How the Courts Should Fight Exclusionary Zoning

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Over a quarter of a century ago, Anthony Downs, an eminent critic of housing and land-use policy, argued that the suburbs had erected zoning barriers blocking out low- and moderate-income households to disastrous effect.[1] Since then, a number of states have enacted policies, either initiated by their courts or by their legislatures, designed more or less directly to address this problem.[2] Also since then, numerous articles have been written examining the nature of the problem, the efficacy of the various state programs designed to address it, and the possible efficacy of various untried techniques, of which one, or some combination thereof, is usually promoted as *the* solution for the problem of exclusionary zoning. However, the problems of diagnosing the nature of the problem and of measuring the efficacy of various solutions in this area are substantial and the data is scarce. Not everyone agrees that exclusionary zoning is a problem. Furthermore, data on the results of state programs is usually limited to the number of units built or zoned directly through the program without regard to possible positive or negative secondary effects of the program, either generally or on the low-income housing market in particular. Furthermore, this data is primarily limited to the few states with statutory programs. For the effect of court doctrine, one must use a surrogate for low-income housing, such as the amount of new multi-family housing built.[3]

Although this article will discuss the approaches that have been taken in the various states to fight exclusionary zoning and the data that exists regarding their efficacy, it is not my purpose to evaluate the various approaches and pick a winner. Instead, this article's contribution is to examine what the role of the courts should be in creating and administering anti-exclusionary policies, once we accept that substantial uncertainty and controversy exists regarding the nature of the problem and of appropriate solutions to it. This is one policy area at least where court action should not be premised on self-confidence with respect to knowledge of a single right answer.

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[1] ANTHONY DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA (1973) [hereinafter DOWNS, OPENING UP THE SUBURBS]. See, in particular, pages 11 and 49-53 for the view that law, especially zoning law, and not market forces is the cause of class-based residential segregation. See pages 9-12 and 26-45 for a description of the negative effects of such segregation. Anthony Downs reiterates and updates his central points in ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA (1994) and Anthony Downs, *Suburban—Inner-City Ecosystem*, 62 J. PROP. MGMT. 60 (1997).

[2] *See, e.g.*, the states discussed in Part II.

[3] *See, e.g.*, *infra* notes 137-44 and accompanying text.

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Furthermore, no action might be better than wrong action. Given these premises, my general conclusion is that the courts' role primarily should be as an agenda-setter that forces legislative and executive attention to this difficult issue. Because of the public choice problems involved, some leveling of the political playing field and back-and-forth "dialogue" with the more political branches are also likely to be necessary, making the courts' role potentially a problematic one. The courts must walk a fine line between overreaching and inefficacy. The dangers of overreaching in the area of exclusionary zoning include the imposition of a policy whose costs outweigh its benefits, or the locking in of a policy that, though worthwhile, prevents the evolution of a better one. The dangers also include the straining of the capacity of the courts and the undermining of their authority and legitimacy as they preempt democratic decision-making in the preeminently political realm of land-use policy. This article concludes with recommendations for how the courts can most effectively fight exclusionary zoning while avoiding these dangers.

State courts, state supreme courts in particular, are the focus of this article rather than federal courts. Not only have the federal courts not been very active in the area of municipal zoning since *Village of Euclid v. Ambler Realty Co.* and *Nectow v. City of Cambridge,*[4] a pattern that seems likely to continue in the future, but this is probably appropriate given the intensely local nature of the problem and the amount of locally specific information required to tackle it.[5] However, since housing markets do not stop at state borders, regional

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[4] *Euclid,* 272 U.S. 365 (1926) (applying low-level scrutiny in upholding the constitutionality of a zoning ordinance); *Nectow,* 277 U.S. 183 (1928) (striking down the application of a zoning ordinance to a particular lot because arbitrary and irrational); *see also* Warth v. Seldin, 422 U.S. 490 (1975) (denying standing to challenge a zoning ordinance to low-income minority residents, local taxpayers, and the local homebuilders association because none had interests in a specific project frustrated by the local zoning).

[5] *See, e.g.,* 1000 FRIENDS OF OREGON & THE HOMEBUILDERS ASS'N OF METRO. PORTLAND, MANAGING GROWTH TO PROMOTE AFFORDABLE HOUSING: REVISITING GOAL 10, EXECUTIVE SUMMARY 1 (1991) (prepared by Paul Ketcham & Scott Siegel) [hereinafter 1000 FRIENDS OF OREGON, AFFORDABLE HOUSING] (stating that "the volume . . . and local texture of most land use decisions make a direct national role unfeasible" in the exclusionary zoning context); HUD ADVISORY COMM. ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACKYARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 7-1 (1991) ("Removal of regulatory barriers to affordable housing can best be accomplished at the State level . . . housing markets are simply too diverse to be regulated at the Federal level.").

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land-use agencies could certainly have a role to play, although the creation of such agencies is beyond the jurisdiction of the courts, state or federal.

Part I provides an overview of the problem and potential solutions. It begins by briefly describing common exclusionary zoning techniques and their possible positive and negative effects. It then discusses various possible anti-exclusionary policies and the possible doctrinal basis for such policies, both statutory and constitutional. Part I also introduces public choice considerations suggesting that municipal and, to a lesser extent, state policymakers cannot be trusted to implement policies in this area conducive to the general welfare. But, while public choice theory can indicate when to distrust the results of the political process, it does not provide substantive solutions to socioeconomic problems. Hence, the dilemma: what should the courts do when confronted with a vast and complex social problem, which, on the one hand, seemingly cannot be entrusted to the democratic process and arguably involves statutory and constitutional violations, but, on the other hand, whose solution is far from clear? Furthermore, a misstep in this matter risks aggravating the problem and undermining the authority of the court.

Part II surveys the various state programs, with a focus on the different approaches taken by state courts that have addressed the exclusionary zoning issue.[6] New Jersey's experience, although unique, provides a particularly enlightening case study because its supreme court pushed the envelope the furthest in its attempt to fight exclusionary zoning, sparking a fierce reaction, and ultimately resulting in a somewhat tepid legislative response. Advocates of an aggressive judicial response often focus on the New Jersey experience. Charles Haar is perhaps the foremost example. Half of *Suburbs Under Siege*, his book on the *Mt. Laurel* decisions[7] and their aftermath, is devoted to countering the argument that the New Jersey Supreme Court may have overstepped institutional limits on its legitimacy and capacity and to advocating that other state courts should follow New Jersey's example and perhaps go further.[8] But, it

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[6] Given this article's focus on the role of the courts, it only selectively addresses programs adopted by state legislatures, notably those of Oregon and California and, to a much lesser extent, those of Connecticut and Massachusetts.

[7] S. Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975) [*Mt. Laurel I*]; S. Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) [*Mt. Laurel II*]; Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 510 A.2d 621 (1986) [colloquially known as *Mt. Laurel III*].

[8] CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 127-208 (1996); *see also* Charles M. Haar, *Judges as Agents of Social Change: Can the*

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is far from clear whether the policy the court chose to implement actually had much of an effect on the problem.[9] Furthermore, the success that the New Jersey Supreme Court did have might be due to factors unique unto itself.[10] The courts of last resort in Pennsylvania, New York, and New Hampshire have avoided the problem of overreaching, but the efficacy of their approaches is in doubt. In any case, they have failed to spur serious political consideration of the exclusionary zoning issue.[11] Although its program was created legislatively, the Oregon experience is relevant because it suggests a way in which the courts can set the agenda and level the political playing field while avoiding the dangers of overreaching; namely, by provoking the creation of a state agency with a broad but vague mandate accompanied by ample powers of planning and implementation.[12]

In addition to examining the appropriate "legislative" role of the courts in this area, Part II also attempts to answer the question of who should be entrusted with administering anti-exclusionary programs created in the legislature—courts, or administrative agencies created for that purpose. Although evidence is scant in this area and largely anecdotal, courts do seem to be far from ideal administrators. So, if it is politically feasible, legislators should try to fashion a better method of implementation than litigation. I primarily focus on the experiences of Oregon (agency enforcement) and California (court enforcement) with respect to this issue, although the experience of New Jersey and other states also provides some insight.

Serious questions regarding the legitimacy and capacity of courts are implicated by judicial attempts to eradicate or mitigate such a pervasive and complex phenomenon as exclusionary zoning. These issues are examined in Part III in light of the Part II case studies and the general debate over the appropriate role of the courts. A vast literature exists regarding the legitimacy and capacity of courts to make good policy decisions and to bring about social change. This literature can inform any discussion of what role courts should play in the exclusionary zoning context. Conversely, I believe that an examination of the exclusionary zoning issue can illuminate general

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Courts Break the Affordable Housing Deadlock in Metropolitan Areas?, 8 HOUSING POL'Y DEBATE 633 (1997) (answering the question posed by his title with a resounding "Yes").

[9] *See infra* Part II.A.4.d.

[10] *See infra* Part II.A.4.e.

[11] *See infra* Part II.A.1-3.

[12] *See infra* Part II.B.1.

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issues regarding the role of the courts in a democratic society. I conclude that although, if given the chance, courts are very flexible institutions that have the capacity to mold themselves in ways necessary to tackle a vast range of social problems, in a democracy, they usually will not be given the chance. Furthermore, this is probably a good thing. Given the ambiguous and complex nature of the problem and the lack of a clear solution, the role of the courts in fighting exclusionary zoning should be primarily as an agenda-setter and instigator, shifting the debate to the state legislative level and doing their best to level the political playing field while avoiding too tightly constraining the political branches.[13] This, however, is easier said than done. The same public choice pathologies that justify judicial action suggest that in order to serve the agenda-setting function effectively, courts will often be forced to strain their capacities and risk their legitimacy and authority.

In short, the main points of my argument can be summarized in five interrelated theses: (1) The public choice pathologies and arguably constitutional interests attending the issue of exclusionary zoning justify court action; (2) The complex and controversial nature of the exclusionary zoning issue makes judicial attempts to impose final solutions unjustified; (3) In light of the first two theses, the appropriate role for the courts is as agenda-setter and political playing-field leveler; (4) The public choice pathologies that justify court action also suggest that courts will have to risk overreaching, with its attendant consequences of policy rigidity and procedural and democratic illegitimacy, to effectively perform the role of agenda-setter; and (5) The best bet for effective agenda-setting without overreaching is suggested by the Oregon experience with an administrative agency with a broad but vague land-use control mandate and effective enforcement powers.

It should be noted that the desirability of forcing state legislatures to confront the issue of exclusionary zoning is not dependent on a results-based vision favoring more economic and racial integration or even one favoring more building of lower-income housing. It depends simply on the view that government

[13] Along these lines, John Payne suggests that the constitutional violation implicated by exclusionary zoning is "not the failure to provide poor people with a 'regional fair share' of housing opportunities, but rather the failure to provide them with a political forum in which they can fairly compete." John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1710 (1998) (reviewing CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996)). Payne further argues that suburban municipalities do not provide such a forum but implies that state level institutions might. *Id.* at 1710-11.

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should not place unnecessary or prejudice-inspired obstacles in the way of integration or lower-income housing.

I. OVERVIEW OF THE PROBLEM

A. *Exclusionary Zoning Techniques*

All zoning is exclusive in that it excludes something. This article is concerned with the obstacles zoning places in the way of building housing that low- and moderate-income households can afford. Just by limiting the amount of housing that can be built, zoning likely raises the price of housing, including low- and moderate-income housing. This can be the result of zoning more land for non-residential uses, such as industrial, agricultural, recreational, and environmental, than the market would otherwise allocate for them.[14] Limiting building density by setting minimum lot sizes achieves the same result. More particularly, minimum lot size requirements can force low-income households to buy more land than they can afford. The same is true of setback requirements. Similarly, minimum floor space requirements can force low-income households to buy a larger house than they can afford.

Another way that municipalities can limit the amount of low-income housing is by underzoning for certain types of housing that are generally less expensive than single-family homes, such as apartment buildings, mobile homes, and attached townhouses.[15] Because education is the primary locally paid-for expense, municipalities sometimes impose restrictions on the number of bedrooms per apartment in order to limit the number of school-aged children in low-income households or impose exactions on developers based on the number of schoolchildren in the development.[16] Age restrictions, namely, zoning for retirement

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[14] For other accounts of the various exclusionary zoning techniques see, for example, PATRICK J. ROHAN, LAND USE CONTROL § 3.013.02 (Eric Damian Kelly ed., 1998); 5 ALAN C. WEINSTEIN, ANDERSON'S AMERICAN LAW OF ZONING § 8 (4th ed. 1997); JAMES A. KUSHNER, FAIR HOUSING § 7.08 (1983); RICHARD F. BABCOCK & FRED P. BOSSELMAN, EXCLUSIONARY ZONING, LAND USE REGULATION AND HOUSING IN THE 1970S 3-17 (1973); Janai S. Nelson, Comment, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1699-1703 (1996).

[15] A 1979 survey found that only 5.1% of undeveloped land in New Jersey was zoned for multi-family units compared to 67.1% for single-family units. DUANE WINDSOR, FISCAL ZONING IN SUBURBAN COMMUNITIES 52-53 (1979).

[16] A 1977 survey found that most of the 0.5% of developable land in northeast New Jersey zoned for multi-family housing was limited to one or two bedrooms. CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 181-82 (1977).

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homes, is another method of keeping out low-income families.[17] In short, exclusionary zoning keeps out lower-income households in three main ways: (1) by raising the cost of housing generally, (2) by restricting supply of low-income housing types and mandating minimum land and housing purchases, and (3) by zoning out families with school-aged children.

B. *The Effects of Exclusionary Zoning—Positive*

The first source of difficulty in deciding what should be done regarding exclusionary zoning is that it has a myriad of possible effects, positive as well as negative. A good deal of controversy exists as to the size of these effects and, in some cases, to their very existence.[18] The Standard State Zoning Enabling Act cites the

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[17] Justice Morris Pashman's concurrence in the original *Mount Laurel* decision discusses most of the above exclusionary zoning devices. He cites a 1970 study by New Jersey's Department of Community Affairs of almost all of the developable land in New Jersey for the following: (1) 92% of the land zoned for single-family housing had some minimum house size requirement, 65% for 1000 square feet or more of floor space, (2) two-thirds had a one acre or more minimum lot size requirement and only 13.5% was zoned for 100 foot minimum frontage or less, (3) multi-family housing was permitted on only 6.2% of the land zoned for residential uses and, disregarding six aberrant municipalities, the percentage falls to 1.1%, (4) 59% of the land zoned for multi-family housing was restricted to one-bedroom or efficiency apartments and 20.6% to two-bedroom apartments, and (5) only 0.1% of the land zoned for residential use was zoned for mobile homes. S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. at 196-205, 336 A.2d at 737-41 (Pashman, J., concurring). The Township of Mount Laurel itself was found by the New Jersey Supreme Court to have practiced most of the above techniques: overzoning for non-residential uses, lack of multi-family and mobile home zoning, minimum lot and floor size requirements, and maximum bedroom restrictions. *Id.* at 160-70, 336 A.2d at 718-22.

[18] The issue is complicated by the fact that alternatives to zoning, such as private covenants between landowners, might achieve many of the positive and negative effects of zoning. Therefore, it is not exactly clear what zoning contributes on top of such alternatives. For the argument that alternatives could achieve most of the positive effects of zoning while avoiding most of the negative, see Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973). This is a controversial topic and beyond the scope of this article, but to the extent that we believe that such alternatives to zoning can block physical and, more controversially, "sociological" externalities without blocking the entry of the poor into a municipality as a whole, the less reason there is to be deferential to zoning ordinances. However, such covenants likely will also pose obstacles to lower-income housing, although on a smaller scale than municipality-wide zoning, and will pose problems of their own, not the least of which is that land-use control as an instance of democratic self-determination, as opposed to market determination by way of unchallenged private preferences, might be valuable in and of itself. *See* Eric H. Steele, *Participation and Rules: The Functions of Zoning*, 1986 AM. B. FOUND. RES. J. 709 (describing the participatory and community-building aspects of the zoning process). The importance of community self-determination is a rationale

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following permissible goals of zoning:

> [T]o lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.[19]

Although, as we shall see, a handful of state supreme courts have used the Enabling Act's "general welfare" clause to fight exclusionary zoning, many of its permissible goals seem to encourage it. Preventing overcrowding and undue concentration, as well as lessening street congestion, obviously can justify the use of exclusionary techniques, but even the safety, light and air, and infrastructure clauses can do so. In other words, enacting zoning for the very purposes for which it was intended can raise obstacles to the construction of lower-income housing.

Narrowly conceived, the goal of zoning is to prevent externalities in a more systematic and farsighted manner than is achievable through nuisance law. Besides generally increasing population density, an apartment building decreases light and air to its neighbors and increases congestion, noise, and pollution on the streets, essentially free-riding on the low-density development around it. This is true even of a luxury condominium, but general prohibitions on multi-family housing made in the name of bona fide zoning goals have a disparate impact on those who cannot afford single-family housing. There is also the problem of providing adequate infrastructure to support such development, such as new roads, water, sewers, schools, and parks. These municipal-wide costs can be defrayed by property taxes paid by the development,[20] but the less expensive the development, the less it will defray them. This raises the question of fiscal zoning, which is zoning to maximize the tax base relative to the level of required municipal services, an issue

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for not superseding local land-use decisions that does not apply to the enforcement of private covenants.

[19] U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 3 (1926), *reprinted in* 5 ALAN C. WEINSTEIN, ANDERSON'S AMERICAN LAW OF ZONING § 32.01 (4th ed. 1997).

[20] Rolf Pendall finds that municipalities that force developers to pay the cost of additional infrastructure allow more development and more dense development than do municipalities that pay for infrastructure through property taxes. Rolf Pendall, *Do Land Use Controls Cause Sprawl?*, 26 ENV'T & PLAN. B: PLAN. & DESIGN 555, 563, 565, 567 (1999). So, although infrastructure exactions raise the cost of construction, they might result in more housing than would otherwise be permitted.

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that will be discussed shortly. Single-family housing puts similar strains on municipal infrastructure,[21] but even if it is relatively high density, it will likely cause less severe neighborhood externalities. Preventing such externalities is a legitimate aim of zoning with which anti-exclusionary policies can interfere.

A more general and perhaps more suspect concern is with the character of the town as a whole. Such a concern can implicate the density of the town as much as the income of its inhabitants. As two defenders of "strict local zoning" put it, such zoning might be meant to "promote community values such as a family-oriented lifestyle protective of the needs of children and those who seek to raise them in a non-urban environment."[22] This consideration has both an aesthetic and a social component. Aesthetically, the pseudo-arcadian nature of low-density suburbia and exurbia is likely amenable to its residents, who probably could have lived in a more urban environment if they had so wished. The predominance of lawns and open spaces might seem vaguely healthier, especially for children.[23]

Socially, even though the benefits of diversity are widely touted, there is also evidence that economic homogeneity at the local level might have some beneficial effects.[24] For example, some studies show that even when controlling for average income, racial composition, and population density, economic homogeneity is correlated with less violent crime,[25] less property crime,[26] and better academic

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[21] Low-density development can place more of a strain on municipal resources because it requires a greater extension of roads and sewers, but the consequent property taxes may be able to pay for it. As mentioned in the previous footnote, developer exactions are an additional possibility for defraying the cost.

[22] G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 558 (1984).

[23] *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding an ordinance that made no allowance for multi-family housing). *Belle Terre* is particularly notable for Justice Douglas's paean to exclusive zoning for single-family homes:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9.

[24] I am assuming for the moment that exclusionary zoning causes residential homogeneity and is not simply correlated with it.

[25] *See* Judith R. Blau & Peter Michael Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114 (1982) (showing that economic inequality and not poverty or race is the dominant correlate with violent crime);

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performance by school students.[27] More particularly, a primary motive behind suburban attempts to zone out affordable housing seems to be suburbanites' "fear of crime and generally disorderly and threatening conduct by the occupants of such housing."[28] The extent to which such fear is exaggerated as a result of class bias or accurately reflects reality is an open question, but the same sort of selection bias on the part of suburbanites for the aesthetics of suburban living likely also exists with respect to the social environment and public order it provides. There is also evidence that renting lowers property values, perhaps because renters are less likely to maintain their property[29] or to be involved in neighborhood and municipal activities.[30] More generally, homogeneity seems correlated with what has been called "social capital," although the type of social capital it promotes, "bonding" social capital, often comes at the expense of "bridging" social capital with others outside one's immediate community or socioeconomic and ethnic group.[31] Related to the notion of social

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Richard Block, *Community, Environment, and Violent Crime*, 3 CRIMINOLOGY 46 (1979) (showing a very strong correlation between violent crime and residential proximity between the poor and the middle class, even when controlling for other factors). *See also* Edward Wyatt, *Sexual Attacks in City Schools Are Up Sharply*, N.Y. TIMES, June 3, 2001, at A1 (stating that national statistics show that "[a]mong urban schools, those with racially and socioeconomically diverse student bodies demonstrate a higher rate of all crimes . . . than do schools where the students are overwhelmingly of one race, or . . . uniformly well off or very poor").

[26] *See* David Jacobs, *Inequality and Economic Crime*, 66 SOCIOLOGY & SOCIAL RES. 12 (1981) (finding strong correlation between economic inequality and the prevalence of economic crime).

[27] *See* Byron Brown, *Achievement, Costs, and the Demand for Public Education*, 10 WEST. ECON. J. 198 (1972) (finding that for Michigan as a whole, socioeconomic heterogeneity is negatively correlated with overall academic achievement).

[28] WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS 333-34 (1985).

[29] *See* Ko Wang et al., *The Impact of Rental Properties on the Value of Single-Family Residences*, 30 J. URB. ECON. 152 (1992) (finding that property values drop as the proportion of leased single-family houses increases and attributing it to the likelihood that leased property will be more poorly maintained).

[30] *See* Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?* (Nat'l Bureau of Econ. Res. Working Paper No. 6363, Jan. 1998), *available at* http://www.nber.org/papers/w6363 (finding that they are).

[31] *See* ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22-24, 360-63 (2000) (contrasting "bonding" and "bridging" social capital, and describing correlation between the former and social homogeneity); Tarr & Harrison, *supra* note 22, at 562 (stating that "homogeneity may also impart a sense of community and cohesion deriving from shared interests and backgrounds, whatever the predominant color or average wealth of a municipality's residents"); *see also* Tamar Lewin, *One State Finds the Secret to Strong Civic Bonds*, N.Y. TIMES, Aug. 26, 2001, at A1 (citing a recent study of forty geographic areas across the nation for the conclusion that "the more diverse the area, the less people trusted their neighbors, shop clerks, co-workers—even other members of their own ethnic groups"). As we

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capital is the civic republican idea that community self-determination is a valuable end in itself. Judicial overriding of municipal land-use decisions necessarily infringes such self-determination.

Economic homogeneity among municipal residents also has positive benefits with respect to efficiency in the provision of local services. This observation is connected to the famous "Tiebout" hypothesis regarding the efficiency of local government.[32] In a world of perfect mobility and perfect information, people can "vote with their feet" for the municipal package of taxes and services that best fits their preferences.[33] Given certain constraints that will soon be discussed, the operation of this model would result on its own in a municipal populace with homogenous tax and services preferences. A substitute for perfect mobility (i.e., exit) is perfect control of municipal tax and service policies (i.e., voice) by homogenous municipal residents.[34]

However, for the model to work, the municipality must require that all residents pay the same level of taxes and consume the same level of services, whatever they choose those levels to be. Otherwise, some residents will be free-riding on the tax expenditures of others and local services will not be provided at the level where marginal costs intersect individuals' marginal utilities. In other words, efficiency requires that people only receive the services for which they are willing to pay.[35] Once willingness to pay is separated from services received, the preference for taxes becomes zero and the preference for services becomes infinite. Given the prevalence of property taxes as a method of revenue raising, zoning can force everyone to pay approximately the same level of taxes by forcing them to buy property of approximately the same value, i.e., by imposing identical

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will see, the charge of damaging "bridging" social capital has been leveled at exclusionary zoning and the socioeconomic segregation it is argued to cause. *See infra* notes 60-65, 68-72 and accompanying text.

[32] Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). On this model, local governments are seen as competing with each other to provide the most attractive set of taxes and services to potential residents.

[33] *Id.* at 418-20.

[34] *Cf.* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 297-99 (1995) (explaining why an approximation of such control might exist in suburban municipalities); *see also* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 405-07 (1977); William A. Fischel & Perry Shapiro, *A Constitutional Model of Compensation for Takings*, 9 INT'L REV. L. & ECON. 115, 122 (1989) (describing the conditions for such control).

[35] By only counting revealed preferences, the prevalent economic definition of efficiency ignores income effects and the possibility that a poor person might get more utility from a service than a wealthy person who is willing to pay more for it.

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lot and building sizes.[36] Otherwise, the poor endlessly chase the rich around suburbia on Tiebout's mobility model.

Some have even argued that exclusionary zoning benefits cities by preventing an exodus of their citizens, especially of their white and moderate-income citizens. Tarr and Harrison, for example, state that absent exclusionary zoning the "sending municipalities . . . would face the loss of jobs and ratables as local residents move to new suburban housing," leaving them with "surplus capital facilities."[37] I would counter that this is only really a problem if it is the middle class and not the urban poor that migrate to the suburbs as a result of anti-exclusionary zoning programs. However, to the extent that any migration has occurred, this does seem to have been the case, as we will see when we examine the most aggressive of the anti-exclusionary zoning programs to date—New Jersey's.[38] One New Jersey judge made this observation in a decision from 1977, two years after *Mt. Laurel I* and six years before *Mt. Laurel II*:

> In short, the lowering of barriers to high density development in the rural and semi-rural areas of the state would probably promote and encourage movements of the white middle class from the traditional urban centers and their surrounding suburbs. A continuation and aggravation of that movement would tend to exacerbate currently existing social and economic divisions . . . .[39]

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[36] *See* Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975). Of course, zoning does not force people to buy property of the exact same value. The question is whether it helps municipalities to approximate the Tiebout model. Hamilton's theoretical zoning ordinance specifies that "[n]o household may reside in the community unless it consumes at least some minimum amount of housing." *Id.* at 206. If exit costs are zero, households will move to towns where this minimum amount is exactly the amount that they prefer to consume, the result being that, in equilibrium, all communities are internally homogenous with respect to property value. *Id.* But, of course, exit costs are not zero.

[37] Tarr & Harrison, *supra* note 22, at 564.

[38] *See infra* notes 288-300 and accompanying text.

[39] Glenview Dev. Co. v. Franklin Township., 164 N.J. Super. 563, 575, 397 A.2d 384, 390 (Law Div. 1978) (exempting a rural town from Mount Laurel obligations and upholding three and five acre zoning). *See also* Jerome G. Rose, *Waning Judicial Legitimacy: The Price of Judicial Promulgation of Urban Policy*, 20 URB. LAW. 801, 816 (1988) ("Suburban exclusionary zoning tends to keep moderate-income families in the cities. Less restrictive zoning would permit middle-income families to leave the city more easily, while still denying those with lower-income . . . ."). *Cf.* Russell S. Harrison, *State Court Activism in Exclusionary Zoning Cases*, *in* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 55, 72 (Mary Cornelia Porter and G. Alan Tarr eds., 1982) ("If these laws were . . . alleviated, poor whites could then leave the center-city locations for the suburbs. The results would not necessarily hold true for center-city blacks. Thus the result . . . would be increased racial segregation among

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In other words, depending on the weapons employed, fighting exclusionary zoning might not only fail to integrate the suburbs, it might exacerbate economic and racial segregation.[40]

C. *The Effects of Exclusionary Zoning—Negative*

After reading about all of the possible benefits of exclusionary zoning, one might wonder why anyone would ever want to get rid of it. But, as this section will explain, exclusionary zoning possibly imposes very high costs on those excluded, the places in which they live, and on American society at large. Among other things, it might decrease housing supply and raise housing costs, contribute to urban sprawl, create a mismatch between supply and demand for local government services, create a mismatch between supply and demand for occupational opportunity, create concentrations of poverty with attendant feedback effects, and increase racial segregation with attendant negative effects on race relations.

For zoning to have any of the negative effects listed above, it must actually raise the cost of housing, at least the cost of housing that would otherwise have been affordable to those with lower incomes. It would seem obvious that the sorts of regulations mentioned in section A, such as minimum lot, floor space, and setback requirements, as well as bans on types of housing with cheaper per unit construction costs, would raise housing costs. And, indeed, this is the majority viewpoint.[41] However, some have challenged it. For instance, Tarr and Harrison argue that once the

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metropolitan communities.").

[40] The loss of moderate-income residents would in turn lower gross rent roll for apartment owners, lowering the market value of their property and reducing tax revenue for the city. Merchants, in turn, would likely follow their customers. *See* Rose, *supra* note 39, at 817. Their migration might also decrease the political influence of the cities. *Id.* at 818. On the plus side, their apartments would filter down to those lower-income residents who remained, assuming that such residents can pay enough rent to sustain their upkeep. Also, if they had previously sent their children to city schools, the migration of middle-income households will likely pose a net positive fiscally for the city. *See infra* note 286.

[41] *See, e.g.*, FISCHEL, *supra* note 28, at 239-40 (but noting that increases in housing prices may also be caused by the beneficial effects of zoning on neighborhood amenities); HUD ADVISORY COMM. ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *supra* note 5, at 2-5 (citing study of Washington, D.C. suburban counties to the effect that restrictive zoning ordinances add about 10% to the price of a home "beyond what is necessary to ensure health, safety, and welfare"); FISCHEL, DO GROWTH CONTROLS MATTER? A REVIEW OF THE EMPIRICAL EVIDENCE ON THE EFFECTIVENESS AND EFFICIENCY OF LOCAL GOVERNMENT LAND USE REGULATION 53 (1990) [hereinafter FISCHEL, GROWTH CONTROLS]; Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the* Mount Laurel *Doctrine*, 7 SETON HALL CONST. L.J. 577, 587 (1997); Nelson, *supra* note 14, at 1699, 1705.

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socioeconomic composition of a community and the values of its residents are controlled for, there is "no empirical evidence conclusively demonstrating that strict zoning laws raise housing prices significantly above the levels that would otherwise occur."[42] But this sort of reply begs the question of whether the community would have the same composition and values if it did not have "strict zoning" in place. Skeptics have to argue that exclusionary zoning simply mimics what the housing market would have produced anyway with respect to lot sizes, housing type, and the like.[43] But if this is the case, then the zoning is superfluous and there is no harm in striking it down. The fact that developers bother to endure the lengthy and costly process of challenging zoning ordinances suggests that the revisionist view is at least not wholly accurate, however, and that something is to be gained or lost by fighting exclusionary zoning.

In addition to probably raising the cost of at least bottom rung housing,[44] exclusionary zoning techniques, such as mandating minimum lot size and banning multi-family housing, have the effect of spreading housing out and contributing to urban sprawl.[45] Such spreading out, in turn, raises the per unit cost of municipal infrastructure.[46] Insofar as these costs are passed on to developers through development exactions, the cost of housing is further increased because developers either pass the costs on to homebuyers or build fewer units as a result of the greater cost. There also seems to be a consensus in the environmental community that such spreading out also has a net negative effect on the environment.[47]

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[42] Tarr & Harrison, *supra* note 22, at 559 (citing LARRY L. ORR, INCOME, EMPLOYMENT, AND URBAN RESIDENTIAL LOCATION 70-75 (1975); LARRY L. ORR, URBAN LAND USE VALUE AS IT RELATES TO POLICY 118 (1969)).

[43] *See, e.g., id.* at 560 ("Instead of raising housing prices above the levels dictated by market forces, strict zoning laws may in fact reflect market demands in the region.").

[44] The remainder of this discussion of the costs of exclusionary zoning assumes that it has the effect of decreasing the supply of low-income housing.

[45] *See* Pendall, *supra* note 20, at 563, 568-69. *Cf.* Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 173-75 (2000) (defining sprawl as the "rapid growth of low-density suburbs," defined by single-family houses, their spreading lawns, and shopping malls).

[46] *See* ARTHUR C. NELSON & JAMES B. DUNCAN, GROWTH MANAGEMENT PRINCIPLES AND PRACTICES 4-7 (1995); *see also* ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 7, 107-08 (2000) (stating in reference to the cost of roadways, pipe, and conduit caused by sprawl that "[t]his high ratio of public to private expenditure helps explain why suburban municipalities are finding that new growth fails to pay for itself at acceptable levels of taxation").

[47] *See, e.g.*, Sierra Club, *The Dark Side of the American Dream: The Costs and*

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While it scatters small amounts of open space such as large yards and small parks among human habitations, it decreases the amount of large, contiguous undeveloped land that most animal species require for habitation.[48] Also, the increased commutes created by suburban sprawl cause greater traffic congestion and worse air quality.[49] On the other hand, by preventing people from moving out of the cities, exclusionary zoning does function to reduce the growth of the suburbs. But the problem might be that it encourages people to leapfrog the suburbs and move further out to non-exclusionary rural areas controlled by farmers eager to sell.[50] Sprawl might also even contribute to decreases in "social capital," as home, work, and shopping become spatially separated and people spend more time commuting.[51]

Through its homogenizing effect, exclusionary zoning can also have a negative effect on local political participation and political debate. One recent study has tied municipal economic homogeneity to decreased municipal political participation.[52] Furthermore, with greater homogeneity one can expect political debate to be more narrowly economistic, focused only on the fiscal aspects of taxation

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Consequences of Suburban Sprawl, at http://www.sierraclub.org/sprawl/report98/cost.html (last visited September 23, 2001).

[48] *See id.* The more serious problem, admittedly, is not the expansion of existing suburban municipalities but the leapfrogging of open space by new residential developments. *See* Vermont Forum on Sprawl, *Six Patterns of Sprawl Development, at* http://www.vtsprawl.org/Newsletter2/5Patterns.htm (last visited Oct. 16, 2001) ("The size of these lots appears to be less significant than their spread-out pattern, which has tended to carve up productive farm and forestland, wildlife habitat, and other spaces and natural areas.").

[49] FISCHEL, GROWTH CONTROLS, *supra* note 41, at 56; Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 570 (1995).

[50] FISCHEL, GROWTH CONTROLS, *supra* note 41, at 55 ("This is not to deny that growth controls may make development in *individual* communities more compact. My claim is that such local ordinances cause developers to go to other communities. The most likely alternative sites are in exurban and rural communities, where the political climate . . . is more favorable to development."). See, for instance, the case of Pohatcong, a small New Jersey farming town facing a 528 unit development with 66 lower income units, far more than required by New Jersey's Fair Housing Act (FHA), because its previous administration was "dominated by farmers eager to profit from the sale of their land." Andrew Jacobs, *New Jersey's Housing Law Works Too Well, Some Say*, N.Y. TIMES, Mar. 3, 2001, at A1. Pendall finds that the empirical studies are mixed with respect to whether development deflected from exclusionary suburbs will become infill in existing urbanized areas or sprawl in newly developing areas. Pendall, *supra* note 20, at 557-58.

[51] PUTNAM, *supra* note 31, at 212-15.

[52] J. Eric Oliver, *The Effect of Metropolitan Economic Segregation on Local Civic Participation*, 43 AMER. J. POL. SCI. 186 (1999).

and government action and their effect on the value of one's perhaps primary investment, one's home.[53] If one's interests and values are similar, then there is not much to debate. Politics becomes "the administration of things" rather than the government of people.[54] There is, I admit, another way of interpreting this phenomena normatively. One could applaud the "less rancorous conflict in public decision-making" that comes with homogeneity[55] and emphasize the opportunity costs of attending town meetings.

Another possible effect of exclusionary zoning is to create a mismatch between the demand for local services and the ability of local government to meet the demand. As mentioned in the previous section, a possible benefit of exclusionary zoning is to allow the efficient matching of taxes and government services to the revealed preferences of residents. However, the desirability of such matching depends on the size of income effects on revealed preferences. For example, residents of a poor inner city might have a much greater need for police protection than do residents of a wealthy suburb, but will nevertheless reveal a much lower preference for such protection, i.e., they are not willing to pay as much for it because they have much less money to spend.[56] In general, poorer families and individuals are likely to have more need for government services and less of an ability to pay the taxes to support such services. As Anthony Downs states: "So local government in many central cities and in some older suburbs must try to combat poor quality schools, high crime rates, high welfare support costs, and high fire incidence rates. Yet their value bases are stagnant or declining (except for a few new downtown buildings)."[57] In fact, it is in the interest of local residents to only allow in those who will pay more in property taxes than they will

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[53] For the fact that personal residences are homeowners' "major asset, indeed, usually their only asset," see William A. Fischel, Municipal Corporations, Homeowners, and the Benefit View of the Property Tax 11 (Sept. 14, 2000) (unpublished manuscript, on file with author) (citing Joseph Tracy et al., *Are Stocks Overtaking Real Estate in Household Portfolios?*, *in* CURRENT ISSUES IN ECON. AND FIN. 1, 5 (Federal Reserve Bank of New York ed., 1999)).

[54] For the reference, see Friedrich Engels, *Socialism: Utopia and Scientific*, *in* ESSENTIAL WORKS OF MARXISM 78 (A. Mendel ed., 1961).

[55] Tarr & Harrison, *supra* note 22, at 562-63.

[56] This is not to ignore that inner city residents might also have other reasons for wanting less police protection.

[57] DOWNS, OPENING UP THE SUBURBS, *supra* note 1, at 10. *See also Mt. Laurel II*, 92 N.J. at 210, 456 A.2d at 415 n.5 (1983) ("The provision of lower income housing in the suburbs may help relieve cities of what has become an overwhelming fiscal and social burden.").

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consume in municipal services.[58] As already mentioned, zoning motivated by such concerns is referred to as "fiscal zoning."[59]

In addition to its negative fiscal effects, concentrated poverty also has negative economic and cultural feedback effects.[60] Exclusionary zoning contributes by creating a spatial mismatch between job opportunities and people with low incomes.[61] It has been widely noted that there has been a significant flow of employment growth from central cities to the suburbs since World War II.[62] So, one result of exclusionary zoning is to isolate from employment those excluded from the suburbs. This lack of employment opportunity, combined with social isolation, in turn feeds crime rates, out-of-wedlock births, drug use, and a general lack of preparation for employment.[63] Combine this, in turn, with a necessarily high tax rate on business in order to make up the fiscal shortfall created by low residential property values and the high need for municipal services, and remaining businesses and middle income families have a high incentive to leave, creating a vicious cycle. On a more personal level, there is strong evidence that low-income households that move from segregated, financially constrained neighborhoods to relatively prosperous suburbs have their life chances greatly enhanced.[64] Put the other way around, not being

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[58] Given the cost of primary and secondary education, very little residential property pays its own way.

[59] Keeping down the local property tax rates was the professed rationale presented by Mount Laurel to support its zoning ordinance. *Mt. Laurel I*, 67 N.J. at 170-71, 336 A.2d at 723 (1975). The New Jersey Supreme Court came to the conclusion that "almost every [developing municipality] acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base . . . ." *Id.* at 171, 336 A.2d at 723. The court rightfully rejected this as a legitimate rationale for zoning. *Id.* at 183-87, 336 A.2d at 730-31.

[60] *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987).

[61] *See* Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 799-804 (1991) (concluding after a survey of the empirical literature that "the weight of the evidence supports" the spatial mismatch hypothesis).

[62] *See, e.g.*, DOWNS, OPENING UP THE SUBURBS, *supra* note 1, at 19-22.

[63] *See* sources cited *supra* note 60; *see also* Schill, *supra* note 61, at 805-07 ("Recent sociological evidence seems to provide some support for [William Julius] Wilson's hypothesis that residence in a concentrated poverty neighborhood has an effect on poor people independent from the effect of their own low personal income.").

[64] In the Gautreaux housing mobility experiment, the few thousand low-income, female-headed, African-American public assistance families that used Section Eight vouchers to move to the suburbs did significantly better with respect to employment and education than did members of the control group that remained in the cities.

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able to move to the suburbs has "considerable and tangible"[65] negative effects.

However, it is not entirely clear to what degree it is exclusionary zoning, and not simply the economics of the housing market, perhaps augmented by building code and infrastructure requirements, that is the major cause of the fiscal, economic, and cultural problems of the cities and poorer suburbs. As mentioned in the previous section, Jerome Rose argues that exclusionary zoning mostly keeps out the lower middle class and not the truly lower class, who could not afford to live in the suburbs anyway.[66] The emphasis that someone such as Anthony Downs places on the need for federal subsidies for lower income housing in the suburbs makes this part of Rose's argument seem plausible.[67] This does not necessarily mean that Rose's argument, namely, that suburban exclusionary zoning provides a great service for the cities, is correct. Although it is possible that those whom the suburbs want to keep out because they present a net negative fiscally and perhaps culturally, in fact, present a net positive fiscally and culturally for the cities and poorer suburbs to which they are relegated, it does not seem likely. In any case, forcibly trapping people in order to improve neighborhoods certainly violates deeply held American values of liberty and justice. However, the likelihood that the truly disadvantaged would be priced out of most suburban housing markets, even in the absence of exclusionary zoning, does deflate some of the claims that have been made with respect to the negative effects of exclusionary zoning.

Similarly, the contribution of exclusionary zoning to racial

See LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 161-72 (2000); James E. Rosenbaum, et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1522, 1528-36, 1553 (1993); *see also* George E. Peterson & Kale Williams, *Housing Mobility: What Has It Accomplished and What Is Its Promise?*, *in* HOUSING MOBILITY: PROMISE OR ILLUSION? 7, 13-14 (Alexander Polikoff, ed., 1995) (summarizing the findings of studies of various household-based mobility programs).

[65] Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 108-09 (1998).

[66] *See supra* notes 39-40 and accompanying text.

[67] DOWNS, OPENING UP THE SUBURBS, *supra* note 1, at 46-48, 112, 133, 137-38, 162. *See also* Haar, *supra* note 8, at 645 (arguing that with respect to New Jersey, "[m]ere elimination of negative restraints" such as minimum lot size or a prohibition on apartments "did not suffice to meet the constitutional requirement of breaking down barriers to low-income families"). Haar does not specify the nature of these barriers or why there is a constitutional requirement to break them down if they are not negative restraints imposed by the government.

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residential segregation has possibly been overstated.[68] Bernard Ham, for one, does not seem to notice the contradiction between his beliefs that exclusionary zoning is a predominant cause of residential segregation, that "the most significant effect of exclusionary zoning is its influence on the price of housing," and that "racial segregation is high at all levels of income."[69] If racial segregation is not a function of income, then it cannot be a function of discrimination based on income.[70] But even if racial segregation is partially a function of income, as is quite plausible,[71] if the discriminatory effect of exclusionary zoning primarily falls upon the middle and lower middle classes, and not upon the poor who could not afford to live in suburbia anyway, its racial impact is probably small considering that the impacted classes are not primarily African-American. This is not to say that the amount of racial segregation in the United States does not have horrible consequences for the country, contributing to racial inequality, stereotyping, and distrust,[72] but just that exclusionary zoning is unlikely to be a major cause of such segregation.

There are at least two responses to the suggestion that exclusionary zoning is not a major cause of urban blight and "American apartheid." The first is "so what?" As I readily admit, these are terrible problems that deserve serious attempts to address them. However, the focus of this article is the appropriate role of the courts. If the causes of urban blight and racial segregation are primarily caused by deeper and more complex factors than

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[68] Ham, *supra* note 41, at 587 ("many legal scholars, as well as Justice Hall and Chief Justice Wilentz of the New Jersey Supreme Court, have agreed that exclusionary zoning is the most pervasive legal structure perpetuating racial segregation"); Nelson, *supra* note 14, at 1699-705.

[69] Ham, *supra* note 41, at 587.

[70] Paul Boudreaux notes that racial segregation also does not seem to be strongly correlated to low-density housing given the high degree of racial segregation in highly dense cities such as Chicago, Washington, D.C., and Philadelphia. Boudreaux, *supra* note 45, at 192.

[71] Margery Austin Turner' and Ron Wienk's survey of the literature uncovers four basic theses regarding the cause of racial residential segregation: (1) personal preference, (2) income differences, (3) overt discrimination in the housing market, and (4) differences in the marketing of housing such that minorities hear of housing opportunities in minority neighborhoods and whites in white neighborhoods. Margery Austin Turner & Ron Wienk, *The Persistence of Segregation in Urban Areas: Contributing Causes, in* HOUSING MARKETS AND RESIDENTIAL MOBILITY 195 (G. Thomas Kingsley et al. eds., 1993).

[72] *See, e.g.*, MASSEY & DENTON, *supra* note 60; Florence W. Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479 (1995).

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exclusionary zoning, it is unclear what role the courts can play in addressing these problems, especially in the absence of a legislative mandate. The sort of program advocated by Anthony Downs involving massive subsidies and constant oversight, reevaluation, and revision is clearly beyond the courts' capacity or authority.[73] Also, if exclusionary zoning is not the cause of urban blight and racial segregation, then those problems cannot be used as justifications for measures fighting exclusionary zoning.

A second possible response is that even if exclusionary zoning's primary effect is not on minorities and the poor, it still is unfair to those it does keep out, such as the teachers and police officers who work in towns where they cannot afford to live, as well as those of moderate means generally. I completely agree with this response, but the problem is that towns are not likely to cite class-based, let alone racial, rationales for their zoning in the wake of the *Mount Laurel* decisions, and legitimate rationales for exclusionary zoning techniques are readily available and perhaps not pretextual. A court deciding to fight exclusionary zoning must decide when those legitimate rationales are insufficient to justify the local zoning and to decide on the remedy that best provides relief with the least harm to existing residents. It must also determine a legal basis for its actions. Given these difficulties, it might be thought that the problem should simply be left to the legislative and executive branches to resolve. However, as discussed in the next section, there are good reasons for believing that the political system cannot be trusted to resolve the problems posed by exclusionary zoning.

I would like to emphasize before moving on that none of the above discussion is meant to be definitive. That so little is definitive with respect to the causes and consequences of exclusionary zoning contributes to making it such a difficult and controversial issue. I quite likely could be wrong about its relative costs and benefits; the former might be larger and the latter smaller than I have intimated. But, just the opposite is also possible. I only ask that the reader keep an open mind with respect to the nature of exclusionary zoning's possible costs and benefits and their relative size when thinking about the appropriate role of the courts in fighting it.

D. The Public Choice Problems Posed by Exclusionary Zoning

In any case, there is good reason to believe that the normal course of politics will not adequately address the issue of exclusionary

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[73] DOWNS, OPENING UP THE SUBURBS, *supra* note 1, at 115-30, 159-65.

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zoning. Local politics cannot be trusted to adequately weigh the costs and benefits involved because the costs are almost completely externalized, while the benefits are almost completely internalized. State and national politics cannot be trusted because those harmed by exclusionary zoning are diffuse, unorganized, and lacking in resources, while those benefited by it have greater resources and are represented by local governments under their control.

It should be quite clear from the discussion in the previous section that municipalities themselves cannot be trusted to judge the fairness and efficiency of exclusionary zoning. This is so because the benefits of exclusionary zoning fall almost entirely on the residents of the municipality, while the costs fall almost entirely on those residing outside it, who, consequently, have no vote and little voice in municipal politics. In fact, the very effect (if not the purpose) of exclusionary zoning is to keep out those who would otherwise want to reside in a community. This is an analogous problem to that posed by malapportionment and limitations on the right to vote. The nature of the harm prevents those on whom it befalls from having a say as to whether it is justified or should be eradicated.[74]

Potential residents of municipalities with strict zoning laws do have potential allies among those who make a living from development, such as developers, construction firms, labor unions, and real estate brokers. But, these pro-development forces will only be allies of the excluded to the extent that servicing their housing needs is more profitable than the alternatives allowed by the exclusionary zoning ordinance. To the extent that lower-income housing is not very profitable, they have less of an incentive to lobby on its behalf. This will also be a problem at the state and national level, but to the extent that municipalities prevent the development of profitable units, developers will support state legislation even if it forces them to build some lower-income units, as long as this requirement does not endanger the overall profitability of their projects. Furthermore, at the local level, pro-development forces face the additional risk of alienating the municipality, which has numerous tools at its disposal to raise the costs and hassle of development.

In any case, in comparison to state politics, where occupational interest group influence can be substantial,[75] it is residential

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[74] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 116-25 (1980).

[75] *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 344-45 (2d ed. 2000) ("In larger, more diverse jurisdictions . . . [pro-

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homeowners who are the dominant force in local suburban politics. Besides usually constituting a substantial majority of voters in such jurisdictions,[76] in the smaller and less complex political setting, residential homeowners can easily express their preferences to local government decision-makers and make sure that they act according to those preferences.[77] In other words, the relatively low informational and organizational costs faced by residents at the local level neutralize the organizational advantages that occupational interest groups enjoy in larger, more complex settings. So, in short, would-be suburban residents can count on local zoning decisions being dominated by those who have the most interest in keeping them out, namely, existing local residential homeowners.

Because of the lesser amount of control exercised by suburban homeowners, the outlook at the state level is not quite as bleak. However, it is still not good. "Soccer moms," as well as dads, are still obviously important political constituencies at these levels, often constituting the swing votes in close elections. And, while as diffuse a constituency as those they keep out, they are relatively more affluent, educated, and politically active. Although they may not have otherwise organized at the state level due to their diffuseness,[78] suburban homeowners have a pre-existing organization that can lobby on their behalf, namely, the local governments that they control.[79] Furthermore, on particularly salient issues, they are likely to pay close attention to the votes of the governor and their state representatives.

Of course, those who are excluded by suburban exclusionary zoning must live somewhere, and they are thus represented by their own municipal governments and state representatives. However, it is unlikely that city governments and state representatives will expend too much political capital fighting exclusionary zoning for at least three reasons. First, changing suburban zoning laws is unlikely to be

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development forces] are likely to be better organized and therefore better able to communicate their interests (and the strength of their vote) to politicians than are existing homeowners . . . .").

[76] *Id.* at 344.

[77] *See supra* note 34, and sources cited therein.

[78] *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 9-16, 28-36, 53-65 (2d ed. 1971) (explaining why large, diffuse groups will be under-organized due to free-riding problems and the consequent high cost of organizing).

[79] *Cf. id.* at 132-35 (explaining the "by-product" theory of interest group organization, in which organizations created for other purposes can effectively represent the interests of diffuse groups in the political arena).

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a very high priority for most of their constituents.[80] Most do not have immediate plans to move to an area where they do not know anyone, do not have a job waiting for them, and do not have a ready means of transportation.[81] This is true even if the housing market, unfettered by exclusionary zoning, provided them with affordable housing, of which we might be skeptical.[82] Most have more immediate concerns and would probably prefer to improve the environment in which they already live. Second, urban politicians and community leaders also have reason to prefer expending their political efforts on gathering funds to improve their cities. They have no interest in undermining their own political base by sending their voters into other jurisdictions.[83] Third, even if central city residents did prefer a policy of fighting exclusionary zoning, public choice theory's observation regarding government's low responsiveness to the preferences of diffuse interests, such as residents, applies in the larger, more complex political setting of the central city.

In summary, public choice theory suggests two things regarding the politics of exclusionary zoning. First, the political system cannot be trusted to adequately resolve the issue without a push from the courts. This suggests that if a legally cognizable issue is involved, the courts should try to do something in order to fashion a remedy

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[80] *See, e.g.*, Alan Mallach, *From* Mount Laurel *to Molehill: Blueprint for Delay*, N.J. REP., Oct. 1985, at 20, 27 ("Suburban housing opportunities . . . are not a priority issue for the urban poor.").

[81] These are also all reasons for being skeptical with respect to the size of the contribution of zoning to racial and class segregation. *See supra* notes 66-72 and accompanying text.

[82] Anthony Downs admits that "one of the most difficult parts of developing effective economic integration will be motivating central-city low- and moderate-income households to move into suburban neighborhoods." DOWNS, OPENING UP THE SUBURBS, *supra* note 1, at 136-37.

[83] *See* FISCHEL, *supra* note 28, at 318. Charles Haar describes this phenomenon in the New Jersey context. He notes that the Congressional Black Caucus, whose members are dependent on the concentration of African-Americans in predominantly minority districts, was "indifferent to the reforms of Mount Laurel," and that generally, "if pressed, black leaders would favor the doctrine, but never enthusiastically." HAAR *supra* note 8, at 165. Some "extremists," he notes, viewed *Mount Laurel* as a "white conspiracy to retain political dominance." *Id.* As we will see, minority urban politicians need not have worried. This lack of support carried over into the implementation stage of New Jersey's Fair Housing Act, which was a legislative response to *Mt. Laurel II*. Kenneth Gibson, the African-American former Mayor of Newark, is reported to have attended meetings of the Board of the Council on Affordable Housing (COAH), of which he was a member, only when Residential Contribution Agreements (RCAs) were scheduled to be discussed. *Id.* RCAs are mechanisms by which municipalities with *Mount Laurel* low-income housing obligations, i.e. suburbs, can pay other municipalities, i.e., cities, to take up to half of their obligation. *See infra* notes 262-63 and accompanying text.

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despite the difficulties involved. Second, although things seem bleak at the state level, they are not quite as bleak as at the local level. Interest groups, both economic and public, have some chance of success at the state level. However, given the organizational costs involved on the public interest side and the usually mild or nonexistent profitability of building low income housing on the economic interest side, opening up the suburbs to such housing is unlikely to appear on the state political agenda in the absence of judicial intervention. Such intervention might not only put the issue of exclusionary zoning on the agenda, but simply by changing the legal status quo, a court can also help level the political playing field to some degree.

There is one thing, however, that public choice theory does not tell us. While it can predict when the normal political process is unlikely to come up with the right answer to a socioeconomic problem, it provides no indication of what is the right answer.[84] Hence, while courts need to act forcefully enough to get the attention of the political branches, they need to be careful not to overly constrain their policy discretion and commit the state to a policy that might not work or might even be counterproductive. The court's authority is also at risk if the court is considered to have gone "too far" in fashioning a remedy. Now we turn to an examination of possible legal bases for court action and to the possible remedies a court might fashion in its effort to fight exclusionary zoning.

E. Possible Legal Bases for Fighting Exclusionary Zoning[85]

There are three main legal bases that state courts can utilize to fight exclusionary zoning, either separately or in combination: the General Welfare, Equal Protection, and Substantive Due Process, the latter particularly in the form of a right to housing or to travel.[86]

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[84] For an example of an advocate for public choice theory and judicial activism who misses this point, see Book Note, *Public Choice Theory: A Unifying Framework for Judicial Activism*, 110 HARV. L. REV. 1161 (1997) (reviewing CHARLES M. HAAR, SUBURBS UNDER SIEGE (1996)). While the author correctly notes that public choice theory supports Haar's belief that local and state government cannot be counted on to rectify exclusionary zoning, the author incorrectly attributes the "success" of the New Jersey judiciary's institutional and remedial creativity to public choice theory. *Id.* at 1164-65.

[85] It should be kept in mind that one limitation on the courts is that they usually can only address legal bases on which they have been briefed.

[86] While I am sure that other possible legal bases are conceivable, I believe that they will tend to fall into the above listed categories of either requiring that zoning ordinances further the general welfare, not impermissibly discriminate between people, or not impermissibly violate individuals' substantive rights. However, it is

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Each has its own limitations and difficulties, but they tend to follow a similar pattern. Specifically, each ultimately places the burden on courts to engage in the substantive evaluation of the merits of the zoning involved and the hurdles it places in the way of construction of lower-income housing.

Where the few courts that have waded into this area have been explicit about their doctrinal basis, they have generally relied on the requirement that the government, including municipal governments, further the general welfare. The key for fighting exclusionary zoning is to require that it be the welfare of the relevant region or state, and not just the welfare of the municipality, that is furthered by municipal policy.[87] This general welfare requirement can be derived from the state constitution,[88] from either an explicit clause or from the implicit idea that the police power can only be exercised to further the general welfare, or from the state's zoning enabling statute.[89] Almost all, if not all, enabling statutes include a general welfare clause because the Standard State Zoning Enabling Statute includes such a clause.[90]

The problems with utilizing a general welfare requirement are its vagueness and inherently political nature. It is easy for a court to justify its actions on a general welfare basis if the municipality admits

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also possible to conceptualize the general problem posed by exclusionary zoning as a violation of procedural due process, in the sense that it possibly represents a failure of the democratic process. *See* Payne, *supra* note 13; *supra* Part I.D.

[87] *See* Berenson v. Town of New Castle, 341 N.E.2d 236, 242 (N.Y. 1975) (stating that "consideration must be given to regional needs . . . There must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met."). The New York Court of Appeals was unclear whether the basis of its opinion was constitutional or statutory.

[88] *See Mt. Laurel II*, 92 N.J. at 208, 456 A.2d at 415 ("The constitutional basis for the *Mount Laurel* doctrine remains the same. The constitutional power to zone . . . is but one portion of the police power and, as such, must be exercised for the general welfare."); *Mt. Laurel I*, 67 N.J. at 174-77, 336 A.2d at 725-726.

[89] *See* Britton v. Town of Chester, 595 A.2d. 492, 495 (N.H. 1991) ("RSA 674:16 authorizes the local legislative body . . . . to adopt or amend a zoning ordinance 'for the purpose of promoting the health, safety, or *the general welfare of the* community' . . . When an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire region must be considered . . . .") (alteration in original). The New Hampshire Supreme Court did not reach the constitutional issue due to its "longstanding policy" not to do so when a case "can be decided on other grounds." *Id.* at 496.

[90] *See supra* text accompanying note 19; *see also* John M. Payne, *Exclusionary Zoning and the "Chester Doctrine,"* 20 REAL EST. L.J. 366, 368-69 (stating that the original standard act "is the grandparent of almost all zoning laws in the country" and "[t]hus, the general welfare language . . . will be found in the laws of virtually every state").

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that it was only zoning with the welfare of its own residents in mind, but a town is unlikely to make such an admission once the court has ruled that towns must take a wider perspective. As a result, the courts will be forced to judge each municipality's zoning ordinance on its merits with only the vague notion of the "general welfare" to guide it. It is difficult to conceive of a more inherently political and essentially standardless issue than the determination of what constitutes the general welfare and the best means to attain it.[91] Most courts have taken what might be considered a minimalist approach, requiring only that a municipality allow more than a de minimis amount of affordable housing[92] or certain housing types such as multi-family housing.[93] This approach requires that the court define affordable housing or the relevant housing "type," and then decide how much qualifies as de minimis. In practice, one cannot be sure whether any amount more than zero will trigger heightened scrutiny by the courts.

The logic of the general welfare approach pushes in the direction of what can be considered the maximalist approach taken by the New Jersey Supreme Court. The court articulated three aspects of the approach. First, one has to define the relevant region. Second, one has to define the need for low- and moderate-income housing within the region. Third, one has to allocate a share of this need to each municipality in the region.[94] Under the minimalist approach, the court is either asking the municipality to make a symbolic showing of taking the region's housing needs into account or requiring that a certain amount of housing be allowed with no factual basis to determine how much is enough. The problem with the maximalist approach is that it not only requires the court to legislate a low-income housing policy for the state, but it also requires

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[91] At least since *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and the "switch in time that saved nine," the courts have been very deferential to legislative determinations of the general welfare.

[92] *See Britton*, 595 A.2d 492.

[93] *See* Appeal of Girsh, 263 A.2d 395 (Pa. 1970) (striking down ordinance that only allowed multi-family housing by variance); Township of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466 (Pa. 1975) (striking down ordinance that had been amended following the commencement of a lawsuit by a developer to allow multi-family housing on eighty of its 11,589 acres, but not including the property owned by the developer). The Pennsylvania Supreme Court's approach to the housing issue follows from its general position that towns must not totally exclude land-uses that are not inherently undesirable. *See* Beaver Gasoline Co. v. Zoning Hearing Bd., 285 A.2d 501 (Pa. 1971) (striking down a municipal ban on gasoline service stations).

[94] *See Mt. Laurel II*, 92 N.J. at 248-49, 456 A.2d. at 436.

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the court to administer it. Putting aside for the moment the question of the legitimacy of such a course of action, it taxes the capacity of the state court system. In reference to the three issues mentioned above, even the New Jersey Supreme Court admitted that each "produces a morass of facts, statistics, projections, theories and opinions sufficient to discourage even the staunchest supporters of *Mount Laurel.* The problem is capable of monopolizing counsel's time for years, overwhelming trial courts and inundating review courts with a record on review of superhuman dimensions."[95] Even if the courts do manage to derive a formula for defining each municipality's "fair share" of low-income housing, the numbers will probably appear to be arbitrary and, given the complexity of the issue, they probably are.[96]

The two other basic legal bases for fighting exclusionary zoning—equal protection and substantive due process[97]—apparently

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[95] *Id.*, 456 A.2d at 436. As we will see, considerable procedural innovation on the part of the New Jersey Supreme Court and the three trial judges to whom it delegated these issues made it possible to overcome what might seem at first glance to be insurmountable obstacles.

[96] For the charge of arbitrariness from a commentator who is generally sympathetic with the *Mt. Laurel* decisions, see Payne, *supra* note 13, at 1709.

[97] Although it is not quite clear to what extent the New Jersey Supreme Court relied on them, the court did hold that zoning regulations that do not meet a municipality's fair share obligation "violate the state constitutional requirements of substantive due process and equal protection," and conflict with the general welfare. *Mt. Laurel II*, 92 N.J. at 208-209, 456 A.2d at 415 (citing *Mt. Laurel I*, 67 N.J. at 174, 336 A.2d at 725, 728). As for equal protection, the court stated that in exercising its control over the use of land, the state "cannot favor rich over poor," and that "[w]hile the state may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages." *Id.* at 209, 336 A.2d at 415. This comes pretty close to announcing that wealth, or at least poverty, is a suspect category. As for a right to housing, the New Jersey Supreme Court used it in conjunction with the general welfare requirement to reach the conclusion that a municipality must consider the regional welfare, and not just its own, when exercising its zoning power. *Id.*, 336 A.2d at 415. ("When the exercise of that power by a municipality affects something *as fundamental as housing*, the general welfare includes . . . [that of] those residing outside the municipality but within the region that contributes to the housing demand within the municipality.") (emphasis added). Even more remarkable, it should be kept in mind that the New Jersey Constitution does not actually have an equal protection or due process clause. Instead, it has an "unalienable rights" clause from which the protections of equal protection and (substantive and procedural) due process have been derived. N.J. CONST. art. I, para. 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."). I am not aware of a court decision that uses the right to travel to strike down exclusionary zoning, but it has been discussed approvingly in some of the academic literature. *See, e.g.*, Thomas Steel, Note, *The Right to Travel and Exclusionary Zoning*, 26 HASTINGS L.J. 849 (1975)

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only seem to avoid the policy morass of the general welfare standard. Facially, these two standards only require that courts ensure that municipalities do not discriminate on the basis of class or race or otherwise violate people's rights, as opposed to having to determine which policies further the general welfare. But, starting with equal protection, it should be kept in mind that the zoning ordinances involved are facially neutral with respect to class and race, and that municipalities are unlikely to admit that their motive was to keep out poor people, let alone to keep out people of a particular race or ethnicity. Hence, if an equal protection requirement is to have any bite, it must at least shift the burden of justifying the challenged zoning ordinance to the town upon a showing of disparate impact along class or racial lines. But, it is hard to imagine a zoning ordinance that does not have such a disparate impact.[98] As a result, each town will have to justify its zoning ordinance using neutral criteria and the courts will have to judge this justification.[99] Since some legitimate justification, even if only aesthetic, can be attributed to any aspect of a zoning ordinance, the courts will have to engage in the same sort of weighing of costs and benefits, including determination of regional housing need, under equal protection review that it would have to do under a maximalist general welfare analysis.

A rights-based approach premised on substantive due process or its state equivalent poses its own difficulties. It is not easy to define a right to housing or to travel or to define what counts as an infringement of them. With respect to a right to housing, presuming that one exists and that the right is derived from the state

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(arguing that much of zoning violates the right to travel). The United States Supreme Court has upheld a zoning ordinance that completely excluded multi-family housing against a right to travel challenge. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[98] Because the races are unevenly distributed by income, any disparate impact along class lines will also entail a disparate impact along racial lines.

[99] *Cf.* James J. Hartnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89 (1993) (arguing for the more aggressive application of the federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968, to state-administered housing programs such as New Jersey's). Citing *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988), Hartnett would require the defendant, once disparate effect had been established, "to show that no alternative plan would serve governmental interests with less discriminatory effect." Hartnett, *supra*, at 132. Taken literally, this burden would have little effect because each zoning ordinance serves a unique set of governmental interests. If taken loosely, the court becomes engaged in deciding whether the governmental interest outweighs the discriminatory effect.

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constitution, then the state government presumably has the duty to make the expenditures necessary to provide such housing for each of its citizens.[100] However, it is hard to imagine that everyone has a right to live in any one municipality in particular. Not everyone can live in the wealthiest suburbs in a state, and it is therefore hard to see how zoning can violate one's right to housing. Either the state satisfies its duty by providing its citizens with adequate housing someplace, or it does not.

The right to housing and the right to travel could be defined as a right to be free of any regulation or policy that makes it more difficult to acquire adequate housing and, hence, to migrate (assuming that we include the right to migrate within the right to travel). But, this is surely too broad as an absolute principle since almost every government action could be so characterized because it makes acquiring adequate housing more difficult for someone. Even applied to policies that directly increase the cost of housing, it cannot be absolute. A zoning regulation or building code that makes it only marginally more difficult to purchase housing might be justified if it has significant health or safety benefits. It should be kept in mind that zoning can raise the price of housing by increasing the desirability of housing. Once again, the court will have to engage in weighing the municipal benefits of the zoning in question against the harm it causes by decreasing the affordability of housing—lower-income housing in particular.

So, it does not seem to matter which doctrinal basis is chosen, but whether it is constitutionally or statutorily derived certainly does matter. Just to state the obvious, depending on the state amendment procedures, it is to various degrees more difficult for a state to amend its constitution than to pass a statute overriding a court's statutory interpretation. While both the constitutional and statutory approaches place the issue of exclusionary zoning on the state's legislative agenda, the constitutional approach makes it more likely that the court's' policy will not be overridden and does more to level the political playing field by more forcefully placing the status quo in favor of those excluded by exclusionary zoning. But, the other side of this is that it locks the state into what might be an unwise policy. Basing the court's decision on the state constitution also might have a more negative impact on the court's legitimacy. Another option is to base the principle on the state constitution, but not the remedy. This

[100] One problem with such a right is that court enforcement of the government duty to provide adequate housing is likely to create rigidities in government housing policy and lead to the neglect of competing demands on the public fisc.

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would provide the legislature with policy discretion, but would enable the courts to control the use of such discretion. This is how the New Jersey Supreme Court explained its earlier decisions when it upheld the New Jersey Fair Housing Act as a constitutional approach to the problem posed by exclusionary zoning.[101]

As for basing court policy on the federal constitution or a federal statute such as Title VIII of the 1968 Civil Rights Act, the United States Supreme Court has already interpreted the United States Constitution in such a way as to make it an inadequate vehicle for fighting exclusionary zoning and the federal courts could do the same with respect to any federal statute.[102]

F. Techniques for Fighting Exclusionary Zoning

The most obvious technique for fighting exclusionary zoning is simply to ban exclusionary zoning techniques, such as minimum lot requirements. However, since almost all zoning has some exclusionary effect, this would be the equivalent of banning zoning. A more moderate response would be to put limits on each technique, e.g., a ban on minimum lot zoning of an acre or more. Alternatively, the court could require that a certain amount of land be zoned at certain densities. Similarly, a court could require that a certain amount of land be zoned for certain types of housing, such as mobile homes or apartment buildings.[103] Of course, the difficult part is

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[101] Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 42, 510 A.2d. 621, 643 (1986) [*Mt. Laurel III*] ("Clearly, however, the method adopted was simply a judicial remedy to redress a constitutional injury. Achievement of the constitutional goal, rather than the method of relief selected to achieve it, was the constitutional requirement.") (citing *Mt. Laurel II*, 92 N.J. at 237, 456 A.2d at 430).

[102] *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (requiring proof of racially discriminatory intent or purpose to show a violation of the Equal Protection Clause); Warth v. Seldin, 422 U.S. 490 (1975) (denying standing to challenge a zoning ordinance to low-income minority residents, local taxpayers, and the local homebuilders association because none had interests in a specific project frustrated by the local zoning); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding a zoning ordinance that allowed no multi-family housing against a challenge based, inter alia, on the right to travel); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (applying low-level scrutiny to uphold Texas's method of funding public education against challenge that it discriminated against the poor); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (rejecting the existence of a constitutional right to housing in the context of upholding a law that made it more difficult for tenants to sue their landlords against an equal protection challenge).

[103] As already mentioned, to a modest extent, this is the approach that has been taken by Pennsylvania courts. *See supra* note 93 and accompanying text. One author has argued that since African Americans have a greater propensity to live in apartments, amending suburban zoning ordinances to allow for more apartment buildings would further integration. Paul J. Boudreaux, *An Individual Preference*

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deciding "the certain amount" for each municipality in such a way that does not appear arbitrary and does not lead to charges of unfairness. Another method, one that has been adopted administratively in Oregon for the Portland metropolitan area, is to set an overall density requirement for each municipality, such as ten units of housing for each unit of buildable land.[104]

Each of the above techniques is negative, in that it asks municipalities to loosen their regulations. One can imagine more affirmative obligations. First, instead of putting caps on the minimum requirements that towns can impose, the courts could mandate caps on actual development. For example, prohibiting towns from mandating minimum lot requirements of more than an acre does not guarantee that a developer will actually build at densities of more than a unit per acre. A court could impose a requirement that all development actually be on lots of less than an acre. But, note that the court would then no longer be fighting exclusionary zoning; it would be fighting the decisions of private developers. Instead of ordering that municipal regulations be relaxed, it would itself be imposing more regulation.

A somewhat different affirmative approach falls under the heading of "inclusionary zoning." This entails either requiring or inducing private developers to set aside a certain percentage of units in their proposed development for lower-income housing. Possible inducements include allowing development at greater than otherwise allowed densities, i.e., "density bonuses," fast-track permit approval, impact fee waivers, reduced parking requirements, reduced streetwidth and setback requirements, state housing bonds, below market-rate construction loans, tax-exempt mortgage financing, and land "write-downs."[105] When combined with adequate regulatory

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Approach to Suburban Racial Desegregation, 27 FORDHAM URB. L.J. 533 (1999). Furthermore, forcing towns to allow for apartment buildings might be more politically feasible than forcing them to accept lower-income housing. *Id.* at 559 ("Zoning for apartments, however, does not necessarily generate the politically poisonous tag of 'low-income housing' that often is implicated by traditional fair-share plans.").

[104] OR. ADMIN. R. § 660-007-0035 (2000). The Oregon "Metropolitan Housing Rule" requires that smaller municipalities within the Portland metropolis allow for an overall density of at least six units per acre, medium-sized ones for eight units per acre, and large urbanized cities for ten units per acre.

[105] *See* Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N 150, 156 (1998). Instead, the municipality could allow or require the developer to pay a fee that would be earmarked by the town for lower-income housing. This, however, is no longer a way of fighting exclusionary zoning, but is instead a way of placing the burden of financing lower-income housing on developers, while the municipality is allowed to

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relief, inclusionary zoning is a way to ensure that the easing of exclusionary measures by the town is translated into lower-income units by developers. Mandatory inclusionary zoning is controversial, because if the regulatory relief and financial assistance does not offset the developer's loss on the lower-income units, the inclusionary requirement acts as a sort of tax on the development, with the result that less overall development occurs.[106] Depending on the rate at which higher-cost units would otherwise eventually "filter down" to the lower-income housing market, lower-income households can actually be impaired.[107]

Each of the above approaches, other than simply banning certain zoning techniques, requires that the court have some idea how much lower-income housing each municipality ought to have. Otherwise, one does not know how much land should be zoned for certain lot sizes or for certain types of housing. This, in turn, requires the determination of regional housing need and how much of that need each municipality should take, considering its own particular attributes, such as how much buildable land it has. If the court does have a particular number in mind, it could just tell the town to meet it any way that it can, including the use of affirmative

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keep its exclusionary zoning in place. John Payne has advocated replacing New Jersey's municipal "fair share" approach with a statewide system of mandatory set-asides on all residential development and earmarked exactions on all nonresidential development. John M. Payne, *From the Courts: Housing Impact Fees*, 20 REAL EST. L.J. 75 (1991); Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20 (1987). Land "write-downs" are decreases in property assessments for property tax purposes, which are perhaps in line with decreases in land value that result from land being dedicated to lower-income housing.

[106] *See* Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981); *see also* FISCHEL, *supra* note 28, at 327-29. Fischel also argues that the municipal growth control movement might be a reaction to "court-ordered equality," and that the negative effect of this movement on lower-income housing outweighs the gains from the courts' efforts. *Id.* at 326-27, 329-31. But, it should be noted that in the state that has gone the furthest with court-ordered equality—New Jersey—municipalities cannot avoid their "fair share" of lower-income housing by keeping out all growth. And, as we will see, courts in only a handful of other states have taken up the fight against exclusionary zoning. *See infra* Part II.A.

[107] *See* Ellickson, *supra* note 106. *But see* Andrew G. Dieterich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (arguing, in response to Ellickson, that even when the total number of units produced is reduced by inclusionary zoning requirements, more lower-market units usually are produced than would have filtered down). Developers do tend to believe that inclusionary zoning requirements are detrimental to their financial interest and often resolutely oppose such requirements or seek additional compensation. *See* Calavita & Grimes, *supra* note 105, at 157, 165 (citing Robert Johnson et al., *Do Density Bonus Incentives for Moderate Cost Housing Work?* LAND USE L., Aug. 1990, at 3; Robert Rivinius, *The Case Against Inclusionary Zoning*, 1 LAND USE F. 25 (1991)).

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measures such as inclusionary zoning.[108] Although still rather activist, this method leaves the town in charge of its own zoning. It just has to make arrangements for some lower-income housing. The problem is making sure that such arrangements are adequately made. Given the numerous factors that determine the impact of zoning a particular tract of land in a particular way, this is far from an easy task. It is certainly to the credit of New Jersey's trial judges that they have done as well as they have, given that many thought the task nearly impossible.[109] Whether the outcome was worth the effort is another question, one that will be addressed in Parts II and III.

There is also the question of whether the courts should act upon one particular plot at a time or retain jurisdiction until the municipality rewrites its entire zoning ordinance. In other words, the court can decide to rezone the plot that the plaintiff bringing the suit wants to develop—a "builder's remedy"—or it can order the town to rewrite its ordinance as a whole in such a way that the result is sufficiently non-exclusionary.[110] Or, it can do both. More ambitiously still, as occurred in New Jersey, the courts could at the beginning of the process develop a standard formula for setting fair share numbers for every municipality in the state and then wait for lawsuits to come along in order to enforce the formula one plot or one town at a time.[111] Even if the court decides on the one plot at a time method, it still needs to know the demand for lower-income housing in the town

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[108] In the New Jersey Supreme Court's formulation, each municipality must "provide[] a realistic opportunity for the construction of its fair share of low and moderate income housing," with "realistic opportunity" defined as the "likelihood—to the extent economic conditions allow—that the lower income housing will actually be constructed." *Mt. Laurel II*, 92 N.J. at 220-22, 456 A.2d at 421-22.

[109] *See, e.g.*, Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 768-79 (1976) (arguing that courts are not equipped to zone or oversee the zoning on a municipal-wide basis). The above Note lists the following factors that must be considered when deciding how to re-zone a town for housing needs: existing drainage capacity, the cost of any new sewerage systems, present traffic patterns, the capacity of existing roads, ecological and landscape considerations, future demands for public services, the locations and capacity of existing schools, fire departments, and other municipal services. *Id.* at 775. See *infra* notes 221-25 and accompanying text for an account of the New Jersey trial courts' attempts at implementation. This Note, including the section cited here, is quoted at great length in Justice Mountain's partial concurrence and dissent in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 625-29, 371 A.2d 1192, 1265-66 (1977) (Mountain, J., concurring in part and dissenting in part).

[110] John Payne argues that the New York courts have adopted solely site-specific relief and that "[b]y requiring that exclusionary zoning be fought one development at a time, New York puts a premium on costly litigation that can be expected to deter many builders and most public interest groups." Payne, *supra* note 90, at 369.

[111] *See infra* notes 215-25 and accompanying text.

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in order to decide whether it outweighs that town's reasons for its zoning of the particular plot. And, since the demand for housing in any one town is a function of the regional housing market and the amount of housing that other towns in the market supply, it makes some sense to determine every town's fair share simultaneously. What a few state legislatures have done is to set an arbitrary fair share number for each town in the state, usually some variation on ten percent of the town's housing, and then put the burden on the defendant town to justify the denial of a building permit for the plaintiff's project if the town is below that number.[112]

Another strategy is to act indirectly by removing incentives for exclusionary zoning. For example, since a major motivation for exclusionary zoning is fiscal, moving taxation and the provision of services to the state level reduces the incentive to keep out those who cannot pay their own way.[113] Education, in particular, is easily the main expense that most municipalities face. By forcing the state to provide a greater proportion of the funding for each town's school budget to equalize disparities, the courts reduce one incentive motivating exclusionary zoning.[114]

I hope that the above relatively brisk overview of the issue of exclusionary zoning provides some notion of the difficulties involved and the wide variety of plausible policy responses. The complexity

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[112] *See* CONN. GEN. STAT. ANN. § 8-30g (West 1998); MASS. GEN. LAWS ANN. Ch. 40B, §§ 20-23 (West 2000); R.I. GEN. LAWS §§ 45-53 (1956). Connecticut town planners complain loudly about the builder's remedy, which upsets their planning. They say that they would much prefer a system like New Jersey's, which gives them a number to shoot for and then lets them come up with a plan to meet it. *See* Peter J. Vodola, *Connecticut's Affordable Housing Appeals Procedure Law in Practice*, 29 CONN. L. REV. 1235, 1266, 1273 (1997); Robert D. Carroll, Note, *Connecticut Retrenches: A Proposal to Save the Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247, 1264-65 (citing municipal planners complaining that the appeals "procedure acts as a zone-busting" device that takes away towns' ability to plan).

[113] *See* Note, *Making Mixed-Income Communities Possible: Tax Base Sharing and Class Desegregation*, 114 HARV. L. REV. 1575 (2001) (calling for the regionalization of the local property tax in order to reduce the incentive for fiscal zoning and thereby "promote the greater integration of different income groups within a metropolitan area").

[114] *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) (requiring the state to assume a greater role in funding public education based on its constitutional obligation to ensure "a thorough and efficient" education). Michael Schill, for example, argues that given the limitations of the courts and resistance at the local and state levels, an indirect approach, such as moving school funding, is the best strategy for "deconcentrating" the inner city poor. Schill, *supra* note 61. This is obviously a question of degree. While moving some school funding to the state level would be politically more feasible, I am skeptical that moving school funding completely to the state level will be much easier than doing so with respect to exclusionary zoning.

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and deeply political nature of the issue, I believe, makes the appropriate judicial response one of provocation and agenda-setting, rather than one of attempting to impose a final authoritative solution. I believe that the experience of the states supports this thesis as well as suggests some ideas with respect to how the courts should and should not go about the task of agenda-setting. This task is by no means easy or uncomplicated. The courts might fail despite the best of intentions and the most ingenious of efforts. It is to the experience of the states that we now turn.

II. THE EXPERIENCE OF THE STATES

Only a handful of state supreme courts have tackled the issue of exclusionary zoning—Pennsylvania, New York, New Hampshire, and New Jersey. The New Jersey Supreme Court went the furthest by mandating that municipalities zone in such a way, including affirmative measures if necessary, as to provide a realistic opportunity for a specific minimum number of low- and moderate-income housing to be actually constructed within their boundaries. Although it is a familiar story, I examine the New Jersey experience in some depth because it most clearly illustrates the issues posed by an aggressive judicial approach in terms of policy rigidity, capacity, and legitimacy. It further demonstrates that these are serious issues even if the ultimate aim is to set the legislature's agenda, as the New Jersey Supreme Court repeatedly suggested was its aim.

The other state courts have refused to quantify, instead deciding on a case-by-case basis whether the particular zoning ordinances before them were constitutional (Pennsylvania, New York) or statutorily legal (New Hampshire), based on criteria specific to the state. As I hope to show, it is unlikely that these approaches will directly result in as many lower-income housing units being built as New Jersey's, but, depending on the criteria and how strictly they are enforced, they could conceivably result in comparable amounts of such housing filtering down by lowering the costs of housing generally. There is some evidence that this might be true of Pennsylvania's approach, which is not aimed directly at lower-income housing at all.[115] As for socioeconomic and racial integration, even New Jersey's unusually aggressive approach has had very little impact.

The provocative approach taken by the New Jersey Supreme Court has the advantage of placing the issue of exclusionary zoning on the state legislative agenda. While the evidence suggests that this

[115] *See infra* Part II.A.1.

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might not have been particularly helpful in New Jersey's case, in Oregon, the creation of a state agency with a broad but vague mandate gave interest groups, including affordable housing advocates, a significant opportunity to influence land-use policy.[116] While on their own courts can only affect the margins, the political branches have greater capacity and the democratic legitimacy to bring about significant change in the ways municipalities exercise their zoning power.[117] Whether they will exercise their power in such a manner, and whether the courts can provoke them into doing so, is another question. As we shall see, at least for the present, the case of Oregon might be unique, while factors particular to New Jersey might have allowed the New Jersey Court to go as far as it did.

Lastly, this Part turns to the issue of who should implement the policy towards exclusionary zoning that the state does ultimately adopt. California provides a useful case study in this regard. The seeming inefficacy of court enforcement of California's anti-exclusionary zoning program suggests that, ideally, administrative agencies, and not the courts, should have this responsibility. This impression is reinforced by a comparison of the experiences of New Jersey and Connecticut (with respect to court enforcement) with those of Oregon and Massachusetts (with respect to administrative enforcement).

A. The Courts

1. Pennsylvania

The dominant focus of the Pennsylvania Supreme Court has been the rights of the landowner, but the court has been quite explicit that a desire to keep people out cannot justify denying landowners the right to build on their land.[118] While not concerned with lower-income housing per se, the court has struck down both

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[116] It should be noted that, in Oregon's case, the state agency was created by legislation that was not provoked by court action. However, the Oregon experience suggests that the provocation of such a legislative response can be a fruitful use of a court's power.

[117] It should be kept in mind that this might not significantly affect the actual provision of housing. This is something that the Oregon data might suggest. *See infra* notes 353-58 and accompanying text.

[118] *See, e.g.*, Nat'l Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965) (striking down a rezoning from one-acre to four-acre minimum lot requirements). The court held that "[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise . . . can not be held valid." *Id.* at 612. Like the New Jersey Supreme Court in its *Mt. Laurel* decisions, the Pennsylvania Supreme Court here seems to renounce "fiscal zoning."

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large-lot zoning[119] and the exclusion of certain housing types, multi-family housing in particular, that tend to be less expensive.[120] Although it did not expressly state it until *Surrick v. Zoning Hearing Board* (1977),[121] the constitutional basis of the court's decisions seems to have been a substantive due process concern that restrictions on property rights have a substantial relationship to legitimate state interests.

The cases involving the exclusion of housing types have generally followed two tracks: (1) total exclusions where the developer will almost always win (the *Beaver Gasoline*[122] track), and (2) partial exclusions where the record is more mixed and trending against developers (the pseudo-*Mt. Laurel* "fair share" track). Beginning with the first, the Pennsylvania Supreme Court has shown that it will almost never uphold a complete ban on multi-family housing. Building on its decision in *Appeal of Girsh*,[123] the court held in *Fernley v. Board of Supervisors*[124] that even municipalities that are fully developed or otherwise not in the path of future development must have some zoning for multi-family housing. Furthermore, the appropriate remedy was approval of the proposed development before the court (i.e., a builder's remedy), with the burden on the municipality to show that the development was "incompatible with the site or reasonable health and safety codes and regulations relating to lands, structures, or their emplacement on lands."[125] As mentioned earlier, any approach based on housing types has to define the relevant housing type. In *Appeal of Elocin, Inc.*, the court held that the relevant housing type was multi-family housing in general and not townhouses or high-rise apartments in particular.[126] The existence of a limited number of two-story, four unit apartments placed the case into the category of only partial exclusions.[127]

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[119] *See Kohn*, 215 A.2d at 612; Appeal of Kit-Mar Builders, Inc., 268 A.2d 765 (Pa. 1970) (striking down two- and three-acre minimum lot requirements).

[120] *See, e.g.*, Appeal of Girsh, 263 A.2d 395 (Pa. 1970) (striking down a zoning ordinance that totally excluded multi-family housing, although two apartment buildings had been permitted by variance).

[121] 382 A.2d 105, 108 (Pa. 1977).

[122] *See* Beaver Gasoline Co. v. Zoning Hearing Bd., 285 A.2d 501 (Pa. 1971) (striking down a municipal ban on gasoline service stations).

[123] 263 A.2d 395 (Pa. 1970).

[124] 502 A.2d 585 (Pa. 1985).

[125] *Id.* at 591. The court had already held in *Casey v. Zoning Hearing Bd.*, 328 A.2d 464 (Pa. 1974), that a municipality could not cure a challenged defect in a way that excluded the developer-plaintiff.

[126] Appeal of Elocin, 461 A.2d 771, 773 (Pa. 1983).

[127] The court explained: "Where a municipality provides for a reasonable share of

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Eight years prior to *Elocin*, the Pennsylvania Supreme Court had extended the holding in *Girsh* to partial exclusions.[128] Shortly thereafter, in *Surrick*,[129] the court, quoting approvingly from *Mt. Laurel I*, developed a multifactor test for determining whether a municipality had provided for its "fair share" of multi-family housing. The test focused on (1) the percentage of land available for multi-family housing, (2) the current population pressure within the town and the region, and (3) the amount of undeveloped land in the town.[130] Throughout, effect and not motive was to be the focus of the investigation.[131] This multifactor test was held in *Fernley* to apply only to partial exclusions and not to cases involving total exclusions.[132]

It soon proved difficult for a developer to win using the unquantified, case-by-case methodology of partial exclusion cases. After defining the exclusion as partial, developers lost in *Appeal of M.A. Kravitz Co. v. Board of Supervisors*[133] on the grounds that the town was not in the path of development. In *BAC, Inc. v. Board of Supervisors* (1993),[134] the court upheld a partial exclusion of mobile home parks on the grounds that the plaintiff had not overcome the presumption of validity that attaches to all zoning ordinances. Furthermore, the court made clear that it was concerned purely with the provision of a broad range of housing types and not with its affordability. Attributing to *Surrick* the "clear distinction between restrictions on uses of property and exclusions of classes of people," the court held that only the former was suspect because, unlike the latter, "it flows from the constitutionally protected right to own and enjoy property."[135]

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multi-family dwellings . . . it need not provide for every conceivable subcategory of such dwellings." Appeal of Elocin, 461 A.2d at 773.

[128] Township of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466 (Pa. 1975) (striking down as exclusionary a zoning ordinance that permitted multi-family dwellings on eighty of the municipality's 11,589 acres because it did not provide for the township's "fair share" of apartment construction).

[129] 382 A.2d 105.

[130] *Id.* at 111. The court noted that the factors listed were not meant to be exhaustive. *Id.* at 111 n.12. Although its holding was still focused on types of housing and not directly on their affordability, the court's reasoning suggested that it was interested in the creation of lower-income housing. Towns were required to "provide land-use regulations which meet the needs of all categories of people." *Id.* at 108. As we shall see, the court soon drew back from this position, eventually explicitly rejecting it in 1993. *See infra* text accompanying notes 134-35.

[131] *Surrick*, 382 A.2d at 110.

[132] *Fernley*, 502 A.2d 585 (Pa. 1985).

[133] 460 A.2d 1075 (Pa. 1983).

[134] 633 A.2d 144 (Pa. 1993).

[135] *Id.* at 147. The plaintiff had challenged not on the grounds that Millcreek had

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In 1988, the Pennsylvania General Assembly added two clauses to its general zoning enabling provisions that sought to incorporate its supreme court's standards. The first clause in particular is relevant; it states that each municipality's zoning ordinance shall "provide for . . . residential housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multi-family dwellings in various arrangements, mobile homes and mobile home parks."[136]

Two studies[137] that compare sample communities in Pennsylvania and New Jersey suggest that Pennsylvania's approach does at least as well, if not better, than New Jersey's in getting multi-family housing built, although one study does suggest that New Jersey's approach might be better at reducing minimum lot sizes for single-family homes. However, two caveats are in order. First, there is reason to believe that multi-family units are not a good proxy for lower-income housing when comparing Pennsylvania and New Jersey. Second, the studies only go up to 1990 and, as we will see, the distinctive New Jersey approach did not begin to operate until 1987-88. In fact, there was effectively a three-year moratorium on *Mt. Laurel* housing from 1985 through 1987 during the peak of a housing boom.[138] The premise of the Mitchell study, which covers the period from 1970 to 1990, is, in fact, that the New Jersey municipalities were "generally free [during the study period] to enact local zoning ordinances requiring large minimum lot sizes and excluding

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not zoned for enough mobile homes, but on the grounds that it had not zoned for enough housing for low- and moderate-income families. The court rejected the plaintiff's contention as an improper field for judicial inquiry.

[136] PA. STAT. ANN. tit 53, § 10604(4) (West 2001). The other clause requires that municipalities "accommodate reasonable overall community growth . . . and opportunities for development of residential dwelling types and nonresidential uses." PA. STAT. ANN. tit. 53 § 10604(5) (West 2001). The Michigan legislature also passed a statute in 1978 very similar to Pennsylvania's anti-total exclusion rule: "§ 27a. A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within the township or surrounding area within the state . . . ." MICH. COMP. LAWS ANN. § 125.297a (West 2000).

[137] James L. Mitchell, Assessing Exclusionary Residential Zoning: A Natural Experiment Approach (2000) (unpublished Ph.D. dissertation, Princeton University) (on file with author); G. Alessandro Giovannotto, Econometric Analysis of the *Mt. Laurel* Approach to Providing Affordable Housing in New Jersey (1994) (unpublished B.A. thesis, Dartmouth College) (on file with author). See *infra* note 287 for other data comparing Pennsylvania and New Jersey.

[138] This moratorium was mandated by New Jersey's Fair Housing Act, ostensibly to give the Council on Affordable Housing (COAH) an opportunity to promulgate regulations and to give towns time to formulate Fair Housing plans. *See infra* notes 260-61 and accompanying text.

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townhouses, apartments and mobile homes," while the Pennsylvania municipalities were not.[139]

Using aerial survey and housing census data of eight suburban counties surrounding Philadelphia, four from Pennsylvania and four from New Jersey, the Mitchell study found that single-family residential lot sizes were larger in Pennsylvania by an amount ranging from 0.13 to 0.22 acres, depending on whether means were compared or multivariate regression was used to control for housing-related and socioeconomic variables.[140] However, the degree of exclusion of townhouses, apartments, and mobile homes during the period was significantly less in Pennsylvania. Although the percentage share of new apartment units among total housing units was about the same in Pennsylvania and New Jersey, the percentage share of townhouses and mobile homes was 40% and 52% greater in Pennsylvania.[141] Controlling for housing-related and socioeconomic variables, regression analysis reveals that the odds of a new unit being a townhouse, an apartment, or a mobile home as compared to a single-family detached residence were 6.2, 3.8 and 4.8 times higher, respectively, in Pennsylvania than in New Jersey.[142]

The Giovannatto study, which covers the period from 1980 to 1990, using building permit data for select New Jersey and Pennsylvania suburban municipalities, found that a typical sample Pennsylvania municipality built 9% more multi-family units between 1980 and 1990 than did a similar New Jersey municipality.[143] However, the results became insignificant once the percentage of multi-family housing units was regressed against the study's control variables.[144]

The important point is that although there is some conflict between the two studies, they suggest that the Pennsylvania Court's approach has had some success in getting multi-family housing built. I do not believe that it says much about the New Jersey approach, however, because as stated earlier, the New Jersey approach did not begin to be implemented until 1987-88, shortly before the end of the study periods. Furthermore, the New Jersey approach never emphasized multi-family housing. There is even evidence that after

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[139] Mitchell, *supra* note 137, at 26-27.

[140] *Id.* at 157.

[141] *Id.*

[142] *Id.* at 157-58. More particularly, Mitchell utilized a multinomial, multivariate logic regression model.

[143] Giovannotto, *supra* note 137, at 96.

[144] *Id.* at 97.

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encountering resistance from municipalities, New Jersey's courts, as well as its Council on Affordable Housing (COAH), specifically avoided pressuring them into accepting multi-family housing in order to meet their fair share obligations.[145] Nevertheless, even if, for purposes of comparison, we were to accept New Jersey as a jurisdiction with no judicial control on exclusions of housing types, as the Mitchell study does, then the Pennsylvania approach, if accurate, had a significant effect.

But, two things should be kept in mind. First, the numberless, case-by-case approach to partial exclusions showed serious signs of judicial erosion in the 1980s and 1990s despite legislative reinforcement. In the face of municipal resistance, this erosion might be inevitable, and without a strong "fair share" approach in order to protect against "tokenism," it is unclear whether the tough anti-total exclusion approach will continue to have much impact on overall numbers. Neither study covers the 1990s. Second, it is unclear whether the housing type approach had much impact either directly or indirectly on the provision of lower-income housing. While multi-family housing is often cheaper than single-family housing, it need not be.[146] The housing market frequently combines with zoning and building regulations to make the provision of relatively upscale multi-family housing more profitable for the developer and, as we have seen, the more upscale the better from the municipality's point of view. As for indirect impact, it is possible that requiring some multi-family zoning in every town resulted in more housing units being built overall and that some of these extra units will eventually filter down into the range of lower-income households. But, one cannot tell from the studies whether more units were, in

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[145] *See* HAAR, *supra* note 8, at 166 ("Out of deference to the suburban ethic, the zoning revisions and other compliance mechanisms included in the courts' remedies were drafted with individual home ownership in mind."); *cf.* DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 159 (1995) ("While COAH flirted with requiring town plans to include rental housing, the agency backed off when the suburbs bristled."). The moral of this story might be that while you can get the suburbs to allow some lower-income housing and you can get the suburbs to allow some multi-family housing, it is very difficult to get them to allow lower-income multi-family housing, especially if it is rental housing. John Payne blames housing economics, arguing that the "dearth of rental housing results because the private sector did not want to build it and would not participate—even for the reward of a builder's remedy—if rental was a condition." Payne, *supra* note 13, at 1700. Current COAH regulations do require that municipalities meet 25% of their fair share obligation through rental housing and also grant bonus credits for its construction. N.J. ADMIN. CODE tit. 5 § 93-5.14 (2001).

[146] Admittedly, mobile homes are more uniformly inexpensive than either multi-family or single-family housing.

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fact, built than would have been otherwise.[147] Even if more units were built overall, significantly more work would have to be done to discover whether the amount of filtering has been significant.

2. New York

The New York Court of Appeals and the New Hampshire Supreme Court have both laid down precedents meant to limit the ability of municipalities to exclude lower-income housing by forcing them to take into account the regional welfare. However, although no data on the amount of housing created as a result exists, the non-quantified, case-by-case methodologies of these states do not seem to have proven very successful insofar as there has been little pro-development activity at the trial court level in either state. They have also failed to provoke legislative consideration of the problem. As for their legal bases, the New York line of cases implicitly utilizes substantive due process analysis,[148] while the sole New Hampshire decision relies on the "general welfare" language of the state's zoning enabling statute.[149]

The original landmark New York Court of Appeals decision, *Berenson v. Town of New Castle*,[150] on its face actually looks like a somewhat weaker version of the Pennsylvania "total use exclusion" jurisprudence. Confronted with a zoning ordinance that excluded multi-family housing from its list of permitted uses, the court held that "it *may* be impermissible in an undeveloped community to prevent *entirely* the construction of multiple-family residences

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[147] For what it is worth, according to census data, total housing units increased in New Jersey by 234,965 between 1990 and 2000, an increase of 7.6%, and increased by 311,610 in Pennsylvania, an increase of 6.3%. The 2000 census data is available at http://quickfacts.census.gov/hunits, and the 1990 census data is available through the "Start with Basic Facts-Housing Units" function at http://factfinder.census.gov/servlet/BasicFactsServlet (last visited September 26, 2001).

[148] *See* Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975) (*Berenson I*) ("[T]he [constitutional] validity of a zoning ordinance depends . . . on whether it is really designed to accomplish a legitimate public purpose.") (internal quotations and citations omitted).

[149] *See* Britton v. Town of Chester, 595 A.2d. 492, 495 (N.H. 1991) ("RSA 674:16 authorizes the local legislative body . . . to adopt or amend a zoning ordinance 'for the purpose of promoting the health, safety, or *the general welfare of the community*' . . . When an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire region must be considered . . . .") (alteration in original). The New Hampshire Supreme Court did not reach the constitutional issue due to its "longstanding policy" not to do so when a case can be decided on other grounds. *Id.* at 496.

[150] 341 N.E.2d 236 (N.Y. 1975).

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anywhere in the locality."[151] To judge whether it is impermissible, the court laid down a two-part test: (1) whether the zoning ordinance provides for the present and future housing needs of current residents, and (2) whether the ordinance gives due consideration to regional needs and requirements.[152] "The local desire to maintain the status quo," the court held, must be "balanc[ed] against the greater public interest that regional needs be met."[153] But if a town's neighbors supply enough multi-family housing to meet the regional housing need, the town need not permit any multi-family housing itself, unless a local need for it exists.[154] This is far from Pennsylvania's near per se rule against total exclusions.

While the original *Berenson* decision, like the Pennsylvania decisions, seems to focus on housing type, later decisions have interpreted it as focused on the provision of lower-income housing. On a later appeal of the case from the trial court, the appellate division held that the remedy need only be tailored to the housing needs of low- and moderate-income people.[155] The court of appeals in *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville* (1980)[156] interpreted the *Berenson* two-part test as requiring that a zoning ordinance be struck down as unconstitutional if it were enacted with an exclusionary purpose or if it showed a lack of regard for local and regional housing needs and had an unjustifiable exclusionary effect.[157] The *Kurzius* decision made clear that the burden was on the plaintiff to make these showings and that zoning ordinances, even those requiring five-acre minimum lots, enjoyed a presumption of constitutional validity.[158] In *Berenson*, the court had, in fact, cited *Village of Euclid v. Ambler Co.*[159] to the effect that "zoning

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[151] *Id.* at 242 (emphasis added).

[152] *Id.* The New York Court of Appeals seems to have adopted Pennsylvania's partial exclusion test in situations involving total exclusions, with apparently no test for partial exclusions.

[153] *Id.*

[154] *Id.* at 242-43.

[155] Berenson v. Town of New Castle, 415 N.Y.S.2d 669, 678 (N.Y. App. Div. 1979) (*Berenson II*) (severely limiting the trial court's relief because it "was referable to the housing market in general . . . and was not directly referable to the needs of the low income groups with which the [Court of Appeals] was primarily concerned").

[156] 414 N.E.2d 680 (N.Y. 1980) (upholding five-acre minimum lot zoning).

[157] *Id.* at 684. One commentator posits that this requirement is now considered a third prong of the *Berenson* test by New York courts. John R. Nolon, *A Comparative Analysis of New Jersey's* Mount Laurel *Cases with the* Berenson *Cases in New York*, 4 PACE ENVTL. L. REV. 3, 8 (1986).

[158] *Kurzius*, 414 N.E.2d at 684.

[159] 272 U.S. 365 (1926).

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ordinances are susceptible to constitutional challenge only if 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"[160]

Just how difficult a burden the plaintiffs faced became even clearer in *Suffolk Housing Services v. Town of Brookhaven*,[161] in which the plaintiffs were given the burden of showing that it was the town's regulations that were the cause of the "inadequate development of low-cost, multifamily housing" and not "factors such as rising construction and financing costs and economic stagnation."[162] This certainly makes sense theoretically, considering that the purpose of the court was to fight exclusionary zoning and not to create an affordable housing program. But, given the complexities involved and the myriad ways that municipalities can effectively block the construction of housing, the reality is that the burdens placed on plaintiffs by the *Berenson* line of cases make it extremely unlikely that they have done much to fight exclusionary zoning.[163] The court had asked, as early as *Berenson*, for the state legislature to take responsibility for the fight, but no help was forthcoming.[164] It seems that the court's attempt at legislative agenda-setting was too timid to provoke a legislative response.

3. New Hampshire

The New Hampshire Supreme Court has heard only one exclusionary zoning case in recent years. In *Britton v. Town of Chester*

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[160] *Berenson I*, 341 N.E.2d at 240. One commentator argues that "New York zoning decision makers may base their denials on very general findings that will be upheld unless proved to be arbitrary and capricious; an onerous burden for a developer to carry." Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: Lessons for Other States*, 8 J. AFFORDABLE HOUSING & CMTY. DEV. L. 36, 65 (1998).

[161] 511 N.E.2d 67 (N.Y. 1987) (upholding an ordinance that allowed no as-of-right multi-family development but which did allow for the issuance of special permits after a public hearing).

[162] *Id.* at 70.

[163] Robert Ellickson and Vicki Been note that "[o]nly a few lower courts have found zoning ordinances to fail the *Berenson* test, and then only in situations in which developing municipalities totally excluded multi-family housing." ELLICKSON & BEEN, *supra* note 75, at 949 (2d ed. 2000).

[164] *Berenson I*, 341 N.E.2d at 243 ("Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster . . . sound regional planning."). Julie Solinski observes that the New York legislature has not translated the court's requirements into "a statutory mandate of any kind," and that "without a statute on which to rely, the rejected developer has a heavier burden to bear in court." Solinski, *supra* note 160, at 63, 65.

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(1991),[165] the court endorsed a master's ruling that unless they have "substantial and compelling reasons" not to, towns must provide a "realistic opportunity to obtain affordable housing" to a proportionate share of the low- and moderate-income families within its region.[166] As stated earlier, the doctrinal basis of the court's decision was "the general welfare of the community" clause in New Hampshire's zoning enabling statute, with "community" interpreted by the court to mean "region."[167] In the case before it, the Town of Britton was held to be both in the path of future development[168] and to have had effectively blocked the construction of multi-family housing.[169]

The court ordered two sorts of remedies. First, it ordered the legislative body of Chester to bring those sections of its zoning ordinance that hindered the construction of multi-family housing into line with its opinion.[170] Second, it granted site-specific relief to the plaintiffs, i.e., a "builder's remedy."[171] Since every portion of the zoning ordinance hindered the construction of multi-family housing in that no part of it allowed a realistic opportunity for such housing, the only guideline was the court's "fair share" and "proportionate share" language. The court, however, gave no guidance for determining "fair" or "proportionate" shares and, in the builder's remedy portion of its opinion, the court denounced "the calculation of arbitrary mathematical quotas which *Mt. Laurel* requires."[172] So, as with the Pennsylvania and New York line of cases, the number of housing units for which a municipality has to plan is left something of a mystery by *Britton*.

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[165] 595 A.2d 492 (N.H. 1991).

[166] *Id.* at 498. The court's language very closely mirrors that of the New Jersey Supreme Court in its landmark *Mt. Laurel* decisions. *See infra* note 196 and accompanying text.

[167] *Britton*, 595 A.2d at 497.

[168] *Id.* at 493.

[169] *Id.* at 494-95. The court found that after taking home construction and environmental considerations into account, only 1.73% of the land of the town could reasonably be used for multi-family development. Furthermore, the standardless review process of the Planning Board was found "to escalate the economic risks of developing affordable housing to the point where these projects would not be realistically feasible." *Id.* at 495.

[170] *Britton*, 595 A.2d at 494.

[171] *Id.* at 497 (citing Fernley v. Bd. of Superiors of Schuylkill Township., 502 A.2d 585, 592 (Pa. 1985)). The court reasoned that "[a] successful plaintiff is entitled to relief which rewards his or her efforts in testing the legality of the ordinance." The court also noted that it was "the most likely means of insuring that low- and moderate-income housing is actually built." *Id.*

[172] *Britton*, 595 A.2d at 497.

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As for the builder's remedy, the court placed the burden on the developer "of proving reasonable use by a preponderance of the evidence."[173] "Reasonable use" was defined as (1) "providing a realistic opportunity for the construction of low- and moderate-income housing," and (2) being "consistent with sound zoning concepts and environmental concerns."[174] The burden was held to have been met in *Britton*.

There is no evidence that New Hampshire's trial courts have taken up *Britton* or that towns have reacted to it.[175] The New Hampshire Supreme Court itself has not cited *Britton* in an exclusionary zoning case since. In one case, *Caspersen v. Lyme* (1995),[176] the court did hold that landowner-plaintiffs within a mountain and forest zone with a fifty-acre minimum lot requirement lacked standing to bring an exclusionary zoning claim because they were not themselves excluded and had no plans to build lower-income housing.[177] With respect to a challenge to zoning restrictions on mobile homes, without mentioning *Britton* or its principles, the court pointed out that "plaintiffs carry the burden of proving the invalidity of a town's zoning ordinance; when a municipal ordinance is challenged, there is a presumption that the ordinance is valid and, consequently, not lightly to be overturned."[178]

4. New Jersey

a. Mt. Laurel I *and* II

In its landmark opinion, *Mt. Laurel I*, the New Jersey Supreme Court laid out the principle that every municipality "presumptively

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[173] *Id.* at 498.

[174] *Id.* at 497-98. As for the first requirement, the court found the plaintiff-developer to be committed to setting aside at least ten of the forty-eight units for low- and moderate-income tenants for twenty years. *Id.* at 497.

[175] William Fischel has written the author that the Town of Hanover worried about *Britton* shortly after the decision but that "that seems to have died out quickly." He notes that "[t]he decision seems to be sleeping" and that the court perhaps has been consumed by its recent school finance decision and the impeachment of the Chief Justice. E-mail from William A. Fischel, Professor of Economics, Dartmouth College (Feb. 22, 2001) (on file with author). New Hampshire Assistant Attorney General Leslie Ludtke seconded the view that the courts have not been active with respect to exclusionary zoning in the wake of *Britton*. Telephone interview with Leslie Ludtke (Mar. 13, 2001).

[176] 661 A.2d 759 (N.H. 1995).

[177] *Id.* at 761-62.

[178] Delude v. Town of Amherst, 628 A.2d 251, 254 (N.H. 1993) (internal quotations and citations omitted).

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cannot foreclose the opportunity . . . for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor."[179] Although the Township of Mount Laurel had recently allowed some multi-family housing by agreement in planned unit developments, the projects were designed to be beyond the reach of low- and moderate-income families and deliberately contained very few apartments having more than one bedroom in an effort to keep out school-aged children.[180] The court held that the fiscal rationales posited by Mount Laurel did not justify excluding lower-income households[181] and required Mount Laurel (and, by implication, other towns with similar zoning) to amend its zoning ordinance in accordance with its decision.[182] The court then waited. And waited.

The problem with *Mt. Laurel I* was that it was both too ambitious and not ambitious enough. On the one hand, the court required more than just multi-family housing and more than just some lower-income housing. It required a fair share of regional lower-income housing and quite clearly had specific numbers in mind.[183] On the other hand, the court not only failed to provide the numbers; it did not set out a procedure for providing them. Moreover, the court did not say what would happen if municipalities did not comply. Along these lines, it made no provision for builder's remedies and, in one case, *Oakwood at Madison, Inc. v. Township of Madison,* appeared to discourage them.[184] There, the court seemed to beat a retreat in

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[179] S. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. at 154, 336 A.2d at 724 (1975) [*Mt. Laurel I*]. The court went on to elaborate that once a plaintiff showed that municipal land-use regulations did not make low- and moderate-income housing available, "a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action." *Id.* at 181, 336 A.2d at 728.

[180] *Id.* at 166-70, 336 A.2d at 721-22. The court found the bedroom restrictions to be "so clearly contrary to the general welfare as not to require further discussion." *Id.* at 183, 336 A.2d at 729.

[181] *Id.* at 183-87, 336 A.2d at 730-31.

[182] Perhaps because the plaintiffs represented the poor and minorities and not a developer with specific plans, the court did not discuss the appropriateness of a builder's remedy.

[183] *Id.* at 190, 336 A.2d at 733 ("The concept of 'fair share' is coming into more general use and, through the expertise of the municipal planning advisor, the county planning boards and the state planning agency, a reasonable figure for Mount Laurel can be determined, which can then be translated to the allocation of sufficient land therefor on the zoning map.").

[184] 72 N.J. 481, 551, 371 A.2d 1192, 1227 n.50 (1977) (stating that builder's

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general, arguing that many of the complexities of the issue were beyond judicial competence and perhaps beyond human competence.[185] Trial courts, confronted with numerous, complex, and time-consuming exclusionary zoning cases, as well as with conflicting messages from the supreme court, were too deferential to the towns.[186] *Mt. Laurel I* could not be enforced as written.[187] Finally, after eight years of delay, the court ran out of patience.[188]

It quickly became clear during the proceedings of *Mt. Laurel II* that the New Jersey Supreme Court was concerned with more than just one reluctant suburb. The court was concerned instead with

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remedies "will ordinarily be rare").

[185] As for defining "the appropriate region," the court noted that experts' approaches vary so widely and "the pertinent economic and sociological considerations [are] so diverse as [to] preclude judicial dictation or acceptance of any one solution as authoritative." *Id.* at 499, 371 A.2d at 1200. The court also stated that "numerical housing goals are not realistically translatable into specific substantive change in a zoning ordinance . . . . There are too many imponderables . . . ." *Id.*, 336 A.2d at 1200.

[186] *See* Payne, *supra* note 13, at 1689-90 (stating that "the lower courts at times all but subverted Justice Hall's mandate in order to make them [the cases] go away"). Charles Haar has also noted an "internal division . . . between the infantry of the trial courts and the strategic headquarters of the supreme court," a division that was evident in the Mount Laurel litigation on remand. HAAR, *supra* note 8, at 32. The trial judge, claiming that he could not "make a determination of Mount Laurel's 'fair share' of housing needs . . . from the plethora of figures and formulae produced," deferred to the town's determination of fair share. S. Burlington County NAACP v. Township of Mt. Laurel, 161 N.J. Super. 317, 391 A.2d 935, 949 (Law Div.1978). The trial judge also cited *Oakwood*, 72 N.J. 481, 371 A.2d 1192 (1977), with respect to the difficulty of determining 'fair share' and for the proposition that courts are not themselves required to adopt fair share quotas. *Mt. Laurel*, 161 N.J. Super. at 343, 391 A.2d at 948.

[187] The court admitted that when it had relieved trial courts of determining fair shares with precision, it had "underestimated the pressures that weigh against lower income housing." S. Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 251, 456 A.2d 390, 438 (1983) [*Mt. Laurel II*].

[188] Some might argue that by anthropomorphizing the court, I am obfuscating the real reason for the court's change of approach from *Mt. Laurel I* to *Mt. Laurel II*, which was change of court personnel. While this explanation is tempting, considering that there were four new justices (out of seven) on the court by the time *Mt. Laurel II* was decided, including the author of *Mt. Laurel II*, Chief Justice Wilentz, I believe it is unsatisfactory. Although two justices had been replaced by the time of *Oakwood* (1977), including the author of *Mt. Laurel I*, Justice Hall, the plurality opinion in that case was arguably more conservative than not only *Mt. Laurel II* but also *Mt. Laurel I*. Furthermore, the opinions of Justices Mountain, Schreiber, and Clifford in *Oakwood* were all more conservative than even the plurality's decision. While Justice Mountain was no longer on the bench by the time of *Mt. Laurel II*, Justices Schreiber and Clifford joined the court's unanimous *Mt. Laurel II* opinion, as did Justice Sullivan, who had been part of the relatively conservative *Oakwood* plurality. This suggests that the changing of justices' minds was more important than the changing of justices.

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formulating "broad principles and rules of implementation."[189] Chief Justice Robert Wilentz ran the three-day proceedings like a "seminar in planning or a legislative committee hearing" in which the attorneys were treated like "graduate students or expert witnesses."[190] The thirty lawyers representing fifty separate parties and friends of the court in six merged cases were induced to take a broader perspective than their client's particular case and to focus on the larger policy issues.[191] Instead of presenting their clients' case, the lawyers were essentially drafted by the court, which assigned them specific items to address, such as "filtering" and neighborhood "tipping," for five to fifteen minutes apiece.[192] As Kirp et al., who defend the court's actions, conclude, "[t]his format transformed six cases into tools for making policy, as the Supreme Court inverted Sergeant Joe Friday's maxim to read 'everything *but* the facts.'"[193] Overall, the New Jersey Supreme Court showed a remarkable capacity to turn itself into a pseudo-legislature. As we will see, the three judges appointed by the court to implement *Mt. Laurel II* would show a similarly remarkable capacity to turn themselves into a pseudo-administrative agency.[194] The legitimacy of their doing so is another question.

The New Jersey Supreme Court began its *Mt. Laurel II* decision by reaffirming its commitment to *Mt. Laurel I*[195] and its holding that municipal land-use regulations provide "a realistic opportunity for low and moderate income housing."[196] It noted that after ten years since the trial court's original order, nothing of substance had occurred in the town of Mount Laurel and that that was typical of municipalities throughout the state.[197]

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[189] KIRP ET AL., *supra* note 145, at 96.

[190] *Id.* at 95. This was despite the fact that, as Kirp et al. report, the Chief Justice "took pains to remind the massed parties that the court was still a judicial tribunal and not a commission or a legislature." *Id.*

[191] KIRP ET AL., *supra* note 145, at 96.

[192] *Id.*

[193] *Id.* at 95-96. Kirp et al. continue, "The role of the court had become . . . coterminous with the domain of government." *Id.* at 96.

[194] *See infra* notes 215-29 and accompanying text.

[195] *Mt. Laurel II*, 92 N.J. at 199, 456 A.2d at 410 ("This court is more firmly committed to the original *Mount Laurel* doctrine than ever, and we are determined, within judicial bounds, to make it work.").

[196] *Id.* at 198, 456 A2d at 410.

[197] *Id.* at 198-99, 456 A.2d at 410 ("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.").

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In response to the ineffectuality of *Mt. Laurel I*, the New Jersey Supreme Court created broad guidelines, according to which three specially assigned trial judges would, with the help of special masters, designate specific fair share numbers for every municipality in the state and see to their implementation. The court essentially turned itself into a legislative body, with its eighty-two page decision constituting the enabling legislation for three regional zoning agencies, each with a trial judge at its head. It adopted the State Development Guide Plan as a means of determining which municipalities were in the path of development and hence had a fair share obligation.[198] The court delegated to the three judges, whom they would later appoint, the responsibility for determining housing regions, low- and moderate-income housing need within each region, and municipal fair share.[199]

The court justified its requirement of precise numbers pragmatically. It basically admitted that accuracy in these matters was an illusion but that without numerical requirements nothing would get done.[200] This belief was justified by its eight years of experience between 1975 and 1983. In addition, the three judges were to be given broad remedial powers. Builder's remedies were now to be rewarded unless the "municipality establishe[d] that . . . the plaintiff's proposed project is clearly contrary to sound land use planning."[201]

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[198] *Id.* at 222-49, 456 A.2d at 422-36.

[199] *Id.* at 249-59, 456 A.2d at 436-41. The court stated that the three judges would be guided by "previously accepted definitions and methods," such as the definition of a housing region as "that general area which constitutes, more or less, the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would be substantially drawn." *Id.* at 256, 456 A.2d at 440. It left the job of defining regional need to experts appointed by the trial courts, but did provide some guidance for the creation of formulas for deciding fair share. Namely, they should give substantial weight to new employment opportunities in a municipality, especially those with substantial ratables, and should not give substantial weight to the current proportion of lower-income residents or otherwise reward towns for their past successful exclusion of lower income housing. *Id.*, 456 A.2d at 440.

[200] *Mt. Laurel II*, 92 N.J. at 257, 456 A.2d at 441 (stating that precise numbers are "required not because we think scientific accuracy is possible, but because we believe the requirement is most likely to achieve the goals of *Mount Laurel*").

[201] *Id.* at 279-80, 456 A.2d at 452. To qualify for the builder's remedy, the proposed project had to include a "substantial" amount of lower income housing. What counted as "substantial" in a particular case was left to the three trial judges to decide, but the court proposed that 20% "appears to us to be a reasonable minimum." *Id.* at 280, 456 A.2d at 452 n.37. One developers attorney later stated that, under the new standard, municipalities were like "baby harp seals. They can slither and squeal, but no municipality seems to have won a *Mount Laurel II* lawsuit. The townships decide to give in fast because the killing is really much more merciful if it's quick." KIRP ET AL., *supra* note 144, at 105 (quoting attorney Henry Hill).

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In addition, the trial court could order the municipality to revise its zoning ordinance according to its specifications within ninety days and appoint a special master with land-use expertise to "advise" the municipality with respect to its task.[202] And, if the revised ordinance still did not meet constitutional muster, the trial court could order particular amendments, halt other developments, relax or eliminate building or use restrictions, and order that particular applications to construct housing that included lower-income units be approved.[203] These implementation powers were "more than adequate" to overcome municipal recalcitrance, according to one defender of *Mt. Laurel II*.[204] The court knew that it was pushing the boundaries of judicial remedial power, but argued that since there was a constitutional obligation, they could not "allow it to be disregarded and rendered meaningless by declaring that we are powerless to apply any remedies other than those conventionally used."[205]

The court also gave some advice to towns regarding how they could meet their *Mt. Laurel* obligations by removing excessive restrictions and exactions[206] and, more affirmatively, by promoting the use of state and federal subsidies and by implementing inclusionary zoning techniques.[207] The court observed that simply permitting lower-income housing was not enough, that positive inducement was necessary to get lower-income housing built.[208] This

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202 *Mt. Laurel II*, 92 N.J. at 280-86, 456 A.2d at 453-55.

203 *Id.* at 285-86, 456 A.2d at 455.

204 HAAR, *supra* note 8, at 238 n.14.

205 *Mt. Laurel II*, 92 N.J. at 287, 456 A.2d at 456.

206 *Id.* at 255-59, 456 A.2d at 450-52.

207 *Id.* at 259-75, 456 A.2d at 442-50.

208 *Id.* at 261, 456 A.2d at 442 ("Satisfaction of the *Mount Laurel* doctrine cannot depend on the inclination of developers to help the poor. It has to depend on affirmative inducements to make the opportunity real."); *id.*, 456 A.2d at 442 ("It is equally unrealistic . . . simply to rezone that land to permit the construction of lower income housing if the construction of other housing is permitted on the same land and the latter is more profitable than lower income housing."); *id.*, 456 A.2d at 443 ("[T]he construction of lower income housing is practically impossible without some kind of subsidy."). The New Jersey Supreme Court has recently decided to revisit the issue of positive inducement by granting certification to the case of *Toll Bros. v. Township of West Windsor*. *Toll Bros.* raises the issue, inter alia, of whether zoning exclusively for a mix of high-density units such as townhouses, condominiums, and zero lot-line singles or patio homes is insufficiently inclusionary because the lack of profitability of such housing types provides insufficient inducement to builders. In other words, the question is whether allowing *only* high-density or lower-income housing can be exclusionary because no one will actually build it. *See* Toll Bros. v. Township of West Windsor, 303 N.J. Super. 518, 697 A.2d 201 (Law Div. 1996) (holding that marketability is a factor that courts should consider when deciding the validity of fair share plans), *aff'd*, 334 N.J. Super. 109, 756 A.2d 1074 (App. Div.

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suggests that two things actually need to be done to get lower-income housing built: (1) the breaking of exclusionary zoning ordinances, and (2) the provision of public or private subsidies. Besides describing its desire that lower-income housing actually get built, the court never explained why municipalities have a constitutional obligation with respect to positive inducement.[209] I admit, however, that this observation is somewhat unfair since other government regulation, such as building codes and control over infrastructure as well as costly permit processes, contributes to the unprofitability of lower-income housing. In other words, towns have numerous tools for preventing the construction of low-income housing. But, the most direct approach to addressing the problems posed by such other regulation is reform and oversight of the problematic regulations. If subsidies are still thought necessary on a remedial basis, tenant-based subsidies, such as housing vouchers, might be more appropriate, as well as more efficient, than project-based subsidies.[210] However, tenant-based subsidies provided at the state level do not solve the problem of municipalities differentially utilizing regulatory processes to keep out lower-income housing.

The court was quite aware that it would be charged with usurping legislative and executive functions. It agreed "that the matter is better left to the Legislature."[211] But, given that the Legislature had not acted to protect what it believed to be constitutional interests, they were forced to do so "through their own devices, even if they [we]re relatively less suitable."[212] When the Legislature eventually did act, the court demonstrated that these words of deference were more than just rhetoric, perhaps to an extent that the court did not fully intend originally.[213] But, in the meantime, the three trial judges appointed for the task by the New Jersey Supreme Court, L. Anthony Gibson, Eugene D. Serpentelli, and Stephen Skillman faced the imposing task of defining regions,

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2000), *cert. granted in part*, 167 N.J. 600, 722 A.2d 914 (2001).

[209] New Jersey's Fair Housing Act specifies that "[n]othing in this act shall require a municipality to raise or expend municipal revenues in order to provide low and moderate income housing," but, nevertheless, clearly anticipates municipalities using various affirmative measures in order to achieve their assigned fair share numbers. N.J. STAT. ANN. § 52:27D-311 (West 2001).

[210] *See* JOHN C. WEICHER, PRIVATIZING SUBSIDIZED HOUSING (1997) (arguing for the superiority of tenant-based housing subsidies to project-based subsidies).

[211] *Id.* at 417.

[212] *Id.*

[213] *See infra* notes 269-73. The court did say in *Mt. Laurel II* that it wished to send a "clear signal of our readiness to defer further to more substantial [legislative] actions." 92 N.J. at 213, 456 A.2d at 417.

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regional need, and fair shares of low- and moderate-income housing for the developing towns that were brought before them.[214]

b. Judicial Implementation and the Troika

The combination of the builder's remedy with the mid-1980s vibrant housing market brought a slew of lawsuits—after one year, sixty-one cases were pending and after two, the number had more than doubled to 125.[215] Although most of the plaintiffs were private developers, the case that resulted in the consensus methodology for determining region, regional need, and fair shares was brought by the National Urban League against all twenty-three municipalities in Middlesex County.[216] Faced with a myriad of parties, lawyers, and experts, Judge Serpentelli essentially turned to "regulatory negotiation"[217] as a way for creating the necessary methodology. After briefly attempting to hear testimony conventionally, Judge Serpentelli placed the parties' nearly two dozen planning experts, along with a few professional planners not involved in the litigation and a planner hired by the judge to coordinate the effort, in a conference room without any lawyers and ordered them to work out the relevant formulas.[218] After meeting for "days on end for a period

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[214] The three judges were selected after a series of interviews with Chief Justice Robert Wilentz. As Charles Haar observes, "it [wa]s unlikely that, after their conversations with the chief justice, any of them would purposely misconstrue [the *Mt. Laurel* doctrine] or narrowly apply it." HAAR, *supra* note 8, at 55. Besides ensuring loyalty to the doctrine and consistency in its application, the supreme court's aim in confining all exclusionary zoning cases to three judges seems to have been to develop expertise on their part. *Mt. Laurel II*, 456 A.2d at 439-40. Connecticut's Affordable Housing Land Use Appeals Procedure Act seems to have had the same goal in mind: "To the extent practicable, efforts shall be made to assign such cases to a small number of judges so that a consistent body of expertise can be developed." CONN. GEN. STAT. § 8-30g(b) (2001).

[215] *See* KIRP ET AL., *supra* note 145, at 104. Kirp et al. cite this slew of activity as evidence that it was exclusionary zoning and not economics that had prevented the construction of low-cost housing. *Id.* They fail to note that if developers had not been allowed to build mostly expensive market-rate units, usually up to 80% of the development, which could effectively subsidize the construction of the lower-income units, it is unlikely that many developers would have been forthcoming. The building activity does show that zoning had been preventing the construction of high-cost housing.

[216] AMG Realty Co. v. Township of Warren, 207 N.J. Super. 388, 504 A.2d 692 (Law Div. 1984). *See* HAAR, *supra* note 8, at 57; KIRP ET AL., *supra* note 145, at 106.

[217] For a description of "regulatory negotiation" as an administrative method, see Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1208-12 (1994); Ellen Siegler, *Regulatory Negotiations: A Practical Perspective*, 22 ENVTL. L. REP. 10,647 (1992).

[218] *See* HAAR, *supra* note 8, at 57; KIRP ET AL., *supra* note 145, at 106. If Lon Fuller were not already spinning in his grave after the *Mt. Laurel II* proceedings, Judge

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of several months," the planners succeeded at achieving a consensus on the formulas.[219] Incorporated in a 150-page decision, the new methodology was applicable to all municipalities in the state and, with only modest variation, it was adopted by the two other *Mt. Laurel* judges.[220] To the charge that he had abdicated his authority to the planners, Judge Serpentelli admitted that "[t]he planners were working in my courtroom without any supervision from me," but asserted that the unconventional proceedings had been the only feasible way of resolving the issue.[221] He simply did not have the capacity to do it any other way, at least in a reasonable amount of time.[222]

Having settled on a set of formulas for deciding regional need and municipal fair share, the three judges still had the difficult task of applying it in specific instances of litigation. In addition to setting numbers for each town, they had to judge the adequacy of revised zoning ordinances and supervise their implementation. In order to do this, the judges turned themselves into something like three streamlined regional administrative agencies, headed by them and staffed with expert special masters. These special masters, with expertise in land-use and environmental planning, were crucial if the judges were to do what the formulas demanded and also handle "economic projections, estimates of job availability, projections of housing need, environmental impact statements, and planning criteria for the suitability of sites."[223] In order to evaluate revised ordinances, the judges needed to evaluate the suitability of the land zoned for inclusionary developments and the relevant infrastructure,

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Serpentelli's methodology must have had him doing so. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (arguing against the legitimacy of "polycentric" judicial decision-making largely on the basis that it does not allow the parties to control the litigation or allow their arguments to shape the decision).

219 KIRP ET AL., *supra* note 145, at 106. Kirp et al. cite one of the planners, Alan Mallach, as recalling that "our first reaction was, 'Thank God the lawyers aren't here. Now we can talk about the real issues.'" *Id.* Mallach also recalled that "[a]lmost everyone . . . focused on the methodological problems, not on how the outcome would affect their particular client. The planners representing municipalities happened to be individuals of high levels of integrity or wanted to be seen by their peers as being such . . . ." *Id.*; *see also* HAAR, *supra* note 8, at 57.

220 *See* HAAR, *supra* note 8, at 57, 67; KIRP ET AL., *supra* note 145, at 106-07.

221 KIRP ET AL., *supra* note 145, at 107.

222 *Id.* Judge Serpentelli told Kirp et al. that it "would have taken me years to come up with something, and even then my own training was so inadequate in terms of what planners do, statistical analysis and all that stuff, that I might never have come up with anything useful." *Id.*

223 *See* HAAR, *supra* note 8, at 200, 72-86.

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as well as the sufficiency of the incentives supplied by the municipality to prospective developers.[224] The judges even had to examine such things as clouds on the title of the rezoned sites and whether the current owners would be willing to sell to an inclusionary housing developer.[225]

Courts are not traditionally equipped to derive formulas for determining regional need and municipal fair share, or to guide their implementation at the municipal level. The nature of adjudication and litigation is commonly thought to limit the ability of courts to make such policy decisions.[226] But, the New Jersey experience shows that an aggressive and creative judiciary can, to a surprising extent, overcome the institutional constraints on its capacity if it is permitted to do so.[227] The New Jersey Supreme Court and its three selected trial judges exhibited tremendous flexibility when it came to fashioning remedies, as well as refashioning themselves and their own procedures. They overcame their informational constraints not only by hiring their own experts, but by co-opting the experts of the parties before them.[228] Through the use of the builder's remedy, they overcame, to at least some degree, their lack of power over the public purse and the lack of ability to monitor compliance after relinquishing jurisdiction.[229] However, this increase in judicial "legislative" and "administrative" capacity came at a cost.[230]

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[224] *Id.* at 141. The judges set specific targets, timetables, and compliance mechanisms, all of the details of the necessary "affirmative reordering." *Id.* at 140. As Haar states, "it became normal practice for judges to examine each component of newly revised zoning ordinances." *Id.* at 141

[225] HAAR, *supra* note 8, at 141-42. One of the judges told Haar that even if the sites seemed perfectly suitable, he had to ask "What happens if the owner's a bigot . . . [and] perceives Mount Laurel as a race issue . . . and is committed to fighting it from now to kingdom come? That surely is not a realistic opportunity . . . ." *Id.*

[226] *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (arguing that courts cannot capably decide "extended impact cases" because of their lack of control over the timing of intervention, their lack of comprehensive information, their lack of flexibility, and their lack of monitoring ability with respect to compliance and with respect to secondary and tertiary effects of their policies).

[227] Haar concludes that the *Mt. Laurel* history "puts to rest charges that judges lack the capacity to formulate and implement complex remedies." HAAR, *supra* note 8, at 148.

[228] This is in addition to developing expertise of their own. Haar observes that "[f]amiliarity bred expertise, and . . . they learned not only to ask the right questions of contending experts but also to gauge the usefulness and limitations of professional testimony." *Id.* at 83.

[229] *Id.* at 130-31; KIRP ET AL., *supra* note 145, at 112-13; Tarr & Harrison, *supra* note 22, at 547-56 (analyzing favorably the New Jersey Supreme Court's performance in *Mt. Laurel II* in light of the Donald Horowitz critique of judicial policymaking).

[230] *See generally* J. Craig Youngblood & Parker C. Folse III, *Can Courts Govern? An*

I will discuss later the possible cost in terms of democratic self-determination and the legitimacy of judicial policymaking.[231] Here, I have in mind the cost in terms of the fairness and neutrality of the adjudicative process.

Charles Haar, a prominent defender of *Mt. Laurel II* and its judicial implementation, readily admits that the "adversarial process model" is insufficient for the remedial focus of institutional reform.[232] First, basing a decision solely on the information and arguments presented by the parties in court is insufficient in complex institutional reform cases with widespread impact. One needs wider participation and bargaining, often in private, between all those affected and those with expertise.[233] Second, in order to get things done in anything approaching a timely manner, one needs to streamline the procedural "underbrush" of discovery, interrogatories, motions, and appeals.[234] Third, continuing ex parte dialogue between the three trial judges and their special masters, as well as with the parties, is necessary.[235] Haar justifies these departures from normal adjudicative procedure on the basis that liability was not really an issue and that they were necessary for crafting remedies.[236] But, even if it were true that these procedural modifications did not effect the finding of liability, they could easily lead to bias or the perception of bias in the crafting of remedies. This bias could run in either the plaintiff's or the defendant's direction depending on the disposition of the judge and the special master, who, working as a team, wielded significantly more power and discretion than is normally the case.

Inquiry into Capacity and Purpose, in GOVERNING THROUGH COURTS 23, 50-62, (Richard A.L. Gambitta et al. eds., 1981) ("Improving a court's policymaking capacity is not costless. It would threaten the institutional integrity of the court and its ultimate legitimacy as an expounder and protector of rights.").

[231] *See infra* Part III.B.

[232] HAAR, *supra* note 8, at 136.

[233] *Id.* at 137. Haar characterizes institutional litigation, generally, as "essentially a matter of politics, involving a broad canvas of deal making, negotiating, consensus building and persuasion." *Id.* at 156. With respect to the three New Jersey judges, he states that "in-chambers resolution of the issues became the norm." *Id.* at 144. He concludes that the New Jersey courts created "a new form of governance" combining administrative and judicial approaches. *Id.* at 143-44.

[234] HAAR, *supra* note 8, at 143-44. The New Jersey Supreme Court explicitly called for streamlined procedures and limited appeals to one. *Mt. Laurel II*, 92 N.J. at 290-92, 456 A.2d at 458-59.

[235] HAAR, *supra* note 8, at 84-85, 138.

[236] *Id.* at 136-37.

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The fourth irregularity, the dedication of the entire project to three specially selected judges, gives rise to the danger of a "mission-orientation."[237] Haar notes that, in general, "a special joy arises from fulfilling a mission that goes beyond law books and legal briefs."[238] He notes that some of the judges worried about the procedural shortcuts, but, for most, they were worth it because the judges were "working for a worthy cause."[239] He also notes that the judges could appear to be pleading the plaintiff's case, but justifies this on the basis that the impecunious and overmatched plaintiffs need the help.[240] Finally, Haar admits that "intuition, empathy, and personal visions of the ideal community . . . rather than explicit text or precedent—played a paramount role."[241] And yet, despite all this, Haar concludes that "the judges' internal control over excessive discretion remained strong,"[242] and that the judges were, "if anything, oversensitive to the traditional limits on unbridled exercise of judicial power," such as precedent and party input.[243] Based on Haar's own account, even those similarly sympathetic to the cause might disagree.

c. The Fair Housing Act and COAH

Neither New Jersey's suburbs, nor its governor, nor its state legislature viewed the supreme court or its three selected trial judges as having been "oversensitive to the traditional limits on unbridled" judicial power. Rather, they viewed their acts as a usurpation and perhaps a "communistic" one at that.[244] As Haar puts it,

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[237] One judge is cited anonymously by Haar as being worried that lawyers and litigants saw them as an administrative agency appointed to promote open housing and chosen because they were so committed. *Id.* at 152.

[238] *Id.* at 150.

[239] *Id.* at 153.

[240] *Id.* at 152-53.

[241] HAAR, *supra* note 8, at 154.

[242] *Id.* at 152.

[243] *Id.* at 157.

[244] For a description of the political reaction to *Mt. Laurel II* and its implementation, see HAAR, *supra* note 8, at ch. 6 (*The Legislature Strikes Back*) and KIRP ET AL., *supra* note 145, at ch. 6 (*The Politics of "No"*). For Governor Thomas Kean's famous quip that *Mt. Laurel II* was "communistic," see KIRP ET AL., *supra* note 145, at 111. A Republican legislator also referred to the *Mt. Laurel* doctrine as "absolute communism" during floor debate. HAAR, *supra* note 8, at 92. As far as judicial usurpation is concerned, twenty-two towns, joined by Republican members of the State Assembly, went as far as to hire an expensive New York law firm to bring suit in federal court contending that the justices had denied New Jersey of the "Republican Form of Government" guaranteed to all states by Article III, Section 4 of the United States Constitution. *Id.* at 110-11. After much fanfare and taxpayers' dollars spent

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"[m]unicipalities exerted intense pressure on the governor and the legislature to do something—anything—to save them from the clutches of the courts."[245] What eventually emerged was the Fair Housing Act (FHA) of 1985.[246] The main motivation of the Governor and the legislature was to appease the suburbs while removing exclusionary zoning as a political issue.[247] Amending the constitution, while favored by some legislators, would have raised the visibility of the issue even further and given pro-*Mt. Laurel* public interest groups, such as the NAACP, an issue with strong rhetorical power: the white legislature with help from the white governor was amending the state constitution in order to allow white suburbs to keep African-Americans out. This was not the sort of publicity that the governor and legislature wanted for New Jersey. Furthermore, an organized coalition in support of the *Mt. Laurel* doctrine had coalesced, consisting of pro-development groups, such as developers and realtors, along with advocates for the poor.[248] But, although they agreed to go along with the FHA, the Governor and previously anti-*Mt. Laurel* legislators certainly were not converts to the cause, and neither were suburbanites.[249]

The FHA was calculated to mimic the proscriptions of *Mt. Laurel II* just enough that the besieged New Jersey Supreme Court would

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on legal research, the effort "fizzled." Mallach, *supra* note 80, at 22.

[245] *See* HAAR, *supra* note 8, at 90.

[246] 1985 N.J. Laws 222 (codified as amended at N.J. STAT. ANN. §§ 52:27D-301-329 (West 2001)). The issue of exclusionary zoning had been kicking around the governor's office and the state legislature since the 1960s. *See* KIRP ET AL., *supra* note 145, at 114-19.

[247] Telephone Interview with Stephen Eisdorfer, New Jersey land-use attorney and co-author with Naomi Bailin Wish of *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV 1268, (1997) (Feb. 23, 2001).

[248] Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 660, 661 & n.220 (1987).

[249] Harold McDougall's suggestion that the FHA passed because "the court's action resulted in the forming of a[n anti-exclusionary zoning] political consensus" and because "public opposition to *Mt. Laurel* was superficial" is not borne out by the facts. *Id.* at 660. In 1985, a referendum appeared on the ballot of 221 New Jersey towns and five counties asking the legislature to begin the process for amending the constitution so that "courts c[ould] not force municipalities to change their zoning laws to accommodate *Mount Laurel* housing." It passed in every single jurisdiction, 226 for 226, by an average margin of two to one. KIRP ET AL., *supra* note 145, at 136. It was also not a coincidence that Democrats were "shellacked" in fall legislative elections and Thomas Kean reelected in the biggest landslide in New Jersey history. *Id.* at 135. *See also, e.g.*, G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 220, 223 (1988) (describing the reaction to *Mt. Laurel II* as "overwhelmingly negative . . . universal condemnation").

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uphold its constitutionality, while providing municipalities immunity from suit and the jurisdiction of the courts.[250] The FHA created the Council on Affordable Housing (COAH),[251] which was given responsibility for doing what the three judges had been assigned to do by the supreme court, namely, define housing regions, define lower-income housing need within each region, and then allocate fair shares of such housing to municipalities that come before it.[252] Municipalities are under no obligation to come before COAH by petitioning for "substantive certification" of their fair share plan. However, by filing their housing element and fair share plan with COAH, the step before petitioning for their certification, municipalities essentially gain immunity from suit.[253] Municipalities have two years to petition for substantive certification after filing their housing element and fair share plan.[254] Prior to 1990, municipalities could stall for six years before petitioning for certification.[255] In any subsequent litigation, COAH's certification of a town's housing element and fair share plan provides them and their implementing ordinances with a strong presumption of validity.[256] COAH's remedial powers are weak. Its main power is to refuse to certify a municipality's plan, thereby placing the municipality at the mercy of the courts if someone decides to sue it. COAH can use this power to

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[250] *See, e.g.*, HAAR, *supra* note 8, at 93 ("Although the rallying point for suburban political support for the legislation was an interim moratorium on the builder's remedy, its motivating drive was removal of close supervision by the judiciary of local zoning.").

[251] COAH board members are appointed by the governor with the advice and consent of the state senate to serve six-year terms. Spots on the board are statutorily allocated to representatives of local government, developers and the public, including representatives of lower-income households. N.J. STAT. ANN. § 52:27D-305 (West 2001).

[252] N.J. STAT. ANN. § 52:27D-307 (West 2001). COAH is mandated to take into account, inter alia, infrastructure, environmental, historic, and architectural preservation, the need for recreational and open space, and the amount of developable land available.

[253] N.J. STAT. ANN. §§ 52:27D-309, 316 (West 2001) (stating that complainants have to exhaust administrative remedies before litigating).

[254] N.J. STAT. ANN. § 52:27D-313 (West 2001).

[255] 1990 N.J. Laws 121-1.

[256] N.J. STAT. ANN. § 52:27D-317 (West 2001) ("To rebut the presumption of validity, the complainant shall have the burden of proof to demonstrate that the housing element and ordinances implementing the housing element do not provide a realistic opportunity for the provision of the municipality's fair share of low and moderate income housing . . . ."). Writing in 1996, Charles Haar stated that a court had never set aside a municipality's certification by COAH. HAAR, *supra* note 8, at 227 n.19. With passage of the FHA, jurisdiction over exclusionary zoning litigation reverted to normal assignment procedures.

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leverage municipal concessions, but COAH has notably been "extremely reluctant" to do so in order to coerce the granting of builder's remedies.[257] On the procedural side, when chosen, the COAH certification process is significantly quicker than litigation, 1.4 years on average, compared to nine years for litigation.[258] By setting implementation rules and guidelines, COAH also makes the courts' job significantly easier when cases do come before them.[259]

Two specific features of the FHA are also worth noting. First, the FHA placed a moratorium on the builder's remedy until COAH issued regulations detailing its criteria and guidelines, and transferred all existing cases to COAH.[260] This effectively postponed all action during the mid-1980s and, hence, *Mt. Laurel* missed the residential construction boom that occurred during that period.[261] Second, the FHA allows municipalities to transfer up to fifty percent of their fair share obligations to other municipalities through regional contribution agreements (RCAs) in return for a negotiated price.[262] As one might have guessed, the idea was for wealthy suburbs to pay poorer cities to build lower-income housing in the cities in return for not having to allow it in their own jurisdictions, and this is

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[257] SIDNEY V. STOLDT, JR., ET AL., NEW JERSEY LAND USE § 8.03(1)(b) (2000) (stating that "while a builder/objector must demonstrate extraordinary circumstances to secure a builder's remedy in COAH proceedings, a builder can obtain such relief with relative ease in a court proceeding").

[258] Roland Anglin, *Subverting Justice: The Case of Affordable Housing in New Jersey, in* AFFORDABLE HOUSING AND PUBLIC POLICY: STRATEGIES FOR METROPOLITAN CHICAGO 335, 347 (Lawrence B. Joseph ed., 1993).

[259] Telephone interview with Carl S. Bisgaier, plaintiff's attorney in *Mt. Laurel I, II,* and *III* (March 7, 2001). From 1987 to 1999, sixty-five municipalities fell under the jurisdiction of the courts, while 161 submitted themselves to COAH certification during the first round (1987-1993) and 261 during the second (1993-1999). This is out of 566 New Jersey municipalities. The first and second round COAH numbers are non-exclusive. COAH 2000 ANN. REP.: MAKING NJ A BETTER PLACE TO LIVE 9, 21 [hereinafter COAH 2000 ANN. REP.]. The court in *Mt. Laurel III* had ordered New Jersey's trial courts to "conform wherever possible to the decisions, criteria, and guidelines of the Council." 103 N.J. at 63, 510 A.2d at 654.

[260] N.J. STAT. ANN. § 52:27D-328 (West 2001) ("No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 26, 1983. . . . This provision shall terminate upon the expiration of the period set forth in [309(a)] for the filing with the council of the municipality's housing element."). In effect, this means "within five months after the council's adoption of its criteria and guidelines." N.J. STAT. ANN. §§ 52:27D-309 (2001). COAH was given until January 1, 1986 to adopt "its criteria and guidelines." N.J. STAT. ANN. § 52:27D-307 (2001).

[261] Telephone interview with Carl S. Bisgaier, *supra* note 259.

[262] N.J. STAT. ANN. § 52:27D-312 (West 2001). It should be noted that urban advocates pushed for the RCAs. *See* Peter S. Reinhart, *COAH: From Paper Tiger to Affordable-Housing Promoter,* N.J. LAW., Jan/Feb. 1996, at 35, 37.

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how it has worked.[263] This obviously undermines the original *Mt. Laurel* goal of opening up the suburbs, but it does get the suburbs to fund lower-income housing in the cities.

It is also worth noting that COAH radically reformulated how regional housing need was calculated. Taking his cue from *Mt. Laurel II*, Judge Serpentelli had based his "consensus methodology" on the number of lower-income households spending more than thirty percent of their income on housing.[264] In 1984, this had amounted to 240,000 households statewide.[265] COAH decided instead to use the number of households living in decrepit homes, a number that is constantly decreasing, combined with the number of new lower-income households anticipated to be formed over the next six-year period.[266] In 1987, COAH reported a statewide need for 145,000 housing units and, in 1993, the number was further lowered to 85,000, despite the fact that New Jersey's Department of Community Affairs estimates that well over 600,000 households in 1995 paid over thirty percent of their income on housing.[267] However, since, as we will see, the state has come nowhere near meeting these numbers, it is hard to tell whether they really make much difference, but they are indicative of COAH's willingness to stray from judicial precedent.[268]

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[263] *See* COAH 2000 ANN. REP., *supra* note 259, at 23-26. There have been ninety-seven transfers of 6799 units, for a total of $133,041,735. This amounts to just under $20,000 per unit, probably not enough to cover the cost of construction let alone to counteract the negative fiscal impact of lower-income housing in terms of services versus taxes. In 1992, COAH instituted a regulation allowing municipalities to charge development fees earmarked for lower-income housing in the municipality or to fund an RCA. N.J. ADMIN. CODE tit. 5, § 93-8 (2001). As of August 18, 2000, 112 municipalities had raised a total of $91,249,821.33 through this program. *See* COAH 2000 ANN. REP., *supra* note 259, at 27-31.

[264] KIRP ET AL., *supra* note 145, at 159. It should be noted that a more direct way of solving the problem of people being forced to spend what is considered to be too much of their income on housing is to increase their incomes, perhaps by providing them with housing vouchers.

[265] *Id.*

[266] *Id.* For the detailed methodology, see N.J. ADMIN. CODE tit. 5, §§ 93-2.1, 93-3.1, 93-4.1 (2001). *See also* N.J. Admin. Code tit. 5, app. § 93.

[267] KIRP ET AL., *supra* note 145, at 159. Municipality's fair share numbers correspondingly fell precipitously. *Id.* at 160.

[268] Kirp et al. blame the lower numbers on the politics of lower-income housing in New Jersey rather than on COAH. KIRP ET AL., *supra* note 145, at 160-61:

> The lower numbers are what a succession of governors, legislators, municipal leaders, and suburban voters wanted, and the agency has had little choice but to oblige. Flashes of administrative bravery have led only to being disciplined by the politicians. . . . From the other side, the pro-housing side, there has been little pressure to expand opportunities for the poor.

Id. at 161. This is in stark contrast to the politics that have surrounded Oregon's

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The New Jersey Supreme Court, to the criticism of many but to the surprise of few, upheld the FHA in *Mt. Laurel III.* Except for the RCAs and the temporary builder's remedy moratorium, the FHA had the same basic structure as *Mt. Laurel II*, with the only question being how COAH's enforcement would compare to that of the troika of trial judges. In effect, the FHA laid a bureaucratic layer on top of *Mt. Laurel II.* The court could not presume ex ante that COAH would not enforce the FHA as vigorously as the troika had enforced *Mt. Laurel II.*[269] As for the builder's remedy moratorium, the court pointed out that the New Jersey courts had upheld reasonable moratoria in analogous contexts and that it was achievement of the goal, not the use of particular methods, that was constitutionally required.[270] Oddly, the court did not discuss the RCA, the only provision within the FHA that posed a direct challenge to *Mt. Laurel.*[271] It is especially odd that the court did not comment on the constitutionality of RCAs considering that the court recognized that they seemed "intended to allow suburban municipalities to transfer a portion of their obligation to urban areas."[272] Most notably, the mention in *Mt. Laurel II* that legislative action in fighting exclusionary zoning was preferable to judicial intervention erupted into an explosion of deference in *Mt. Laurel III.* As Professor Franzese points out, the preferability of legislative and executive solutions was reiterated at least ten times in *Mt. Laurel III.*[273]

The New Jersey Supreme Court, however, did not entirely withdraw from the field. The court has prodded COAH forward in at least two important cases. In the first, *Holmdel Builder's Ass'n v. Holmdel Township*,[274] the court upheld the imposition of development fees earmarked for the construction of lower-income housing as both

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land-use agency, the Land Conservation and Development Commission (LCDC). *See infra* notes 314-24 and accompanying text.

[269] *Mt. Laurel III*, 103 N.J. at 43, 510 A.2d at 643 ("The judiciary must presume, if the assumption is at all reasonable, that the Act will function well and fully satisfy the *Mount Laurel* obligation. . . . [B]efore this Act may be declared *un* constitutional [sic] on these grounds, the contention that it will *not* work must be close to a certainty.").

[270] *Id.*, 510 A.2d at 643.

[271] *Id.* at 36-37, 39-47, 510 A.2d at 640-41, 642-46.

[272] *Id.* at 38-39, 510 A.2d at 641. The court did mention, seemingly approvingly, that by transferring suburban obligations to urban areas, RCAs "aid[ed] the construction of lower income housing in the area where most lower income housing could be found." *Id.*, 510 A.2d at 641.

[273] Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 50 (1988). For the reiterations, see *Mt. Laurel III*, 103 N.J. at 22, 24, 43, 46, 51-52, 64, 65, 510 A.2d at 632, 634, 644, 645, 648, 654, 655.

[274] 121 N.J. 550, 583 A.2d 277 (1990).

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constitutional and authorized by the FHA. However, towns were held to be only authorized to impose such fees if they did so in compliance with COAH regulations on the topic, regulations that did not exist. In this way, the court not only gave COAH permission to authorize the imposition of development fees, but put pressure on it to promulgate regulations for doing so. In the second case, *In re Town of Warren* (1993),[275] the court struck down as arbitrary a COAH regulation that authorized towns to grant an occupancy preference for up to fifty percent of its fair share housing to income-eligible households that resided or worked in the town. These cases show that even after provoking legislation and stepping down as the primary proponent of the fight against exclusionary zoning, the courts still have a role to play in supporting and nudging along the agency created to carry on the fight.[276] However, the same dangers that exist if the court oversteps its role initially also exist if it pushes too hard later on.[277]

d. The Results

What has been accomplished since 1987, when COAH became fully operational? As far as the building of lower-income housing is concerned, the results are mixed. With the caveat that exact figures are notoriously unreliable,[278] COAH reports that through June 2001, 28,855 units have been built or are under construction as a result of cases before the courts or COAH; an additional 13,231 have been zoned for or approved, and 11,246 more have been created through rehabilitation.[279] This is in addition to 7396 RCA units transferred

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[275] 132 N.J. 1, 622 A.2d 1257 (1993).

[276] The Oregon courts played a similar role in spurring on Oregon's LCDC. *See infra* text accompanying note 329.

[277] See *infra* Part III for a discussion of the dangers of judicial activism in the realm of exclusionary zoning, as well as in the realm of social policymaking generally.

[278] *See* Florence Wagman Roisman, *The Role of the State, the Necessity of Race-Conscious Remedies, and Other Lessons from the* Mount Laurel *Study*, 27 SETON HALL L. REV. 1386, 1418-22 (1997).

[279] COAH 2001 ANN. REP., COAH OPTIONS 19 [hereinafter COAH 2001 ANNUAL REPORT.] These figures do not include those municipalities under court jurisdiction that were not ordered by the court to file monitoring reports with COAH. *Id.* at 4. They include units built between April 1, 1980 and December 15, 1986 for which municipalities later received credit from COAH towards their fair share obligation. *Id.* at 3. Wish and Eisdorfer cite a 1995 survey by the N.J. Department of Community Affairs to the effect that between 1985 and 1995, 16,000 units were actually constructed and an additional 6500 rehabilitated. Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mount Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1271 (1997). Charles Haar reports that from 1987 to 1992, 54,000 new or rehabilitated units were zoned for, a

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from suburbs to cities.[280] The above figures include only the deed-restricted lower-income housing and not the market-rate units that often accompany them as a result of inclusionary zoning deals. So, given the standard four-to-one ratio, the total amount of units built, zoned for, or approved as a result of the FHA may be up to five times as large as the figure for lower-income units, i.e., up to 150,000 in a little over thirteen years. As a point of comparison, approximately 25,000 to 30,000 privately-owned units, which tend to make up the vast bulk of all housing starts, were started each year in New Jersey from 1995 through 1999.[281]

These numbers present a classic half-full, half-empty evaluation problem. Compared to even COAH's calculations of lower-income housing need, these numbers are obviously quite small.[282] But compared to zero, approximately 40,000 lower-income units built, rehabilitated, or under construction in a little over thirteen years is pretty good. John Payne points out that public sector funding from 1937 to 1992 had produced on average about 2400 units per year in New Jersey, slightly less than the rate resulting from the FHA-modified *Mt. Laurel* doctrine.[283] Payne also argues that the market-

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figure significantly higher than COAH's for the same period. HAAR, *supra* note 8, at 131, 190 (citing ROBERT W. BURCHELL ET AL., REGIONAL HOUSING OPPORTUNITIES FOR LOWER INCOME HOUSEHOLDS 23 (1994)). "By anecdotal account," Haar also believes that large numbers of lower-income housing were built in order to forestall litigation. HAAR, *supra* note 8, at 131.

[280] COAH 2001 ANNUAL REPORT, *supra* note 279, at 19.

[281] The Bureau of Census puts the New Jersey figures at 23,600 (1996), 26,800 (1997), 33,000 (1998), 33,700 (1999). BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1999, at 724 (1999) [hereinafter 1999 STATISTICAL ABSTRACT]. The Nelson A. Rockefeller Institute of Government at SUNY puts the figures at 25,300 (1995), 26,000 (1996), 29,400 (1997), 27,400 (1998). STATE UNIVERSITY OF NEW YORK: NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, 1999 NEW YORK STATE STATISTICAL YEARBOOK 291 (1999).

[282] One explanation for the shortfall is that once developers have brought municipalities to the bargaining table by invoking the FHA, they work out a deal between themselves in which lower-income housing is left out to the mutual benefit of both. Telephone Interview with Stephen Eisdorfer, *supra* note 247; *see also* KIRP ET AL., *supra* note 145, at 124. Another explanation is that various mechanisms exist for municipalities to reduce their "pre-credited" fair share obligation and, when they succeed in doing so, the cut housing units are not then redistributed to other towns. However, it could be that COAH is simply being too lax with municipalities in general, especially in certification reviews in which no one objects to the municipality's fair share plan. Telephone interview with Carl S. Bisgaier, *supra* note 259. For ways that a municipality can reduce its obligation, see STOLDT, JR., ET AL., *supra* note 257, § 8.03(2)(c)(i).

[283] John W. Payne, *Norman Williams, Exclusionary Zoning, and the* Mount Laurel *Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 674 (1996). Payne also notes that the public sector commitment to lower-income housing dropped

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rate units in inclusionary developments are relatively modestly priced and that they would not have been built if developers had not been able to break zoning ordinances using the *Mt. Laurel* doctrine.[284] Payne's observation is a reply to those that charge that the lower-income units would have been built anyway, or that more higher-income units would have been built if they had not had to subsidize the lower-income units in inclusionary developments.[285] In general, it seems that suburban municipalities are becoming increasingly reluctant to allow almost any residential development, let alone lower-income residential development.[286] It is therefore quite possible that not only are most of the lower-income units produced through the *Mt. Laurel* process a net gain, but so are the market-rate units produced along with them in inclusionary developments.[287]

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dramatically in the 1980s. *Id.* at 674 n.36.

[284] Payne, *supra* note 283, at 681 ("The data suggest a flood of modestly priced market rate units in *Mount Laurel* developments in communities that would otherwise have been able to restrict supply through their zoning controls.").

[285] *See supra* notes 106-07 and accompanying text.

[286] Telephone Interview with Stephen Eisdorfer, *supra* note 247. This could be due to purely fiscal reasons. Given the cost of elementary and secondary education, very few residential developments produce enough in property taxes to cover what they consume in municipal services. *Cf.* John Mooney, *Average Cost of Schooling a N.J. Kid Rises to $8,950*, THE NEWARK STAR-LEDGER, Mar. 16, 2001, at 1 (citing the New Jersey Education Department's annual Comparative Spending Guide). Furthermore, simply by restricting the supply of new housing, existing homeowners can raise the value of their own homes. *See* FISCHEL, *supra* note 34, at 221-24. This is in addition to any preference they might have for open spaces.

[287] Changes in suburban attitudes towards growth, especially residential, make attempts to isolate the effect of the FHA on total New Jersey housing production extremely difficult, if not impossible. Not only would one have to regress economic and demographic data against the amount of housing production, one would also have to control for such changes in municipal attitudes. This is further complicated by the fact that such negative changes in attitude might have been caused to some extent by the FHA, although I am skeptical. *See* FISCHEL, *supra* note 28, at 326-27. In other words, it is impossible to know what suburban zoning would have been like, and hence its effect on the construction of housing in New Jersey, in the absence of *Mt. Laurel II* and the FHA. We do know, however, that the housing market in New Jersey is still "tight." The rental vacancy rate in 1999 was only 3.9%, compared to 10.3% in Pennsylvania, 6.3% in the Northeast, and 8.1% in the United States. NEW JERSEY DEP'T OF CMTY. AFFAIRS, 2001-2005 FAIR HOUSING PLAN (Draft), Mar. 30, 2001, at 17, *available at* http://www.state.nj.us/dca/dhcr/fhp01-05.pdf (last visited Oct. 24, 2001). The median cost of a one-bedroom apartment in New Jersey has increased by 39% from 1990 to 1999, and the average single-family home sales price by 23.4%. *Id.* at 42. The homeowner vacancy rate in 1999 was 1.2%, compared to 1.6% in Pennsylvania and 1.7% in the United States generally. However, New Jersey's homeowner vacancy rate has fluctuated in the 1990s between 1.1% and 2.0% and, in six of those ten years, its rate was higher than Pennsylvania's, with one tie. 1999 STATISTICAL ABSTRACT, *supra* note 281, at Table 4. For what it is worth, according to census data, total housing units increased in New Jersey by 234,965 between 1990

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After all, a developer would not bother going through either the courts or COAH, with the accompanying risk of alienating town officials, if it could have convinced the town to agree to a development without the financial drag of the lower-income units necessary to bring a *Mt. Laurel* challenge.

However, when we move from examining the numbers of units produced to examining who actually lives in them, the picture is not even mixed. The common wisdom, accepted even by ardent supporters of the *Mt. Laurel* doctrine, is that occupants of *Mt. Laurel* housing tend to be of relatively high socioeconomic status but at a low point in their lifetime earning potential, e.g., "junior yuppies, divorced persons, graduate students, the retired."[288] COAH's own annual report tends to support this contention, seemingly as a selling point to reluctant suburbs.[289] The Wish and Eisdorfer report, based on data from the New Jersey Affordable Housing Management Service (AHMS), presents some statistical support for this contention.[290] For example, households headed by persons sixty-two or over, despite the fact that they account for only 17% of the applicant pool, occupy 27% of all AHMS-administered housing and 39% of the suburban units.[291] Furthermore, although they account for only 4% of the applicant pool, elderly white females living alone occupy 10% of all AHMS-administered units and 15% of the suburban units.[292] Another group that seems to have benefited

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and 2000, an increase of 7.6%, and increased by 311,610 in Pennsylvania, an increase of 6.3%. The 2000 census data is available at http://quickfacts.census.gov/hunits/ and the 1990 census data is available through the "Start with Basic Facts-Housing Units" function at http://factfinder.census.gov/servlet/BasicFactsServlet (last visited October 17, 2001).

[288] HAAR, *supra* note 8, at 115.

[289] COAH 2000 ANN. REP., *supra* note 259, at 5. The story of the Unanski family of Holmdel is highlighted by the Report. Daniel and Robin Unanski, we are told, are both recent college graduates who were raised in Holmdel. Furthermore, in the three years since they received their *Mt. Laurel* unit, they have become financially secure and plan to move into a market rate unit before their daughter begins school.

[290] Wish & Eisdorfer, *supra* note 279. The Wish and Eisdorfer report utilizes March 1996 data from the AHMS, which was created by the FHA to assist municipalities and developers in the administration of eligibility standards and affordability controls. *Id.* at 1281.

[291] Wish & Eisdorfer, *supra* note 279, at 1298.

[292] *Id.* at 1298-99. These are extrapolations from the subset of units for which age, gender, race, and the number of persons in the household are known. *Id.* Eighty-five percent of single, elderly women live in rental housing; given the paucity of such housing, they likely occupy a significant portion of it. *Id.* at 1299.

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disproportionately is local middle-class and lower middle-class residents who otherwise could not have afforded to live in the towns in which they worked.[293]

When it comes to the goal of opening up the suburbs to poor urban residents, the numbers are bleak. For those AHMS households for which both current and previous residence, as well as race and ethnicity are known (2675 households),[294] Wish and Eisdorfer report that 47% previously lived in urban areas but that only 15% of these (7% of the total) moved to units in suburban municipalities.[295] Of the households that moved to suburbia, 66% (121 households) were White, 23% (42) Black, 2% (3) Latino, and 9% (16) other.[296] Almost as many Black households used the opportunity to move from

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[293] *See* KIRP ET AL., *supra* note 145, at 157 (stating that what has been "accomplished is leagues removed from the vision of lawyer-progressives;" the accomplishment being $40,000 to $50,000 units (1995 dollars) intended for local teachers, firemen and nurses). More recently, developer's' attorney Henry Hill has stated that *Mt. Laurel* is necessary in order to get permits to build $100,000 to $200,000 homes. Jacobs, *supra* note 50, at A1.

[294] Although this sample is small, Wish and Eisdorfer present no reason, and I know of none, why it would not be representative. A comparison of census data with the number of lower-income units built, under construction, or rehabilitated reinforces the impression that *Mt. Laurel* housing has had little to do with the integration of New Jersey's suburbs. For example, four counties that were considered "outer-ring" suburban counties by Justice Pashman in *Mt. Laurel I* in 1975 (Middlesex, Monmouth, Morris, and Somerset) saw increases in their collective Black and Hispanic populations of 25,480 and 90,365, respectively, between 1990 and 2000. *See* U.S. Census Bureau, Race, Hispanic or Latino: 2000 and U.S. Census Bureau, General Population and Housing Statistics: 1990 for Middlesex, Monmouth, Morris, and Somerset Counties, *available at* the "Start with Basic Facts" and "Search" functions, respectively, at http://factfinder.census.gov/servlet/BasicFactsServlet (last visited Nov. 7, 2001). These numbers are probably understated, because 42,591 people in these counties in 2000 listed themselves as "two or more races" and 71,181 listed themselves as "some other race," which were not options in 1990. *Id.* This is in comparison to a total in these counties of only 12,355 units built or under construction and 2634 units rehabilitated under the FHA between 1987 and 1999. *See* COAH 2000 ANN. REP., *supra* note 259, at 10-21 (counties listed alphabetically). Even if most of the FHA units in these counties were occupied by minorities, as almost certainly is not the case, FHA housing would have contributed little to their overall integration. Admittedly, there are some relatively urban municipalities within these generally suburban counties and this reduces the relevance of the data.

[295] Wish & Eisdorfer, *supra* note 279, at 1302. Furthermore, because AHMS employs a market strategy aimed at moving urban households to the suburbs, it is quite likely that the proportion of previously urban households that occupy non-AHMS suburban units is significantly smaller. *Id.*

[296] *Id.* at 1302-03. Once again, given AHMS's affirmative marketing strategy, the numbers are probably even worse in non-AHMS administered *Mt. Laurel* housing. Wish and Eisdorfer hypothesize that the racial differences are caused by individual locational preferences and subtle discrimination by developers, mortgage lenders, and others. *Id.* at 1303.

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suburbs to cities. Of those households who made this suburb to city move, 0% were White, 90% (27 households) Black, 3% (1) Latino, and 6% (2) other.[297] In summary, to the extent that it has furthered socioeconomic integration of the suburbs, the *Mt. Laurel* doctrine, as implemented by the FHA, has enabled some lower-income suburbanites to remain in suburbia and a handful of city-dwellers to move to the suburbs.[298] Worse still, because it enables whites to move from the cities to the suburbs, the *Mt. Laurel* doctrine might have even exacerbated racial residential segregation.[299] But considering that the migration numbers are so small, the segregative effect is also small, although it is still ironic. In short, although the *Mt. Laurel* doctrine did result in some lower-income housing being built both in the suburbs and the cities, it hardly brought about significant social change.[300]

e. New Jersey's Judicial and Constitutional Uniqueness

Still, it is remarkable how much the New Jersey courts did accomplish in the face of widespread opposition, almost no political support, and a hallowed New Jersey tradition of home rule.[301] The courts tackled a very complex problem, got a significant amount of lower-income housing built, and emerged relatively unscathed. Shortly after *Mt. Laurel III* was decided, Chief Justice Wilentz came up

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[297] *Id.* So among those households in which data was available, there were a net 121 White households moving to suburbia, fifteen Black households, two Latino, and fourteen other.

[298] This tends to be the common wisdom. *See, e.g.*, Peter Buchsbaum, Mount Laurel II: *A Ten Year Retrospective*, N.J. LAW., Oct. 1993, at 13, 17 ("The actual units have generally helped lower-income suburbanites retain residency in their areas rather than open up new opportunities for urban people of color.").

[299] *See* Rose, *supra* note 39, at 816-17.

[300] David Troutt argues that we simply do not know enough to justify a "narrative of futility" with respect to integration strategies in general or *Mt. Laurel* in particular. David D. Troutt, Mount Laurel *and Urban Possibility: What Social Science Research Might Tell the Narratives of Futility*, 27 SETON HALL L. REV. 1471 (1997). Perhaps, he suggests, *Mt. Laurel*'s lack of results has simply been due to inadequate information and marketing aimed at urban residents. *Id.* at 1486. Troutt argues in favor of focusing on urban community development, however, rather than on dispersal of poor urban residents. *Id.* at 1487-1493. *Cf.* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (discussing the literature regarding the ability of courts to bring about social change and concluding that the advocates of the "constrained court" view generally have the better of the argument).

[301] *See* Maureen Moakley, *New Jersey*, *in* THE POLITICAL LIFE OF THE AMERICAN STATES 222 (1984) (describing New Jersey's home rule tradition as "the dominant force behind public life" whose importance is "difficult to overstate . . . in explaining the political, social, and economic development of the state.").

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for reappointment and, with Governor Kean's support,[302] just reached the twenty-one votes necessary for reappointment.[303] However, in the New Jersey context, the closeness of the vote is very significant. Since the 1947 constitutional revision spearheaded by future New Jersey Chief Justice Arthur Vanderbilt, not a single supreme court justice and only a handful of judges overall had failed to be reappointed, and those usually due to "financial peccadilloes."[304]

The near automatic reappointment of judges in New Jersey is one thing that sets it apart from other states. The reapportionment process places a weaker political limit on its ability to champion unpopular causes, such as opening up the suburbs. New Jersey judges are appointed by the Governor with the advice and consent of the Senate, making New Jersey one of only nine states that has no election element in its selection and retention process.[305] After their initial appointment to the Superior Court or the Supreme Court, judges come up for reappointment once seven years later.[306] Once they have been reappointed, they hold their offices during "good behavior."[307]

New Jersey also has relatively difficult procedures for amending its constitution.[308] An amendment can only be placed before the

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[302] Kean reportedly told opponents to Wilentz's reappointment that a no vote would "totally compromise the integrity of the judicial system." KIRP ET AL., *supra* note 145, at 143. This is in stark contrast to the actions of Governor Deukmejian who actively fought the reelection of Chief Justice Rose Bird and some of her colleagues in California. *Id.* at 142; *see also* TARR & PORTER, *supra* note 249, at 271.

[303] KIRP ET AL., *supra* note 145, at 144. Although *Mt. Laurel II* was the real source of opposition, the ostensible issue was Wilentz's residence in New York City, where his wife was receiving cancer treatments. *Id.* at 143-44. The fact that those who opposed Wilentz's reappointment sensed that it was unseemly to use a court decision as the grounds for opposition is highly significant.

[304] KIRP ET AL., *supra* note 145, at 142.

[305] *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 136 (2000-01 ed.); John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 714 (1998). Professor Wefing also observes that "[i]t generally is accepted that a system of appointment rather than election leads to a more independent judiciary." *Id.* at 715.

[306] N.J. CONST. art. VI, § 6, ¶ 3.

[307] *Id.*

[308] Robert Williams writes that although the amendment process was made easier in the Constitution of 1947, it is still relatively difficult compared to most other states. ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 123 (1990). Since the new constitution took effect, New Jersey has averaged slightly less than one amendment per year, slightly less the national average of 1.23 per year. Robert J. Martin, *Calling in Heavy Artillery to Assault Politics as Usual: Past and Prospective Deployment of Constitutional Conventions in New Jersey*, 29 RUTGERS L.J. 963,

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voters, where it requires majority approval, if either both houses of the legislature approve the proposed amendment by a three-fifths vote or both houses approve it by majority vote in two successive years.[309] The process cannot be initiated by popular initiative.[310] While the amendment process has been used relatively freely in other states to overturn court decisions, it has only happened twice in New Jersey and not until 1992, when anti-death penalty and anti-legislative veto decisions by the court were effectively overturned.[311]

That the New Jersey Supreme Court has been unusual in its ability to combine activism with independence and authority has not escaped notice. Comparing New Jersey's court with other activist state courts, Tarr and Harrison conclude that the contrast "highlights [New Jersey's] distinctiveness . . . for now at least that court must be viewed as unique among activist courts."[312] Given this uniqueness, the marginal success of the New Jersey courts probably should not be a beacon for less well-insulated courts thinking of wading into the thicket of exclusionary zoning. That no other court has followed in the footsteps of the New Jersey Supreme Court is perhaps evidence that this has been understood.

B. The Legislatures

1. Oregon

a. The Program

In Oregon and California, the state legislatures passed laws intended to fight exclusionary zoning. I believe that the Oregon experience shows that if a court can manage to provoke a state legislature into creating a state agency with jurisdiction over land-use and housing policy, such an agency can go further than its original mandate if given significant interest group, as well as judicial,

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1020 n.132 (1998).

[309] *See* THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 5.

[310] *Id.* at 7.

[311] *See* Wefing, *supra* note 305, at 717-18; *see also* TARR & PORTER, *supra* note 249, at 271-73 (noting decisions of the highest courts of California, Florida, Massachusetts, and Maryland that were effectively overturned by state constitutional amendments). The death penalty and defendants' rights seem to be the primary pitfall for state supreme courts, although notably the California Supreme Court's busing position was also overruled by constitutional amendment. *See* TARR & PORTER, *supra* note 249, at 271-73; Tarr & Harrison, *supra* note 22, at 537.

[312] TARR & PORTER, *supra* note 249, at 273. Tarr and Porter emphasize that it is unusual "to [be] able to combine activism with insulation from politics." *Id.* at 272.

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support. The contrast with California is meant to illustrate the advantages of administrative enforcement of anti-exclusionary zoning statutes relative to judicial enforcement. Before moving on, I want to emphasize that by recommending the creation of a land-use agency, like the one created in Oregon, I am not recommending Oregon's substantive land-use policies, let alone those unrelated to the fight against exclusionary zoning, such as the Urban Growth Boundary (UGB) program.[313]

The original 1973 Oregon legislation was relatively modest. Oregon Bill 100[314] required municipalities to formulate comprehensive land-use plans and created a state land-use agency, the Land Conservation and Development Commission (LCDC), to review these plans in light of state land-use goals through an acknowledgment process.[315] However, the bill lacked specific rules defining the review process and "left the substance of Oregon's land use policy undetermined."[316] Furthermore, dependence of legislators on local constituents had significantly weakened the bill from its original form.[317] While local influence on the legislature would remain strong,[318] interest group politics came to dominate the LCDC. These interest groups included the development industry and environmental organizations, but perhaps the most influential group proved to be 1000 Friends of Oregon (1000 Friends), which was formed specifically to act as a watchdog over the program.[319]

With only general guidelines provided by the legislature, it was

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[313] For UGBs, see *infra* note 321 and accompanying text. I recommend the creation of an Oregon-style agency because of the positive effect it had on leveling the political playing field between suburban municipalities and those supporting the development of lower-income housing.

[314] 1973 Or. Laws 80 (codified as amended at OR. REV. STAT. §§ 197.005-197.860 (1999)) (Comprehensive Land Use Planning Coordination).

[315] *See* Gerrit Knaap, *Land Use Politics in Oregon, in* PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION 3, 8 (Carl Abbott et al. eds., 1994).

[316] *Id* at 8. This was also true of housing policy in particular. *See* GERRIT KNAAP & ARTHUR C. NELSON, THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON 77 (1992) ("Although housing was an important component of state land use objectives from the very beginning, LCDC had little on which to base its housing policy . . . . The substance of LCDC's housing policy thus had to be formed and articulated through the acknowledgment process, a process that attracted the attention of many interest groups . . . .").

[317] Knaap, *supra* note 315, at 9.

[318] Evidence for this is that the majority of funds for the program was allocated to local governments with no strings attached. *Id.* at 10. Knaap states that "[t]his pattern of appropriation curtailed the influence of LCDC and preserved the influence of local governments over local land use." *Id.* at 10-11.

[319] Knapp, *supra* note 315, at 9-10. 1000 Friends is funded by donations, gifts, foundation grants, and membership dues. *Id.* at 10.

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left to the LCDC to adopt the state goals by which it would evaluate municipal land-use plans. One of the goals adopted was Goal 10 (Housing), which states that "plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."[320] Another of the goals, Goal 14, calls for the creation of "urban growth boundaries" (UGBs) around metropolitan areas, within which development is supposed to occur.[321]

Interest groups not only influenced the formulation of the goals but, perhaps more importantly, influenced their implementation through the acknowledgment process. When it came to the issue of high-density development, the LCDC usually sided with developers and 1000 Friends against local governments, forcing "nearly every local government to increase the density of residential zoning and to clarify the conditions for high-density land use."[322] Only one of the fifty-three comprehensive plans submitted by municipalities with populations greater than 5000, Portland's, was found to satisfy Goal 10 in its first review by the LCDC.[323] But, although statewide interest groups can influence the content of municipal land-use plans through the acknowledgment process, they are not similarly able to influence the towns' implementation of their plans.[324] Hence, the possibility certainly exists that the local political process will not result in a fully conforming implementation. The data on Oregon provides some evidence that this has been the case.

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[320] LAND CONSERVATION AND DEV. COMM'N, OREGON'S STATEWIDE PLANNING GOALS 10 (1996); *see also* OR. REV. STAT. §§ 197.295-197.314 (1999). Goal 10 also calls for municipalities to inventory buildable lands for residential use. Nohad Toulan writes that Goal 10 met with little opposition when promulgated, and little enthusiasm from housing advocates because it was viewed as a vague guideline that would not alter local control of land-use. Nohad Toulan, *Housing as a State Planning Goal, in* PLANNING THE OREGON WAY 91, 101 (Carl Abbot, et al. eds. 1994).

[321] LAND CONSERVATION AND DEV. COMM'N, OREGON'S STATEWIDE PLANNING GOALS 14 (2000) ("Urban growth boundaries shall be established to identify and separate urbanizable land from rural land.").

[322] Knaap, *supra* note 315, at 13-14. Likewise, when local governments submitted plans for large UGBs, the LCDC often sided with 1000 Friends and reduced the size of the proposed UGBs. *Id.* at 10. Knaap and Nelson state that "[w]ith the assistance of influential interest groups and the state judiciary, LCDC has been able to change considerably the content of local comprehensive plans." KNAAP & NELSON, *supra* note 316, at 95.

[323] KNAAP & NELSON, *supra* note 316, at 80. In addition to dedicating insufficient land to high-density development and not clearly specifying the required conditions for conditional uses, municipalities were also frequently found by the LCDC to have made an unsatisfactory buildable lands inventory or needs assessment. *Id.*

[324] Knaap, *supra* note 315, at 15.

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The LCDC set an important precedent for lower-cost housing in its first acknowledgment review interpreting Goal 10, *Seaman v. City of Durham*.[325] The LCDC's decision, which has been characterized as "closely parallel[ling]" the *Mount Laurel* decision,[326] posited that municipal plans must consider regional needs for lower-income housing. The LCDC found that Durham, which had increased its minimum lot size requirements, evidently had not given "consideration to low-cost housing needs of its residents and workers, much less the region."[327] In 1979, the LCDC issued a Housing Policy Statement specifying that municipal plans had to zone sufficient buildable land for housing types designed to meet the demonstrated need for housing "at particular price ranges and rent levels."[328] The LCDC and the cause of affordable housing, meanwhile, found support in Oregon's courts, which held that municipalities could not impose special conditions with the intent of excluding certain types of lower-income housing, such as migrant housing projects, mobile homes, and manufactured housing.[329]

Two years later, based on its assessment of projected housing need, the LCDC promulgated the "Metropolitan Housing Rule" for the Portland metropolitan area.[330] The Housing Rule has two

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[325] LCDC No. 77-025 (Apr. 18, 1979).

[326] KNAAP & NELSON, *supra* note 316, at 78.

[327] LCDC No. 77-025, at 9-10.

[328] *See* Sandra Smith Gangle, Note, *LCDC Goal 10: Oregon's Solution to Exclusionary Zoning*, 16 WILLAMETTE L. REV. 873, 880 (1980) (citing LCDC, Housing Policy Statement (July 12, 1979) as codified at OR. REV. STAT. § 197.307 (1999)). The second part of the Housing Policy Statement provided that approval standards and special conditions "must be clear and objective," and "not have the effect . . . of discouraging . . . the needed housing type." *Id.* In 1983, Oregon Revised Statutes sections 197.295-197.314 were revised to include government-assisted housing as a separate needed housing type, along with multi-family housing, both owner and renter, mobile homes, and manufactured homes, both in dwelling parks and on individual lots planned for single-family homes. Toulan, *supra* note 320, at 103; *see* OR. REV. STAT. § 197.303(1)(b) (1999). Housing need can be met by in-fill and redevelopment as well as by the zoning of vacant land. Toulan states that this has had a sizeable impact on the Portland area. Toulan, *supra* note 320, at 104.

[329] Toulan, *supra* note 320, at 103-04; *see also* OR. REV. STAT. §§ 197.303, 197.307, 197.480 (1999) (codifying court and LCDC decisions with respect to "needed housing"). It should be noted that a municipality can avoid having to plan for one of the "needed" housing types if it demonstrates that it is being provided in sufficient numbers elsewhere in the region to meet regional need. OR. ADMIN. R. 660-008-0035 (2001). This is a similar holding to that of the New York Court of Appeals in *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242-43 (N.Y. 1975). *See supra* text accompanying note 154.

[330] OR. ADMIN. R. 660-007-0000 to 660-007-0060 (2001). As of 1991, the Portland metropolitan area contained 43% of Oregon's population. 1000 FRIENDS OF OREGON, AFFORDABLE HOUSING, *supra* note 5, at 2.

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components: (1) each of the metropolitan area's three counties and its twenty-four municipalities are required to adopt comprehensive plans that allow for at least 50% of new housing to be multi-family or attached single-family units;[331] and (2) plans must allow development to occur at certain minimum housing densities: ten units/buildable acre for the area's six largest cities and its most urban county (Multnomah), eight units/buildable acre for most of the rest, and six units/buildable acre for five small communities with projected populations of 8000 apiece.[332]

Viewed in comparative perspective, the Housing Rule approach to fighting exclusionary zoning is more like Pennsylvania's approach than New Jersey's, in that it does not aim directly at housing for lower-income households.[333] Motivated by the risk of spiraling housing costs caused by the UGB, it is aimed at housing affordability generally. It is also like Pennsylvania's approach, as well as New York's and New Hampshire's, in that there is no requirement that municipalities mandate that developers build lower-income housing or provide developers with incentives such as density bonuses or land writedowns to do so. On the other hand, it is similar to New Jersey's approach in that it provides "[c]lear numeric targets" as "a yardstick by which community efforts . . . can be measured."[334] Unlike any of the other approaches, however, Oregon's is part of a broader statewide land-use system and applies to urban, as well as suburban, jurisdictions. The approach outside the Portland area seems similar to the original *Mt. Laurel* approach in that it demands that municipalities accommodate their fair share of lower-income housing need, but rejects a hard numbers approach in which the courts or a state agency determine specific fair share numbers ex ante.

In 1979, in order to relieve some of the burden on the LCDC and on Oregon's trial courts, the legislature created the Land Use Board of Appeals (LUBA).[335] While the LCDC retained the

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[331] OR. ADMIN. R. 660-007-0030 (2001). Small developed municipalities are exempt from this requirement and other municipalities are given an opportunity to justify an alternative housing mix. OR. ADMIN. R. 660-007-0030(1) (2001).

[332] OR. ADMIN. R. 660-007-0035 (2001) (applying varying density requirements to those municipalities that also have to meet the 50-50 housing mix requirement); *see also* Toulan, *supra* note 320, at 107.

[333] However, as with Pennsylvania, the statewide housing statute focuses on housing types such as multi-family housing and mobile homes that tend to be lower priced. *See* OR. REV. STAT. § 197.303 (1999). Furthermore, reference is made to housing need at "particular price ranges and rent levels." OR. REV. STAT. § 197.307(3)(a) (1999).

[334] 1000 FRIENDS OF OREGON, AFFORDABLE HOUSING, *supra* note 5, at 3.

[335] OR. REV. STAT. §§ 197.805-.860 (1999). LUBA is composed of three lawyers

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responsibility for adopting statewide goals, as well as acknowledging and periodically reviewing municipal comprehensive plans,[336] LUBA was given jurisdiction over appeals of municipal land-use decisions.[337] LUBA has generally been praised as being much faster and less expensive than litigation.[338] It is also generally viewed as displaying a "reasonable modicum of efficiency and expertise" lacking in the courts.[339] Courts of appeals' review of LUBA's decisions also work under strict deadlines,[340] and LUBA decisions are less likely to be reversed than the trial courts' decisions had been.[341]

b. The Results

Most of the published data for Oregon housing comes from the

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appointed by the governor with the advice and consent of the state senate for four-year terms. OR. REV. STAT. § 197.810 (1999).

[336] OR. REV. STAT. §197.825(2)(c), (3) (1999).

[337] OR. REV. STAT. §197.015(10) (1999). LUBA judges local land-use decisions based on their consistency with the local comprehensive plan, which in turn should be consistent with the state's land-use goals if they have been "acknowledged" by the LCDC.

[338] *See, e.g.*, Edward J. Sullivan et al., *The Oregon Example: A Prospect for the Nation Panel Discussion with Edward J. Sullivan, Norman Williams, Jr., and Bernard H. Siegan*, 14 ENVTL. L. 843, 845 (1984) (Sullivan stating that LUBA is "'less expensive' and certainly faster than anything we had before"); Hong N. Huynh, Comment, *Administrative Forces in Oregon's Land Use Planning and Washington's Growth Management*, 12 J. ENVTL. L. & LITIG. 115, 122 (1997) (stating that "LUBA issues orders expeditiously, economically, and consistently"). After a final local land-use decision, petitioners have twenty-one days to appeal to LUBA. OR. REV. STAT. § 197.830(8) (1999). Except under limited circumstances, LUBA must issue an opinion and an order within seventy-seven days of the record being submitted. OR. REV. STAT. §§ 197.830(14), 197.840 (1999). Before 1979, land-use cases took an average of 243 days from filing to final order by the trial court. Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENVTL. L. REP. 10,367, 10,374 n. 97 (1992). By comparison, the first fifty cases filed with LUBA in 1985 took an average of 139 days to resolve. *Id.* Liberty recommends LUBA to other states because such a "tribunal will assure speedy and consistent land use decision and will be much less costly for participants, provided it functions as an appellate review body," as LUBA does. *Id.* at 10,388. He even believes that "the assurance of speedy decisions and procedural fairness for citizens may attract additional support from individuals or interest groups that may otherwise have doubts about a growth management plan." *Id.* at 10,389.

[339] Sullivan et al., *supra* note 338, at 845 (Sullivan continues, "[i]nstead of going to court and hoping to be assigned a judge who has been educated in land use law, we now have a board of experts . . . .").

[340] Appeals must be filed within three weeks of LUBA's decision, and briefs filed and oral arguments heard within seven weeks. OR. REV. STAT. § 197.850 (1999). The court of appeals then has ninety-one days after oral argument to issue a final order, absent extenuating circumstances. OR. REV. STAT. § 197.855(1)-(2) (1999).

[341] *See* Liberty, *supra* note 338, at 10,374 & n.97. Judicial review is confined to the record. OR. REV. STAT. § 197.850(8) (1999).

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Portland metropolitan area. It is evident from the data that the Housing Rule, combined with other LCDC regulations, has had a significant impact on zoning within the metropolitan area, including its suburban jurisdictions. However, the data on actual housing construction is mixed. With respect to affordability, although the average housing prices for the area are available and generally encouraging, we do not know their distribution, i.e., how much housing is affordable by lower-income households.

Beginning with the effect on zoning, between 1977 and 1982, the amount of land zoned for new multi-family development in the Portland metropolitan area almost quadrupled from 7.6% to 27% of net buildable acreage.[342] Between 1978 and 1982, average vacant residential lot size declined from 12,800 square feet to 8280, reducing the average cost of such a lot by $7000 to $10,000.[343] Moreover, the gap between urban and suburban lot sizes shrank during this period.[344] These two phenomena combined to increase the maximum number of permissible units in the metropolitan area from 129,000 to over 301,000, an almost 150% increase, even though only 10% more land had been zoned residential.[345]

A 1985-1989 study of the Portland metropolitan area by 1000 Friends shows that multi-family and attached single-family housing accounted for 54% of new residential development during the study period.[346] Prior to the Housing Rule, they had only accounted for 30% of the planned twenty-year supply of new housing in the metropolitan area.[347] Remarkably, the municipalities in the area with the highest ratios of multi-family to single-family housing starts were in the suburban belt, while Portland itself came up short with only a 48:52 ratio.[348] The density of new development increased throughout the region by 13% to 32% over pre-Housing Rule levels.[349] However, not all the projects built were built to the maximum density allowed

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[342] 1000 FRIENDS OF OREGON, THE IMPACT OF OREGON'S LAND USE PLANNING PROGRAM ON HOUSING OPPORTUNITIES IN THE PORTLAND METROPOLITAN REGION 6-7 (1982) (prepared by Mark Greenfield & L. De Kroon Rahman) [hereinafter 1000 FRIENDS OF OREGON, IMPACT OF PROGRAM].

[343] *Id.* at 4, 23.

[344] KNAAP & NELSON, *supra* note 316, at 82.

[345] 1000 FRIENDS OF OREGON, IMPACT OF PROGRAM, *supra* note 342, at 7.

[346] 1000 FRIENDS OF OREGON, AFFORDABLE HOUSING, *supra* note 5, at 6.

[347] *Id.* One county, Washington, approved 11,110 multi-family units during the five-year study period, nearly equal to the 13,893 units planned for the next twenty years prior to the Housing Rule. *Id.* at 10.

[348] Toulan, *supra* note 320, at 110.

[349] 1000 FRIENDS OF OREGON, AFFORDABLE HOUSING, *supra* note 5, at 7.

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by local zoning. While multi-family projects were built at 90% of the zoned density, single-family subdivisions were only built at 66% of allowable density.[350] Furthermore, 12% of single-family subdivisions were built on land whose zoning allowed for multi-family housing.[351] 1000 Friends concludes that, due to "underbuilding," not enough land is zoned to meet the metropolitan area's projected housing need over the remainder of the twenty-year planning period.[352]

Outside the Portland area, Oregon cities did not do as well with respect to housing mix and density.[353] For example, only 34% of new housing starts were multi-family or attached in the Brookings area, and only 15% in the Medford area.[354] In the Bend area, single-family residential subdivisions averaged two lots per acre, 40% of the allowable density.[355] This is evidence that the Housing Rule has had effect over and above the LCDC's other regulations, but obviously the housing market is very different in the Portland area than it is in Oregon's other metropolitan areas. But, even for the Portland area, the evidence regarding actual housing construction is mixed. Looking at the Portland area's pattern of multi-family housing starts, one sees that they were just as high in the early 1970s as they were in the late 1980s, and not substantially different after the adoption of the Housing Rule than that of other western municipal areas.[356] The annual data is highly variable, suggesting that market cycles rather than zoning is the dominant factor. However, we know that municipalities changed their comprehensive plans to allow for multi-

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[350] *Id.* at 8.

[351] *Id.* at 9. To some degree the program might have been a victim of its own success. By lowering land prices it made lower density development more profitable. Otherwise, given the finite supply of land caused by the UGBs, developers would probably prefer to build up to zoning maximums. One could correct for this by requiring and not just permitting multi-family and high-density development, but then one is forcing the market as opposed to fighting exclusionary zoning.

[352] *Id.*

[353] *See* Robert L. Liberty, *Planned Growth: The Oregon Model*, NAT. RESOURCES & ENV'T, Summer 1998, at 315, 318 (Mr. Liberty is the executive director of 1000 Friends of Oregon); Toulan, *supra* note 320, at 113. It is unclear whether this is because of inadequate zoning or market forces.

[354] Toulan, *supra* note 320, at 109. "Area" refers to the area within the UGB.

[355] ECO NORTHWEST & D. NEWTON & ASSOC., BEND CASE STUDY: URBAN GROWTH MANAGEMENT STUDY 9 (1990).

[356] KNAAP & NELSON, *supra* note 316, at 90-91. Knaap and Nelson believe that Oregon does not clearly have a wider mix of housing types or higher density development than other western states, but recognizes that it has relatively low housing costs despite its UGBs. *Id.* at 95-96. They believe that the "lackluster" Oregon economy and the coordination of planning for urban services have helped keep housing prices down, but paradoxically also include the increase in allowed housing densities as a factor. *Id.* at 96.

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family housing in response to the Housing Rule. So, either zoning was more lax in the early 1970s and had been tightened up by the late 1970s or, as Knaap and Nelson suggest, towns did not hold developers to earlier low-density zoning requirements.[357] Towns could more easily grant variances or ignore violations prior to 1973 because comprehensive plans were not binding on towns before then.[358]

Turning to housing prices and affordability, the Portland metropolitan area has consistently had lower housing prices than other western metropolitan areas, but admittedly, this pattern began before 1981.[359] Still, it seems significant that despite its UGB, which was widely predicted to increase housing prices, from 1980 to 1990, the average price of a single-family home on a 10,000 square foot lot in Portland grew at an annual rate of 3.6%, compared to 4.9% in other western cities.[360] So, not only did Portland housing remain cheaper than that of other western cities, but the gap grew. Also, as of 1990, housing affordability, measured as a percentage of an area's households able to purchase the area's median-priced house, was two to three times greater in the Portland area than in comparable West Coast metropolitan areas.[361] Nationwide, Portland came in fourth out of twenty-three metropolitan areas for affordability, behind Houston, Detroit, and Minneapolis/St. Paul.[362]

Generally, housing prices remained "modest and affordable" in Oregon by national standards into the early 1990s, but Robert Liberty of 1000 Friends reports that "rapid price increases later in that decade have sharply reduced housing affordability in many parts of Oregon."[363] But even so, he reports, average housing prices in the Portland metropolitan area remained below that of most western metropolitan areas.[364] A 1999 study places the median price of a

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[357] KNAAP & NELSON, *supra* note 316, at 93.

[358] *Id.*

[359] *Id.* at 85.

[360] Toulan, *supra* note 320, at 115.

[361] 1000 FRIENDS OF OREGON, AFFORDABLE HOUSING, *supra* note 5, at 6. The other metropolitan areas were San Diego, Los Angeles, Sacramento, San Jose, San Francisco, and Seattle.

[362] Toulan, *supra* note 320, at 116.

[363] Liberty, *supra* note 353, at 318. Liberty argues that lack of affordability could be due to relatively modest incomes rather than unusually high home prices. *Id.* But one would expect that modest incomes, all other things being equal, would lead to modest housing demand, suggesting that supply-side factors, such as land-use control, were keeping housing prices from falling.

[364] Liberty, *supra* note 353, at 318. For example, the average single-family home price in 1997 in Portland was $151,000, $288,000 in the San Francisco Bay Area,

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single-family home in Portland at $160,000, Denver at $160,000, Seattle at $195,000, San Diego at $203,000, San Jose at $346,000, and San Francisco at $400,000.[365] While Portland was below average in the west, Eugene, Salem, and Medford were below average nationally.[366] As for affordability relative to income, another 1999 study placed Oregon in the middle nationally with respect to "the number of full-time job incomes" needed to rent the median two-bedroom apartment, but found it to be the cheapest among West Coast states (i.e., Washington, California, and Alaska).[367] With respect to single-family homes, the ratio of median home price to family income was 3.05 in Portland, 3.16 in Eugene-Springfield and 2.85 in Salem, compared with 3.70 in Los Angeles, 3.74 in Santa Barbara, 3.89 in Oakland, and 3.87 in San Diego.[368]

In summary, the evidence suggests that the LCDC has had a significant impact on zoning within the Portland metropolitan area. It also suggests some positive impact on the actual construction of high-density housing and housing affordability, although the data is mixed on this score. But, if it is true, as one commentator asserts, that "[a]lmost all success stories are in the Portland metropolitan area,"[369] this certainly reflects poorly on Oregon's general program for making housing affordable for all of its residents. Given the relative free rein granted to the LCDC, its interest group support, and its evident sense of mission, this suggests that the difficulty of fighting exclusionary zoning might extend to all government efforts and not just to judicial ones. Absent relatively extraordinary rules

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$183,000 in Seattle, but only $139,000 in Denver. *Id.*

[365] 1000 Friends of Oregon, *Myths and Facts about Urban Growth Boundaries*, http://www.friends.org/resources/myths.html (Nov. 1999) (citing the National Association of Home Builder's "Housing Opportunity Index").

[366] *Id.* (citing OREGON BUILDING INDUSTRY ASS'N ET AL., OREGON HOUSING COST STUDY (1999)).

[367] *Id.* (citing HARVARD UNIVERSITY JOINT CENTER FOR HOUSING STUDIES, THE STATE OF THE NATION'S HOUSING (1999)).

[368] Evan Manvel, *Four Reasons NAHB's Housing Affordability Rankings Don't Tell Us What We Care About*, http://www.friends.org/resources/nahb.html (last visited Sept. 30, 2001) (citing the National Association of Home Builder's "Housing Affordability Index"). The main goal of this website is to rebut the NAHB's affordability rankings that had placed Portland at 177, Eugene-Springfield at 182, and Salem at 170, out of 184 municipalities across the nation. For example, Los Angeles, Santa Barbara, Oakland, and San Diego are all placed above Portland on the rankings although they have higher median housing price to median income ratios.

[369] Toulan, *supra* note 320, at 116.

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such as the "Metropolitan Housing Rule," state oversight of local land-use planning and zoning has yet to prove very effective with respect to significantly altering housing patterns and affordability.[370]

2. California

California has an oversight scheme similar to Oregon's with respect to affordable housing, except that its version of the LCDC has weaker enforcement powers and does not have a LUBA. As a result, enforcement rests with the courts. This feature of the California scheme has been blamed for its shortcomings, and the California experience does tend to demonstrate the superiority of administrative enforcement relative to judicial enforcement in this area. At the end of this section, I briefly discuss the programs of New Jersey, Connecticut, and Massachusetts with respect to this issue.

As in Oregon, the California statute requires municipalities to adopt a long-term comprehensive plan whose housing element includes a strategy for meeting the locality's share of the regional housing need at various income levels.[371] The Department of Housing and Community Development (HCD) determines each region's housing needs, while the regional Councils of Government (COG) determine each locality's share of the regional housing need.[372] HCD reviews local housing elements for compliance, but it has no power to compel localities to implement them.[373] But, while the statute allows little regulatory enforcement, it does permit court action by private parties.[374]

Like New Jersey's, the California courts have broad enforcement powers.[375] However, the time and expense of litigation, as well as

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[370] The effectiveness of mandatory future housing mixes and densities might depend on general oversight of municipal housing elements because, otherwise, towns could avoid housing mix and density requirements simply by choosing not to allow *any* new housing.

[371] CAL. GOV'T CODE § 65583 (West 2001).

[372] CAL. GOV'T CODE § 65584 (West 2001).

[373] *Id.*; *see also* HUD ADVISORY COMM. ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *supra* note 5, at 7-6 (stating with respect to California's program that "there are no effective implementation methods or strong incentives for local governments fully to follow their housing element or to implement the programs in them").

[374] CAL. GOV'T CODE § 65587 (West 2001).

[375] They include the power to suspend a municipality's power to issue building permits, grant zoning changes or variances, and grant subdivision approvals, as well as the power to mandate approval of building permits under certain limited conditions (i.e., the "builder's remedy"). CAL. GOV'T CODE § 65755 (West 2001). *See also* Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 47-50 (arguing that lack of judicial enforcement is not due to lack of enforcement powers).

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judicial reluctance to wield its powers over land-use decisions, has made enforcement through the courts seemingly unsatisfactory. As in New Jersey, despite very liberal standing rules, the cost of litigation has meant that developers bring almost all suits in California.[376] But, unlike in New Jersey, there have not been a very large number of developer's suits. One reason for this is that, for developers, the cost of litigation, like any other cost, can be the difference between a project's profitability and unprofitability. Second, site options and financing commitments, both private and public, can lapse during the lengthy delays caused by litigation.[377] Third, as has been mentioned, a significant amount of discretion is unavoidable in local land-use decision-making. As a result, other impediments to development can always be made to arise once a developer has alienated a town by suing it. Even if the merits lie with the developer with respect to these new impediments and this can be proved in court, for the reasons mentioned above, time is on the side of the municipality. Fourth, even if the municipality is unable to figure out a way to stop the project in question, if the developer is a repeat player, it will be unwilling to jeopardize the town's goodwill on behalf of the project because such goodwill will be needed for other or future projects.[378]

Another problem with relying on the courts to enforce anti-exclusionary zoning laws is judicial reluctance. State judges in particular are likely to show deference to local land-use decision-making. Most face periodic elections, even if they are non-partisan, as is the case in California,[379] and angry homeowners are a powerful constituency. Even in New Jersey, where the judges are appointed and have job security until they reach retirement age, there is evidence that trial judges resisted implementing the *Mt. Laurel* doctrine.[380] Judges are likely to be prominent members of their communities and, indeed, to be among the homeowners who stand to benefit from exclusionary zoning. Although the community

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A search of Westlaw and Lexis revealed no cases in which a builder's remedy has been granted.

376 Field, *supra* note 375, at 51 n.121 (stating that as of 1993, there were only three published cases brought by citizen's groups). Even though private attorneys can file suits on behalf of taxpayers and collect attorney's fees, Field reports that there are no published cases in which this has occurred. *Id.* at 51 n.120.

377 *Id.*

378 *See, e.g.*, Bradley Inman, *Lawmakers Frustrated with Low-Cost Housing at Local Level*, THE SAN DIEGO UNION-TRIBUNE, Dec. 8, 1991, at F5.

379 THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 135-37.

380 *See supra* note 186 and accompanying text.

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pressure with respect to exclusionary zoning might not be quite as intense as was faced with respect to desegregation, if the New Jersey experience is any guide, it can still be very powerful.[381] It would be naïve to believe that local judges would not, to some extent, share the values of their communities and be influenced by the local social and political "environment."

Judges might also be unwilling to delve too deeply into an area such as land-use that is both highly technical and extremely political. This seems to have been the case in California. Ben Field's survey of California cases demonstrates that, despite having a legislative mandate, the California courts have shown substantial deference to local land-use decision-making, limiting themselves to reviewing local housing elements for facial compliance with the housing element law.[382] In other words, they seem unwilling to delve below the surface and evaluate the substance of the housing elements.[383]

New Jersey from 1983 to 1986 and Connecticut from 1990 to 1995 sought to avoid the problem of judicial timidity by assigning anti-exclusionary zoning cases to a handful of select judges. At least in the case of New Jersey, this gave the selected judges a sense of expertise that came from repeated experience and perhaps also a sense of mission. But, in Connecticut, the number of lawsuits and consequent construction appear to have been small both before and after 1995.[384] It should be noted before moving on that the

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[381] *See* ROSENBERG, *supra* note 300, at 17-18, 89-91 (describing how and why trial judges, especially state trial judges, can sabotage the implementation of higher court opinions and did in fact sabotage *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954)). For evidence that New Jersey trial courts undermined the implementation of *Mt. Laurel*, see *supra* note 186 and accompanying text.

[382] Field, *supra* note 375, at 54-61.

[383] *Id.* Field cites the unwillingness of the courts to consider evidence extrinsic to the housing element in their evaluations as indicative of their unwillingness to probe beneath the surface. *Id.* at 57.

[384] During the first six years of Connecticut's Affordable Housing Land Use Appeals Procedure Act, developers won twenty-seven of forty-five appeals brought, a high percentage of victories but a small number of cases. Peter J. Vodola, *supra* note 112, at 1237-38. The result was seventy-eight lower-income units built and approval of another 386, with ninety-one of those under construction. *Id.* One of the changes imposed by the 1995 amendments to the Connecticut Act was to relocate appeals to the judicial district where the property in question is located rather than to the Hartford district. *Id.* at 1242 n.19 (citing P.A. 95-280 (approved July 6, 1995)). The results up through 1999 are 218 lower-income units built and approval of another 441, with 166 of those under construction. Including the market-rate units, the totals are 666 units built and approval of another 1141, with 299 of those under construction. JOHN RAPPA, OFFICE OF LEGISLATIVE RESEARCH, NO. 2000-r-0607, HOUSING PROJECTS DEVELOPED UNDER THE AFFORDABLE HOUSING LAND USE APPEALS PROCEDURE 8 (2000), *available at* http://www.cga.state.ct.us/2000/rpt/olr/htm/

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Connecticut Affordable Land Use Appeals Procedure Act presents yet another approach to fighting exclusionary zoning. It creates a special appeals procedure for permit denials of projects that include lower-income housing if the municipality's housing stock is less than 10% lower-income housing.[385] Contrary to the usual practice with respect to zoning, the municipality bears the burden of proof on appeal in these cases.[386]

The Massachusetts "Anti-Snob" Zoning Appeals Act is very similar to the Connecticut Appeals Act, which is not surprising considering that the latter was modeled on the former, except that appeals of permit denials with respect to lower-income housing are handled by an administrative panel rather than the courts.[387] Perhaps as a result, the Massachusetts program seems to have done somewhat better than Connecticut's in terms of numbers of units built.[388] However, it might not be easy politically to create a state agency with the authority to override municipal land-use decisions.[389] But, as the New Jersey experience shows, court activism can provide the necessary political cover so that the creation of such an agency looks like a rescue from the clutches of the courts rather than a state takeover of local government.

III. ASSESSMENT AND RECOMMENDATIONS

This Part begins with an examination of the issues of capacity and legitimacy raised by judicial attempts to fight exclusionary

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2000-r-0607.htm (last visited Sept. 30, 2001).

385 *See* CONN. GEN. STAT. ANN. § 8-30g (West 1998).

386 *Id.*

387 *See* MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 2000). Counteracting the benefits of having an administrative appellate venue, Massachusetts imposes somewhat stricter criteria than does Connecticut for the special appeals process. MASS. GEN. LAWS ANN. ch. 40B, § 20. Rhode Island has a program nearly identical to that of Massachusetts. *See* R.I. GEN. LAWS § 45-53 (1956).

388 *See* Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 574 (1992) (arguing that although the results are mixed and that certain improvements should be made, about a thousand units a year have been produced through the process); HUD ADVISORY COMM. ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, *supra* note 5, at 7-4 (suggesting the efficacy of the Massachusetts Act). MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23.

389 Terry Tondro, a member of the Blue Ribbon Commission that formulated the Connecticut Appeals Act, explains that the creation of a state agency to hear the appeals would have been too hard for the legislature to pass given the "symbolism of a state take-over of local government." Terry J. Tondro, *Fragments of Regionalism: State and Regional Planning in Connecticut at Century's End*, 73 ST. JOHN'S L. REV. 1123, 1138-39 (1999).

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zoning. Then, building on this discussion, it argues that the appropriate role of the judiciary in this area is agenda-setting and leveling the playing field. In light of the difficulties and dangers involved, I make some recommendations with respect to how this role should be approached based on my reading of the experiences of the states discussed in this article, particularly Oregon's. With respect to the issues of judicial capacity and legitimacy, as well as of policy rigidity, this Part particularly draws on the experience of New Jersey, whose courts most aggressively and systematically fought the unpopular fight against exclusionary zoning.

The problems of capacity and legitimacy overlap in at least two ways. First, judicial capacity depends in part on judicial authority, which in turn depends in part on the perceived legitimacy of adjudicative procedures and judicial actions. Second, procedural adjustments aimed at increasing capacity can undermine procedural legitimacy.[390] I conclude that with procedural innovation many of the limitations on court capacity can be overcome to some extent, but that doing so raises profound issues of adjudicative and democratic legitimacy. These issues, as well as the danger of rigidly locking-in a suboptimal policy, suggest that the appropriate role of the courts in fighting exclusionary zoning is not to try to solve the problem themselves, but to set the agenda for the legislative and executive branches and, in doing so, to level the political playing field as best they can.

A. Court Capacity

Generally, when determining the appropriate role of an institution in tackling a social problem, the two main issues are capacity and legitimacy. I wish to argue in this section that, given the considerable institutional flexibility of the courts, as evinced in the area of land-use regulation by the New Jersey courts, the ultimate issue is largely one of legitimacy.[391] If the political context allows them to do so, courts can turn themselves into mini-legislatures and mini-agencies with analogous capacities. The real question is whether they should do so or be allowed to do so. This is not to say

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[390] Because procedural legitimacy is so closely linked to issues of capacity, I discuss it in Section A rather than in Section B, which focuses on issues of judicial usurpation of democratic decision-making.

[391] To some extent this is a reversal of Gerald Rosenberg's position that normative focus on the democratic legitimacy of court activism is misguided since what the courts do has little effect on society at large. ROSENBERG, *supra* note 300, at 343 (1991).

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that courts can fully emulate legislatures and agencies even if given free rein. Especially in the realm of enforcement, administrative agencies have perhaps inherent advantages over the courts.[392] But, the New Jersey experience shows that the ultimate constraint on judicial capacity is the extent to which the political context allows courts to alter their institutional structure in order to legislate solutions to social problems and implement them. In the following paragraphs, I first discuss this institutional proteanism of the courts, then an objection that the New Jersey Supreme Court did not in fact demonstrate much competence, and then finally the Gerald Rosenberg critique of the ability of courts to bring about social change.

The issue of court capacity has two dimensions, the competence of the officials involved—namely, judges—and the suitability of adjudicative procedures to the resolution of general societal problems. Both have been called into question. For instance, in one well-known critique, Donald Horowitz has argued that courts lack the capacity to make good policy decisions because of a lack of specialized expertise, a lack of control over the timing of intervention, a lack of comprehensive information, a lack of remedial flexibility, and a lack of monitoring ability with respect to compliance and, more importantly, with respect to the secondary and tertiary effects of their decisions.[393] But, there is nothing in the inherent nature of the universe that prevents courts from aggrandizing to themselves legislative and administrative capacities. Like all institutions, they are only limited by the political will not to grant them such capacities. In other words, smart, diligent, courageous judges can write good legislation and administer it competently, if they are allowed to make the necessary procedural alterations, including the appropriation of others' expertise. To some extent, this seems to be what happened in New Jersey. The New Jersey Supreme Court reworked itself into a temporary mini-legislature in order to formulate the piece of legislation that was the *Mt. Laurel II* decision.[394] Then, the three judges, whom the supreme court had hand-selected to implement *Mt. Laurel II*, reworked themselves into a sort of streamlined administrative agency in order to carry out their appointed function.[395] But, just as judges can capably take on legislative and administrative tasks if permitted to make the necessary

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392 *See supra* Part II.B.2.

393 HOROWITZ, *supra* note 226, at 25-55.

394 *See supra* notes 186-91 and accompanying text.

395 *See supra* notes 215-29 and accompanying text.

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procedural adjustments, smart and diligent legislators and executive officials can do the same with respect to adjudicative tasks. In either case, issues of democratic self-government, checks and balances, and procedural due process are implicated by such institutional aggrandizement, and these are all ultimately issues of legitimacy.

Of course, to the extent that they alter their institutional structure, courts may no longer be considered to be courts. But this is only a problem in more than a formalistic sense if we believe that such alteration either results in a hybrid procedure that is unfair or that harms the ability of courts to perform their traditional function of resolving two-party disputes, perhaps because it is not easy or costless to shift back and forth between roles and procedures.[396] I do not mean to dismiss the latter issue, but because the case studies in Part II present no evidence with respect to it, I focus here on the issue of the legitimacy of the procedures adopted to fight exclusionary zoning.

The prerequisites of procedural legitimacy with respect to the traditional adjudicative task of dispute resolution and with respect to general societal problem-solving are not the same. Dispute resolution requires impartiality, political insularity, and principled reasoning, while social planning and problem-solving require accountability, preference aggregation, and democratic deliberation.[397] During the discussion of the procedures adopted by the New Jersey courts in order to fight exclusionary zoning, it was suggested that procedural legitimacy might have been compromised.

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[396] This latter observation goes to the efficiency gains of institutional specialization.

[397] I do not mean the distinction to be hard and fast. Obviously the concepts of "principled reasoning" and "democratic deliberation," for instance, cannot be easily distinguished nor should they be. However, dispute resolution and general problem solving are conceptually distinct and have different legitimacy requirements. In an address worth quoting at length, Judge Simon H. Rifkind points out the difficulties that problem solving poses for the adjudicative process:

> Problem-solving is . . . a chancy business requiring, in a democracy, not only wisdom and inventiveness but a keen perception of the political implications. Moreover, it imposes a duty upon the problem-solver to hear all those who have a significant interest in the problem. Very frequently the problem-solver tends to become a champion of a cause and not a neutral decider. His reward comes from popular acclaim, not from law review commendation.

Judge Simon H. Rifkind, *Are We Asking too Much of Our Courts?*, 15 JUDGES' J. 43, 46 (1976). Rifkind's address is quoted at even greater length by New Jersey Supreme Court Justice Clifford in his lukewarm concurrence in *Oakwood at Madison, Inc. v Township of Madison*, 72 N.J. 481, 631-634, 371 A.2d 1192, 1268-69 (1977) (Clifford, J., concurring).

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By essentially appropriating the parties' attorneys and land-use experts, the New Jersey Supreme Court, as well as Judge Serpentelli, denied the parties any semblance of control over the presentation of their cases.[398] Furthermore, settling issues, such as the formula for determining municipal fair share, once and for all, denies future litigants a full hearing. This is in addition to the problem of the courts adopting, or being perceived as adopting, a "mission orientation."[399] While these are problems for the legitimacy of the adjudicative process, they are not generally considered serious problems for the legitimacy of legislative or administrative processes. The legitimacy of a process depends on the nature of the task—dispute resolution versus general societal problem-solving.

One might object that, even granting their institutional innovation, I have not actually proven that the courts in New Jersey demonstrated much capacity to make good legislative and administrative decisions. Tarr and Harrison, for instance, conclude that the New Jersey Supreme Court decisions in *Mt. Laurel I* and *II* were incompetent and that this reflects poorly on judicial capacity in the land-use area.[400] But, although Tarr and Harrison phrase their criticism in terms of the court failing to consider relevant research and issues,[401] the real problem for them is that the court came out differently on the issues than they would have. Considering the complexities of the issue as a whole, this does not necessarily reflect poorly on the court, especially considering that the Tarr and Harrison view of exclusionary zoning as not posing a problem is a minority position in the academic literature. In any case, neither Tarr and Harrison nor others have demonstrated that the legislature would have done a better job than the New Jersey Supreme Court, even if a level political playing field had existed. The New Jersey legislature, in fact, passed a statute that largely mimicked what the courts had done, although this might have reflected its view of what would pass constitutional muster, rather than its honest view of the

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[398] *See supra* notes 191-94, 215-29 and accompanying text.

[399] Although it increases consistency and expertise and decreases redundancy and undue deference, specially assigning a small number of judges to handle the task of fighting exclusionary zoning exacerbates the mission-orientation problem. *See supra* notes 237-43 and accompanying text.

[400] Tarr & Harrison, *supra* note 22, at 556-67.

[401] *Id.* at 567 ("[T]he fact that the court failed to consider relevant research relating to land use regulation and to consider relevant and possible adverse consequences of its decisions raises serious doubts not only about the desirability of its policy prescriptions but also, more generally, about judicial capacity to contribute in a useful way to policy in this area.").

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best way to fight exclusionary zoning. Likewise, it is possible that the courts have not done as well as COAH in making the individual land-use decisions necessary to implement the *Mt. Laurel* doctrine. I am unaware of any evidence to support this contention, although COAH regulations do seem to have provided a consistency in implementation that is impossible for a decentralized court system to provide.[402] But, generally, given the complex and controversial nature of land-use decision-making and the issue of exclusionary zoning, one cannot conclude that the courts are incompetent in this area just because one disagrees with their decisions.

Another criticism of court action in the area of social policy is not that it is incompetent, but that it is ineffectual. This is a hypothesis most recently and prominently championed by Gerald Rosenberg.[403] For courts to bring about social change,[404] according to Rosenberg, they must overcome three constraints: (1) the limited nature of constitutional rights, (2) their lack of independence, and (3) their lack of implementation powers.[405] Courts can overcome the first constraint simply by ignoring it, but this will certainly impact their ability to overcome the last two constraints. To overcome these constraints, courts require support from the executive and legislative branches, along with low levels of societal opposition and the presence of one of four conditions. These conditions are (1) the power to dispense "sticks," (2) the power to dispense "carrots," (3)

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[402] Telephone interview with Carl S. Bisgaier, *supra* note 259. Consistency across cases is one advantage that bureaucratic procedures have over adjudicative ones.

[403] ROSENBERG, *supra* note 300. For some of the better criticism of Rosenberg's argument, see Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992) (review essay of GERALD N. ROSENBERG, THE HOLLOW HOPE); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993) (reviewing GERALD N. ROSENBERG, THE HOLLOW HOPE and GERALD P. LOPEZ, REBELLIOUS LAWYERING); Michael W. McCann, *Reform Litigation on Trial*, 26 LAW & SOC. INQUIRY 715 (1992) (reviewing GERALD N. ROSENBERG, THE HOLLOW HOPE)

[404] Rosenberg defines "social change" as "policy change with nationwide impact" that affects "large groups of people." ROSENBERG, *supra* note 300, at 4. He gives the notion a substantive egalitarian content by further defining it as "broadening and equalizing" the distribution of basic goods such as material resources and political participation. *Id.* Presumably an anti-egalitarian change in the nature of society would also count as "social change." Rosenberg's discussion of desegregation and gender equality suggest that what he has in mind is a change in the nature of society that can be characterized as near-fundamental. Because he is focused on the federal courts, Rosenberg neglects the possibility that social change could occur on a statewide basis.

[405] ROSENBERG, *supra* note 300, at 35-36. Since this paper is concerned primarily with the appropriate role of the courts and not predicting what role they will take, the first constraint regarding the nature of constitutional rights is more appropriately discussed with respect to the issue of legitimacy of court action, not its efficacy.

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the existence of market implementation, and (4) officials who are willing to act, but desire political cover in the form of court orders.[406] Unless courts have elite support, only minor societal opposition, and at least one of the four implementation conditions, they are unable to even indirectly bring about social change by changing elite or popular opinion, or by mobilizing supporters to action.[407]

The New Jersey experience to some extent supports the Rosenberg hypothesis. The Rosenberg framework predicts that the New Jersey courts' attempt to bring about social change was doomed to fail and, if genuine social change was the goal, I believe that it did. The courts lacked political support for their anti-exclusionary zoning program, and societal opposition was relatively staunch, if not rising to the level of anti-desegregation sentiment in the Deep South.[408] Despite this, we know that, unlike *Brown* and the civil rights acts, *Mt. Laurel* did lead to New Jersey's FHA[409] and a significant amount of housing, including lower-income housing.[410] Charles Haar, in fact, concludes that New Jersey's experience with *Mt. Laurel* "flatly contradicts" the Rosenberg hypothesis.[411] But, it seems clear that rather than being positively inspired by *Mt. Laurel*, the FHA was largely an attempt to declaw it. Furthermore, the fact that attempts to override *Mt. Laurel* by amendment have failed is more of a testament to the uniqueness of New Jersey's constitutional amendment procedure than anything else. Similarly, the failure of the attempt to block Chief Justice Robert Wilentz's reappointment is a testament to the uniqueness of New Jersey's appointment procedures. Both of these phenomena are evidence of a political culture supporting deference to the state supreme court, and are not indicative of anything resembling the general influence of the

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406 *Id.*

407 *Id.* at 127-31 (civil rights), 245-46 (women's rights), 338 (generally).

408 *See supra* notes 244-49 and accompanying text.

409 *See supra* notes 244-49 and accompanying text.

410 *See supra* notes 278-81 and accompanying text.

411 HAAR *supra* note 8, at 130-31, 133, & 238 n.14. John Boger also uses *Mt. Laurel* to criticize Rosenberg, arguing that, like *Brown*, it had "an extraordinary legitimating force, which can empower a minority to come forward and claim the protection of those rights the courts have identified and reserved for them." John Charles Boger, Mount Laurel *at 21 Years: Reflections on the Power of the Courts and Legislatures To Shape Social Change*, 27 SETON HALL L. REV. 1450, 1470 (1997). Although the *Mt. Laurel* decisions probably had some effect in mobilizing housing advocates, its main effect was probably to mobilize developers, due to its "builder's remedy," and to give both groups the benefit of the status quo absent a constitutional amendment overturning *Mt. Laurel II*.

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courts.[412] That significant amounts of housing were constructed in Pennsylvania and Massachusetts is due largely to the builders' remedy, which meets one of Rosenberg's conditions for successful implementation: the existence of market implementation. In any case, 30,000 units of lower-income housing built in thirteen years in a state the size of New Jersey, with no racial integration and little socioeconomic integration resulting, can hardly be considered to constitute "social change." Courts cannot force people to move, and they cannot plan and finance the public transportation and employment opportunities necessary to integrate the urban poor into the suburbs.[413]

I would suggest that bringing about substantial social change might be too high a standard for judging the legal fight against exclusionary zoning. If my intuition is correct and exclusionary zoning is only one relatively minor factor causing residential segregation and the plight of the cities, then even successful fights against it will bring about only minor social change.[414] It is indicative that in Anthony Downs's account of what it would take to truly open up the suburbs, the courts and zoning changes play only a minor role.[415] But, significant numbers of new housing units built in the suburbs at a time when the suburbs seem to be moving in an increasingly exclusionary and anti-residential growth direction, even if it meets only a fraction of the housing need, is a significant achievement for a court system lacking support for its program.

B. Court Legitimacy

The legitimacy of the courts tackling social problems comes down largely to two things: (1) the fairness of the processes that they adopt when tackling such problems, and (2) the degree of usurpation of democratic decision-making entailed by the attempt.

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412 *See supra* Part II.A.4.e.

413 *Cf.* Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1143 (1995) [hereinafter Note, *Growth Management*] (describing what is necessary to "deconcentrate" low-income households and the need for state planning in order to bring it about).

414 *See supra* notes 66-72 and accompanying text.

415 DOWNS, OPENING UP THE SUBURBS, *supra* note 1, at 131-65; *see also, e.g.*, Note, *Growth Management*, *supra* note 413, at 1143 (stating that "[m]eaningful change will not be easy. The deconcentration of low-income households requires more than the curtailment of suburban power to exclude affordable housing"). For the purposes of this article, which only addresses the appropriate role of the courts in fighting exclusionary zoning, I have deliberately not taken a position with respect to the comprehensive legislative agenda of those, like Anthony Downs, who want to disperse the urban poor throughout suburbia through a variety of proactive means.

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Having already discussed the first issue in the previous section, I turn here to the second. A third factor, the primary one for some, is the degree of plausibility of the constitutional or statutory interpretation upon which the court's activism rests.[416] For example, even some allies of the *Mt. Laurel* court believe that the "general welfare" rationale was an implausible constitutional justification for the court's activism and that this undermined its legitimacy.[417] However, the implausibility problem posed by the fight against exclusionary zoning rests largely at the remedial stage rather than the general principle stage.[418] That municipalities should promote the general welfare when exercising their land-use power and should not deliberately exercise it in a discriminatory manner in order to exclude the less wealthy are principles that can be plausibly derived from any state constitution. The problem is what these principles can plausibly justify doing when municipalities claim that they are promoting the general welfare and deny trying to keep the poor out, although exclusion is to some degree the necessary by-product of policies that otherwise have legitimate bases, such as the promotion of health and safety. Court action in these circumstances, regardless of its legal basis, poses a danger of usurpation of democratic decision-making.[419]

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[416] An implausible statutory interpretation poses less of a legitimacy problem insofar as it is easier for the legislature to override than an implausible constitutional interpretation. Of course, this assumes that the court will recognize and acquiesce to a statutory override rather than interpret it in some implausible way that supports its earlier implausible interpretation.

[417] *See, e.g.*, Payne, *supra* note 13, at 1709 ("[A] court mindful of its own stock of legitimacy, should interfere with the political choices only in proportion to the confidence that the constitutional mandate is clear and unambiguous. The general welfare approach of the *Mount Laurel* cases has failed this test."). Kirp et al. share this skeptical view of the "general welfare approach" but seem willing to overlook it given their belief in the rightness of the cause. KIRP ET AL., *supra* note 145, at 145 (stating that the constitutional right at issue had the "flimsiest of support . . . since the 'general welfare' means more or less whatever the majority of the justices says it means"). Payne believes that a "constitutional rule requiring municipalities to exercise their land use power in a racially fair way would command broad . . . respect as a legitimate exercise of judicial power." Payne, *supra* note 13, at 1709. However, I am skeptical that "racially fair way" provides a "clear and unambiguous mandate" for the full *Mt. Laurel II* program or that the citizenry would generally believe so.

[418] *Cf.* Robert Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 709 (1978) (observing in the context of institutional litigation that "the plausibility that the injunctive language is necessary to fulfill the courts' constitutional function decreases as the gap between the generality of the constitutional language and the specificity of the injunctive language increases").

[419] Furthermore, even if the constitutional language is unambiguous, the binding of future generations by past ones through the practice of judicial review can be seen as undemocratic. *See, e.g.*, Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145 (1998) (discussing, inter alia, the "dead

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I want to be clear that the problem of legitimacy posed by judges taking on essentially legislative and executive tasks is not the violation of a formalistic version of the separation of powers doctrine.[420] As with the federal government, the states have systems of government characterized by separate institutional powers exercising overlapping functions. This is the essence of a system of checks and balances. Each branch of government must to some degree exercise functions performed primarily by the others in order to fulfill the overall checking function that the system is designed to achieve. This is in contrast to the British system in which power is unified while function is specialized.[421] Checks and balances and not functional specialization are the essence of the American system.[422] The legitimacy problem arises when one of the branches aggrandizes too much power to itself, thereby upsetting the system of checks and balances.[423] So, for the courts, the ultimate issue in terms of legitimacy is not whether their performance of legislative and executive functions violates the separation of powers, but whether it infringes on popular sovereignty. Democracy and not specialization is what is important when it comes to the legitimacy of judicial policymaking.[424]

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hand" problem posed by constitutionalism); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993) (same).

[420] For a criticism of *Mt. Laurel II* from the perspective of separation of powers doctrine, see Tarr & Harrison, *supra* note 22, at 538-41. Tarr and Harrison recognize that in many states it is traditional for the courts to exercise lawmaking functions beyond those exercised by the federal courts, and that, in particular, the New Jersey courts traditionally have exercised jurisdiction over substantive abuses of the zoning power. They nevertheless criticize the *Mt. Laurel II* court for not taking the separation of powers issue seriously enough. *Id.*

[421] *See* SAMUEL HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 109-21 (1968) (contrasting the American and British systems of government to the detriment of the American); WALTER BAGEHOT, THE ENGLISH CONSTITUTION AND OTHER POLITICAL ESSAYS 290-91 (New York, D. Appleton & Co. 1887) (same).

[422] After all, in the context of fighting exclusionary zoning, it is not considered a problem that administrative bodies such as COAH and LUBA serve essentially adjudicative functions.

[423] *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). Madison makes it very clear that it is checks and balances and not functional specialization for its own sake that is important. *Id.* at 302-03 (arguing that Montesquieu "did not mean that these departments ought to have no *partial agency* in . . . the acts of each other," but only that "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted").

[424] This is not to deny that specialization might be important with respect to institutional capacity.

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Few would deny that it infringes on democratic decision-making for the courts to require, as they did in New Jersey, that almost every municipality change its zoning and adopt affirmative measures so that a court-specified number of lower-income housing units likely will be built, and then for the courts to oversee the details of implementation down to the parcel level.[425] It infringes not only on a municipality's decision-making with respect to its own land-use, but also the state's decision to delegate such decision-making to the municipality. The ability of municipalities to control the use of the land within their jurisdiction goes directly to their ability to shape their own character and future. The issues implicated by zoning could hardly be more political and, although there are winners and losers in the process, this is true of politics in general. Municipal control of zoning is not just an historical accident but is the result, to varying extents, of considered judgments made at the state level. If such municipal control, in general or in particular categories of cases, is no longer believed to be justified, state legislatures have the ability to preempt that power, although in some cases amending the state constitution might be necessary. Infringing the authority of the more electorally-accountable branches of government should not be made lightly in this area.

The common justification for such infringement, both generally and in the case of New Jersey in particular, is that the legislature was unable to remedy the constitutional wrong because it was a gridlocked[426] victim of "institutionalized lethargy."[427] As a result, the courts were forced to step into the "policy vacuum."[428] However, with due respect to the common wisdom, this was clearly not the case in New Jersey. The legislature had been debating the issue of exclusionary zoning but, given the state's "commitment to local autonomy,"[429] had deliberately decided, despite its recognition of the problem, not to interfere with municipal decision-making. Generally

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[425] *See supra* notes 198-201, 217-25 and accompanying text.

[426] HAAR, *supra* note 8, at 179.

[427] KIRP ET AL., *supra* note 145, at 145. Another common justification for court activism, one seemingly shared by Haar and Kirp et al., is the substantive rightness of the court's actions. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976) (observing that "the American legal tradition has always acknowledged the importance of substantive results for the legitimacy and accountability of judicial action"). But, one cannot always count on being right or being perceived as being right even when one is.

[428] KIRP ET AL., *supra* note 145, at 145.

[429] *Id.* Kirp et al.'s recognition of the role played in legislative debate by the "commitment to local autonomy" is irreconcilable with their view that New Jersey's legislature failed to act because it was somehow incapacitated.

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speaking, legislative "gridlock" is far too sweeping a justification for judicial activism because it can be applied every time the legislature fails to act and the margins are close.[430] The political systems of most American states are deliberately designed to make political action difficult. So, if the complaint is that one's favored policy cannot get through, perhaps the remedy is to work to streamline the political process, not to shortcut it through the courts.

A better rationale is that because of a "malfunctioning" in the democratic system, neither the municipalities nor the state legislature can be trusted to adequately address the issue at stake.[431] Depending on the nature of the malfunction, the moral force of democratic decision-making is to varying degrees also impaired in such cases. This, for example, is the case when a government policy harms those who have been deliberately and unjustifiably denied the right to vote. I have already discussed the "public choice" failures likely to beset the democratic process with respect to the issue of exclusionary zoning.[432] I believe that the presence of these failures justifies significant court intervention, but the nature of the issue and the extent to which judicial activism with respect to it intrudes on democratic self-government suggests that the courts should ultimately defer to the popular will. This is, of course, inevitable in the sense that judges can always be replaced, although this might take somewhat longer in jurisdictions where judges have life tenure.

The undemocratic nature of rule from the bench varies from state to state, according to the method of judicial selection and constitutional amendment.[433] The easier it is for the citizenry to remove judges and amend the Constitution, the lesser the counter-majoritarian difficulty. The issue of legitimacy is somewhat tempered on the state level by the fact that almost all state judges face periodic elections or confirmation throughout their time on the bench.[434] New Jersey's one-time confirmation process is unusual. While it is true that judicial elections are relatively uncontested, if judges stray too far from popular opinion, the means exist to pull them back, as

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[430] *See* Rose, *supra* note 39, at 836-37.

[431] *See generally* ELY, *supra* note 74.

[432] *See supra* Part I.D. As noted there, the victims of exclusionary zoning have been denied the right to vote, in a sense, in the jurisdiction that has excluded them and hence have been excluded from the decision to exclude them.

[433] This is not to say that other problems, including those of legitimacy, arise when judges are too easily subject to political removal and constitutions are too easily subject to amendment.

[434] *See* THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 135-37.

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the California Supreme Court found out.[435] Also, state constitutions, including New Jersey's, are generally easier to amend than the federal constitution.[436] State political majorities also seem quicker to amend their constitutions in order to override judicial decisions.[437] But, it follows, and the history of state constitutional amendment supports this, that to the extent judicial policymaking is less undemocratic because it is more accountable to popular opinion, the more likely it will be overridden when the policy is unpopular, as is likely if the policy seriously challenges exclusionary zoning.

It should be noted that, besides being bad in itself, the illegitimacy of judicial action can have negative instrumental effects to the extent that it is perceived as such and thereby undermines judicial authority. First, a loss of authority can undermine a court's ability to challenge other government policies and actions through the exercise of judicial review or otherwise. Insofar as one believes that this is an important role for the courts to play in our political system, perhaps because it serves a checking, rule of law, or dialogic function, this is an important loss. Second, perceived illegitimacy can undermine the courts' authority with respect to the traditional dispute resolution tasks that constitute the bulk of their docket. As stated in the previous section, dispute resolution requires impartiality, political insularity, and principled reasoning. If these are lacking or are perceived to be lacking, the legal process, as well as respect for the rule of law, is in vast trouble.

C. *The Courts and Legislative Agenda-Setting in the Fight Against Exclusionary Zoning*

As described in the two previous sections, there are two major dangers of which courts should be aware when they enter the thicket of exclusionary zoning. The first danger is that the court will impose one particular approach that it will make impervious to alteration despite its shortcomings. The second danger is that the unpopularity of the approach and the perceived overreaching of the courts will undermine the legitimacy and authority of the court. Given these dangers, the aim of the court, in particular, a state supreme court, should be to provoke the legislature into adequately addressing the exclusionary zoning problem. However, given the public choice problems involved, a good deal of provocation and field-leveling may

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[435] *See* TARR & PORTER, *supra* note 249, at 271.

[436] *See* THE COUNCIL OF STATE GOVERNMENTS, *supra* note 305, at 5-9. *See supra* notes 308-11 and accompanying text.

[437] *See supra* notes 308-11 and accompanying text.

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be required, once again raising the specter of the twin dangers of policy rigidity and political usurpation.

As noted earlier, public choice theory suggests that the more political government branches, state and local, cannot be trusted to fight exclusionary zoning, and that courts should therefore act. However, public choice theory does not provide any substantive solutions.[438] Given the complexity of the exclusionary zoning problem and the variety of plausible approaches to fighting it, any government institution should be wary of imposing a rigid long-term solution. This is regardless of the court's confidence in its own capacities or in the rightness of its cause and its particular approach to it. For example, in the case of New Jersey, a recent *New York Times* article summarizes that "[i]n the realm of laws with unintended consequences, a chapter could be devoted to the Mount Laurel doctrine."[439] Even the *Mt. Laurel*-booster, Charles Haar, admits that many of the builder's remedies awarded were environmentally problematic and "might not pass muster" today.[440] He also believes, in hindsight, that the four-to-one ratio of market-rate to deed-restricted or rent-controlled lower-income units allowed by *Mt. Laurel* and the FHA for builder's remedy eligibility is "too narrow a straitjacket," which does not squeeze developers enough.[441] Generally, a problem with *Mt. Laurel II* is that it seems to have given the New Jersey legislature the impression that it had to rigidly follow the decision's remedial structure in order to pass constitutional muster[442] and that this has impeded reform ever since.[443] The court's

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[438] *See supra* Part I.D.

[439] Jacobs, *supra* note 50, at A1.

[440] HAAR, *supra* note 8, at 199.

[441] *Id.* at 166. Haar goes on to state that by allowing such a high ratio, society "paid an unrealistically high cost to protect builder's profits." *Id.* Others of course would disagree. See the sources, *supra* note 106, which argue that the financial drag of having to provide lower-income units decreases the overall number of housing units built, which in turn raises housing prices generally with a disproportionate negative effect on the poor.

[442] *See* Rose, *supra* note 39, at 838 ("The underlying assumption of New Jersey's FHA was that the legislative response to the exclusionary zoning problem had to take the form prescribed by the New Jersey Supreme Court because of the legislative fear that everything contained in the court's decision was required by the state constitution."). Rose neglects the significant innovation of the RCAs and that COAH had significant discretion in setting fair share numbers and formulating implementing regulations.

[443] It should be noted that changes have occurred, including the adoption of COAH regulations permitting the imposition of mandatory development fees earmarked for lower-income housing, and that further reforms are contemplated. *See* N.J. ADMIN. CODE tit. 5 § 93-8 (2001). *See also* Jacobs, *supra* note 50, at A1 (noting

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rulings certainly seem to block wholesale experimentation with the variety of techniques discussed in Part I.F, including those utilized in other states such as Oregon, Massachusetts, and Pennsylvania. In short, courts should be aware that even if they are sure of the constitutional principle involved, they might be wrong, perhaps disastrously so, with respect to the remedy when tackling complex social issues such as exclusionary zoning.

One way to avoid the rigidity problem and to defuse the legitimacy issue is to rest one's policy on statutory grounds. This was the approach taken by the New Hampshire Supreme Court in *Britton v. Town of Chester*.[444] An additional benefit of the statutory approach is that, as a practical matter, it has a better chance of avoiding making the court the issue rather than exclusionary zoning. It does have the disadvantage that there is a risk that, rather than stimulating an honest confrontation with the problem, it may trigger a knee-jerk legislative override, especially given the political imbalance in the exclusionary zoning context.[445] But the court can always reserve the right to step back in on constitutional grounds if the legislative response is deemed inadequate.[446] Likewise, a court could rest its position on constitutional grounds, while making it clear that a wide range of legislative remedies could conceivably satisfy the constitutional principle involved. If the legislative response was still inadequate, the court could say so, although in close cases it might be prudent to wait and see how the legislative policy works in practice. Because facially reasonable responses may prove to be clearly inadequate in practice, the court should be prepared to intervene if this proves to be the case. In this way, the court can gradually turn up the heat on the more political branches of government rather than throwing them into the fire.

This back-and-forth "dialogue" between the judiciary and the other branches of government has a long and distinguished history of

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that COAH is currently considering proposals designed to ease the *Mt. Laurel* burden on rural areas).

[444] 595 A.2d. 492, 496 (N.H. 1991). See *supra* notes 165-69 and accompanying text.

[445] *See, e.g.*, Haar, *supra* note 8, at 646 (arguing that when fighting exclusionary zoning courts should rest their decisions on constitutional rather than other grounds because it makes judges "freer to carry out the function of defending principle against the wishes of the majority").

[446] This coincides with the somewhat prominent judicial policy, one advocated by the New Hampshire Supreme Court in *Britton*, 595 A.2d at 496, of only resorting to constitutional grounds when an issue cannot be resolved on statutory grounds.

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support in the academic literature.[447] It also has been attributed to the New Jersey Supreme Court's efforts with respect to exclusionary zoning, usually as a means of defending *Mt. Laurel III*, which was widely considered to be a retreat on the court's part.[448] John Payne argues, for instance, that for Chief Justice Robert Wilentz, *Mt. Laurel III* was "no retreat, because the whole point of the exercise was to galvanize the political branches to action."[449] Likewise, Professor Franzese states, "If it was not clear before, *Mount Laurel III* leaves no doubt that the court's attempt in *Mount Laurel II* to implement the constitutional obligation was never intended to usurp the responsibilities of the political branches."[450] Rather, she continues, "*Mount Laurel III* implicitly acknowledges that judicial participation, even at its most aggressive, should exist in the form of a continuous and fluid dialogue with the other political components."[451] On this view, *Mt. Laurel I* provided the state legislature with an invitation to act, which was followed by *Mt. Laurel II* when the invitation was not accepted. When it finally was, the court withdrew in *Mt. Laurel III*. I believe that a more plausible narrative is that *Mt. Laurel I* provided municipalities with an invitation to act whose refusal triggered *Mt. Laurel II*. Under considerable political pressure and institutional strain, the court then withdrew in *Mt. Laurel III* when presented with

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[447] For perhaps its most prominent propounder, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). Bickel himself had in mind a more cautious and less aggressive judicial role in the political dialogue than even that suggested by the previous paragraph let alone the role taken by the New Jersey Supreme Court. *Cf.* GUIDO CALABRESI, A COMMON LAW FOR AN AGE OF STATUTES (1982) (advocating that judges should force legislative reconsideration of laws that have become anachronistic or non-functional).

[448] *See, e.g.*, HAAR, *supra* note 8, at 162 (positing that with respect to the FHA, the "[m]unicipalities joined together and had their way in the state legislature. The court, making a virtue out of necessity, graciously allowed itself to be upstaged.").

[449] John M. Payne, *Politics, Exclusionary Zoning and Robert Wilentz*, 49 RUTGERS L. REV. 689, 704 (1997). Payne adds that the object of *Mt. Laurel II* "was to break the legislative stalemate that prevented meaningful political bargaining and eventually, accomodation [sic] between the 'housers' and the 'suburbs.'" *Id.* at 704-05. I completely agree that this is the proper role for the courts to play, but I am skeptical that this was the New Jersey court's conscious design, and it should be clear that it was not "legislative stalemate" that prevented meaningful bargaining and accommodation but unequal political power between the "housers" and the "suburbs."

[450] Franzese, *supra* note 273, at 50.

[451] *Id.* at 51. For textual support for this reading of *Mt. Laurel III*, see, for example, 103 N.J. at 46, 510 A.2d at 645 ("Both in *Mount Laurel II* and again today we have asserted that the vindication of the *Mount Laurel* obligation is best left to the Legislature. Legislative action was the 'relief' we asked for, and today we have it."), and *id.* at 65, 510 A.2d at 655 ("This kind of response, one that would permit us to withdraw from the field, is what this court has always wanted and sought.").

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a statute that was by and large acceptable on its face.[452]

Alternatively, the role I am recommending can be termed "agenda-setting policymaking," with more emphasis on the "agenda-setting" than on the "policymaking."[453] The idea is to mandate legislative attention to a problem, establish parameters for its solution, and allow policy discretion and political judgment within those parameters.[454] I would add that the parameters should be "soft" in the sense that as conditions and information change, including those regarding the political context, the courts need to demonstrate flexibility in permitting legislative action that falls outside the original parameters. Ultimately, the most prudent and democratically legitimate course of action may be to relent in the face of legislative persistence.

In hindsight, Professor Franzese attributes an agenda-setting purpose to *Mt. Laurel II*, stating that "the court's intervention seemed intended almost as much to help produce that initiative [the FHA] as to vindicate the constitutional rights involved."[455] Furthermore, she states that "[b]y placing the issue of affordable housing at the forefront of the state's political agenda, and prescribing aggressive remedies to fill perceived gaps in state policy, the court provided the coordinating branches with the latitude as well as the incentive to

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[452] *See, e.g.*, HAAR, *supra* note 8, at 162 (stating that "the long haul of institutional reform litigation sapped [the courts'] vigor"), and *id.* at 643 (stating that "a strong case can be made that the New Jersey Supreme Court stopped too soon . . . weary of the struggle"). *See supra* Part II.A.3.

[453] The phrase is Porter and Tarr's. Mary Cornelia Porter & G. Alan Tarr, *Introduction* to STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM, at xvii (Mary Cornelia Porter and G. Alan Tarr eds., 1982). They define "agenda-setting policymaking" as on the one hand "affect[ing] the distribution of political power by focusing attention on unacceptable inequities in existing policy," and on the other as giving "substantial latitude" to the other branches to devise new approaches to resolving those inequities. *Id.* They explicitly provide as examples state supreme court rulings with respect to zoning, school finance and plea bargaining. *Id.* I would suggest that *Mt. Laurel I* provided substantial policymaking discretion to the political branches without affecting the distribution of power, while *Mt. Laurel II* somewhat affected the distribution of power but substantially constrained policymaking discretion. As I argue in the text, this is to some extent a necessary trade-off, one that has gone unrecognized in the exclusionary zoning literature.

[454] TARR & PORTER, *supra* note 249, at 233.

[455] Franzese, *supra* note 273, at 48. Franzese mistakenly cites Porter and Tarr's concept of judicial "innovative policymaking" as having the effects that they attribute to "agenda-setting policymaking," thereby making it easier for her to attribute agenda-setting to *Mt. Laurel II*, although it arguably better fits Porter and Tarr's innovative policymaking model. *Id.* at 48 n.124. The key to innovative policymaking and what sets it apart from agenda-setting policymaking for Porter and Tarr is that it "imposes specific policies." Porter & Tarr, *supra* note 453, at xvi.

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act."[456] Franzese observes that a similar dynamic occurred with respect to the state's school financing system: the court found a constitutional inadequacy, waited for legislative action, and, when it did not occur, imposed its own scheme, which finally did spur legislative action.[457] The parallel has been noticed by others, but in a way that makes clear that more than agenda-setting was going on in both cases. For instance, Tarr and Porter, in a work that appeared six years after the one cited by Franzese and after Franzese's own article, argue that the agenda-setting approach failed in New Jersey with respect to school finance and exclusionary zoning. With respect to school financing, the court was forced to precipitate a crisis by closing the schools, while "the legislation it eventually endorsed only partially met [the court's] goals."[458] Kirp et al.'s interpretation of events is somewhat different than Tarr and Porter's but also suggests that the New Jersey Supreme Court had gone beyond agenda-setting. They observe that as with school finance and reapportionment, the court, by imposing an "unpalatable outcome[,] . . . forced a political response similar to the interim judicial solution."[459]

These accounts suggest a more nuanced, and ultimately problematic, view of not only what the New Jersey Supreme Court did, but of what is necessary to overcome the public choice problems attendant to exclusionary zoning. This more problematic view is not fully captured by the relatively innocuous phrases of "dialogue" and "agenda setting." Kirp et al.'s characterization of the court as imposing a solution suggests that the New Jersey Supreme Court did not avoid the danger of rigidity. But, the problem is that anything short of the New Jersey Supreme Court's actions might fail to motivate the legislature and reasonably level the political playing field. For instance, after observing that the agenda-setting approach has not been "wholly successful" in New Jersey, Tarr and Porter note that the legislative response to the court's exclusionary zoning and school finance decisions demonstrates that "reliance on political officials for the development of policy has, *perhaps inevitably*,

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[456] Franzese, *supra* note 273, at 49 n.229.

[457] *Id.*

[458] TARR & PORTER, *supra* note 249, at 218. Likewise, according Tarr and Porter, the New Jersey Supreme Court "abandoned its agenda-setting approach" in *Mt. Laurel II*, although the agenda it has in mind here might be that of municipalities rather than that of the state legislature.

[459] KIRP ET AL., *supra* note 145, at 146. Tarr and Porter distinguish the issue of reapportionment, arguing that with respect to it the court refused to impose its own solution, instead using deadlines and threats of sanctions to spur legislative action. TARR & PORTER, *supra* note 249, at 215.

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endangered . . . the achievement of judicial objectives."[460] But, when the court has gone further and formulated policy on its own, or delegated it to other judges, Tarr and Porter note it "has strained the capacities of the court, exposed it to political attack, and threatened to erode its authority."[461] These are the Scylla (of ineffectiveness) and Charybdis (of overreaching) faced by judicial action in complex social policy realms such as exclusionary zoning. Although they do not say so, Tarr and Porter could be writing about *Mt. Laurel I* and *III* with respect to the former danger and about *Mt. Laurel II* with respect to the latter.

I have written that the New Jersey Supreme Court escaped its foray into formulating an anti-exclusionary zoning policy relatively unscathed, but that is not exactly true. The near non-reappointment of Chief Justice Wilentz, given that reappointment previously had been near-automatic, suggests that the court's legitimacy was undermined, although perhaps only momentarily. Furthermore, the court's rulings, to a large extent, made the court itself the issue rather than exclusionary zoning.[462] And, as we have seen, the legislative response only mimicked the court's policy, doing so in such a way so as to water it down.[463] It is quite possible that more lower-income housing would have been built if the court had failed to prod the legislature into action.

One is reminded of Gerald Rosenberg's grim reply to justifications for judicial action based on democratic malfunctioning: it is exactly when legislatures fail to act that courts are "most unlikely to be of any help." [464] This just might be correct in the case of exclusionary zoning. Perhaps an indirect, numberless approach such as that of the Pennsylvania Supreme Court might be best, considering the political factors involved. There are two downsides to the Pennsylvania sort of approach, however.[465] First, it does not force the issue to the state level where developer's groups and housing

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[460] TARR & PORTER, *supra* note 249, at 233 (emphasis added).

[461] *Id.*

[462] *See* HAAR, *supra* note 8, at 92-93.

[463] *See supra* notes 250-67 and accompanying text. As such, New Jersey's FHA is not much of a "testament to the vital role a court can serve in creating the conditions for legislative action," as Franzese so writes. Franzese, *supra* note 273, at 53.

[464] ROSENBERG, *supra* note 300, at 338 n.2. Rosenberg refers specifically to John Hart Ely, but it applies equally to an argument such as mine that explains democratic malfunctioning in terms of organizational costs and public choice theory.

[465] These two downsides are in addition to the fact that the partial exclusion element of Pennsylvania's doctrine seems to be susceptible to erosion. *See supra* notes 133-35 and accompanying text.

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advocates at least have a chance to influence policy. Second, if it is to result in significant numbers of lower-income housing either being built or filtering down, the courts will have to substantially disrupt a large number of zoning plans with the negative results that this entails, including political resistance.[466] Furthermore, the different approaches of New Jersey and Pennsylvania are not mutually exclusive. A court could gradually raise the temperature in the manner suggested above[467] and then backtrack to the Pennsylvania approach if overruled by the legislature. If the aim is to get the political branches to honestly address a difficult and important issue, as I believe it should be, and not just to impose the policy that the court believes to be most effective, courts should not be content to rely on the indirect property-rights based approach championed by the Pennsylvania Supreme Court.

Case-by-case numberless approaches aimed directly at lower-income housing seem to suffer from the worst of both worlds, i.e., failing to set the legislature's agenda and failing to get housing built. Without specific numbers, courts are likely to be eventually ground down by the particularly vehement local resistance that they are likely to encounter. This seems to be what happened in New York. Likewise, in New Hampshire, there does not seem to have been any follow-up on *Britton v. Town of Chester.* This is especially likely to be the case if it is randomly selected local trial judges who are asked to enforce the unpopular policy.

I have included the example of Oregon, even though the LCDC was created by the state legislature, because it suggests a possible approach to the extremely difficult problem of how a court can best level the playing field in this area where the deck seems so stacked against reform, while avoiding the dangers of rigidity and overreaching. The experience of the LCDC suggests that if a court can induce the legislature to create a statewide bureaucracy with jurisdiction over local land-use matters, there is a chance that it will provide housing advocates interested in fighting exclusionary zoning with a forum where, with the help of pro-development forces, it can

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[466] It is hard to see how ad hoc rulings requiring that towns zone for some unspecified number of multi-family housing units could lead to large numbers of new units being built without causing major disruption and cries of unfairness from towns with the misfortune of being singled out by a developer. And, as noted above, Connecticut towns, or at least their planners, would rather have the chance to plan for their fair share of lower-income housing than to have the placement of such housing determined by a developer who happens to sue. The same would likely be true to some extent with respect to multi-family housing. *See supra* note 112.

[467] *See supra* notes 445-47 and accompanying text.

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meet the suburbs on something approaching equal footing.[468] This is true even if the substance of the original statute is modest.[469] Once such an agency exists, the courts can help gently nudge it along, as has been the case in Oregon and, to some extent, in New Jersey.[470] Besides different political settings, two factors seem to explain the activism of the LCDC compared to that of COAH. First, the LCDC has mandatory jurisdiction. All municipalities must submit a housing element to the LCDC for "acknowledgement" and, unlike California's HCD, the LCDC has real enforcement powers.[471] When this is the case, municipalities cannot avoid the agency and take the chance that it will not be sued if the agency adopts an activist housing policy. Second, the LCDC seems to have benefited from a less specific but broader mandate. This combination led to less initial opposition on the one hand, and wider interest group support on the other.[472] That it was able to unite environmental interests and affordable housing interests might be one reason why 1000 Friends, the primary interest group pushing statewide land-use regulation in Oregon, has been so influential and post-enactment housing politics so much different in Oregon than in New Jersey.[473]

Contrasting the experience of Oregon with that of California, and perhaps also that of Massachusetts with that of Connecticut, suggests that, if politically feasible, implementation and enforcement of anti-exclusionary programs should be placed in the hands of specialized administrators, rather than that of the courts. Administrative agencies have proven better than the courts at achieving expertise, consistency, speed, and, ultimately, results with less danger to procedural legitimacy.[474]

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[468] John Payne suggests that the creation of COAH, where "as a housing advocate, I now have a political forum within which to lobby, scheme, and intrigue, just as any other interest group does," is the most positive outcome of the *Mt. Laurel* line of cases. Payne, *supra* note 13, at 1712. This is despite COAH's limited mandate and purely voluntary jurisdiction.

[469] *See supra* notes 314-19 and accompanying text.

[470] *See supra* notes 274-76, 329 and accompanying text.

[471] *See supra* Part II.B.1.a.

[472] *See* Liberty, *supra* note 338, at 10,390-91 (noting how Oregon's comprehensive growth management plan rallied support from a broad range of powerful and often adversarial political groups by integrating conservation and development objectives); Note, *Growth Management*, *supra* note 413, at 1140-41 (arguing that comprehensive growth management statutes invite less direct opposition than do solely anti-exclusionary statutes and broader political support, including from environmentalists and urban activists).

[473] *See supra* notes 268, 316-30 and accompanying text.

[474] *See supra* notes 335-40, 373-88 and accompanying text.

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Of course, Oregon is perhaps unique in some ways, including possibly the way its concern for agricultural and forestry resources has combined with its environmental concerns, that make it unusually amenable to its particular statewide system of land-use planning.[475] But, in general, statewide systems that combine affordable housing concerns with environmental and general planning concerns do seem to be more likely to find adequate political support than those focused solely on fighting exclusionary zoning. To help provoke the state legislature into creating this sort of system, a state supreme court could rule that municipalities have a statutory, and perhaps a constitutional, duty to use their land-use powers to promote the general welfare beyond their borders. Environmental and other interests should be included along with affordable housing as part of the definition of the general welfare. But, the court should refrain from specifying in any detail what that entails. In order to provoke the legislature into creating an LCDC-type agency, the court will probably have to make a few rulings, or perhaps more than a few, imposing substantial obligations on particular towns that come before it. Of the state courts that have taken the lead in this area, only New Jersey's has succeeded in provoking a serious response from the legislature, but it did so in such a way that isolated the unpopular issue of lower-income housing. Furthermore, in order to ensure a broad but flexible mandate, the court should make clear that it is not mandating any particular system of statewide planning, something which the New Jersey Supreme Court arguably did not make clear.

It should be noted that even if the courts and, ultimately, state government do everything right in fighting exclusionary zoning, changing zoning practices by itself will not necessarily result in much more lower-income housing actually being built, or mass racial and economic integration of the suburbs. There are factors involved other than exclusionary zoning, such as the realities of housing market economics and people's personal preferences. This is another lesson that can be gleaned from the experiences of states such as New Jersey and Oregon.

CONCLUSION

The exclusionary zoning problem is a complex one that raises strong passions. Public choice theory and recent history suggest that municipalities and state legislatures cannot be trusted to address it appropriately. However, because the problem is so complex, and

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[475] *See* Sullivan, *supra* note 338, at 846.

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because zoning, although it often excludes lower-income housing, may also serve legitimate and important interests, courts should refrain from imposing long-term statewide solutions and should be cautious when overturning particular zoning decisions. The aim should be to place the issue on the state legislative agenda and try to even the political playing field, but this is easier said than done. The same public choice pathologies that justify court action also make it very difficult for the court to force the other branches of government to take an honest look at the exclusionary zoning problem without judicial overreaching. Such overreaching imposes solutions that tie states to policies that might do more harm than good, while also taxing the judiciary's capacity and undermining its authority. In this article, I have tentatively set forth a few recommendations for effective agenda-setting that avoids these dangers, particularly recommendations taken from the experience of Oregon's LCDC. In the end, though, a court can lead the more political branches of government to water, but it cannot make them drink.

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