defined by the legislature," its holding is much more limited, merely requiring prioritization among different kinds of resources.<sup>104</sup> Given that the *Askew* Court was evidently concerned with the nearly complete discretion granted to the executive branch, a clear listing of priorities for protection would more effectively promote the goals of growth management within the constitutional constraints of a state like Florida. Thus, the APA's model statutes may not represent the best solution to the nondelegation problem posed by *Askew*.

### C. Standing

Another area of constitutional concern for state growth management programs is the doctrine of standing. This principle, which is grounded in the case-or-controversy requirement of Article III of the United States Constitution and analogous state

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101. See AM. PLANNING ASS'N, *supra* note 42, at §§ 5-207(1), 5-209(1).

102. In the Florida context, this would require modification of section 380.05(2), *Florida Statutes*. The relevant criteria in the APA's model legislation, which are very similar to the Florida criteria, are contained at section 5-203.

103. *Askew*, 372 So. 2d at 920-22.

104. *Id.* at 922, 919, 925; see also Callies, *supra* note 29, at 203 (characterizing *Askew* as disapproving of the methodology of the designation process "because the state legislation did not set out priorities by which an administrative agency would designate such areas").

constitutional provisions,<sup>105</sup> restricts judicial review to those who have suffered injury to a legally protected interest that was caused by the defendant's complained-of conduct and is redressable by a favorable judicial decision.<sup>106</sup>

In the federal context, constitutional problems have resulted from statutory schemes that provide broad grants of standing to any interested individuals. Typical of these grants is the citizen suit provision of the 1973 Endangered Species Act, which provides that "any person may commence a civil suit on his own behalf" to enjoin violations of the Act and compel the Secretary of the Interior to fulfill her legal duties.<sup>107</sup> In *Defenders of Wildlife*, the Supreme Court ruled that the plaintiffs, who were members of an environmental organization, failed to satisfy the standing requirements of the United States Constitution. It held that the plaintiffs' injury was not concrete, and further asserted that "ignoring the concrete injury requirement ... would ... discard[] a principle fundamental to the separate and distinct constitutional role of the Third Branch."<sup>108</sup> Similar problems can develop in states where judicial review is likewise limited to parties meeting certain constitutional requirements. In these states, legislative efforts to provide broad grants of standing may fail if courts confine judicial review to only those suffering individualized grievances.

The standing doctrine is important to state growth management programs because increased public involvement is a primary goal of many programs,<sup>109</sup> with some commanded by statute to promote it.<sup>110</sup> Public participation in the land use decisionmaking process is manifested in a variety of ways. While much of it should and does occur during legislative and quasi-legislative processes, allowing public input is also important when a local government considers specific development proposals and zoning changes. Public involvement in these decisionmaking processes, through testifying before local governments and tribunals, submitting comments, and appealing unlawful decisions, helps to ensure that decisionmakers uphold the dictates and purposes of growth management laws. It

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105. See, e.g., FLA. CONST. art. V, § 1.

106. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The formulation of the standing requirement elucidated in *Defenders of Wildlife*, though it has influenced the resolution of standing disputes in state courts, is not controlling over the states' disposition of this issue in state courts.

107. 16 U.S.C. § 1540(g) (2001).

108. *Lujan*, 504 U.S. at 576. For a complete discussion of this nightmare scenario imagined by the Court, see generally *id.* at 573-78.

109. See, for example, Goal 1 of Oregon's planning program: "Citizen Involvement." OR. ADMIN. R. 660-015-0000(1) (2002).

110. See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 4312(2)(G) (West 1996); R.I. GEN. LAWS § 45-22.2-3(c)(10) (1999).

was perhaps for this reason that the Maine legislature encouraged “the widest possible involvement by the citizens of each municipality in all aspects of the planning and implementation process.”<sup>111</sup> Most of the means used to promote public participation do not trigger constitutional difficulties, and may even enhance constitutional objectives by foreclosing possible due process concerns. Broad standing, by allowing private citizens to enforce the purposes of the growth management program, also promotes valuable policy objectives in the same way that citizen suit provisions have increased enforcement of federal environmental laws. However, broad grants of judicial standing often face the same constitutional obstacle encountered at the federal level.

The statutes of the state programs focused on in this Article have provided for varying degrees of standing to appeal, to either administrative tribunals or courts, the land use decisions of local governments. These standing provisions, and the courts’ response to them, are presented below, followed by a discussion of how standing provisions could be designed to both comport with constitutional imperatives and meet the goals served by broad grants of standing.

Florida’s growth management program allows for differing degrees of standing based on the kind of decision a local government makes. For DRI proposals, standing to appeal the local government’s decision is quite limited. Only the owner of the subject property, the would-be developer, and the DCA are entitled to appeal to the Land and Water Adjudicatory Commission.<sup>112</sup> Because each of these parties each has easily identifiable interests that could motivate a possible appeal, the risk of violating the standing doctrine is minimal.

The Growth Management Act provides for broader standing than the DRI review process allows. It grants three different degrees of standing, which vary according to the nature of the local government action.<sup>113</sup> The broadest standing is provided for comprehensive plan amendments. Under the Act, standing for administrative appeals is available for “affected person[s],” those “owning property, residing, or owning or operating a business within the boundaries of the local government” who provided oral or written comments to that government prior to the amendment’s

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111. ME. REV. STAT. ANN. tit. 30-A, § 4312(2)(G).

112. FLA. STAT. § 380.07 (2001).

113. For a general discussion of the varying grants of standing under the Growth Management Act, see TERRELL K. ARLINE, 1000 FRIENDS OF FLORIDA, EFFECTIVE ADVOCACY PROMOTES GROWTH MANAGEMENT AND THE ENVIRONMENT, at [http://www.1000f.org/Legal\\_Advocacy/Effective\\_Advocacy.asp](http://www.1000f.org/Legal_Advocacy/Effective_Advocacy.asp).

adoption.<sup>114</sup> In cases where the DCA concludes that an amendment does not comply with state requirements, an affected person may intervene in the review of the amendment conducted by the Division of Administrative Hearings (DOAH).<sup>115</sup> Affected persons may also petition for administrative review of the amendments even when DCA finds them to be in compliance.<sup>116</sup> The Growth Management Act thus allows for broad public participation and opportunities for quasi-judicial review of plan amendments. And it avoids potential constitutional tripwires by not extending this broad standing to the court system.

A more limited grant of standing is provided for review of the land development regulations implemented pursuant to comprehensive plans. Under the Act, only “substantially affected person[s]” may bring administrative challenges to the adoption of land development regulations.<sup>117</sup> Like challenges to plan amendments, review of regulations takes place through a DOAH hearing.<sup>118</sup> Standing for challenges to a local government’s development order is also narrower than the broad standing allowed for plan amendments. Here, standing is provided to “any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan.”<sup>119</sup> The statute notes that “[t]he alleged adverse interest may be shared in common with other members of the community at large, but must exceed in degree the general interest in community good shared by all persons.”<sup>120</sup> Notably, this statutory provision grants judicial, rather than administrative, standing for development order challenges. Importantly, the Florida legislature narrowed the breadth of standing allowed for these judicial challenges.

Taken together, the various grants of standing provided for under the Growth Management Act avoid exceeding potential constitutional limits. In those situations wherein the legislature wished to give more people the right to challenge local government

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114. FLA. STAT. § 163.3184(1)(a) (2001).

115. The administrative law judge’s conclusions are transmitted to the Administration Commission for a final decision. FLA. STAT. § 163.3184(9) (2001).

116. FLA. STAT. § 163.3184(9)(a) (2001). It should be noted that while affected persons have this right of petition, they must demonstrate that the amendment’s validity is not “fairly debatable,” a presumption of validity that is difficult to overcome.

117. The “substantially affected” requirement is narrower than that needed to challenge plan amendments, but remains broader than would have been allowed in the absence of the statutory scheme. See FLA. STAT. § 163.3213(2)(a); § 120.56(1); *Florida Home Builders Ass’n v. Dep’t of Labor*, 412 So. 2d 351 (Fla. 1982).

118. FLA. STAT. § 163.3213(5) (2001).

119. FLA. STAT. § 163.3215(2) (2001).

120. *Id.*

decisions, such as for comprehensive plan amendments, it combined the broad grant of standing with a limitation on the type of review allowed. Review of these decisions was retained within the executive branch. Similarly, the legislature allowed for judicial review of challenges to development orders, but limited the breadth of standing to those adversely affected. The Act's coupling of broad standing with limited administrative review and narrow standing with judicial review may be a helpful template for policymakers designing growth management programs.

Neither the ELWMA nor the Growth Management Act standing provisions have been found to violate the Florida Constitution. No case analyzing standing under these laws has found the statutory standing to be more extensive than the constitution allows.<sup>121</sup> The Florida courts have resolved standing questions by focusing on the degree of standing granted under the relevant statute, extending standing to parties when consistent with legislative objectives.<sup>122</sup> However, it is unknown whether the courts would find a violation in the face of even broader statutory standing grants.

Vermont's standing provisions for appealing an Act 250 permit decision are broader than that of Florida's DRI program. Following the decision of a district environmental commission on a permit request, standing for appeals to the state Environmental Board is extended to "those who have received notice, adjoining property owners who have requested a hearing, and such other persons as the board may allow by rule."<sup>123</sup> Under current rules, the Board or district commission may grant party status for Act 250 proceedings to those not explicitly mentioned in the statute "if it finds that the petitioner has adequately demonstrated: (1) That a proposed development or subdivision may affect the petitioner's interest under [the DRI criteria] or (2) That the petitioner's participation will materially assist the board or commission by providing

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121. There have been cases in which courts found standing violations, but these were based on statutory, rather than constitutional, grounds. *See, e.g.*, *Citizens Growth Mgmt. Coalition of W. Palm Beach v. City of W. Palm Beach*, 450 So. 2d 204, 206-07 (Fla. 1984) (resting its decision that plaintiff had no standing to challenge the validity of a zoning ordinance on the absence of a separate standing provision in the Local Government Comprehensive Planning Act of 1975); *see also* *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 943-44 (Fla. 5th DCA 1988).

122. *See, e.g.*, *S.W. Ranches Homeowners Ass'n v. County of Broward*, 502 So. 2d 931, 935 (Fla. 4th DCA 1987) (noting that the recently enacted § 163.3215 "liberalizes standing requirements and demonstrates a clear legislative policy" to grant standing to adversely affected parties); *see also* *Putnam County Env'tl. Council, Inc. v. Bd. of Comm'rs*, 757 So. 2d 590 (Fla. 5th DCA 2000).

123. VT. STAT. ANN. tit. 10, § 6085(e)(1) (1997). The parties identified in note 113, *infra*, constitute those who have received notice. Not only do the Vermont statutes explicitly grant standing to more entities than Florida, they also operate to further broaden standing through the issuance of Board rules.

testimony ... or offering argument or other evidence relevant to [the criteria].”<sup>124</sup> Judicial standing for the purpose of appealing Board decisions to the state supreme court is narrower, though still broader than Florida’s.<sup>125</sup> Persons who were granted party status for administrative proceedings under the Board rules, so-called “[p]ermissive parties,” are “affirmatively prohibited” from appealing its decision to the Vermont Supreme Court.<sup>126</sup>

As with Florida, the Vermont Supreme Court has not found Act 250’s standing provisions unconstitutional. The Act mirrors Florida’s DRI review in providing for relatively limited judicial standing, with the only significant difference being Vermont’s provision of standing to additional parties representing the public interest, such as municipal and regional governmental entities. This represents a substantial expansion of standing beyond that allowed in Florida, where only the state planning agency may appeal a final administrative decision. Nevertheless, allowing these governmental entities the right to appeal does not trigger constitutional difficulties in the same way that a citizen suit provision might. Had the Vermont Legislature granted permissive parties the right of judicial appeal, the court would probably have seen more serious constitutional challenges to the standing granted by statute. And in Oregon, where the legislature passed a similar provision, such challenges have been made.

One of the features of Oregon’s growth management regime, consistent with the program’s goal of citizen involvement,<sup>127</sup> is its broad standing provisions. The Oregon program allows virtually any interested party to appeal a local government’s land use decisions to LUBA.<sup>128</sup> Under the current statutory formulation, “a

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124. Environmental Board Rule 14(B)(1)-(2) (Jan. 18, 2001), at <http://www.state.vt.us/envboard/rules.htm>.

125. Those parties with judicial standing include the property owner, the developer, the municipality within which the project would be located, state agencies, municipal planning commissions, the regional planning agency within whose boundaries the project would be located, and the state planning agency. VT. STAT. ANN. tit. 10, §§ 6085(c)(1), 6089(b) (1997). At one time an adjacent property owner could also appeal decisions to the supreme court, but a subsequent statute abrogated this right. See *In re Wildlife Wonderland, Inc.*, 346 A.2d 645, 652 (Vt. 1975). For a discussion of the distinction between standing for administrative proceedings and for judicial appellate proceedings, see *Application of George F. Adams & Co.*, 353 A.2d 576, 577 (Vt. 1976).

126. *In re Cabot Creamery Coop., Inc.*, 663 A.2d 940, 941 (Vt. 1995).

127. See OR. ADMIN. R. 660-015-0000(1) (2002) (“Goal 1: Citizen Involvement”).

128. A “[l]and use decision” under the statute is a “final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) The goals; (ii) A comprehensive plan provision; (iii) A land use regulation; or (iv) A new land use regulation.” OR. REV. STAT. § 197.015(10) (2001). Thus, land use decisions encompass nearly all policy decisions local governments make with respect to land use. A “[l]imited land use decision” includes certain kinds of land use decisions made with respect to property located within an urban growth boundary. OR. REV. STAT. § 197.015(12) (2001).

person may petition the board for review of a land use decision or limited land use decision if the person ... [a]ppeared before the local government, special district or state agency orally or in writing.”<sup>129</sup> Parties may also move to intervene in a LUBA appeal if they can demonstrate that they appeared before the decisionmaking body.<sup>130</sup> The broad standing requirements of the Oregon program also extend to appeals of LUBA decisions, such that any party to a LUBA appeal may seek judicial review of the decision in the Oregon Court of Appeals.<sup>131</sup> Thus, the statutes allow an individual who has not demonstrated that the land use decision will adversely affect her to appeal that decision to LUBA, and, eventually, the judiciary. The efficacy of the Oregon program rests, to some degree, on interest groups and citizens acting as “private attorneys general,”<sup>132</sup> and these standing provisions promote such citizen involvement.

Though these standing provisions ably serve the public participation goals of the Oregon program, and provide the means for citizens to ensure governmental compliance with the law, their breadth is also constitutionally hazardous. Recently a court found these provisions to be unconstitutional. In *Utsey v. Coos County*,<sup>133</sup> the Oregon Court of Appeals held that the League of Women voters did not have standing to appeal a LUBA ruling to the appeals court. The court defined the question as “whether the constitution imposes limits on the authority of the legislature to confer a right to seek judicial review.”<sup>134</sup> In a lengthy opinion discussing the historical roots of the standing doctrine in Oregon and the federal courts, the court concluded that “justiciability includes the requirement that ‘the court’s decision in the matter will have some practical effect on the rights of the parties.’”<sup>135</sup> The court interpreted this practical effect requirement similarly to the “injury in fact” requirement described in *Defenders of Wildlife*, stating that “the simple assertion that another individual or government agency has violated the law” does not present a justiciable controversy.<sup>136</sup> Thus, the attempt of a private attorney general, like the League of Women Voters, to enforce the law without a potential threat to its own interests would

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129. OR. REV. STAT. § 197.830(2) (2001). In addition to this substantive requirement, there are also timeliness requirements for the filing of a LUBA appeal. See *Miller v. Washington County*, 25 Or. LUBA 169 (1993); see generally OR. REV. STAT. § 197.830 (2001).

130. OR. REV. STAT. § 197.830(7)(b)(B) (2001).

131. OR. REV. STAT. § 197.850(1)-(3) (2001).

132. See Edward J. Sullivan, *Oregon Blazes a Trail*, in STATE AND REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 51, 52 (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

133. 32 P.3d 933 (Or. Ct. App. 2001).

134. *Id.* at 935.

135. *Id.* at 942 (quoting *Brumnett v. PSRB*, 848 P.2d 1194 (Or. 1993)).

136. *Id.* at 943.

be “no more than a request for an unconstitutional advisory opinion.”<sup>137</sup> The court made clear that the inquiry into whether a party has met constitutional standing requirements is independent whether that party has standing under the statute.<sup>138</sup> The effect of the court’s decision was to add a “practical effects” requirement onto the judicial review provision of section 197.850(1).<sup>139</sup> This new requirement is analogous to the need to show an “adverse effect” before challenging development orders under Florida law.

The risk of a court finding statutory standing to be too broad, as the *Utsey* court did, poses a challenge for policymakers designing a growth management program. The APA’s model statutes offer one attempt to resolve the difficulties associated with the standing doctrine. However, the model statutes’ standing provisions might not effectively advance the goals of the growth management. Policymakers wishing to promote citizen participation in the planning process and allow an avenue of appeal to those affected by land use decisions may wish to consider an alternative solution.

Not all of the model statutes’ standing provisions present difficulties, and some of them, like those concerned with the adoption of comprehensive plans and amendments thereto, could prove to be very effective. The comprehensive plan procedures offer state policymakers the option of including a broad array of “other interested parties” to be involved in the process, which could potentially lead to greater citizen involvement than Florida’s comprehensive plan review process. Whether it actually would depends on how broadly a state legislature defined “other interested party.”<sup>140</sup> Similarly, for those states looking to enact DRI legislation, the model statutes take no position on who should be allowed standing for DRI review appeals.<sup>141</sup> Under the statutes interested parties are readily allowed to appeal a local government’s decision. And in cases where the state planning agency finds the amendment acceptable, interested parties can automatically petition for a hearing before the state-level Comprehensive Plan Appeals Board.<sup>142</sup> Unlike in Florida, these parties would not have to overcome the fairly debatable standard to get a hearing. This appeals process represents an improvement over the procedure in Florida.

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137. *Id.*

138. *Id.* at 947.

139. *Id.*

140. See AM. PLANNING ASS’N, *supra* note 42, § 7-402.2(5).

141. *Id.* at 5-65.

142. *Id.* at §§ 7-402.2(5), 7-402.2(7), 7-402.2(13).

However, the model statutes' standing provisions for other types of land use decisions are somewhat problematic. Appeals of a local government's decision on development permit applications, conditional uses, and variances are limited to "aggrieved" persons. The statute offers two different definitions of "aggrieved," thereby giving policymakers a choice as to how broadly they would like to extend standing. The alternative definitions are reprinted below. The narrow definition includes all the text within the block quotation, while the broader definition excludes the italicized words: 'Aggrieved' means that a land-use decision has caused, or is expected to cause, *special* harm or injury to a person, neighborhood planning council, neighborhood or community organization, or governmental unit, distinct from any harm or injury caused to the public generally....<sup>143</sup>

Thus, the narrower definition "requires persons claiming standing to demonstrate that they have suffered harm distinct from the harm to the general public,"<sup>144</sup> while the broader definition merely requires that the party show some kind of injury.

The locus of the problem created by the definition stems from the far reaching effects of either alternative. Those who meet the definition may fully participate in the decisionmaking process. They "can be party to a hearing, ... submit information in an administrative review, ... ha[ve] standing in an appeal, ... appeal decisions to hearing officers, and ... bring judicial appeals."<sup>145</sup> But if they fall outside the definition, they are entirely foreclosed from participating in any of these activities. Thus, a state's adoption of the narrow definition would sharply constrain the public's involvement in land use decisions, allowing less public input than any of the standing provisions in Florida, Vermont, and Oregon.

By contrast, the adoption of the broad definition would resolve that problem by providing much greater opportunity for involvement.<sup>146</sup> However, the broad definition potentially runs afoul of the standing doctrine. Because the broad definition of aggrieved does not require a showing of greater injury than that suffered by the public at large, it would allow someone who had failed to show a "concrete and particularized"<sup>147</sup> injury to appeal an administrative decision to the courts. A court might find this statutory grant of standing to exceed the constitutional limits of justiciability, the

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143. *Id.* at § 10-101.

144. *Id.* at § 10-18.

145. *Id.*

146. Note, however, that even the broad definition is a narrower grant of standing than that provided for under the Oregon program.

147. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

same problem the League of Women Voters faced in *Utsey*.<sup>148</sup> Thus, either definition of “aggrieved” could create serious problems that would threaten achievement of the goals of growth management.

For policymakers wishing to both maximize public involvement in the land use decisionmaking process and avoid constitutional difficulties, the model statutes’ standing provisions may be inadequate. But there is a viable alternative. Taking a bifurcated approach, wherein the degree of standing for administrative appeals differs from that of judicial appeals, would better meet these two conflicting purposes. In states adopting an Oregon-style growth management program,<sup>149</sup> the goals of growth management might be best achieved by adopting a variant of Oregon’s broad standing provisions. As has been seen, Oregon provides for extremely broad administrative and judicial standing. It allows for unparalleled citizen involvement in the review of local government land use decisions. However, as the *Utsey* decision demonstrated, the standing provisions were also unconstitutional. The best solution to this problem is simply to confine this broad grant of standing to the administrative review of land use decisions, while limiting judicial standing to those suffering a legally cognizable injury. Policymakers can implement this solution by creating a state-level appeals board to handle all land use appeals, similar to LUBA, with judicial review available upon the completion of the administrative appeals process. This system of review would allow broad standing for citizens wishing to contest a local government’s decision to the state administrative tribunal. But, unlike the Oregon program, only those meeting the constitutional requisites of standing could appeal the tribunal’s decision to the court system.

This bifurcated approach would solve the problem identified in *Utsey*. Courts have recognized that there are no constitutional barriers to broad grants of standing for administrative appeals. As Florida’s First District Court of Appeal noted, “[s]tanding in a Florida administrative proceeding is a judicially created prerequisite based upon statutory language and is not a

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148. The commentary accompanying the Model Statutes indicates that the provision for standing for judicial review was intended to be based on that provided for in the Washington growth management program, section 36.70C.060, *Revised Code of Washington*. AM. PLANNING ASS’N, *supra* note 42, at 10-74. However, the actual statutes do not include the requirements elucidated in the Washington statute. If the language of the Washington statute were adopted, it is less likely a court would find a party meeting the statutory definition of standing to have run afoul of the case-or-controversy requirement.

149. Though there is discussion *infra* pertaining to states wishing to enact a DRI review statute, most states enacting growth management programs in the future will likely follow the “planning consistency” model of Oregon and other states. For a discussion of the superiority of the planning consistency model, see Wickersham, *supra* note 3, at 519, 546-47.

constitutional jurisdictional requirement.”<sup>150</sup> This same principle was extensively discussed in a concurring opinion in the *Utsey* case, where the author asserted that “the legislature is at liberty to make any individual or entity that it desires a party to an *executive* proceeding, including a party who represents only the public interest, rather than a personal interest.”<sup>151</sup> Accordingly, granting party status for LUBA appeals to “any person or organization who has appeared before the local government” did not violate the Oregon Constitution.<sup>152</sup>

The combination of broad administrative standing with the creation of an appeals board would promote the same goals that had been intended by the enactment of citizen suit provisions in federal environmental laws. The effectiveness of this citizen involvement can be magnified by statutorily mandating that the board’s decisions be given deference.<sup>153</sup> Such a provision would limit the ability of development proponents to easily overturn the appeals board’s determination by resort to the courts.

For policymakers looking to enact DRI legislation, broad standing provisions should also be considered. Though the purposes of the DRI review program are sometimes seen as best carried out by regional and state agencies working in the public interest,<sup>154</sup> the value of retaining expansive standing is arguably even more important for these developments than for most other land use decisions. DRIs, as the Florida First District Court of Appeal recognized in *Friends of the Everglades, Inc. v. Board of Commissioners of Monroe County*,<sup>155</sup> by definition affect individuals far beyond the neighboring properties. Accordingly, allowing broad standing for administrative appeals of DRI decisions would force DRI proponents to better internalize the spillover effects of their projects. Since many affected individuals may live outside the jurisdiction within which the DRI would be located, the likelihood

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150. *Home Builders & Contractors Ass’n of Brevard, Inc. v. Dep’t of Cmty. Affairs*, 585 So. 2d 965, 968 (Fla. 1st DCA 1991).

151. *Utsey v. Coos County*, 32 P.3d 933, 953 (Edmonds, J., concurring).

152. *Id.* at 953.

153. An example of this can be found in Oregon. When reviewing an order issued by LUBA, the Oregon Court of Appeals does not conduct a trial *de novo*. It will only review the record, and will only reverse under very limited circumstances. In most cases it will only reverse if the order “is not supported by substantial evidence in the whole record.” OR. REV. STAT. § 197.850(9)(c) (2001). Vermont’s Act 250 grants similar deference to determinations of the Environmental Board, whose findings of fact will be upheld by the Vermont Supreme Court “if supported by substantial evidence on the record as a whole.” VT. STAT. ANN. tit. 10, § 6089(c) (1997).

154. *See, e.g., Friends of the Everglades v. Bd. of Comm’rs*, 456 So. 2d 904, 908-909 (Fla. 1st DCA 1984).

155. *Id.* at 909.

that they had previously been involved in that municipality's planning process is remote. Thus, allowing them to fully participate in the review process might be their first and only chance to affect the character of the proposed DRI. And, by allowing citizen standing, the efficacy of the review process will not hinge upon the leadership of what may be a politicized state planning agency or regional planning commission.<sup>156</sup>

#### *D. Due Process*

Another constitutional concern for state policymakers is the principle of due process. Due process concerns are rooted in the Fifth and Fourteenth Amendments to the United States Constitution and similar state protections. Like their federal counterparts, typical state-level due process clauses provide that "[n]o person shall be deprived of life, liberty, or property without due process of law."<sup>157</sup> Notably, neither the Oregon nor Vermont constitutions have an explicit clause, so due process claims arising from growth management activities in these states rest largely upon the Fourteenth Amendment. Because both procedural and substantive due process claims have been made against growth management programs, a separate discussion of each doctrine follows.

##### 1. Procedural Due Process

In the federal context, procedural due process rights are violated when the government deprives someone of a protected interest without following the requisite procedures. The Supreme Court has divided the due process inquiry into two steps. First, it must be determined whether the rights that were allegedly deprived were constitutionally protected.<sup>158</sup> The range of interests protected under the due process clause is narrow, with the claimant needing to show that either a property or liberty interest was implicated. While the jurisprudence of the last several decades has expanded this range beyond those rights traditionally protected,<sup>159</sup> there are still relatively few interests that enjoy due process protection. Once a court has decided that an interest is protected, it proceeds to analyze the adequacy of the procedures that resulted in its

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156. *But see* Caloosa Prop. Owners Ass'n, Inc. v. Bd. of County Comm'rs, 429 So. 2d 1260, 1264-65 (Fla. 1st DCA 1983).

157. FLA. CONST. art. I, § 9.

158. *See, e.g.,* Bd. of Regents v. Roth, 408 U.S. 564, 569-572 (1972).

159. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783 (1964).

deprivation.<sup>160</sup> Because of significant differences between the various rights given due process protection, certain interests require greater procedural protections than others. Since many of the rights allegedly infringed through implementation of growth management programs are less vital than other protected interests, they may be entitled to fewer protections than those interests at the heart of the due process clause.

In the context of state growth management programs, due process claims most commonly pertain to the adequacy of notice governments provided to potentially affected persons, as well as limitations on standing for land use appeals. To the extent that these due process concerns arise from statutory limitations on standing, they can be viewed as the corollary to the constitutional concerns related to excessively broad standing. While expansive grants of standing may exceed the jurisprudential constraints of the judicial branch, limited standing can trigger due process concerns. Despite the host of due process problems that could arise from a growth management program, few courts considering such claims have found violations of either state or federal due process.

No aspect of Florida's growth management program has been found to violate due process. The First District Court of Appeal considered a due process argument in *Friends of the Everglades*,<sup>161</sup> wherein two environmental groups challenged their denial of standing to appeal a county's DRI approval to the Florida Land and Water Adjudicatory Commission. They asserted a right to adequate notice and an opportunity to comment on the DRI prior to its approval by the zoning board and county commission.<sup>162</sup> The court rejected this due process claim. Though conceding that affected landowners were entitled to notice and a chance to be heard, it characterized "affected landowners" as those whose own land was the subject of government action.<sup>163</sup> The court asserted that "due process does not require that the local zoning authority 'hold a plebiscite' or 'poll' the neighborhood on the issue."<sup>164</sup> Thus, the environmental groups were not entitled to due process protection. The court also noted that once due process requirements had been satisfied at the local level, there was no need to grant neighboring landowners or others a right to judicial review. Other plaintiffs have fared no better. To date, no Florida decision has found either

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160. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 260-71 (1970).

161. 456 So. 2d 904 (Fla. 1st DCA 1984).

162. *Id.* at 910-11.

163. *Id.* at 911.

164. *Id.*

the DRI review process or the Growth Management Act to abrogate due process rights.<sup>165</sup>

The Vermont Supreme Court has similarly considered due process challenges to the Act 250 program without finding a violation. Its views were elucidated in *In re Great Waters of America, Inc.*,<sup>166</sup> which involved a due process claim brought by a landowner adjacent to a property for which an Act 250 permit was sought. This owner argued that Act 250 was constitutionally deficient in two ways. First, the act required only constructive, rather than actual, notice of a pending application be given to adjoining landowners. Second, it did not automatically grant these landowners party status in the proceedings.<sup>167</sup> Thus, the appellant claimed, the statute “falls short of the notice and full hearing requirements inherent in the due process clause of the Constitution.”<sup>168</sup> The court focused on the nature of her interest, “the right of landowners to participate in Act 250 hearings if adjoining property is the subject of a construction permit application.”<sup>169</sup> Finding that this property interest “is itself conditioned by procedural limitations,” it followed United States Supreme Court precedent in holding that the legislature’s coupling of an adjacent landowner’s participation right with limits on its exercise did not trigger additional due process protections.<sup>170</sup> The court concluded that the state legislature could have constitutionally foreclosed all participation of adjacent property owners in the Act 250 process.

The recent Vermont Supreme Court case of *In re White*<sup>171</sup> considered the due process rights of Act 250 permit holders. That case involved an owner’s Act 250 permits for industrial activities.

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165. The First District also rejected a due process argument based on access to the courts in *Caloosa Prop. Owners Ass’n, Inc. v. Bd. of County Comm’rs*, 429 So. 2d 1260, 1264-65 (Fla. 1st DCA 1983). In addition to the general due process clause of Article 1, section 9, the Florida Constitution also contains a clause ensuring that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” FLA. CONST. art. I, § 21. In *Caloosa*, the appellant, an organization of property owners, argued that the DRI review process, by not granting it standing to appeal the county board’s approval of a DRI, violated its right of access to the courts. The court summarily rejected this contention, observing that this right only applied to causes of action that existed prior the adoption of the constitutional provision. The DRI review process was thus beyond the scope of interests protected by the clause.

166. 435 A.2d 956 (Vt. 1981).

167. Party status is granted to adjacent landowners who notify the district commission within the statutorily specified timeframe. VT. STAT. ANN. tit. 10, § 6085(c)(1) (1997).

168. *Great Waters*, 435 A.2d at 958.

169. *Id.* at 958.

170. *Id.* at 959. The Vermont Supreme Court relied on the United States Supreme Court decisions in *Arnett v. Kennedy*, 416 U.S. 134 (1974), and *Bishop v. Wood*, 426 U.S. 341 (1976).

171. 779 A.2d 1264 (Vt. 2001).

In response to a neighboring landowner's petition to the Environmental Board, and after a series of intervening procedural steps, the Board revoked five of his permits and subsequently reissued them with more stringent operating conditions. Because the hearing that actually led to revocation of White's permits was not technically a revocation hearing, the court ruled that White was not entitled to the full statutory protections provided for in Act 250. It then analyzed White's claim in constitutional terms. Applying the principles of due process enumerated in the United States Supreme Court's decision in *Mathews v. Eldridge*,<sup>172</sup> the Vermont Supreme Court concluded that White had not been deprived of due process of law. It rested its decision on the many procedural safeguards provided in the Board's proceedings.<sup>173</sup> Thus, the Act 250 permitting process continues to comply with due process standards.<sup>174</sup>

Though the Oregon courts have considered procedural due process questions tangentially related to the state's growth management program,<sup>175</sup> they have not directly ruled on the structure of the program itself. But the Oregon Supreme Court hinted at its disapproval of abstract due process challenges in *Fifth Avenue Corporation v. Washington County*,<sup>176</sup> which involved a challenge to the county's rezoning of its property. The plaintiff had advanced several constitutional arguments before the trial court that were dropped on appeal. Although not ruling on the due process issue, the court observed that "[t]he use of this type of generalized constitutional attack without reference to specific textual provisions has been persuasively criticized" in an article written by one of the justices.<sup>177</sup> This dismissive language suggests that, without great specificity of pleading and solid legal underpinnings, it would be difficult to mount a successful due process challenge to the Oregon planning regime.

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172. 424 U.S. 319 (1976).

173. *White*, 779 A.2d at 1272.

174. In addition to due process claims based on the statutory structure, such as those in *Great Waters* and *White*, the Vermont Supreme Court has also rejected due process claims based on an alleged bias of an administrative decisionmaker. See *Secretary v. Upper Valley Reg'l Landfill Corp.*, 705 A.2d 1001 (Vt. 1997); *Secretary v. Earth Constr., Inc.*, 676 A.2d 769 (Vt. 1996); *In re Crushed Rock, Inc.*, 557 A.2d 86 (Vt. 1988).

175. See, e.g., *Neuberger v. City of Portland*, 603 P.2d 771 (Or. 1979) (discussing due process standards for a property rezoning); *Bienz v. City of Dayton*, 566 P.2d 904 (Or. Ct. App. 1977) (holding that due process requires only one full-scale evidentiary hearing at the local level of government for approval of a conditional use permit); see also *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23 (Or. 1973) (articulating due process standards that affected the resolution of later land use cases).

176. 581 P.2d 50 (Or. 1978).

177. *Id.* at 52 n.2; see Hans A. Linde, *Without Due Process*, 49 OR. L. REV. 125 (1969).

The foregoing cases indicate the limited success of due process claims brought by individuals without a tangible property interest. The Oregon Appeals Court's decision in *Bienz* and the *Friends of the Everglades* opinion by the Florida First District suggest that neighboring landowners are entitled to a hearing at the local level. Yet, due process does not require that they be given additional procedural protections. Also, if there are both local and state-level approval processes for a development proposal, like in Vermont, *Great Waters* makes clear that due process does not entitle neighboring landowners to participate in the state process. The lack of success these challenges have enjoyed is also evidence of the ample opportunities for public involvement provided by most growth management programs.

Perhaps the most serious due process questions posed by growth management programs concern property owners whose land is the subject of a land use decision. Due process concerns are particularly heightened in the context of decisions that impose stricter regulations. Stripped of its procedural surplusage, this was essentially the question facing the Vermont Supreme Court in *White*. And, had the plaintiff not dropped its argument, this would have been the issue presented to the Oregon Supreme Court in *Fifth Avenue Corporation*. The treatment of the due process issue in both decisions suggests that the proper procedural protections of the Vermont and Oregon programs are sufficient to protect owners' rights. The existing growth management programs thus provide a good model for avoiding due process difficulties. As long as programs are designed with procedural protections like those found in Florida, Oregon, and Vermont, serious problems are unlikely. The case law makes clear, though, the importance of providing neighboring landowners with at least a local government hearing before a land use decision is made. Actions taken with no opportunity for input will run due process risks. And for landowners with concrete property interests, those processes resulting in more stringent regulations should provide plenty of procedural protections. In any event, the Florida, Vermont, and Oregon programs appear to have sufficiently protected their citizens' due process rights.

## 2. Substantive Due Process

In addition to the constitutional concerns raised by procedural due process, there is also a threat that the doctrine of substantive due process could be used to invalidate portions of a state's growth management program. Though this has not happened, one state's experience suggests that the risk exists. Substantive due process,

though at one time rigorously applied by courts in cases involving economic regulation,<sup>178</sup> has been increasingly discredited since the 1930s.<sup>179</sup> Despite suffering from a degree of desuetude in the federal courts, the doctrine of substantive due process has not been eradicated at the state level.<sup>180</sup>

In Washington, the one state where substantive due process currently threatens the administration of a growth management program, the state supreme court has applied the test set forth in *Lawton v. Steele*<sup>181</sup> to land use regulation. In *Lawton*, the United States Supreme Court ruled that a state's exercise of the police power must satisfy three requirements: First, that the interests of the general public require its exercise; second, that the means used are reasonably necessary for accomplishing the purpose; and third, that the means are not unduly oppressive upon individuals.<sup>182</sup> The *Lawton* inquiry focused on the third requirement, and subsequent courts balanced the public need for a particular regulation against the private interests that would be affected.<sup>183</sup>

When the Washington Supreme Court resurrected the *Lawton* test in *West Main Associates v. City of Bellevue*,<sup>184</sup> it similarly focused on this balancing test. The supreme court has applied it in striking down the imposition of impact fees to be paid by developers demolishing low-rent residential apartments.<sup>185</sup> The court found the impact fees, though meeting the first two prongs of the *Lawton* test,

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178. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

179. Susan Boyd, Note, *A Doctrine Adrift: Land Use Regulation and the Substantive Due Process of Lawton v. Steele in the Supreme Court of Washington*, 74 WASH. L. REV. 69, 72-78 (1999). The dearth of due process challenges being advanced by property owners facing limits on use of their land is also partly attributable to the fact that many of these claims are brought under the Takings Clause instead. Though land use cases early in the last century often framed constitutional questions in the context of due process, see, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the Takings Clause has since come to dominate analysis of the protection of a property owner's rights.

180. See *id.* at 69. Despite the discrediting of substantive due process in the context of economic regulation, some commentators have noted the doctrine's continued application to land use regulations. The record of a symposium of land use experts discussing this issue can be found in BLAESSER ET AL., *supra* note 58 at 53-59.

181. 152 U.S. 133 (1894).

182. *Id.* at 137. In a reflection of its anti-regulatory bias at that time, the Court went on to state:

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. *Id.*

183. Boyd, *supra* note 179, at 73.

184. 720 P.2d 782 (Wash. 1986).

185. *Robinson v. City of Seattle*, 830 P.2d 318 (Wash. 1992); *Sintra, Inc. v. City of Seattle*, 829 P.2d 765 (Wash. 1992).

to be “unduly oppressive.”<sup>186</sup> Though the court distinguished these impact fees from the imposition of environmental mitigation fees under the State Environmental Policy Act, the theoretical distinction between these two kinds fees is slim, and may not be legally tenable.<sup>187</sup> Moreover, it has indicated that this same kind of balancing test is appropriate for determining whether prohibitions on development are valid,<sup>188</sup> a holding that could, in other cases, threaten the substantive restrictions of the state’s growth management regime. The Washington Supreme Court’s application of the doctrine, if extended to land use restrictions, could eviscerate that state’s growth management program. However, Washington’s experience is atypical.

A more representative response to substantive due process challenges can be seen in Vermont. In *Omya, Inc. v. Town of Middlebury*,<sup>189</sup> the Vermont Supreme Court considered a substantive due process argument based on the state constitution. Omya, whose business operations included the hauling of minerals through the town of Brandon, had requested that the district environmental commission increase the number of allowable daily trips it could take under its Act 250 permit. Because the commission did not raise it to the level desired, Omya appealed to the Environmental Board, which increased the limit only slightly. On appeal to the Vermont Supreme Court, Omya argued that this limitation violated substantive due process under the state constitution. In an argument reminiscent of the first prong of the *Lawton* test, Omya contended that there was no rational relationship between the daily trip limitation and the public health, safety, morals, or welfare.<sup>190</sup> The court rejected this argument, finding ample evidence that additional daily trips would create a host of disturbances in downtown Brandon.<sup>191</sup> Accordingly, the substantive due process argument failed.

The Second Circuit Court of Appeal was faced with a federal substantive due process challenge related to Act 250 in *Southview Associates, Ltd. v. Bongartz*.<sup>192</sup> Judge Oakes’ opinion in this case

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186. *Robinson*, 830 P.2d at 329.

187. *Boyd*, *supra* note 179, at 89-90.

188. *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash. 1990).

189. 758 A.2d 777 (Vt. 2000).

190. *Id.* at 780.

191. *Id.* at 780.

192. 980 F.2d 84 (2d Cir. 1992). The panel unanimously found that Southview’s due process claim was unripe. However, Judge Oakes, the author of the opinion, also included a discussion of the merits of that claim. His colleagues did not join this section of the opinion, having found the court’s decision complete based on its ripeness determination alone. Their failure to join his discussion does not reflect disagreement with the merits of his argument.

reflects the weakness of the doctrine under recent federal case law. Southview had attempted to obtain an Act 250 permit for a residential development that would have displaced a deeryard. The Environmental Board rejected the application on the grounds that the development failed to meet one of the criteria used in considering permit applications, whether the development would “destroy or significantly imperil necessary wildlife habitat.”<sup>193</sup> Southview argued that the Environmental Board’s rejection of its permit application was arbitrary and capricious, and thus violated its guarantee of substantive due process.<sup>194</sup> Oakes rejected this argument for two reasons. First, he noted that because the Board possessed significant discretion in making its determination, Southview’s expectation of permit approval had not reached “‘the level of certainty required to give rise to a ... property right’, cognizable under the Fifth and Fourteenth Amendments.”<sup>195</sup> Thus, Southview’s expectation of being able to develop the land did not fall within the narrow zone of interests entitled to due process protections.

However, Oakes also stated that even if Southview’s expectation had risen to the level of a constitutional property interest, it still would not have adequately asserted a substantive due process violation. Government regulation of land use, Oakes wrote, “violates ... substantive due process only when [the] government acts with ‘no legitimate reason for its decision.’”<sup>196</sup> Such a violation could also have been shown “if it is ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.’”<sup>197</sup> Because the Environmental Board had multiple reasons for rejecting the application, Southview had not overcome this presumption of validity. More important than the application of the doctrine to this particular case, where the governmental action was clearly based on valid reasons, is the decision’s articulation of the difficulty of successfully advancing a substantive due process argument. Barring a showing of maliciousness, or the complete absence of any underlying rationale at all, even those with protected interests cannot succeed.

Despite the risk of Washington’s program running afoul of substantive due process, the likelihood of its application to other state programs, and the degree of concern it should engender in policymakers, is minimal. For one reason, the Washington Supreme

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193. *Id.* at 90.

194. *Id.* at 101.

195. *Id.* at 102 (quoting *Dean Tarry Corp. v. Freidlander*, 826 F.2d 210, 213 (2d Cir. 1987)).

196. *Id.* at 102 (quoting *Shelton v. City of College Station*, 780 F.2d 475, 483 (5th Cir. 1986)).

197. *Id.* at 102 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

Court's jurisprudence remains inconsistent with the federal case law of substantive due process. The "federal roots of *Lawton v. Steele* dried up long ago,"<sup>198</sup> which suggests that the application of the doctrine at the state level is inapposite unless rooted in state constitutional provisions. Moreover, many of the concerns to which the Washington courts have applied the doctrine are more properly analyzed under the Takings Clause. Finally, Vermont's very different treatment of these claims further suggests that the Washington view is unusual. It should be noted, however, that despite the low risk of substantive due process impeding growth management efforts, similar arguments will continue to be raised under the Takings Clause.

As a general matter, policymakers need not be concerned about possible substantive due process violations. A legislature can foreclose possible challenges by providing a statement of legislative purposes and adequate criteria to guide those agency actions that infringe on property rights. These measures, which will also assuage non-delegation concerns, can help guard against the appearance or reality of arbitrary agency action. Since any growth management program should have these features anyway, substantive due process does not represent a special concern requiring significant attention in designing a statutory scheme.

#### *E. Other Constitutional Issues*

In addition to questions of regulatory takings, delegation of power, standing, and due process, other constitutional issues have developed from the implementation of state growth management programs. Three in particular meriting discussion are constitutional concerns related to home rule authority, the equal protection doctrine, and the federal Supremacy Clause. The past three decades of experience suggest the minimal likelihood that these issues will constrain growth management efforts. However, because courts may be faced with legal challenges based on these theories, identifying them will better prompt policymakers to avoid them.

One constitutional problem that could theoretically arise, but has not been a concern in practice, relates to local government's home rule authority. Many states provide for home rule in their constitution. For example, Oregon's constitution allows voters to adopt a county charter, which "may provide for the exercise by the county of authority over matters of county concern."<sup>199</sup> In 1000

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198. Boyd, *supra* note 179, at 70.

199. OR. CONST. art. VI, § 10.

*Friends of Oregon v. Washington County*,<sup>200</sup> the county argued that the state planning laws violated its home rule authority under the state constitution. The law at issue required the final decision on a local comprehensive plan amendment to be made by the governing body, while the county ordinance had allowed the planning commission to do it.<sup>201</sup> The court noted that policies related to comprehensive planning were of statewide concern, and dismissed the county's argument as "manifest nonsense."<sup>202</sup> The court's refusal to seriously entertain this argument is reflective of the little influence home rule concerns have had over state growth management programs. Despite the theoretical home rule violations that could result from the imposition of a state-level program, particularly one concerned with the traditionally local function of planning and zoning, serious problems have not developed.

Courts have also rejected equal protection challenges to growth management programs. As with other constitutional doctrines, equal protection is guaranteed in both the federal and state constitutions.<sup>203</sup> Growth management efforts generally do not involve a suspect classification such as one based on race, so courts have applied only minimal scrutiny to these government actions. Although equal protection claims based on land use regulations can succeed even under rational basis scrutiny,<sup>204</sup> the doctrine has posed no threat to growth management programs. The Florida First District's decision in *Caloosa* represents a typical response to such challenges. In that case, the plaintiff argued that two classes were created under the DRI review process: landowners applying for a DRI, and landowners substantially affected by DRI approval. The First District dismissed the plaintiff's state and federal equal protection claims after applying the rational basis test, which requires some rational relationship to a legitimate state interest.<sup>205</sup> It easily found a rational basis for the unequal treatment.<sup>206</sup>

The Florida Supreme Court also rejected an equal protection challenge under the state constitution in *Department of Community Affairs v. Moorman*.<sup>207</sup> In *Moorman*, the lead plaintiff had been

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200. 720 P.2d 1316 (Or. Ct. App. 1986).

201. The county ordinance only required approval by the governing body when a private party appealed the planning commission's decision. *Id.* at 1317.

202. *Id.*

203. See, e.g., OR. CONST. art. I, §§ 1, 20.

204. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

205. *Caloosa Prop. Owners Ass'n, Inc. v. Bd. of County Comm'rs*, 429 So. 2d 1260, 1266 (Fla. 1st DCA 1983).

206. *Id.*

207. 664 So. 2d 930 (Fla. 1995).

prohibited from building a fence around his property under an ordinance enacted to protect the remaining population of the endangered Florida Key deer. The court denied that there was an equal protection issue at all, asserting that the right to equal protection “does not restrict the State’s ability to establish or mandate reasonable environmental regulations, even those that may apply only in a certain area, where the State is addressing an environmental problem peculiar to the area.”<sup>208</sup> It went on to note that, even had there been a theoretical equal protection question, the state would have satisfied the rational basis requirement. Accordingly, as long as courts continue to apply the rational basis test to these equal protection claims, the risk of an adverse decision remains minimal.

Finally, the United States Constitution’s mandate that federal law “shall be the supreme Law of the Land”<sup>209</sup> may theoretically impose limits on the implementation of a strong growth management program. Yet here again, this constitutional provision poses little risk to growth management efforts. These claims have not come up in Oregon and Florida at all, and the Vermont Supreme Court has twice rejected Supremacy Clause arguments. *Vermont Agency of Natural Resources v. Duranleau*<sup>210</sup> involved a company’s blasting activities at a site it was preparing for development. Prior to the commencement of the blasting, the town suffered a flood, which required the rebuilding of several roads for which the town received a Federal Emergency Management Agency (FEMA) grant. Duranleau made an agreement with the town to supply crushed rock from its property for roadbuilding. The state halted Duranleau’s activities after concluding that it needed an Act 250 permit for the blasting. In its appeal of the imposition of fines for its violations, Duranleau argued that the work at the site could be done because there is a federal preference for local procurement for disaster relief, and the work was necessary to accomplish a FEMA-administered project.<sup>211</sup> The court rejected this argument, noting that a state violates the Supremacy Clause if: 1) it regulates the federal government directly or discriminates against it; or 2) the state law conflicts with an affirmative command of Congress.<sup>212</sup> The requirement that Duranleau obtain an Act 250 approval prior to blasting did neither. It simply “imposed permit requirements upon

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208. *Id.* at 932.

209. U.S. CONST. art. VI, § 2.

210. 617 A.2d 143 (Vt. 1992).

211. *Id.* at 145.

212. *Id.* at 145 (citing *North Dakota v. United States*, 495 U.S. 423, 433-34 (1990)).

a local supplier of crushed stone.”<sup>213</sup> The court rejected a similar claim in *In re Commercial Airport*.<sup>214</sup> There the plaintiff appealed an Environmental Board decision that he needed an Act 250 permit to complete certain improvements to his private airport. In holding that the permit was not preempted by federal aviation law, the court concluded that the Federal Aviation Administration had not “fully occupied the field of land use as it relates to aircraft operation.”<sup>215</sup> These constitutional claims advanced in *Duranleau* and *Commercial Airfield*, though novel, are unlikely to affect the implementation of growth management.

There is little risk that any these three constitutional doctrines would substantially limit growth management programs. Though there is a possibility of prevailing on one of these theories, it remains a remote one. Avoiding potential problems appears to be relatively easy, at least for equal protection and Supremacy Clause claims. Though claims based on local home rule authority may be more likely to arise, they can be guarded against by allowing local governments to retain some planning and zoning powers.

#### IV. CONCLUSION

This survey suggests that there are several things lawmakers can do to avoid breaching the constitutional limits upon state growth management efforts. First, nondelegation concerns can be minimized by statutorily providing clear standards and principles to guide agencies’ implementation of the program. In addition to lowering the risk of a court invalidating part of a program on non-delegation grounds, clear legislative direction also has the benefit of promoting better overall policies. Lucid standards, in addition to thwarting potential non-delegation challenges, are likely to minimize the risk of overly politicized decisions, thereby best effectuating the goals of growth management.<sup>216</sup>

For policymakers wishing to maximize public involvement while not exceeding constitutional limits to judicial standing, a bifurcated approach is the key to avoiding problems. By allowing all interested parties to take part in administrative proceedings, there will be ample opportunity for the concerns and policy preferences of citizens

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213. *Id.*

214. 752 A.2d 13 (Vt. 2000).

215. *Id.* at 14-15.

216. As has been noted, forcing the legislature to make discrete policy decisions, such as in Florida’s areas of critical concern program, would overly politicize such decisions. Yet standardless delegations of power also carry a risk of over-politicization, as the agencies’ policy direction would shift all the more easily with changes in the gubernatorial administration.

to be accounted for. Limiting judicial standing to those who can demonstrate an adversely affected legal interest eliminates the risk of a court finding a constitutional violation. The overall effect of citizen intervention in the administrative review process can be enhanced by repositing appeals from the administrative tribunal directly in an appellate court with a narrow standard of review.

Due process principles should also be accounted for when designing a growth management program. Procedural due process problems can generally be minimized by following the example of existing growth management programs. A well-designed program must mandate that all local government land use decisions be preceded by at least one public hearing, and decisions imposing stricter land use controls should provide adequate procedures for the property owners subjected to those regulations. As for substantive due process, the Washington experience notwithstanding, the doctrine poses little danger to the effective administration of a growth management regime. Ensuring that governmental decisions are based on solid reasoning, and providing standards to guide those decisions, will help minimize the likelihood of substantive due process challenges. Finally, there are potential constitutional concerns related to home rule authority, equal protection, and the Supremacy Clause. However, the likelihood of a serious challenge based on any of these theories is small.

The issues discussed in this Article represent only one issue among the many that must be carefully considered in designing an effective growth management program. However, given the potentially crippling effect of an adverse constitutional decision, policymakers should strive to create statutory schemes that minimize such difficulties. With cognizance of the issues raised in this article and careful program design, an effective growth management program conforming to constitutional dictates can be readily crafted.