

A FORTY-YEAR FAILURE: WHY THE NEW JERSEY SUPREME COURT SHOULD TAKE CONTROL OF MOUNT LAUREL ENFORCEMENT

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I. INTRODUCTION

Howell Township is a prototype of the quiet and prosperous New Jersey suburbs. The town of 51,000 boasts a median household income of over \$96,000, far exceeding the \$53,657 national and \$72,062 state medians.¹ Its children attend one of three regional public high schools, all of which have been ranked in the state's top third (with two in the top twenty percent).² It hosts more than a dozen public parks, including the 1,200-acre Manasquan Reservoir, where visitors can fish, boat, ride horses, and observe wildlife.³ Eighty-eight percent of Howell's residents are white.⁴

In 2015, Howell announced a plan to rezone twenty-seven wooded acres to permit construction of seventy-two affordable housing units.⁵ The public response was immediate and severe. Residents posted dozens of comments to Howell Happenings NJ, a Facebook community page administered by private residents of the township, ranging from the frantic ("Time to sell and get the heck out of here!") to the ugly ("I moved to Howell 15 years ago to get away from garbage. Now the garbage is getting dumped on top of me.")⁶ The response by many residents at a

¹ U.S. CENSUS BUREAU, *Am. FactFinder*, [http://factfinder.census.gov/bkmc/cf/1.0/en/place/Howell township, Monmouth County, New Jersey/POPULATION/DECENNIAL_CNT](http://factfinder.census.gov/bkmc/cf/1.0/en/place/Howell%20township,MonmouthCounty,NewJersey/POPULATION/DECENNIAL_CNT) (last accessed Oct. 30, 2016); U.S. CENSUS BUREAU, *Am. FactFinder*, [http://factfinder.census.gov/bkmc/cf/1.0/en/place/Howelltownship, Monmouth County, New Jersey/INCOME/MEDIAN_HH_INCOME](http://factfinder.census.gov/bkmc/cf/1.0/en/place/Howelltownship,MonmouthCounty,NewJersey/INCOME/MEDIAN_HH_INCOME) (last accessed Oct. 30, 2016); Carmen DeNavas-Walt & Bernadette D. Proctor, *Income and Poverty in the United States: 2014* at 5, U.S. CENSUS BUREAU (Sept. 2015), <http://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>; U.S. CENSUS BUREAU, *Am. FactFinder*, [http://factfinder.census.gov/bkmc/cf/1.0/en/state/New Jersey/INCOME/MEDIAN_HH_INCOME](http://factfinder.census.gov/bkmc/cf/1.0/en/state/NewJersey/INCOME/MEDIAN_HH_INCOME) (last accessed Oct. 30, 2016).

² FREEHOLD REG'L HIGH SCH. DIST., *Which High School will my Child Attend?*, [http://www.frhsd.com/cms/lib8/NJ01912687/Centricity/Domain/4/Attendance%20 Boundaries.pdf](http://www.frhsd.com/cms/lib8/NJ01912687/Centricity/Domain/4/Attendance%20Boundaries.pdf) (last accessed Oct. 30, 2016); N.J. MONTHLY, *Top School Alphabetical List 2014* (Sept. 2, 2014), <http://njmonthly.com/articles/towns-schools/top-schools-alphabetical-list/> (listing Freehold Township High School as 66th, Colts Neck High School as 68th, and Howell High School as 107th out of 339 schools in the list of 2014 top high schools).

³ HOWELL TWP., <http://www.twp.howell.nj.us/Facilities> (last accessed Oct. 30, 2016); MANASQUAN RESERVOIR CNTY. PARK, <http://www.nynjtc.org/park/manasquan-reservoir> (last accessed Oct. 30, 2016).

⁴ U.S. CENSUS BUREAU, *Am. FactFinder*, [http://factfinder.census.gov/bkmc/table /1.0/en/DEC/10_SF1/QTP3/0600000US3402533300](http://factfinder.census.gov/bkmc/table/1.0/en/DEC/10_SF1/QTP3/0600000US3402533300) (last accessed Oct. 30, 2016).

⁵ Kala Kachmar, *Taxes, Religion at Core of Howell Apartment Controversy*, ASBURY PARK PRESS (Oct. 20, 2015), <http://www.app.com/story/news/local/western-monmouth-county/howell/2015/10/20/howell-affordable-housing-hearing/74244048/>.

⁶ HOWELL HAPPENINGS NJ, <https://www.facebook.com/Howell-Happenings-NJ-157703170966044/> (last accessed Jan. 25, 2016); Alana Semuels, *The Pervasive Fear of Affordable Housing in New Jersey*, THE ATLANTIC (Dec. 22, 2015), <http://www.theatlantic.com/business/archive/2015/12/the-pervasive-fear-of-affordable-housing-in-new->

township council meeting was decidedly more measured but no less critical, foreboding the usual suburban fears of higher taxes, busier traffic, and more crowded schools.⁷

Some speakers at the meeting, unshielded by the relative anonymity of a Facebook page, cautioned against Howell becoming “Lakewood North”—referencing the neighboring town with a large Hasidic Jewish population.⁸ A woman urged, “We just want a fair chance to find out who would be moving in.”⁹ Many were concerned about the religious affiliation of the landowner, Rabbi Israel Meyer Hachohen, who was associated with the Rabbinical Seminary of America.¹⁰ A user on Howell Happenings NJ did not mince words: “This means we are going to have more Jewish families milking the system.”¹¹

When affluent white communities like Howell oppose affordable-housing plans, their resistance often stems from “fear [of] the changes that they believe an influx of black, Latino, or lower-income white residents would bring.”¹² The fear that affordable housing will attract an influx of Jewish residents is far less common but nonetheless springs from the same place: many residents “want[] their town to stay just as it [is],” and admitting a minority group would threaten that.¹³ There is also an argument of fairness: a resident might have spent decades saving to afford the price tag and property taxes on a house in an upscale suburb, and he feels cheated when “poor people just get to move there on the cheap.”¹⁴ Howell officials faced a difficult dilemma—“listen to [their] constituents and try to block the housing, or listen to the law.”¹⁵

“The law” in this case referred to a March 2015 ruling by the Supreme Court of New Jersey (“SCNJ”).¹⁶ Months before Howell released the controversial plan, the SCNJ decided that the state judiciary would resume enforcing an affordable-housing doctrine that was first

jersey/421581/.

⁷ Kala Kachmar, *Taxes, Religion at Core of Howell Apartment Controversy*, ASBURY PARK PRESS (Oct. 20, 2015), <http://www.app.com/story/news/local/western-monmouth-county/howell/2015/10/20/howell-affordable-housing-hearing/74244048/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Alana Semuels, *The Pervasive Fear of Affordable Housing in New Jersey*, THE ATLANTIC (Dec. 22, 2015), <http://www.theatlantic.com/business/archive/2015/12/the-pervasive-fear-of-affordable-housing-in-new-jersey/421581/>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ In re N.J.A.C. 5:96 & 5:97 (“*Mount Laurel IV*”), 110 A.3d 31 (N.J. 2015).

articulated in the 1970s but had since lapsed.¹⁷ In 1975, the SCNJ decided *Southern Burlington County NAACP v. Township of Mount Laurel*.¹⁸ The landmark decision—commonly known as “*Mount Laurel I*”—interpreted the state constitution to require that municipalities use their zoning powers to provide low and moderate-income housing options.¹⁹ Thus arose the influential *Mount Laurel* doctrine, today a staple of property law casebooks.²⁰ The Fair Share Housing Center (“FSHC”), a non-profit organization founded to enforce the doctrine on behalf of aggrieved parties, calls *Mount Laurel I* “one of the most significant civil rights cases in the United States since *Brown v. Board of Education*.”²¹

At first, many local governments resisted *Mount Laurel I*.²² Moreover, courts struggled to find the proper way to apply the doctrine, with “deficiencies . . . rang[ing] from uncertainty and inconsistency at the trial level to inflexible review criteria at the appellate level.”²³ In 1983, the SCNJ reaffirmed that “[t]he doctrine is right” but admitted “its administration has been ineffective.”²⁴ It decided the second *Southern Burlington County NAACP v. Township of Mount Laurel* case²⁵ (“*Mount Laurel II*”) implementing several procedures that would “put some steel into th[e] doctrine.”²⁶

The New Jersey Legislature finally intervened in 1985 with the Fair Housing Act (“FHA”).²⁷ One function of the FHA was to create the

¹⁷ *Id.*

¹⁸ *S. Burlington Cnty. NAACP v. Mt. Laurel (“Mount Laurel I”),* 336 A.2d 713 (N.J. 1975).

¹⁹ *Id.*

²⁰ See, e.g., STEVEN SEMERARO, AN INTRODUCTION TO PROPERTY LAW IN THE U.S. 336 (ver. 1.1 2014). Less than a decade after *Mount Laurel I*, the Court itself observed that “[t]he doctrine has become famous.” *S. Burlington Cnty. NAACP v. Mt. Laurel (“Mount Laurel II”),* 456 A.2d 390, 410 (N.J. 1983). See also Alan Mallach, *The Betrayal of Mount Laurel: Will New Jersey get away with Gutting its Landmark Fair Housing Legislation?*, NAT’L HOUS. INST. (Mar./Apr. 2004), <http://www.shelterforce.com/online/issues/134/mtlaurel.html> (“Ever since the [S]upreme Court’s pioneering *Mount Laurel* decisions in 1975 and 1983, New Jersey has been seen as a leader across the nation for its efforts to create suburban affordable housing opportunities.”).

²¹ FAIR SHARE HOUS. CTR., *What is the Mount Laurel Doctrine?*, <http://fairsharehousing.org/mount-laurel-doctrine/> (last accessed Oct. 30, 2016).

²² Eight years after *Mount Laurel I*, the Court “believe[d] that there is widespread non-compliance with the constitutional mandate of [its] original opinion.” *Mount Laurel II*, 456 A.2d at 410. Even *Mount Laurel* Township itself had refused to comply with its namesake doctrine: “[T]en years after the trial court’s initial order invalidating its zoning ordinance, *Mount Laurel* remains afflicted with a blatantly exclusionary ordinance.” *Id.*

²³ *Id.*

²⁴ *Id.* at 411.

²⁵ *Mount Laurel II*, 456 A.2d 390.

²⁶ *Id.* at 390, 410.

²⁷ Fair Hous. Act, N.J. STAT. ANN. § 52:27D-301 to -329 (West 2015).

Council on Affordable Housing (“COAH”), an administrative agency that would draft regulations to assign each municipality a share of the burden.²⁸ But the statute hardly solved the problem, and the *Mount Laurel* cases were only the first skirmishes in a dispute that continues today. In March 2015, citing the COAH’s failure to satisfy its constitutional burden, the SCNJ resumed its role as forum of first resort to evaluate whether a defendant municipality is complying with its *Mount Laurel* obligations—perhaps “the most significant action in the last 30 years of the . . . doctrine.”²⁹

This note will argue that the SCNJ has been too tentative in managing the *Mount Laurel* problem. The events of the last forty years demonstrate that the legislature and the executive—political branches subject to popular whim—cannot muster the will to commit to an affordable-housing solution compliant with their constitutional obligation. Since the *Mount Laurel I* decision in 1975, the judiciary has demanded action that its collateral branches have failed to produce.

Where the executive and legislature refuse to comply with the supreme law of the state, the SCNJ must take command: the SCNJ, pursuant to its duty to uphold the New Jersey Constitution, should eliminate any remedy that does not flow through the judicial branch.³⁰ The judiciary has demonstrated time and again that it takes seriously its *Mount Laurel* mandate, while the other branches have demonstrated only that they will put partisan political considerations before their state constitution.

Still, this issue, like most issues with deep political implications, is solved most palatably by elected officials rather than by appointed judges. It also raises thorny balance-of-powers problems. Therefore, the judicial action proposed in this note should not be understood to foreclose the other branches from designing an effective legislative or administrative solution. But even then, the SCNJ should evaluate such a solution skeptically, and the judicial branch should permanently remain a forum of first resort for *Mount Laurel* relief.

Part II of this note will discuss relevant background details to support the subsequent analysis. Part III will specify the particular sort of action the SCNJ should take and will argue why it is necessary. Part IV will briefly conclude and will propose additional lines of inquiry.

²⁸ *Id.* § 52:27D-305.

²⁹ Gary Forshner, *Affordable Housing: The Next Generation*, N.J. L.J. (June 23, 2015); see also *Mount Laurel IV*, 110 A.3d at 35.

³⁰ See, e.g., N.J. CONST. art. VII, § I, ¶ 1 (“Every State officer . . . shall take and subscribe an oath or affirmation to support the Constitution of this State.”); *Mount Laurel II*, 456 A.2d at 417 (“We may not build houses, but we do enforce the Constitution.”).

II. BACKGROUND

Three major background topics inform the later analysis. First, it is crucial to understand how and why the *Mount Laurel* doctrine is a constitutional doctrine. This note examines *Mount Laurel I* and the SCNJ's reasoning therein.³¹ Second, to support the ultimate argument that the SCNJ should modify its enforcement of the doctrine, this note tracks *Mount Laurel* enforcement over the past forty years—a narrative that on its face exposes how legislative and executive approaches have been inadequate.³² Third, this note addresses the SCNJ's latest pronouncements on the issue in its March 2015 decision.³³

A. *Mount Laurel I* and its Constitutional Implications

By 1975, the states' power to design and enforce zoning ordinances was long-settled law. *Euclid v. Ambler*, the seminal United States zoning case, was decided nearly fifty years earlier.³⁴ *Nectow v. Cambridge* followed shortly after and affirmed the practice of zoning in general (though it struck down the particular ordinance at issue).³⁵ New Jersey, in a 1927 amendment to its constitution, proclaimed plainly that

the Legislature may enact general laws under which municipalities . . . may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State.³⁶

Zoning ordinances in the township of Mount Laurel permitted multi-family dwellings for only farmers and their families and then only if they were set at least 200 feet from the property line.³⁷ Attached townhouses, apartments, and mobile homes were outright prohibited.³⁸ The realistic outcome of these rules, even if not their purpose, was permitting housing

³¹ See *infra* Part II.A.

³² See *infra* Part II.B.

³³ See *infra* Part II.C.

³⁴ *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³⁵ *Nectow v. Cambridge*, 277 U.S. 183, 185 (confirming that “[t]he [zoning] ordinance is an elaborate one” but “[i]n its general scope it is conceded to be constitutional within [the *Euclid* precedent]”).

³⁶ This language was incorporated into New Jersey's 1947 constitution. N.J. CONST. art. IV, § VI, ¶ 2.

³⁷ *S. Burlington Cnty. NAACP v. Mt. Laurel*, 290 A.2d 465, 468 (N.J. Super. Ct. Law Div. 1972) (“In defendant township multi-family dwellings are only permitted on a farm for a farmer, a member of the farmer's family, or persons employed by the farmer, provided the multiple-family dwelling is not closer than 200 feet from the property boundary line.”).

³⁸ *Mount Laurel I*, 336 A.2d at 719.

that only middle or high-income residents could afford.³⁹ For at least some of the township's legislators, the unabashed goal was to "clear out substandard housing in the area and thereby get *better citizens*."⁴⁰ The township meant to "provide direct and substantial benefits to [its] taxpayers" by permitting new development for only higher-income residents.⁴¹

i. Procedure and Issue

It was against this backdrop that a group of plaintiffs sued Mount Laurel to challenge its zoning scheme.⁴² Though only "the minority group poor (black and Hispanic)" were directly represented in the suit, their essential complaint addressed a challenge faced also by "young and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places."⁴³

The trial court acknowledged the breadth of the problem and lamented that "[t]he judiciary cannot be expected to alleviate a condition that definitely calls for legislative action from either the national or state governments."⁴⁴ The best the courts could do was to "meet each specific situation as it is presented."⁴⁵ The court recited recent examples of zoning laws that might have an effect similar to that of Mount Laurel's, one tending to exclude lower-income residents: "ordinances which require minimum interior floor space; which limit lot sizes for a single-family unit to five acres; which absolutely prohibit the construction of any additional multi-family units; which prohibit the use of mobile homes on an individual lot, and which absolutely prohibit all mobile-home parks from a township."⁴⁶ Each of these was upheld, generating a record of "clearly enumerate[d] judicial standards" the courts could apply to future zoning schemes.⁴⁷

But Mount Laurel's scheme overstepped even these standards. The "patterns and practice" of the scheme indicated that Mount Laurel "ha[d] exhibited economic discrimination" with concern "solely for the betterment of middle and upper-income persons."⁴⁸ While a government

³⁹ *Id.*

⁴⁰ *S. Burlington Cnty. NAACP v. Mt. Laurel*, 290 A.2d at 468 (emphasis added).

⁴¹ *Id.*

⁴² *Id.* at 465.

⁴³ *Mount Laurel I*, 336 A.2d at 717.

⁴⁴ *S. Burlington Cnty. NAACP v. Mt. Laurel*, 290 A.2d at 472.

⁴⁵ *Id.*

⁴⁶ *Id.* at 467–68 (citations omitted).

⁴⁷ *Id.* at 468.

⁴⁸ *Id.* at 473.

may use its police power to legislate for the “general welfare” of its people, that phrase should not be construed to protect only “private welfare.”⁴⁹ The Mount Laurel zoning ordinance was invalid.⁵⁰

An inevitable appeal followed, but the SCNJ recognized that “the implications of the issue presented are . . . broad and far-reaching” and it certified the parties’ appeals before the Appellate Division could hear arguments.⁵¹ The issue was not limited to only the poor African-American and Hispanic plaintiffs and it was not limited to only Mount Laurel Township—the housing situation was no less than a statewide “crisis.”⁵² The SCNJ embraced the trial court’s reasoning and conclusion. Mount Laurel was developing a variety of housing projects for segments of its population that would provide a more favorable tax base, yet “[a]ll this affirmative action . . . is in sharp contrast to the lack of action, and indeed hostility, with respect to affording any opportunity for decent housing for the township’s own poor living in substandard accommodations.”⁵³ Proposals for less affluent housing were met with “fear . . . that such housing would attract low income families from outside the township.”⁵⁴

ii. Constitutional Principles

Most land use regulations involve only practical, even mundane, questions of local planning and policy. A municipal decision to limit lot sizes or to segregate industrial parks away from pastoral suburbia does not normally invoke the fundamental rights and privileges enshrined in the Constitution.⁵⁵ But the SCNJ recognized that *Mount Laurel I* was not just an unglamorous case about local land use policy, rather it contemplated “the basic importance of housing and local regulations restricting its availability to substantial segments of the population.”⁵⁶ The case implicated “fundamental principles” of state law.⁵⁷

Surely, a state’s police power encompasses and permits land use regulation.⁵⁸ If that principle was not clear enough after *Euclid* and its

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Mount Laurel I*, 336 A.2d at 716.

⁵² *Id.* at 716–17.

⁵³ *Id.* at 722.

⁵⁴ *Id.*

⁵⁵ See *Mount Laurel I*, 336 A.2d at 725 (“[A]s a matter of policy, we do not treat the validity of most land use ordinance provisions as involving matters of constitutional dimension; that classification is confined to major questions of fundamental import.”).

⁵⁶ *Id.* at 725.

⁵⁷ *Id.*

⁵⁸ *Id.*

aftermath, it was confirmed by express language in the state constitution.⁵⁹ A municipality might believe genuinely—and even correctly—that its exclusionary policies *do* serve the “general welfare,” especially if the inquiry is confined to only the municipality’s existing residents. After all, Mount Laurel’s residents were surely better off (economically, at least) when their town contained fewer families with fewer school-age children. Under New Jersey’s tax structure, “the fewer the school children, the lower the tax rate.”⁶⁰ That this policy happened to exclude certain residents was, arguably, a result not of race or class-based animus but of a cold fiscal calculation.⁶¹

But town borders are often illusory, mere historical artifacts of local geography, commerce, or politics, and they do not yield vacuum-tight compartments where the policies and practices of one town cannot affect its neighbors.⁶² When the ordinances in one town inevitably ripple outward to touch others, “the welfare of the state’s citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.”⁶³ It is “fundamental . . . that the zoning power is a police power of the *state* and [that] the local authority is acting only as a delegate of that power.”⁶⁴ Further, “It is plain beyond dispute that proper provision for adequate housing *for all categories of people* is certainly an *absolute essential* in promotion of the general welfare required in all local land use regulation.”⁶⁵ The SCNJ reasoned that “the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially

⁵⁹ N.J. CONST. art. VI, § 6, ¶ 2.

⁶⁰ *Mount Laurel I*, 336 A.2d at 723. The Court explained, “New Jersey’s tax structure . . . has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality’s children. The latter expense is much the largest, so, basically, the fewer the school children, the lower the tax rate.” *Id.* The predictable result was that local planners “eagerly sought” industrial and commercial ratables while “homes and the lots on which they are situate[d] are required to be large enough . . . to have substantial value in order to produce greater tax revenues to meet school costs.” *Id.* “Large families who cannot afford to buy large houses and must live in cheaper rental accommodations are definitely not wanted, so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing for those of lesser income.” *Id.*

⁶¹ *Mount Laurel I*, at 723. The Court carefully pointed out that Mount Laurel’s zoning policies were not rooted in animus against any race or class but were a pragmatic response to the state’s tax structure. Certain types of municipal development were important “in order to produce greater tax revenues to meet school costs.” *Id.*

⁶² See *Mount Laurel I*, at 726–27 (citing *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 64 A.2d 347, 350 (N.J. 1949)).

⁶³ *Mount Laurel I*, 336 A.2d at 726.

⁶⁴ *Id.* (emphasis added).

⁶⁵ *Id.* at 727 (emphasis added).

confined to the claimed good of the particular municipality.”⁶⁶

It has to follow that . . . each such municipality must plan and provide, by its land use regulations, the reasonable opportunity for . . . low and moderate cost housing, to meet the needs, desires and resources of all categories of people. . . . [I]t may not adopt regulations or policies which thwart or preclude that opportunity.⁶⁷

The SCNJ pronounced that “[i]t is *required, affirmatively*, [that] a zoning regulation . . . must promote public health, safety, morals or the general welfare. . . . Conversely, a zoning enactment which is contrary to the general welfare is invalid.”⁶⁸

The SCNJ’s decision to ground its holding in constitutional law is critical to the *Mount Laurel* doctrine’s significance and longevity. An affordable-housing mandate embedded within the state constitution is not easily swept away by political caprice.⁶⁹ More relevant to the substance of this note, a constitutional doctrine binds all government actors alike—including all three branches of the state government.⁷⁰

B. Implementing the *Mount Laurel* Doctrine

i. *Mount Laurel II*

Despite the SCNJ’s intrepid holding in *Mount Laurel I*, the decision was essentially toothless. Many towns openly refused to enforce it, and even *Mount Laurel* itself refused to implement the doctrine bearing its name.⁷¹ The SCNJ observed:

After all this time, ten years after the trial court’s initial order invalidating its zoning ordinance, *Mount Laurel* remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but *Mount Laurel*’s determination to exclude the poor. *Mount Laurel* is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.⁷²

With *Mount Laurel II*, the SCNJ resolved that “[t]o the best of our

⁶⁶ *Id.* at 727–28.

⁶⁷ *Id.* at 728.

⁶⁸ *Id.* at 725 (emphasis added).

⁶⁹ See N.J. CONST. art. IX (specifying the procedures to amend the state constitution).

⁷⁰ STEVEN H. GIFIS, LAW DICTIONARY 102–03 (6th ed. 2010) (“A constitution represents a mandate to the various branches of government directly from the people acting in their sovereign capacity. It is distinguished from a law which is a rule of conduct prescribed by legislative agents of the people and subject to the limitations of the constitution. . . . The Constitution . . . is not designed to protect majorities, who can protect themselves, but to preserve and protect the rights of minorities against the arbitrary actions of those in power.” (citations omitted)).

⁷¹ *Mount Laurel II*, 456 A.2d at 410.

⁷² *Id.*

ability, we shall not allow [this delay] to continue.”⁷³ The SCNJ was “more firmly committed to the original *Mount Laurel I* doctrine than ever, and [it was] determined, within appropriate judicial bounds, to make it work.”⁷⁴ Not only did *Mount Laurel II* reaffirm the constitutional obligation to provide affordable housing, but it provided a suite of tools to realize that obligation.⁷⁵ After *Mount Laurel I*, constitutional compliance was at the discretion of each town; but after *Mount Laurel II*, the courts themselves could be an effective enforcement instrument, supplying a “special litigation track for exclusionary zoning cases and . . . a ‘builder’s remedy’ by which builders could file suit for the opportunity to construct housing at higher densities than a municipality otherwise would allow.”⁷⁶ The SCNJ had “learned from experience . . . that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals.”⁷⁷

ii. Fair Housing Act and the Council on Affordable Housing

The New Jersey Legislature’s first move to respond to the *Mount Laurel* doctrine was its 1985 Fair Housing Act (“FHA”).⁷⁸ The legislative findings in the FHA expressly incorporated the SCNJ’s reasoning:

The [SCNJ], through its rulings in [*Mount Laurel I*] and [*Mount Laurel II*], has determined that every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region’s present and prospective needs for housing for low and moderate income families. . . . The interest of all citizens . . . would be best served by a comprehensive planning and implementation in response to this constitutional obligation.⁷⁹

To promote this interest, the FHA created the Council on Affordable Housing (“COAH”), an administrative agency within the executive branch.⁸⁰ Among the COAH’s duties, both upon its founding “and from time to time thereafter,” are to estimate the need for low and moderate-income housing in the state and to adopt guidelines for municipalities to determine and satisfy their share of the burden.⁸¹

The FHA also includes a process to allow a municipality to certify

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 390.

⁷⁶ *Mount Laurel IV*, 110 A.3d at 36.

⁷⁷ *Mount Laurel II*, 456 A.2d at 410.

⁷⁸ Fair Housing Act, N.J. STAT. ANN. § 52:27D-301 to -329 (West 2015).

⁷⁹ Fair Housing Act § 52:27D-302(a), (c).

⁸⁰ Fair Housing Act § 52:27D-305.

⁸¹ Fair Housing Act § 52:27D-307.

its housing ordinances, rendering them presumptively valid against a *Mount Laurel* challenge for a limited time.⁸² To assure that future exclusionary zoning grievances would be managed by the COAH rather than by the courts, the FHA transferred all pending and future *Mount Laurel* litigation to the COAH except where a transfer might result in “manifest injustice.”⁸³

iii. First and Second-Round Rules

Under the terms of the FHA, the COAH was to update its assessment of each town’s affordable-housing responsibility every six years.⁸⁴ For the third round, this period would increase to ten years.⁸⁵ In 1986 and 1994, the COAH released its first and second-round rules, respectively, and both sets generally withstood legal challenge.⁸⁶

iv. Third-Round Rules

The COAH was due to issue third-round rules in 1999, but political pressures caused a delay.⁸⁷ It adopted interim rules at the end of the year to operate until it could draft an adequate final version.⁸⁸ But the gap was longer than expected: permanent rules failed to issue for several more years, a delay that was “dramatic and inexplicable.”⁸⁹ Once the COAH finally did propose permanent rules, the period they were supposed to have covered had nearly ended.⁹⁰

For nearly the equivalent of one full round of *Mount Laurel* administration, no municipality [was] held to updated standards reflecting its present and prospective fair share of the housing needs of its region. The public policies underlying the FHA and the *Mount Laurel* cases have, quite obviously, been frustrated by inaction.⁹¹

And even then, the proposed final rules were unsatisfactory.⁹² The Appellate Division granted the COAH yet another extension but warned

⁸² Fair Housing Act § 52:27D-313, 317.

⁸³ Fair Housing Act § 52:27D-316. The Court heard a constitutional challenge to the FHA but upheld it and “order[ed] that all of the cases pending before [it] be transferred to the Council.” *Hills Dev. Co. v. Bernards (“Mount Laurel III”)*, 510 A.2d 621, 634 (N.J. 1986).

⁸⁴ Fair Housing Act § 52:27D-307(c).

⁸⁵ Fair Housing Act § 52:27D-307(c) (amended 2002).

⁸⁶ FAIR SHARE HOUS. CTR., *What is the Mount Laurel Doctrine?* <http://fairsharehousing.org/mount-laurel-doctrine/> (last accessed Oct. 30, 2016).

⁸⁷ *Id.*

⁸⁸ *In re Six Month Extension of N.J.A.C. 5:91-1 et seq.*, 855 A.2d 582, 586 (N.J. Super. Ct. App. Div. 2004).

⁸⁹ *Id.* at 602.

⁹⁰ *Id.*

⁹¹ *Id.* at 602–03.

⁹² *Id.* at 608.

that “[t]he continued absence, for an unreasonable time, of a timely, valid and sufficiently comprehensive interim extension procedure . . . will, of course, free interested parties from” the COAH’s administrative restrictions and permit them to again petition the courts for *Mount Laurel* redress.⁹³

The COAH again attempted third-round rules in December 2004.⁹⁴ Two years later, the Appellate Division invalidated parts, but, in a display of superlative patience yet again, remanded the matter to the COAH to propose further revisions.⁹⁵ The Appellate Division imposed a six-month time limit, placing the deadline in July 2007.⁹⁶ It granted two further extensions, and the COAH finally offered its newest draft in January 2008.⁹⁷

The January 2008 rules were beset immediately by legal challenges and, perhaps predictably, were rendered invalid in October 2010.⁹⁸ The Appellate Division again demonstrated its apparently boundless patience and remanded the matter to the COAH, directing the agency “to redetermine prospective need based on a methodology similar to the ones used in the first and second round rules,” both of which had been held valid.⁹⁹ The deadline was five months.¹⁰⁰ This time, the SCNJ granted certification, affirmed the Appellate Division, and emphasized the gravity of the matter:

Rules to govern the third round cannot wait further while time is lost during legislative deliberations on a new affordable housing approach. A remedy must be put in place to eliminate the limbo in which municipalities, New Jersey citizens, developers, and affordable housing interest groups have lived for too long.¹⁰¹

Nonetheless, the SCNJ granted another five-month compliance period, setting the deadline at February 26, 2014.¹⁰²

Naturally, on that date, the COAH filed for another extension.¹⁰³ Requesting a new deadline of May 1, 2014, its chairperson certified that the agency was diligently laboring on the third-round methodology; it had

⁹³ *Id.*

⁹⁴ 36 N.J. Reg. 5895(a) (Dec. 20, 2004).

⁹⁵ In re Adoption of N.J.A.C. 5:94 & 5:95 by N.J. Council on Affordable Hous., 914 A.2d 348, 402 (N.J. Super. Ct. App. Div. 2007).

⁹⁶ *Id.*

⁹⁷ *Mount Laurel IV*, 110 A.3d at 36.

⁹⁸ In re Adoption of N.J.A.C. 5:96 & 5:97, 6 A.3d 445, 450 (N.J. Super. Ct. App. Div. 2010).

⁹⁹ *Id.* at 460.

¹⁰⁰ *Id.* at 476.

¹⁰¹ In re Adoption of N.J.A.C. 5:96, 74 A.3d 893, 917 (N.J. 2013).

¹⁰² *Id.*; *Mount Laurel IV*, 110 A.3d at 36.

¹⁰³ *Mount Laurel IV*, 110 A.3d at 36.

reviewed the relevant data but was continuing to evaluate it.¹⁰⁴ The SCNJ later learned that the COAH had hired a consultant to draft the rules just three weeks before it requested the extension.¹⁰⁵ On March 14, 2014, the SCNJ granted the motion but attached a warning, “[I]f COAH did not adopt Third Round Rules by November 17, 2014, the Court would entertain applications for relief,” including requests to suspend the FHA’s provision protecting municipalities against litigation.¹⁰⁶ Suspending the provision would permit “actions [to] be commenced on a case-by-case basis before the Law Division or in the form of ‘builder’s remedy’ challenges.”¹⁰⁷

C. Latest Developments

i. COAH’s Failure

Though the COAH was supposed to have issued the third-round rules in 1999, the COAH’s board found itself convened in April 2014—*fifteen years later*—to discuss the latest attempt and to vote on whether to propose the draft that the board had received just twenty-four hours earlier.¹⁰⁸ The draft passed and was published in the *New Jersey Register* on June 2, 2014.¹⁰⁹ A public comment period lasted until August 1, 2014, provoking approximately 3,000 comments.¹¹⁰ The SCNJ’s March 14, 2014 order required the COAH to finally adopt third-round rules by October 22, 2014 and the board met two days prior to vote on adoption.¹¹¹ However, the vote split 3-3 and the rules were not adopted.¹¹²

The Fair Share Housing Center quickly filed a motion seeking a return to judicial enforcement of the *Mount Laurel* doctrine.¹¹³ At oral argument in January 2015, before the parties spoke on the merits, the SCNJ requested an update on the COAH’s progress toward drafting and adopting acceptable third-round rules, reminding the COAH representative that “nothing limited [the COAH’s] continuing ability to

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* Writing retrospectively in 2015, the Court stated, “It has since come to light that COAH retained its primary consultant for the development of new regulations on February 6, 2014.” *Id.*

¹⁰⁶ *Id.* at 36–37.

¹⁰⁷ *Id.*

¹⁰⁸ *Mount Laurel IV*, 110 A.3d at 35, 37.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

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adopt the required regulations” even as motion practice was ongoing.¹¹⁴

The representative admitted that

COAH has not conducted or scheduled any further meetings since its October 2014 meeting, that it does not have any plans to meet further in an effort to adopt Third Round Rules, and that staff have not been directed to perform any work in furtherance of adoption of Third Round Rules.¹¹⁵

Nonetheless, the COAH asserted that it “had not been willfully contumacious,” had “made all possible efforts to comply with the SCNJ’s order,” and had “neither ignored nor willfully violated” the order.¹¹⁶

ii. SCNJ’s Granted Relief

Though the COAH pleaded for yet another extension, the SCNJ “reject[ed] the argument that relief should be withheld in order to allow COAH even ‘more time’ than it has already been given.”¹¹⁷ In a moment ripe for a ruthless judicial reprimand—the COAH had dallied for a decade and a half, had repeatedly submitted inadequate rules, and had flouted numerous court-ordered deadlines—the SCNJ’s tone was relatively delicate,

[T]he clarity of COAH’s inaction is apparent. . . . COAH has had fifteen years to adopt Third Round Rules as it is required to do in accordance with its statutory mission. It has been under several orders of the Appellate Division and this Court directing it to adopt Third Round Rules using a known methodology by specific deadlines. It has not done so. More time is not a viable response.¹¹⁸

It was evident that “the administrative forum is not capable of functioning as intended by the FHA.”¹¹⁹ The SCNJ could conclude only that “towns must subject themselves to judicial review for constitutional compliance, as was the case before the FHA was enacted.”¹²⁰ After all, the *Mount Laurel* doctrine is a constitutional doctrine, and “the courts always present an available forum for redress of alleged constitutional violations.”¹²¹ “The relief authorized is remedial of constitutional rights.”¹²²

The SCNJ decided that “the courts may resume their role as the forum of first instance for evaluating municipal compliance with *Mount*

¹¹⁴ *Mount Laurel IV*, 110 A.3d at 37.

¹¹⁵ *Id.* at 37–38.

¹¹⁶ *Id.* at 38.

¹¹⁷ *Id.* at 40.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 42.

¹²⁰ *Mount Laurel IV*, 110 A.3d at 42.

¹²¹ *Id.*

¹²² *Id.* at 43.

Laurel obligations.”¹²³ It described comprehensive procedures for lower courts to observe when hearing *Mount Laurel* challenges, and it delayed the order for ninety days “as a matter of basic fairness” to towns that had made good-faith efforts to comply with *Mount Laurel* despite the COAH’s neglect.¹²⁴ This judicial process was designed “to track the [administrative] processes provided for in the FHA” so as to “facilitate a return to a system of coordinated administrative and court actions in the event that COAH eventually promulgates constitutional Third Round Rules that will allow for the reinstatement of agency proceedings.”¹²⁵ The courts were not to become a “replacement agency” and, the SCNJ repeated several times, “[T]he action taken herein does not prevent either COAH or the Legislature from taking steps to restore a viable administrative remedy that towns can use in satisfaction of their constitutional obligation.”¹²⁶ But finally, it was time for the SCNJ to act where the legislature and executive had not; the *Mount Laurel* doctrine and its constitutional mandate were “premised on the existence of a functioning agency, not a moribund one.”¹²⁷

III. ANALYSIS AND ARGUMENT

The SCNJ should take firm control of *Mount Laurel* enforcement and relieve the legislature and executive of their power to further stall, obstruct, or dilute the doctrine. This proposed solution is drastic but necessary to preserve the legitimacy of the constitutional mandate articulated in *Mount Laurel I* and affirmed by its progeny cases.

Regardless, “drastic” should not be read as synonymous with “excessive” or “imprudent.” The SCNJ is justified in taking drastic action because the other branches—which the judicial branch must check and balance—have abandoned their duties. As it pertains to *Mount Laurel*, the administrative process is “nonfunctioning” and COAH is “moribund.”¹²⁸ Simply, it has failed.

There are three chief reasons that the SCNJ may and must become the unilateral instrument of *Mount Laurel* enforcement. First, *Mount Laurel* compliance is not just an optimistic public-policy goal but a strict constitutional requirement.¹²⁹ “[T]he courts always present an available

¹²³ *Id.* at 42–43.

¹²⁴ *Id.* at 44–48, 43.

¹²⁵ *Id.* at 48.

¹²⁶ *Mount Laurel IV*, 110 A.3d at 48, 50–51.

¹²⁷ *Id.* at 34.

¹²⁸ *Id.*

¹²⁹ *See infra* Part III.A.

forum for redress of alleged constitutional violations.”¹³⁰ Second, seizing control would not be an unprecedented coup, but rather would resemble past judicial interventions that produced favorable outcomes.¹³¹ Third, the SCNJ has proven itself to be a trustworthy steward of the critical *Mount Laurel* mission where the other branches have failed.¹³²

A. *Mount Laurel as a Constitutional Doctrine*

It is relatively easy to forgive the legislature for overrunning its budget or the governor for publicly bickering with political opponents, not because these blunders are necessarily trivial but because they do not carry constitutional implications. But *Mount Laurel* is a constitutional doctrine.¹³³ It binds government actors and compels their action because it is backed by the weight of the state constitution, which is itself “a mandate to the . . . government directly from the people.”¹³⁴ By articulating the *Mount Laurel* doctrine to be contained within and mandated by the state constitution, the SCNJ imbued the doctrine with full constitutional authority.¹³⁵

The nature of the American constitutional system “is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.”¹³⁶ A person injured by a violation of some constitutional right can petition the courts for a remedy “even if the broader public disagrees and even if the legislature refuses to act.”¹³⁷ Indeed, the very “idea of the Constitution ‘was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’”¹³⁸

B. *Mount Laurel and Brown*

The *Mount Laurel* saga resembles, at least in form, a more prominent line of constitutional decisions. In *Brown v. Board of*

¹³⁰ *Mount Laurel IV*, 110 A.3d at 42.

¹³¹ See *infra* Part III.B.

¹³² See *infra* Part III.C.

¹³³ See *supra* Part II.A.2.

¹³⁴ STEVEN H. GIFIS, LAW DICTIONARY 102 (5th ed. 2003).

¹³⁵ *Id.* at 278 (defining “judicial review” as “the review by a court of law of some act, or failure to act, by a government official or entity. . . . Under this doctrine . . . the highest courts of every state have assumed the power and responsibility to decide the constitutionality of acts of the legislative and executive branches of their respective jurisdictions.”).

¹³⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

¹³⁷ *Id.*

¹³⁸ *Id.* at 2605–06 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

Education (“*Brown I*”), the United States Supreme Court held that racial segregation deprived schoolchildren of their constitutional equal-protection rights.¹³⁹ After declaring this principle, the Court ordered further fact-finding and argument so that it could formulate a specific remedy.¹⁴⁰ Within a year, a second *Brown v. Board of Education* case (“*Brown II*”) remanded each of the consolidated *Brown I* cases to their respective District Courts and directed the courts “to take such [action] as [is] necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”¹⁴¹

Even then, certain high-profile politicians opposed integration.¹⁴² United States Senator Harry Byrd promoted a “Southern Manifesto” signed by more than one hundred Congressmen.¹⁴³ Virginia was among several states to defy the Supreme Court.¹⁴⁴ Its “Massive Resistance” strategy included a variety of anti-integration laws that were facially and deliberately unconstitutional in light of the Supreme Court’s plain conclusion that segregation violated equal protection and its plain instruction that the states must integrate their schools.¹⁴⁵ By 1964, ten years after *Brown I*, “only [five] percent of black students in Virginia were attending integrated schools.”¹⁴⁶

Congress eventually cooperated in the *Brown* mission by enacting the Civil Rights Act of 1964.¹⁴⁷ Title VI of the Act prompted compliance in a way the Supreme Court’s order alone could not: it threatened to withdraw federal funding from any program that discriminated on the ground of race, color, or national origin.¹⁴⁸

¹³⁹ *Brown v. Bd. of Educ.* (“*Brown I*”), 347 U.S. 483 (1954).

¹⁴⁰ *Id.* at 496.

¹⁴¹ *Brown v. Bd. of Educ.* (“*Brown II*”), 349 U.S. 294, 301 (1955).

¹⁴² See *Massive Resistance*, VA. HISTORICAL SOC’Y (Nov. 12, 2015), <http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/massive>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Passive Resistance*, VA. HISTORICAL SOC’Y (Nov. 12, 2015), <http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/passive>.

¹⁴⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-02, 78 Stat. 241, 252-53 (codified as amended in 42 U.S.C. § 2000d).

¹⁴⁸ *Id.* §§ 601–02 (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity

For the experienced jurists sitting on the SCNJ to decide *Mount Laurel I*, *Brown* could not have been far from mind.¹⁴⁹ The *Brown* decisions were just two decades old and remained a sterling example of the judiciary recognizing an acute injustice and crafting a remedy where the political branches had failed. While a comparison to the revered *Brown* decisions always risks stumbling into hyperbole, it is not unreasonable to note their basic resemblance to the *Mount Laurel* cases. In both *Brown* and *Mount Laurel*, the courts heard complaints by minority groups alleging that government actors had violated their rights. The courts broke ground by recognizing “fundamental rights” that had not been previously observed. Yet both decisions were politically unpopular in some sectors, and enforcement was neither easy nor immediate. Finally, in both cases, the respective legislatures eventually lent their support by passing statutes to promote compliance with the constitutional mandate: Congress with its Civil Rights Act to, *inter alia*, promote integration, and the New Jersey Legislature with its Fair Housing Act to streamline and formalize the affordable housing mission.

At this point, the two stories diverge. Racial integration is today an uncontroversial principle: a Gallup poll in 1994 found that eighty-seven percent of Americans approved of *Brown*, a figure that consistently increased in the decades following the case and is likely higher today.¹⁵⁰ But affordable housing, particularly as formulated in *Mount Laurel*, remains fiercely contested. New Jersey Governor Chris Christie pushed in 2010 to end the “COAH nightmare” and to “[place housing development] back into the hands of local municipalities.”¹⁵¹ He took

for hearing, of a failure to comply with such requirement . . .”).

¹⁴⁹ See Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 CONN. PUB. INT. L.J. 325, 347 n.161 (2013) (“A case likely in the minds of the Mount Laurel court is *Brown v. Bd. of Education*. The court also likely considered familiar adages associated with social change: that rules are not self-executing and that a rule change is no good without a political base to support it.” (citations omitted)).

¹⁵⁰ Joseph Carroll, *Race and Education 50 Years After Brown v. Board of Education*, GALLUP NEWS SERV. (May 14, 2004), <http://www.gallup.com/poll/11686/race-education-years-after-brown-board-education.aspx>. Even though the American public overwhelmingly endorses integration, it remains an incomplete mission and, in fact, may be regressing from the victories achieved immediately post-*Brown*. This note poses the *Brown* comparison as an example of aggressive judicial action to recognize and enforce a constitutional right; however, it should not be read to imply that *Brown* has been an unmitigated success or that such judicial action guarantees favorable outcomes in the long term. See generally Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, THE CIVIL RIGHTS PROJECT (May 2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> (examining the state of race- and wealth-based segregation in schools six decades after *Brown*).

¹⁵¹ Lisa Fleisher, *N.J. Gov. Chris Christie Creates Task Force to Review Affordable Housing*, NJ.COM (Feb. 9, 2010), <http://www.nj.com/news/index.ssf/2010/02/>

steps to dismantle the agency altogether.¹⁵² The legislature expressed its own animus toward *Mount Laurel* when it passed a bill to abolish the COAH and devolve affordable-housing authority back to local governments.¹⁵³

While the COAH survived the assault by the political branches, the move against it was not the work of a renegade governor and legislature.¹⁵⁴ For decades, critics have condemned the *Mount Laurel* doctrine, both on separation of powers grounds and for the perceived damage it has done to New Jersey taxpayers.¹⁵⁵ In a 1985 New York Times editorial, New Jersey Assemblyman William Flynn pointed out that the judiciary “consists of no elected officials” and argued that “the recent Mount Laurel housing decisions” had “usurp[ed] the law-making power of the Legislature.”¹⁵⁶ A 2012 article cast the SCNJ as “the most activist state appellate court in America” and accused it of “hijacking zoning powers from towns and cities.”¹⁵⁷ The SCNJ’s “builder’s remedy” mechanism was “a nightmarish burden on communities” and the *Mount Laurel* doctrine overall had “transformed many towns” for the worse.¹⁵⁸ A 2014 editorial lamented the “sorry tradition” of Republican governors “endors[ing] a liberal activist chief justice,” exemplified by Chief Justice Richard Hughes, who headed the SCNJ when *Mount Laurel I* “imposed Soviet-style housing plans on every municipality in the state.”¹⁵⁹ “By the time Hughes was done, the state was being run by its

[nj_gov_chris_christie_creates_1.html](#).

¹⁵² STATE OF N.J. EXEC. DEP’T., *Reorganization Plan No. 001-2011, A Plan for the Abolition of the Council on Affordable Housing and Providing for the Transfer of the Functions, Powers, and Duties of the Council on Affordable Housing to the Department of Community Affairs* (June 29, 2011), <http://www.nj.gov/dca/services/lps/hss/transinfo/001-2011.pdf>.

¹⁵³ S. 1, 214th Leg., 2010–11 Sess. (N.J. 2010) (conditionally vetoed Jan. 2011). See also News Release, Giordano Halleran & Ciesla, *New Jersey State Senate Passes Bill S-1*, GIORDANO HALLERAN & CIESLA ATTORNEYS AT LAW, <http://www.ghclaw.com/65C0C8/Articles/2010/GianettiNewsRelease2010.pdf> (last accessed Oct. 30, 2016).

¹⁵⁴ In re Plan for the Abolition of the Council on Affordable Hous., 70 A.3d 559 (N.J. 2013).

¹⁵⁵ Taxation in New Jersey is a frequently contentious political issue, considering the state’s already-high rates. See Jared Walczak, *How High Are Property Taxes in Your State?*, TAX FOUND. BLOG (Aug. 13, 2015), <http://taxfoundation.org/blog/how-high-are-property-taxes-your-state>.

¹⁵⁶ William E. Flynn, *New Jersey Opinion; On the Checks and Balances Within the State Government*, N.Y. TIMES (Nov. 3, 1985), <http://www.nytimes.com/1985/11/03/opinion/new-jersey-opinion-on-the-checks-and-balances-within-the-state-government.html>.

¹⁵⁷ Steven Malanga, *The Court That Broke Jersey*, CITY J. (Winter 2012), http://www.city-journal.org/2012/22_1_nj-supreme-court.html.

¹⁵⁸ *Id.*

¹⁵⁹ Paul Mulshine, Editorial, *Chris Christie Dooms NJ to Judicial Activism and Himself to Obscurity*, NJ.COM (May 27, 2014), <http://www.nj.com/opinion/index.ssf/>

Supreme Court rather than its legislature and governor.”¹⁶⁰

New Jerseyans in general are more divided on the issue, but there is hardly a zealous public movement to support the SCNJ’s action. In a 2009 poll, only just more than half of the respondents approved of the basic *Mount Laurel* affordable-housing principle.¹⁶¹ Three quarters of respondents knew little or nothing at all about the cases themselves or about the COAH.¹⁶²

To be fair, the *Mount Laurel* doctrine is not some divine instruction; it, like all products of government, is necessarily imperfect, if only because the interests of the myriad New Jersey municipalities are complex and diverse. But the doctrine remains an interpretation of the state constitution, and its requirements are not easily dismissed simply because they prove difficult to implement, politically unpopular, or burdensome on the tax base.¹⁶³ While *Mount Laurel* bears certain resemblances to *Brown*, the latter today represents an uncontroversial public value—that racial integration is beneficial and desirable—while the values underlying the former do not enjoy similar support. Faithfully vindicating *Mount Laurel* will require the active leadership of a body that can observe its constitutional duty without bending to political or popular criticism.

C. SCNJ’s Stewardship of the *Mount Laurel* Mission

Many of the *Mount Laurel* criticisms are grounded in the notion that both the original doctrine and its subsequent enforcement were mere bald gambits by the SCNJ to seize political power. *Mount Laurel* was lawmaking from the bench, a clear encroachment of the judiciary into a space reserved for the legislature. However, the SCNJ’s words and actions more fairly characterize the court as only a reluctant executor of the doctrine.

i. *Mount Laurel I*

In the very first *Mount Laurel* trial court case, the Law Division ordered the defendant towns to draft an affordable-housing plan, but it intended to retain jurisdiction of the matter only “until a final order

2014/05/chris_christies_judicial_picks_put_activists_in_control_mulshine.html.

¹⁶⁰ *Id.*

¹⁶¹ FAIRLEIGH DICKINSON UNIV., Opinion Poll, *Mt. Laurel, COAH, and the Race for Governor* (Feb. 25–Mar. 2, 2009), <http://publicmind.fdu.edu/coah/>.

¹⁶² *Id.*

¹⁶³ *Cf. Gratz v. Bollinger*, 539 U.S. 244 (2003). While discussing affirmative action in higher education, the Supreme Court stated, “The fact that the implementation of a program [that satisfies constitutional requirements] might present administrative challenges does not render constitutional an otherwise problematic system.” *Id.* at 275.

issue[d] requiring implementation of the plan as agreed upon.”¹⁶⁴ From the very start, there was no design for the courts to become a permanent enforcer; they would merely inspect a town’s proposal, approve its terms, and then withdraw from the matter. The SCNJ, affirming the Law Division by deciding *Mount Laurel I*, settled on much the same conclusion, and it explicitly recognized that local governments were to retain autonomy: “It is the local function and responsibility, in the first instance at least, rather than the court’s, to decide on the details of the same within the guidelines we have laid down.”¹⁶⁵ “It is not appropriate at this time . . . to deal with the matter of the further extent of judicial power in the field or to exercise any such power.”¹⁶⁶

ii. *Mount Laurel II*

In *Mount Laurel II*, the SCNJ again was alert to how critics might perceive its action. Its strategy was to acknowledge the controversy:

[A] brief reminder of the judicial role in this sensitive area is appropriate, since *powerful reasons suggest, and we agree, that the matter is better left to the Legislature*. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this Court from those controversies. But *enforcement of constitutional rights cannot await a supporting political consensus*. So while we have always preferred legislative to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine. That is our duty. *We may not build houses, but we do enforce the Constitution.*¹⁶⁷

The SCNJ viewed itself as the reluctant but duty-bound torchbearer of the state constitution.

The provision of decent housing for the poor is not a function of this Court. Our only role is to see to it that zoning does not prevent it, but rather provides a realistic opportunity for its construction as required by New Jersey’s Constitution. The actual construction of that housing will continue to depend, in a much larger degree, on the economy, on private enterprise, and on *the actions of the other branches of government at the national, state and local level*. We intend

¹⁶⁴ S. Burlington Cnty. NAACP v. Mt. Laurel, 290 A.2d at 474.

¹⁶⁵ *Mount Laurel I*, 336 A.2d at 734.

¹⁶⁶ *Id.*

¹⁶⁷ *Mount Laurel II*, 456 A.2d at 417 (emphasis added).

here only to make sure that *if the poor remain locked into urban slums, it will not be because we failed to enforce the Constitution.*¹⁶⁸

iii. Fair Housing Act, Council on Affordable Housing, and Beyond

In *Hills Development Company v. Bernards* (“*Mount Laurel III*”), the SCNJ heard and rejected a challenge to the FHA, effectively ratifying the legislature’s response to *Mount Laurel*.¹⁶⁹ The SCNJ did caution that “[i]f . . . the [FHA], despite the intention behind it, achieves nothing but delay, the judiciary will be *forced* to resume its appropriate role”; however, presumably, *Mount Laurel III* should have signaled the end of the SCNJ’s role in the affordable-housing controversy.¹⁷⁰ The COAH, a legislatively created executive agency, now had the reins. While “the [COAH’s] decisions can still be challenged in court,” the courts “will [for the most part] be out of the zoning business.”¹⁷¹ Chief Justice Robert Wilentz wrote, “This kind of response, one that would permit us to withdraw from this field, *is what this court has always wanted and sought*. It is potentially far better for the state and its lower-income citizens.”¹⁷²

The birth of the COAH quieted the controversy momentarily, until it was time for the agency to compose and adopt third-round rules.¹⁷³ Considering the importance of the COAH’s work, the SCNJ arguably could have been justified in taking a firmer hand at the first sign of delay. Instead, it repeatedly granted extensions for the COAH to draft and re-draft the rules.¹⁷⁴ It took fifteen years for the SCNJ’s patience to expire.¹⁷⁵ Even then, as the SCNJ ordered a return to the judicial remedies it had practiced before *Mount Laurel II*, it was circumspect: its aim was not to usurp the COAH and modify its procedures to suit judicial preference, but rather to act as a surrogate until the COAH had put its own house into order, so to speak.

The process developed herein is one that seeks to *track the processes provided for in the FHA*. Doing so will facilitate a return to a system of coordinated administrative and court actions in the event that COAH eventually promulgates

¹⁶⁸ *Id.* at 490 (emphasis added).

¹⁶⁹ *Mount Laurel III*, 510 A.2d 621.

¹⁷⁰ *Id.* at 633 (emphasis added).

¹⁷¹ Op-Ed, *Judicial Duty in New Jersey*, N.Y. TIMES (Feb. 24, 1986), <http://www.nytimes.com/1986/02/24/opinion/judicial-duty-in-new-jersey.html>.

¹⁷² *Id.* (emphasis added).

¹⁷³ See *supra* Part II.B.3–4.

¹⁷⁴ See *supra* Part II.B.4.

¹⁷⁵ See *Mount Laurel IV*, 110 A.3d 31.

constitutional Third Round Rules that will allow for the reinstatement of agency proceedings. *The judicial role here is not to become a replacement agency for COAH.* The agency is sui generis—a legislatively created, unique device for securing satisfaction of *Mount Laurel* obligations. In opening the courts for hearing challenges to, or applications seeking declarations of, municipal compliance with specific obligations, it is not this Court's province to create an alternate form of statewide administrative decision maker for unresolved policy details of replacement Third Round Rules.¹⁷⁶

The SCNJ further emphasized that it would not resist if the COAH or the legislature moved to overrule its decision.

[N]othing herein should be understood to prevent COAH from fulfilling its statutory mission to adopt constitutional rules to govern municipalities' Third Round obligations in compliance with the FHA. Nor should the action taken by this Court, in the face of COAH's failure to fulfill its statutory mission, be regarded as impeding the Legislature from considering alternative statutory remedies to the present FHA.¹⁷⁷

Even the doctrine's most cynical critic must concede that the SCNJ has been eager to yield to its collateral branches. But the SCNJ has also demonstrated that it will not compromise the principles expressed in *Mount Laurel*.

D. Proposed Solution

The SCNJ's *reluctance* to take control is precisely why it should be *trusted* with control. The court is mindful of its role in the machinery of government, and its words and actions over the last forty years indicate that its motive in regard to *Mount Laurel* is merely to enforce the Constitution.¹⁷⁸ In contrast, the other branches' motives are colored by political and partisan factors. Each time the SCNJ has acted, it has been only to mend an injury that the other branches caused, whether by total neglect or by ineffective half-measures. The political branches have not only shirked their constitutional duty but have actively thwarted it. As long as *Mount Laurel* is enforced—or not—at the pleasure of the legislature or an executive agency, the affordable-housing mission first charged in *Mount Laurel I* will not be achieved.

¹⁷⁶ *Id.* at 48 (emphasis added).

¹⁷⁷ *Id.* at 34–35.

¹⁷⁸ Even beyond the *Mount Laurel* context, consider the Court's record of ruling against its own self-interest when the Constitution demands it. "Judges, to the extent humanly possible, interpret the Constitution fairly, fearlessly, and independently, even when the issue touches on the judiciary's institutional concerns." *In re P.L. 2001, Chapter 362*, 895 A.2d 1128, 1143 (N.J. 2006) (citing cases where the Court's decision had the effect of reducing judicial power in a particular area).

There must be a judicial solution. Before the legislature passed the FHA, municipalities were subject to the procedures authorized in *Mount Laurel II*—particularly, builder’s remedy courts and a special litigation track dedicated to exclusionary housing claims. This note proposes a permanent return to the *Mount Laurel II* scheme or one substantially similar to it. The courts originally withdrew from the affordable-housing issue when the legislature stepped in, believing judicial leadership was no longer necessary, but the record is clear that a task as controversial as affordable housing in New Jersey cannot be handled effectively by a body subject to political pressures.

Because the *Mount Laurel II* scheme proved unpopular among certain factions, the legislature might move to again craft a statutory response as it did with the FHA in 1985. But the SCNJ must remain skeptical and permit alternative remedies only when it can be confident that such remedies would effectively fulfill the constitutional mandate. The SCNJ might even permit a legislative option to coexist with its own judicial enforcement scheme. However, at all times, the judicial scheme should remain available to resolve an exclusionary zoning complaint in the first instance. The SCNJ was fooled when it trusted the political branches to faithfully assume the burden and it should not be fooled again.

IV. CONCLUSION

Mount Laurel I made clear that the New Jersey Constitution requires each municipality to bear a reasonable portion of the state’s collective affordable housing burden. While the decision remains controversial today, its constitutional authority remains, and there can be no question that it continues to bind both the state government and each local government exercising the police power. However, the legislative and executive branches have proven repeatedly that they are obstacles to properly realizing *Mount Laurel*. Where there are constitutional rights at stake, it is both the SCNJ’s power and duty to supply relief. The SCNJ should take charge of *Mount Laurel* enforcement to assure the state’s citizens the housing rights guaranteed by their constitution.

In the interest of completeness, it should be acknowledged that this note presumes that *Mount Laurel* is both constitutionally sound and, ultimately, a good policy choice for New Jersey. Arguments that the doctrine is unconstitutional (or, at least, is not constitutionally required) or that it is bad public policy have been thoroughly addressed elsewhere and are outside the scope of this note. Further, the entire issue of judicial involvement in *Mount Laurel* would be obviated if the people of New Jersey were to amend their constitution to foreclose the SCNJ from

participating in the affordable-housing issue or to exclude any interpretation that would grant a constitutional right to housing. Finally, to what extent the earlier proposed solution is practicable is, again, outside the scope of this note. To implement such an intricate solution to such a complicated problem would require much more fact-finding and analysis than this note is able to contain.