Are the Suburbs Unconstitutional?

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BOOK REVIEW

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Reviewed by J. Peter Byrne*

INTRODUCTION

It is hard not to conclude that American local land use law has been a persistent and squalid failure. Once proud cities now stagger—decayed, honeycombed with dangerous, surreal moonscapes of physical and human devastation, and surrounded by insipid suburbs that sprawl over a vanishing rural world. What has gone wrong? To some extent, localities have had to bear the consequences of persistent racism and the national failure to embrace social democracy and adopt decent minimum guarantees of health care, education, and housing. Still, local land use law is deeply complicit with these national political choices.

We have created a political framework in which modestly affluent citizens can simply exit from urban failure. The chief functions of local government are land use regulation and education. As havens of “good” schools, “good” public services, and relatively low taxes, suburban governments remain politically autonomous from neighboring cities. Suburbs are places, as Justice Douglas once wrote with no trace of irony, “where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”1 A sanctuary from what? The role of land use law has not been to address poverty or urban blight, but to permit the fortunate to escape. Suburban jurisdictions are popular alternatives to social justice.

The mechanisms for creating these suburban havens are generally grouped under the rubric of exclusionary zoning.2 They need not be subtle. A town might provide that only free-standing single-family houses on half-acre (or one-, or

* John Carroll Professor of Law, Georgetown University Law Center. Thanks for research assistance go to Piet Niederhausen.
2. Of course, all zoning is exclusionary in principle, prohibiting specified structures and uses in particular locations. “Exclusionary zoning” generally refers to zoning laws that aim for a social effect.
five-, or twenty-acre) lots may be constructed, for example. The predictable consequences are that prices will be high and purchasers will have wealth. All land use regulations have distributive effects, and people constitute suburbs as separate jurisdictions to form exclusive political communities.

Should the excluded have a legal claim against the suburb? Under the U.S. Constitution, they plainly do not; under the Equal Protection Clause neither is wealth a "suspect classification," nor is housing a "fundamental right." No state has statutorily barred exclusionary zoning, nor have many state courts expressed any apprehension about it. A few states have hedged the practice with restrictions, or offered limited remedies to the excluded. And then there is New Jersey.

In 1975, in Southern Burlington County NAACP v. Township of Mount Laurel, the New Jersey Supreme Court held that a baldly exclusionary ordinance violated the state constitution. The rule of the case was startling: Every developing community must provide a realistic opportunity for the construction of a fair share of the region's need for low and moderate income housing. In 1983, after the township and other recalcitrant local governments had failed to comply, the court clarified its holding and announced, in Mount Laurel II, innovative remedial measures designed to ensure that low income housing would be built. At that point, the state legislature enacted the Fair Housing Act (FHA). The FHA created an administrative agency, the Council on Affordable Housing (COAH), to specify the requirements to be placed on localities and to oversee their compliance. The New Jersey Supreme Court soon blessed the statute and surrendered detailed administration of the Mount Laurel requirements to the agency, while continuing to review its rules and procedures.

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3. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (refusing to apply strict scrutiny to tax structure because wealth is not a suspect classification); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (refusing to apply strict scrutiny to Oregon Forcible Entry and Wrongful Detainer Statute because housing is not a fundamental right).


5. 336 A.2d 713, 730 (N.J. 1975) [hereinafter Mount Laurel I].

6. Id. at 724.


9. Id. at § 52:27D-305.

10. Hills Dev. Co. v. Township of Bernards, 510 A.2d 621, 642-45 (N.J. 1986) ("Legislative action was the 'relief' we asked for, and today we have it.").

11. Id. at 649-50.
The entire episode has been steeped in controversy about the propriety of the judicial role and the efficacy of the remedy.

One might hope to understand better the social context and legal significance of mass suburbanization through study of the Mount Laurel cases and their political ramifications. Thus, one greets with enthusiasm Charles Haar’s Suburbs Under Siege: Race, Space and Audacious Judges12 and Our Town: Race, Housing, and the Soul of Suburbia13 by David Kirp, John Dwyer, and Larry Rosenthal. Both authored by distinguished legal and public policy scholars, the great virtue of these books is that they take the reader far beyond printed legal documents and offer textured accounts of legal and political maneuverings that are based upon original interviews and studies of primary documents. They also share an understandable moral indignation at the exclusion of the poor and of racial minorities from traditional suburbs. But both ultimately fail to illuminate the inner logic of exclusionary zoning and thus leave readers without real hope that better communities can be realized.

This review first briefly recounts the course of Mount Laurel and subsequent legislation, placing them in the context of the pattern of suburban development. Second, the review considers several problems in understanding and evaluating Mount Laurel, and discusses how the books under review illuminate them. In particular, the review recounts why New Jersey courts took a forward position against exclusionary zoning, searches for the constitutional grounding relied on by the court, assesses the merits of New Jersey’s statutory compromise, and questions whether limiting exclusionary zoning alone offers much help to struggling cities. Finally, the review addresses the merits of these books and the interesting decision of their authors to attempt to reach the mythic “general reader.”

I. MOUNT LAUREL: A TYPICAL SUBURB, A UNIQUE CASE

A. THE RISE OF THE SUBURBS

American suburbs have long been viewed as refuges from the chaos and danger of our cities. Since technology made daily commuting possible, many Americans have sought to escape noise and industrial pollution by living in detached houses surrounded by gardens and situated in “villages” of similar and compatible estates.14 Without doubt, from the beginning of the flight to the

14. For the classic history of America’s move to the suburbs, see KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985). Even before rail transport made suburban living possible, property developers in the expanding cities used a variety of legal devices to orchestrate the social exclusivity of particular streets or plots, see ELIZABETH BLACKMAR, MANHATTAN FOR RENT, 1785-1850, at 41-42 (1989), although it occurred within an urban grid that affirmed a republican commitment to open communities of common citizenship. Id. at 94-100.
suburbs, suburbanites have sought to leave behind the perceived threats posed by poor, ethnically alien hordes: rudeness, disease, crime, and political corruption.\textsuperscript{15}

Maintaining exclusivity in the suburbs was easy at first: the costs of commuting by rail were too high for all but the most affluent business managers and their nonworking families.\textsuperscript{16} Land developers reassured prospective buyers about the character of a new community through the dimensions of the lots on their subdivision plats and the many restrictive covenants limiting new construction to single family homes with agreeable features. Racial discrimination was common, open, legal, and socially condoned.\textsuperscript{17}

Zoning arose in the 1920s when the automobile opened up for suburban development rural land far-removed from commuter train stations. Lower commuting costs made suburban living affordable for middle income people, thus increasing demand, and the flexible mobility of the motor car increased the supply of land for development. Communities needed to apportion uses and types of structures throughout their jurisdictions to preserve their overall appeal to future builders and buyers, especially for choice enclaves of single-family houses, which received the most protection under the basic zoning approach developed by the U.S. Department of Commerce and enacted in nearly every state.\textsuperscript{18}

By that time, cities in most states had lost their ability to easily annex developing outlying areas. Suburban residents found it advantageous to remain politically and fiscally independent of the city, and zoning became a power exercised exclusively by local governments.\textsuperscript{19} In upholding the constitutionality of zoning in 1926, the Supreme Court specifically confirmed the appropriateness of suburban jurisdictions adopting restrictions without regard to broader regional economic or social needs.\textsuperscript{20}

After World War II, of course, the intensity of suburban development increased dizzyingly. The de facto policy of the United States government became

\textsuperscript{15} For an explanation of the broader cultural meanings, see LEO MARX, THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA (1978).

\textsuperscript{16} See JACKSON, supra note 14, at 87-102.

\textsuperscript{17} See, e.g., Patricia B. Stach, Deed Restrictions and Subdivision Development in Columbus, Ohio, 15 J. URB. HIST. 42 (1988).

\textsuperscript{18} A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT REGULATIONS (Dep't Commerce 1926) reprinted in EDWARD H. ZIEGLER, JR., 5 RATHKOPF'S THE LAW OF ZONING AND PLANNING A1-A5 (1996). The act popularized the concept of "cumulative" zoning, in which only less "intensive" uses are permitted in each district; thus single family houses may be built in districts zoned for apartment buildings but not vice versa.

\textsuperscript{19} JACKSON, supra note 14, at 138-156; see also DAVID RUSK, CITIES WITHOUT SUBURBS 18-23 (1993).

\textsuperscript{20} The Supreme Court upheld zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The court expressly rejected as a ground for invalidity the alleged negative effects of a suburbs ordinance on the metropolitan area, stressing that "the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit. . . ." Id. at 389.
the promotion of mass suburban development; it played an indispensable role in
the creation of modern mortgage financing of houses—greatly preferring new
single homes in developing areas—and built the interstate highway system that
further decreased the costs of commuting from ever more distant locations. This
activity increased both the opportunities for suburban communities and
competition among them for development that would increase local tax bases
without unduly increasing local expenditures.

Thus, what fell into place were the social and economic incentives and the
legal technology for exclusionary zoning: the political independence of subur-
ban jurisdictions, the near-complete delegation of zoning power by the state to
the locality, the reliance on local taxes to fund local government services
(particularly education), and national policies facilitating and subsidizing subur-
ban development on a scale never undertaken before.

One must add to this list both the increasing numbers of blacks and Hispanics
in northern cities, intensifying traditional ethnic antagonisms, and the successful
struggle of blacks to end legal segregation—particularly in public education.
The provision of superior public education already had become a prime goal of
suburbs seeking to attract middle (rather than upper) class residents. Now
familiar patterns of “white flight” emerged to communities whose “good”
schools were unavailable to poor nonresident blacks. The Supreme Court
confirmed suburban public schools as educational “havens” in *Milliken v.
Bradley,* in which it held that a finding of past de jure segregation by a city in
its public schools could not justify remedies imposing duties on surrounding
suburban jurisdictions, even if the noninclusion predictably would result in
greater de facto segregation in the city’s schools.

Several aspects of American zoning also contributed to the acceptability of
exclusionary zoning. Zoning is sometimes viewed as a limited step toward
public control of or limitation on real estate development to achieve various
public goals. It may be better, however, to view it as an expression of long-
standing American legal interest in promoting private development of vacant
land through the creation of simplifying legal frameworks. The zoning map
resembles the famous American grid, long imposed on rural land to give order
to urban development. These structures share with zoning an eager anticipation
of development as a new opportunity and an aim to coordinate private develop-
ment to reduce costs. Professional planning has played little or no role in most
zoning, which is not surprising given that serious planning requires a metropoli-

21. See, e.g., Jackson, supra note 14, at 190-218; Michael H. Schill & Susan M. Wachter, *The
Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America,* 143 U. PA.
23. Dissenting in *Milliken,* Justice Marshall wrote, “[I]t may seem to be the easier course to allow
our great metropolitan areas to be divided up into two cities—one white, the other black—but it is a
course, I predict, our people ultimately will regret.” *Id.* at 815.
24. See *Kozesnik v. Township of Montgomery,* 131 A.2d 1 (N.J. 1957); Charles M. Haar, “In
tan or regional dimension. Political zoning battles have focused on the competing private interests of current residents and other property owners, with constitutional emphasis on protecting the reasonable expectations of individual property owners. In short, zoning has provided a context for private competition rather than a political mechanism for rational deliberation about identifying or achieving public ends.

B. AND THEN THERE IS NEW JERSEY

New Jersey, the “most suburban state” in the nation, might seem an unlikely jurisdiction for a dramatic case invalidating exclusionary zoning. In the years after 1945, the New Jersey Supreme Court broadly approved “fiscal zoning” (i.e., zoning to increase local net public revenue), statutes to exclude mobile homes and motels from jurisdictions, and ordinances specifying minimum lot sizes and house floor areas for single family homes. New Jersey’s principal cities, relatively small, poor, dull, and declining, lacked power in the state legislature. The state legislature itself exercised little power over local governments. The counterbalance, as it proved, was a state judiciary that enjoyed great prestige and had developed a tradition of reform-minded activism.

The original Mount Laurel case began under dramatic circumstances. Mount Laurel itself, seven miles west of Philadelphia, was a nondescript expanse of truck farms rapidly converting to pricey subdivisions. Although most of the land was undeveloped, nearly all of it was zoned for single-family homes on large lots or for industrial use. Nowhere could anyone construct multifamily homes or place mobile homes. The original plaintiffs included several low-income black residents of the town, who had been denied a zoning change to construct subsidized housing (for which they had secured a commitment for public financing).

Some of these residents descended from freed slaves whose families had lived in the town since the Revolution, but could not afford new housing. In a scene retold in Our Town, the mayor advised this group at a sweltering meeting at the black church in Mount Laurel, Jacob’s Chapel, “If you people can’t afford to live in our town, then you’ll just have to leave.”

25. For the classic account of suburban zoning politics, see Richard Babcock, The Zoning Game (1966). The principal constitutional provisions courts use to review zoning ordinances are the takings and due process clauses, protecting the individual property owner against “unreasonable” or unexpected new regulations. See J. Peter Byrne, Ten Arguments for the Abolition of the Regulatory Takings Doctrine, 22 Ecology L.Q. 89 (1995).
27. Our Town, supra note 13, at 63-65.
28. Mount Laurel I, 336 A.2d at 718-22. Mount Laurel had approved four specific “planned unit developments” that did provide some multi-family housing, but only for middle and upper income residents, under an ordinance repealed in 1971. Id. at 721-22. The court listed the various restrictions in the plans designed to keep the cost of such units high. Id.
29. Id. at 717.
30. Our Town, supra note 13, at 2.
The decision by the New Jersey Supreme Court in *Mount Laurel* had no precedent but did have several forerunners. The court rested its holding solely on the state constitution, avoiding review by an increasingly conservative United States Supreme Court. The court did not deny that exclusionary zoning might be in the rational interests of a majority of a suburb's residents, but insisted that the "general welfare" which zoning long had been constitutionally required to advance was that of the state as a whole. Given that, local ordinances that did not provide a realistic opportunity for a fair share of the region's low income housing needs were unconstitutional. Numerous prior decisions by the court sanctioning a variety of exclusionary devices were mined, rather artfully, for expressions of concern about the eventual effects of the rulings, and shoved aside as dealing with relatively primitive stages of suburbanization, when the effects of exclusion on the poor had not been so dire.

The court's provision for a remedy was mild and conciliatory, remanding to allow Mount Laurel time to consider how it would meet its new constitutional obligations. An extended period of shilly-shallying ensued both for Mount Laurel and for other suburbs engaged in similar litigation. Decisions by a rapidly changing New Jersey Supreme Court suggested growing timidity and possible retreat from the broad principle of *Mount Laurel*. In particular, there was deep confusion about how to understand the extent of any developing community's obligation to permit the construction of low income housing.

Doubts about the court's resolve were settled in *Mount Laurel II*, in 1983. The Court strongly reaffirmed the principle of what now was called *Mount Laurel I*, but mandated a host of specific remedies that every municipality in the state had to embrace. The court seized upon a state plan adopted (for quite limited purposes) to designate "growth areas," and towns within those areas had to provide not just for their own resident poor but also for a fair share of projected regional needs for low and moderate income housing. Litigation over fair share requirements would result in mandates for specific numbers of units. Removing regulatory barriers alone would no longer suffice to satisfy

32. Id. at 726.
33. Id. at 727.
34. Id. at 725-27.
35. Id. at 734. Justice Pashman entered a vigorous concurrence, id. at 735-50, chiding the court for its timidity and suggesting several remedial devices that eventually would be adopted by the full court in *Mount Laurel II*, 456 A.2d 390 (1983). The opinion has an enduring appeal, at least to city dwellers, for its unstinting excoriation of suburban life. For example: "A homogeneous community, one exhibiting almost total similarities of taste, habit, custom, and behavior is culturally dead, aside from being downright boring." *Mount Laurel I*, 336 A.2d at 749. Taken seriously as a constitutional standard, Justice Pashman's view would place nearly all of the United States in cultural receivership.
38. Id. at 415.
39. Id. at 437-39.
the principle; suburbs would need to adopt a variety of "affirmative" or "inclusionary" devices such as mandatory set-asides. The court sought to make its remedial regime effective by assigning all exclusionary zoning cases to three hand-picked trial judges who would develop expertise in administering such cases. Finally, the court changed the dynamics of Mount Laurel litigation entirely by approving a builder's remedy: developers proposing to include an appropriate percentage of low and moderate income housing in their project could challenge the constitutionality of a town's ordinance and—if they prevailed—be awarded the right to construct their projects.

A substantial controversy surrounds the remedial regime enforced by the three trial judges in the wake of Mount Laurel II. Developers, rather than poor people or public interest organizations representing their interests, brought nearly all of the suits, seeking to build projects prohibited by challenged ordinances, and many prevailed. The judges found innovative means to resolve tricky questions—such as setting the methodology for determining fair shares by locking planners in a room without lawyers—and creatively employed special masters to help towns develop acceptable plans. Houses got built, but political opposition gained strength. The authors of these books view this period as heroic. At a minimum, it represents a high point of determined judicial efforts to break open an established, popular legal structure found to be fundamentally unfair to the poor and minorities.

C. A LEGISLATIVE SOLUTION

The court in Mount Laurel II lamented that legislative inaction had made judicial action necessary to redress a complex social wrong. Intense resentment and apprehension by local governments, particularly toward the builder's remedy, stimulated political initiative. Our Town interestingly describes the complex process that led to the enactment of New Jersey's FHA, which established COAH to apply and enforce the basic Mount Laurel principle.

Both books criticize the FHA as the product of opposition to intense judicial enforcement of broad fair share obligations, yet the statute represents the first political commitment in the United States to statewide planning to expand the number and locations of affordable housing units for low and moderate income people. The court promptly sustained the constitutionality of the FHA, and most
pending cases were transferred from the courts to COAH.\textsuperscript{46} One of the most interesting and controversial elements of the FHA is the Regional Contribution Agreement (RCA), which permits a suburb to transfer up to half of its fair share obligation to another community in its region in exchange for cash.\textsuperscript{47} The suburb avoids dedicating land to residences for poor people, while the transferee—usually a city—gains funds to renovate or construct housing for the poor already within it. In effect, affluent suburbs subsidize housing in beleaguered cities.\textsuperscript{48} While both the suburb and the city may view such exchanges as optimal, RCAs certainly represent a retreat from \textit{Mount Laurel I}’s commitment to integrate the suburbs economically and racially.

How much has been accomplished in fact? Here is the proverbial half-full, half-empty glass. Both books cite the same numbers: by 1993, 14,000 units of low and moderate income housing had been or were being built in the New Jersey suburbs.\textsuperscript{49} \textit{Our Town} views this as “relatively little,” using as its benchmark the statistical need for low income housing and the expectations generated by a constitutional right of access to suburban living.\textsuperscript{50} \textit{Suburbs Under Siege} finds the accomplishment “considerable.”\textsuperscript{51} Harr notes that 14,000 units equal 9\% of total New Jersey housing permits during the period; moreover, another 11,000 units had been rehabilitated and land for another 30,000 had been appropriately zoned.\textsuperscript{52} Both books note that construction has been hampered by a depressed housing market and shrinking federal subsidies; they question the emphasis placed on owner-occupied moderate income developments, as opposed to low income rentals. Only in April 1997 did Mount Laurel itself finally approved a 140-unit rental development for low income residents, organized by the lawyer in the original suit and the daughter of the lead plaintiff, Ethel R. Lawrence, for whom the complex will be named.\textsuperscript{53}

II. INTERPRETING AND EVALUATING \textit{MOUNT LAUREL}

Great cases enfold deep normative and human ambiguity. How should we think about \textit{Mount Laurel}? A striking aspect of the books under review is that they are so intent on leading the reader to judge the efforts of the New Jersey courts as good. In the next section, I will offer comments specifically about the

\begin{thebibliography}{99}
\bibitem{46} Hills Dev. Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986).
\bibitem{47} N.J. STAT. ANN. § 52:27D-312 (West 1986).
\bibitem{48} By March 1992, $60 million had been transferred to urban areas to rehabilitate 2,500 units and construct 700 more. \textit{Suburbs Under Siege}, \textit{supra} note 12, at 233 n.82.
\bibitem{49} \textit{Id.} at 159; \textit{Our Town}, \textit{supra} note 13, at 190.
\bibitem{50} \textit{Our Town}, \textit{supra} note 13, at 159.
\bibitem{51} \textit{Suburbs Under Siege}, \textit{supra} note 12, at 189.
\bibitem{52} \textit{Id.} at 189-90.
\bibitem{53} Ronald Smothers, \textit{Ending Battle, Suburb Allows Homes for Poor}, \textit{N.Y. Times}, Apr. 12, 1997, at A21. Although the measure passed, more than 200 local residents vocalized their opposition to the units by taunting and threatening the planning board members involved. \textit{Id.}
\end{thebibliography}
authors' theses and manner of persuasion.\textsuperscript{54} Here, I want to engage the books on aspects of \textit{Mount Laurel} that seem important and difficult. Why should New Jersey take the lead against exclusive zoning? Why is there still pervasive ambiguity about the constitutional principles that animate the decision? What are the respective merits of the judicial and legislative routes taken? As will be seen, the books shed light on some of these questions but are curiously silent about others.

A. WHY NEW JERSEY?

The New Jersey courts stepped far in front of the courts of all other states in taking a constitutional stand against exclusionary zoning. The courts in neighboring Pennsylvania previously had made large lot zoning suspect and subsequently required towns in the path of development not to keep too many putative residents out.\textsuperscript{55} A few other states have placed some limits on the ability of suburbs to exclude.\textsuperscript{56} But why should New Jersey, the most suburban state in the nation, take actions so much more decisive than any other state?

\textit{Our Town} emphasizes New Jersey's traditions of a strong, centralized judiciary and a weak, parochial legislature. The modern judiciary emerged strong and prestigious from the 1947 New Jersey Constitution, which adopted proposals for reform by Dean Arthur Vanderbilt of New York University Law School, who became the first Chief Justice of the new court.\textsuperscript{57} Vanderbilt helped institutionalize the view that courts should adopt new rules for new conditions, and the court developed a long record of common law innovation in torts and property.\textsuperscript{58} Appointments tended to be nonpartisan and based on professional and political prestige. At the same time, the state legislature was timid, especially in matters touching the interests of local communities; local government officials also often represented their communities in the legislature.\textsuperscript{59} Moreover, it seems significant that New Jersey's largest cities are small, depressed satellites of great cities in other states, gaining voice in the state legislature neither through numbers nor prestige.

It is arguable that the effect of these forces persuaded the court it was the only power in the state that ever would address exclusionary zoning, and that its

\textsuperscript{54} See infra Part III.

\textsuperscript{55} DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 432-34 (2d ed. 1994) (discussing National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965) and its holding that a four acre minimum lot size is unconstitutional).

\textsuperscript{56} Id. at 457-58 (discussing actions taken in California, Massachusetts, New Hampshire, New York, and Washington).

\textsuperscript{57} OUR TOWN, supra note 13, at 63-65.

\textsuperscript{58} See, e.g., Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47 (N.J. 1972) (holding under the public trust doctrine that municipalities may not discriminate against nonresidents by charging fees for beach use); State v. Shack, 277 A.2d 369 (N.J. 1971) (holding under state law that ownership of real property does not include the right to bar resident migrant workers from access to government services).

\textsuperscript{59} OUR TOWN, supra note 13, at 112-14.
previous successful modifications of common law rules made it the policymaker in this area. The court's view of its role in reforming the constitutional prerogatives of local governments must have been affected by its earlier long-running battle with the legislature and local governments over state public education funding rules, which historically left all funding to local property taxes, creating unequal education revenues and tax burdens among rich suburbs and poor communities. Professor Haar is adamant that the actions of the court are justified by the implausibility of any other organ of government acting to protect the housing interests of poor people entirely or largely unrepresented in suburban and state political bodies. The thoroughness with which the court addressed exclusionary zoning might have been accentuated by its earlier broad approvals for exclusionary devices, which had subjected it to widely read scholarly criticism. The court's strong stand against the practice seems in part a reaction against its earlier conspicuous stand in favor.

Another significant factor was the representation provided by Greater Camden Legal Services. Of course, poor people require free lawyers to challenge entrenched local powers. It may have been unusual that legal services lawyers schooled in urban housing litigation saw it as part of their mission to assist suburban challenges to their own town's zoning.

B. AMBIGUITIES OF CONSTITUTIONAL MEANING

Neither book concerns itself particularly with traditional constitutional law theory, such as the persuasiveness of the court's interpretation of the constitu-

60. For an unsympathetic discussion of this battle, which eventually resulted in revenue sharing and enactment of a state income tax, see Jerome G. Rose, Waning Judicial Legitimacy: The Price of Judicial Promulgation of Urban Policy, 20 Urb. Law. 801, 803-814 (1988). Although the school funding litigation may have initially smoothed the court's way toward activism, the difficult wrangles with the state legislature over funding might well have induced a period of caution after Mount Laurel I and led the court away from any claim that the state had to expend tax revenue to meet a right to housing.

61. SUBURBS UNDER SIEGE, supra note 12, at 134, 129-47, 175-85. Haar writes, "Through the intelligent formation and supervision of remedies, the judiciary turns out to be the most accessible (and realistic) instrument for bringing about changes in metropolitan zoning and housing patterns." Id at 147. In support of that argument, Our Town notes that Governor William Cahill attempted to address affordable housing in suburban communities and failed to win reelection shortly before Mount Laurel I, losing in the primary to a candidate who made local zoning control "his hot-button issue." Our Town, supra note 13, at 116.

62. It should be noted with admiration that among the promptest academic critics was Professor Haar himself, in a perceptive comment published nearly 45 years ago. Charles M. Haar, Zoning for Minimum Standard: The Wayne Township Case, 66 Harv. L. Rev. 1051 (1953). See also Lawrence G. Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 Stan. L. Rev. 767 (1969) (arguing that equal protection analysis should be applied to strike down exclusionary zoning measure); Norman Williams, Jr., Planning Law and Democative Living, 20 Law & Contemp. Probs. 317, 343-46 (1953) (outlining several ways zoning can lead to economic segregation); Norman Williams, Jr. & Edward Wacks, Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited, 1969 Wis. L. Rev. 827 (stressing connection between local control and exclusive zoning).

63. Permitting exclusionary zoning might have been thought the progressive position in the 1950s, as the court backed power in the town to provide for unprecedented growth through planning, rather than constitutionally restrict such power through broad readings of individual property rights. See SUBURBS UNDER SIEGE, supra note 12, at 16-17.
tional text or how its ruling mediates between the separation of powers and the allocation of local and central authority under broad principles of the New Jersey Constitution. In this, the authors are in tune with the court, which focused more on the justice of the plaintiff's claim than its technical legal merits. Kirp, Dwyer, and Rosenthal begin convinced that exclusionary zoning is as plainly unconstitutional as de jure racial discrimination; they are more concerned with praising the moral courage of the justices than quibbling about the contours of the rule. Haar is equally convinced of the propriety of the Mount Laurel principle; although he uses most of his legal acumen for justifying the remedial regime, he finds constitutional justification for the court's role in the systematic failure of other organs of government to correct injustice. Both books emphasize Mount Laurel's role as a landmark in social justice and describe the right created as a right to move to the suburbs.

Reading the Mount Laurel opinions, one has the sense that the reasoning process begins with the judgment that complete exclusion is unjust, proceeds with a consideration of the remedies that might be practicable, and concludes with the announcement of a rule that gives the court sufficient leverage to end the injustice. The opinions certainly show no concern with the intent of the framers of the New Jersey Constitution. In this regard, the most the court does is to quote itself suggesting that the general welfare clause in the constitution cannot mean just the welfare of the locality. The court insulated its conclusion from review by the United States Supreme Court by basing it on state law, while insulating itself from revision by the legislature by basing it on construction of the constitution rather than the zoning enabling act.

There is much to be said for grounding a legal rule in the practicalities of eliminating an injustice. But the consequence may be to foster doubt about the dimension of the right or the principle it embodies. There are several such key ambiguities in Mount Laurel. First, is the decision concerned more about race or poverty? The plaintiffs pled both, but the court chose only to write about economic discrimination. Of course, the categories overlap and, by striking at economic discrimination, the court enhanced the mobility of minorities. As Norman Williams wrote more than forty years ago: “[E]conomic segregation is not only the easiest but also the most effective form of racial and ethnic

64. Our Town, supra note 13, at 63-82.
65. Suburbs Under Siege, supra note 12, at 177-79. Haar also offers an entirely unpersuasive traditional justification of the court's action: the court was compelled to act by the plaintiff's demonstration that the constitution had been violated. "Any charge that the Mount Laurel courts are expansionist is fundamentally contrived: the court is performing the function it has been assigned under the constitution or a statute." Id. at 176. This begs the very question at issue, since the court, rightly or wrongly, created new legal obligations from the broad generalities of the state constitution in order to provide poor urban minorities a remedy not available from the state or local legislatures.
66. See Suburbs Under Siege, supra note 12, at 19 ("an extraordinary vision of social justice"); Our Town, supra note 13, at 84 ("a hallmark of social justice").
But the idea that Mount Laurel imposes some duty of nondiscrimination on every community has more weight with regard to race than ability to pay. Although it is sometimes asserted that exclusionary practices result merely from the pursuit of economic self-interest by suburban residents, the history of suburban expansion makes the conclusion that it is also driven by a desire for racial isolation inescapable. Did the court disagree or did it think that racial "fair shares" for each community would have been politically impossible? The books have little to say about the court's purposes, but seem to favor economic fair shares primarily because they entail racial integration.

Second, is the primary thrust of Mount Laurel regulatory or deregulatory? Mount Laurel I treated the end of exclusionary zoning as a matter of deregulation—of eliminating those restrictions that prohibit construction of the types of housing low income people can afford. However, Mount Laurel II emphasizes the affirmative duties of localities to provide inclusionary mechanisms to make the opportunity realistic. Certainly, the shift between the opinions reflects the drying up of federal and state subsidies for low income housing between 1975 and 1983, and also the dramatic rise in new home prices that tended to price people of modest income out of the market. In these circumstances, localities would have to impose various forms of exactions on new development to create funds for subsidizing lower income housing. In other words, the court did not believe that an unconstrained local market would produce low income housing. The problem is that this pragmatic assessment shifted the baseline of illegality for localities away from active economic discrimination and toward failure to provide subsidies. Although such a directive may well be appropriate, it loses touch with the constitutional wrong that sets in motion the court's remedial power.

There is another dimension in which the court mixes deregulation and increased regulation. The court never invalidates per se the devices that artificially raise housing costs, such as minimum lot size or floor area. Indeed, Mount Laurel II is explicit in stating that once towns meet their fair share requirements, they can be as exclusive or fiscal-minded in their zoning of the rest of their area.

68. Williams, supra note 62, at 330.
69. One point on which Haar faults the New Jersey court is in failing to articulate in a persuasive way the ethical principle upon which Mount Laurel is based. Suburbs Under Siege, supra note 12, at 48-49. Early on, he emphasizes his view that "the most disturbing characteristic of the metropolitan scene is surely the high degree of racial and ethnic separation ...." Id. at 5. He finds "the most troublesome inadequacies" of the process to be that "too few of the intended beneficiaries—African-Americans and other minorities from the inner city—enjoy the benefits of the new housing." Id. at 114. Kirp, Dwyer, and Rosenthal firmly adhere to the view that Mount Laurel made affordable housing a constitutional right. Our Town, supra note 13, at 141.
70. Haar laments that the court did not emphasize that "instead of bestowing power on the public sector, the Mount Laurel decisions, in their reliance on incentives such as the builders remedy to move the private branch, reinforced the market-based approach to land development as opposed to a command-and-control regulatory model." Suburbs Under Siege, supra note 12, at 49-50. The context suggests that he offers this argument more for its political appeal than for its explanatory power.
71. Actually, financing low income housing by raising the cost of other housing is moderately regressive.
as they wish. But this broad endorsement of exclusionary devices seems inconsistent with the moral base of the decision. The decision did not mandate a new approach to land use regulation, but rather a minimum number of exceptions to the prevailing system. On the other hand, the great prod to towns to adopt conforming plans was the threat of the builder’s remedy, which exempted developers who proposed to include a percentage of moderate income units in the complex from all but minimal health and safety regulations. The threat of deregulation was used to encourage some progressive rezoning.

Third, is the decision about individual rights or defective governmental structures? Our Town emphasizes the narrative of the Mount Laurel plaintiffs, particularly Ethel Lawrence, whom they present as a heroine and compare with Rosa Parks. Such emotional power stems from the conviction that the fathers of Mount Laurel wronged her personally. But neither the opinions nor the remedies had much to do with individual poor people. The language is that of planning and statistics; the opinions relate no narrative. Twenty-seven years after filing suit, the poor blacks of Mount Laurel have finally just turned the earth for low income housing; the only individual plaintiffs who have received direct judicial relief are the developers who gained the builder’s remedy.

Haar claims that the court “identified and enunciated a constitutional right for all people—rich or poor, black or white—to live in the suburbs.” As I argue below, such a right would be a disaster for urban land use—laws should restrict for all people the opportunities and attractiveness of moving to the suburbs. But no such right emerges from Mount Laurel. The court only placed a substantive limitation on the discretion of the locality not to make zoning provisions for a minimum number of low and moderate income residents. Once a town meets its “fair share” requirements, for example, no poor person has any right not to be effectively excluded from the town, regardless of their individual need. Moreover, neither the suburbs nor the state is under any constitutional obligation to appropriate money to subsidize housing.

Exclusionary zoning is better understood as one consequence of current residents pursuing a narrow self-interest by acting through the available structure of local government. The court’s approach conditioned the power of the town to pursue its self-interest on its prior dedication of a small portion of its legal landscape or zoning map to affordable housing. An interesting alternate approach might have been to change the structure of local government land use planning more radically—by combining the local governments of Camden and Mount Laurel or by shifting the land use planning authority to the state, for example. Either approach would give poor people in cities some political say over the entirety of land use on the fringe of cities and, perhaps, the tax revenues stemming from such land. The underlying issue in Mount Laurel is not

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72. OUR TOWN, supra note 13, at v (dedicating the book to Ethel Lawrence, “an unassuming hero for our time”).
73. SUBURBS UNDER SIEGE, supra note 12, at 3.
so much the rights of individuals as the definition of what constitutes the relevant political community.\textsuperscript{74}

But even assuming that such a structural remedy would better serve the interests of the poor than \textit{Mount Laurel}'s “fair share” requirements, it presumptively would be beyond the power of courts. We do not have a constitutional theory to explain fundamental reallocation of constitutional government power, and such a thorough threat to control of suburbs by the affluent appears unthinkable. A reality of complex constitutional institutional litigation is that a court can find only a narrow band of remedies that will aid plaintiffs and still be accepted as an appropriate exercise of judicial power. Judges will act when legislatures will not, as Haar properly emphasizes, but judges cannot achieve reforms as efficacious or thorough as a motivated legislature could.

This limitation provides an important consideration in evaluating the success of \textit{Mount Laurel}. The court’s exercise of power prompted political opposition and legal criticism while achieving limited benefits for the poor; it could not revise more extensively the allocation of power over land use. Despite its unusual bipartisan prestige, the New Jersey Supreme Court nearly suffered the humiliation of the denial of reappointment for Chief Justice Willentz, the author of \textit{Mount Laurel II}. Thus, that one may critique its reasoning or the nuances of its remedies ought not prevent the observer from applauding the court’s moral courage.

C. COURT OR LEGISLATURE?

Both books view New Jersey’s passage of the FHA in 1985 and the court’s

\textsuperscript{74} It may not be inappropriate in this issue of \textit{The Georgetown Law Journal} to pause to note the relevance of Michael J. Sandel’s \textit{Democracy’s Discontent} to exclusionary zoning. To simplify, Sandel supports the republican tradition of assessing legal initiatives more by their capacity to promote self government than by their ability to satisfy aggregate individual interests. \textit{MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY} (1996). At first blush, it might seem that \textit{Mount Laurel} is “liberal” rather than republican. Local land use decisions are among those that ordinary citizens feel they have the most control over, and \textit{Mount Laurel} could be characterized as the elevation of individual rights of outsiders to choose where to live over the decisions of small communities. At the same time, exclusionary devices might be understood as modern derivatives of property qualifications for voting, limiting participation in community deliberations to those with the means and interest to do so. Indeed, the fragmentation of suburban jurisdictions might generally be seen as promoting opportunities for participation in political deliberation in appropriately sized, somewhat homogeneous units.

On the other hand, modern suburbs might be seen as the antithesis of traditional republican communities. They represent the geographic locus of rootless individualism, jurisdictions without histories or identities apart from the capacity to provide individual residents with desired mixes of costs and services. Suburban zoning politics consist of contention among individual interests united only to employ the local government form to capture benefits and export costs. Certainly, the latter model accords more closely with penetrating accounts of actual zoning practices. \textit{See, e.g., BABCOCK, supra note 25}. \textit{Mount Laurel} thus might better be seen as a republican search for a more satisfying understanding of who belongs to the political community.

Sandel’s often attractive civic humanist vision offers few resources for deciding questions of membership in the relevant political community. And exclusionary definitions of the community have been the besetting sins of republican theories historically. Sandel’s heart is surely in the right place, but his embrace of community development corporations and the “\textit{New Urbanism}” needs to be connected to a fuller political theory of a republican metropolitan area.
prompt sustaining of the Act and referral of pending cases to COAH as regrettable surrenders of principle. Our Town frankly views the Act as the successful neutering of the fair share principle by the reactionary impulses of the suburbs, mediated by cynical politicians, particularly Governor Thomas Kean. Suburbs Under Siege provides a more modulated view, but maintains that continued judicial enforcement would have fulfilled the promise of Mount Laurel more completely than the legislation permitted. Yet, the FHA constitutes a fundamental change in the governmental structure of land use decision-making that provides a politically accepted starting point for statewide coordination.

The FHA did pull back on some forward positions established by the judges. It greatly restricted the builder's remedy, first imposing a moratorium on its use and later eliminating use of the remedy against towns whose plans have been certified by COAH. The FHA also directed COAH not to impose numerical requirements on a town that would "drastically alter" its essential character. Moreover, COAH reduced estimates of the state's total need for new low and moderate income housing from the judges' 243,000 units to 145,000, and later to 118,000 units.

But COAH has overseen substantial rezoning for and construction of affordable housing in communities that would not otherwise have permitted it. This modest progress has occurred within a sustainable political structure which permits and constrains controversy. While Mount Laurel II generated furious proposals for constitutional amendments and efforts to retire individual justices, the Council has persisted for a decade through two different governors with only modest amendment. In truth, the questions before COAH are a compound of politics and social science under a statute that has settled the basic policy choices. Despite the earlier imaginative innovations by the courts, enthusiastically recounted by Haar, administrative agencies can decide such questions with greater acceptance of legitimacy than can judges. However, the courts today do continue to play an established role in reviewing decisions by COAH for compliance with the statute and the underlying constitutional principle.

75. Our Town, supra note 13, at 135. Characteristically, the authors write that the election of Kean as governor "slammed shut the window of opportunity to boost affordable housing in the suburbs." Id. at 118. This seems a harsh judgment given the quantity of housing built pursuant to the Fair Housing Act, compared to the actual effects of the broad pronouncement of Kean's predecessors.


78. Suburbs Under Siege, supra note 12, at 102. It is quite unclear whether there is any practical significance to these changes. COAH intended to meet its reduced total in a shorter time, and the reduced numbers reflect in part the depressed real estate demand of the late 80s and early 90s that might well have led the courts to revise their own figures.

79. The 1989 "Fanwood Amendment" prohibited COAH from requiring localities to consider sites with sound existing residences as sites for new Mount Laurel housing. Id. at 103.

80. In Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990), the court upheld the ruling of COAH that the FHA gives towns the authority to impose development fees on builders to be used for subsidized housing. This decision, constituting a consensus among the three branches and a
The most controversial innovation of the FHA was to permit localities to transfer, through Regional Contribution Agreements (RCAs), up to fifty percent of their fair share to another community in the same region in exchange for funds to build lower income housing. There have been some substantial deals. Four affluent suburban communities paid New Brunswick $7.65 million to accept their obligation to build 406 units. Our Town thoroughly disapproves of RCAs, viewing their inclusion in the FHA as a corrupt bargain between wealthy suburbs that wish to preserve their socially exclusive character and cities hard-up for housing renovation funds and eager to retain constituents.\(^8\) No doubt, as a formal matter, RCAs provide an alternative to further economic and racial integration. But RCAs have many virtues that outweigh Our Town's objections. First, they create an incentive for revenue sharing between cities and the suburbs within their region; thus, they decrease on the margin the fiscal advantages suburbs enjoy over cities and blunt the incentive for affluent people to move to the suburbs. Second, they provide a source of funding for subsidized housing that likely will be built more quickly and at lower unit cost than comparable suburban housing. Third, each suburb still retains at least fifty percent of its fair share. Hence, substantial integration is still mandated, and that integration is likely to proceed more easily because fewer low income residents are likely to face less opposition or hostility.

To weigh these factors requires one to confront the underlying issue: how important is it to disperse the urban poor to the suburbs? To the authors of both books, it is an imperative objective. Haar seems to believe that cities are finished; thus, retaining the poor in cities inevitably will isolate them from employment and education opportunities and from normal social intercourse.\(^8\) Kirp, Dwyer, and Rosenthal implicitly share this view, which is conveyed by their harrowing narrative of the degradation of Camden.\(^8\) Moreover, they view exclusionary zoning as a legacy of racial segregation and a symbol of indifference to the poor.

Unfortunately, the authors present most of their views as assumptions and do not subject them to critical reflection. While some dispersal would be helpful, relocation is a very partial response to poverty and urban failures. Poverty, of course, has many unpleasant externalities, and concentrating the poor, as large public housing projects do, further burdens those already struggling with their own poverty. Deconcentration of subsidized housing, whether in city or country, has numerous benefits. Moreover, placing lower cost housing in the suburbs local government, rests on a firmer foundation than would one in which the court simply found the authority in vague commitments to the general welfare.

\(^{81}\) They write, "But those who read Mount Laurel as a civil-rights case that stands for a vital constitutional principle see this commerce [i.e., RCAs] in a darker, more Faustian light. The RCAs have undermined one of the goals of the litigation, the racial and economic integration of the suburbs." \(^{82}\) Our Town, supra note 13, at 162.

\(^{82}\) Suburbs Under Siege, supra note 12, at 4-8.

\(^{83}\) Our Town, supra note 13, at 176-86.
will reduce the excessive burden on cities of coping with the needs of lower income persons for services. In addition, mixing the poor with people of other classes will give them better access to employment and education, as the Gautreux studies show.\textsuperscript{84} Finally, the mingling of classes will tend to dispel both the demonizing and romanticizing of the poor that are such jejune aspects of our political culture. These considerations support some dispersal of the poor to suburbs.

But such a policy is only a partial response to urban and poverty needs. We cannot base our policies on an assumption that cities are obsolete or hopeless. Cities elsewhere in the developed world continue to be attractive centers of business and culture; in the developing world they are growing in size at an unprecedented pace. The experience of these other people indicates that we must and can develop governmental structures and planning processes that can build efficient, equitable, and culturally vital cities. Moreover, American suburban living patterns may not be sustainable as an environmental matter. Numerous voices are insisting on higher density development that permits more land to be left in its natural state and provides alternatives to long commuting by automobile.\textsuperscript{85} Insisting on moving large numbers of lower income families to the suburbs legitimates destructive suburban development patterns while facilitating further abandonment of cities. In short, it democratizes the same incentives to move out that created the crazy development patterns in the first place.

There are advantages to the poor in remaining in cities, assuming that employment and education can be made available. First, housing subsidies should go further, given the costs of land, expectations about densities, and the stock of older housing suitable for attractive rehabilitation. Second, transportation costs will be lower where public transportation is available. Third, the poor


are more likely to find political and cultural voice in cities. Of course, such advantages may be cancelled if the city lacks an economic base.

Thus, it seems preferable to keep the affluent in the cities rather than send the poor to the suburbs. There are several important means to achieve this end. First, planning law needs to strictly limit suburban development in large areas on the fringes of cities, as is done in Europe and Oregon, and encourage new employment centers in places where people live. Second, more local governmental functions, such as environmental and transportation planning, need to be performed on a regional basis. Third, revenues for local government expenditures must be equalized among local jurisdictions. Finally, subsidized lower-


87. German planning law creates a presumption against extending suburban development into the countryside. Within rural areas, or “Aussenbereiche,” only construction compatible with rural pursuits is permitted, unless the local government has approved a detailed development plan covering the area that permits the owner’s desired construction (with a degree of serious professional and bureaucratic input). Thus, in the German system, planning must precede the conversion of rural to urban land. See Terence J. Centner, Preserving Rural-Urban Fringe Areas Enhancing the Rural Environment: Looking at Selected German Institutional Responses, 11 ARIZ. J. INT’L & COMP. LAW 27, 31-38 (1994) (discussing the German Federal Building Act, Baugesetzbuch). In England, the “green belts” around London and most provincial cities significantly restrain sprawl, despite the strong British affection for suburbs. See MALCOLM GRANT, URBAN PLANNING LAW 507-09 (1982).

Some American cities in the fast-growing, but environmentally sensitive West have adopted “urban growth boundaries,” which direct new development to areas within a line drawn around the metropolitan area. Oregon has required local communities to designate urban growth boundaries since its landmark 1971 planning act, and Portland has emerged as a model of integrated land use and transportation planning while enjoying a substantial economic boom. See, e.g., Gerrit Knapp & Arthur C. Nelson, The Regulated Landscape: Lessons on State Land Use Planning from Oregon (1992). Washington has adopted new state planning laws permitting the imposition of urban growth boundaries around its western cities. See Keith W. Dearborn & Ann M. Gygi, Planner’s Panacea or Pandora’s Box: A Realistic Assessment of the Role of Urban Growth Areas in Achieving Growth Management Goals, 16 U. PUGET SOUND L. REV. 975, 976 (1993). Numerous California towns have adopted urban growth boundaries in recent years, San Jose being the largest. See William Fulton, San Jose Joins Greenline Movement, PLANNING, June 1, 1996, at 23.

88. Encouraging the development of employment in the inner city is a difficult matter. Nicholas Lemann, The Myth of Community Development, N.Y. TIMES, Jan. 9, 1994, §6 (Magazine), at 26. Two promising initiatives are the Empowerment Zone Program, which offers subsidies and tax incentives to new businesses in designated inner city areas while promoting, organizing, and relocating any residents, local governments, and businesses, see Audrey G. McFarlane, Empowerment Zones: Urban Revitalization Through Collaborative Enterprise, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35 (1995), and the EPA's “brownfields” program, which is attempting to facilitate the redevelopment of contaminated urban sites through consensual agreements. See Douglas A. McWilliams, Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization, 21 ECOLOGY L.Q. 705, 722-23 (1994).

89. See MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1997); DAVID RUSK, CITIES WITHOUT SUBURBS (1993). Regional planning has been encouraged by the Clean Air Act Amendments. Downs, supra note 85, at 174-82. Plainly, the federal government has a role in requiring regional approaches to spending federal dollars. Orfield, moreover, has demonstrated both in theory and in practice that cities can forge alliances with older, inner suburbs in the state legislature to establish metropolitan governing structures. See Orfield, supra at 156.

90. Breaking the link between local revenues and land use planning removes the chief rational motive for exclusionary zoning. A prime distinguishing factor between land use planning in Britain and
income housing should be developed throughout the metropolitan region, placing the Mount Laurel principle within a comprehensive, publicly funded planning approach. Only within such a comprehensive approach will judicial strictures against exclusionary zoning achieve more than vindicating an attractive principle. Exclusionary zoning is an instance of a deeper structural problem, not a distinct blemish on an otherwise wholesome pattern.

A ready answer to my approach must be that it is pie in the sky: The American electorate has rejected such programs of planning, welfare, and urbanism nearly every chance it could. Indeed, the authors of both books plainly premise their approval of the court's Mount Laurel innovations on the judgment that political forces in New Jersey were incapable of addressing the isolation of the poor and minorities in decayed cities. To the extent this is correct, it may become pedantic to argue the merits of the elements of the court's doctrine—it grabbed hold of a large malignant structure where it could find a handle, and the moral tone of its effort is more significant than its efficacy. But the Mount Laurel cases also changed perceptions of what was normal and what could be done. They changed the political climate, so that the FHA, with its structure for statewide and regional approaches, could be implemented. The Mount Laurel courts did not make their greatest contribution in fashioning a purer alternative to politics, but in broadening the scope of political dealmaking by destroying the constitutional quarantines surrounding the suburbs and forcing them to reach accommodations with cities.

III. WRITING ABOUT MOUNT LAUREL

Landmark cases arise from intense social conflict and have complex, often ironic consequences. Books that chronicle the human dimensions of such cases have been memorable successes, particularly Richard Kluger's Simple Justice and J. Anthony Lukas's Common Ground. We should be thankful that distinct-

the United States is that in Britain the tax revenue consequences of local planning decisions are small. That is so because localities do not raise their own tax revenues, but receive a share of pooled revenues according to a formula that tracks local needs. Richard Wakefield, American Development Control Parallels and Paradoxes from an English Perspective 32 (1990). The most significant steps toward freeing local governments from the fate of local resources have been the judicial decisions and statutes forcing states to equalize public education expenditures among localities. See, e.g., Abbott v. Burke, 693 A.2d 417 (N.J. 1997).

91. While conceding reconfiguration of metropolitan governing structures provides "interesting stuff for the policy maven," Kirp, Dwyer, and Rosenthal conclude, "it's simply not going to happen." Our Town, supra note 13, at 172. Haar believes that economic dominance has "permanently shifted" from city to suburb. Suburbs Under Siege, supra note 12, at 7. Given the horrors of urban poverty, "the more promising urban policies are not incentives for housing or employment initiatives for central city neighborhoods but those fostering the redistribution of minority households into the suburban areas." Id. at 7-8.

92. And there have been other improbable political successes in recent years, particularly in Minnesota, see Orfield, supra note 89, and in Connecticut, see Westbrook, supra note 4.


94. J. Anthony Lukas, Common Ground: A Turbulent Decade in the Lives of Three American
guished scholars have helped place *Mount Laurel* in its broader social and legal context.

But it is doubtful that either book will find many of the general readers at whom it is aimed. Despite its pictures and racy title, it is hard to imagine that anyone but lawyers, planners, or policy wonks will penetrate very far into *Suburbs Under Siege*. Although Haar is a clear and sometimes graceful writer, the book is often ponderous and poorly organized. It really comes alive when Haar writes about the efforts of the three trial judges to fashion effective remedies in the wake of *Mount Laurel II*. Haar’s wide knowledge of planning law and personal experience as special master in the Boston Harbor litigation gives him a sure touch in grasping the significance of how these judges dealt innovatively with highly technical questions of implementation. Unfortunately, the very issues on which Haar writes so engagingly are least likely to retain the interest of the nonlegal reader.

The authors of *Our Town* take a different tack. They attempt to infuse the *Mount Laurel* litigation with the moral drama of *Brown v. Board of Education*. There are numerous rhetorical echoes of earlier civil rights struggles, equating the figures in *Mount Laurel* with Rosa Parks, Thurgood Marshall, or George Wallace. Too often, however, this attempt at moral passion comes across as tiresome moralism. Too often, the reader is asked to accept nasty judgments about actors without adequate bases to assess those judgments. The authors fail to capture the moral complexity of multiple conflicting but valid perspectives.

Even if the books will not have much appeal in the wider world, they have value for those who concern themselves with land use issues and constitutional litigation. Such readers will profit from reading *Our Town’s* depiction of the circumstances that led to the lawsuit and the political jockeying that resulted in the FHA, and *Suburbs Under Siege’s* account of the remedial litigation that followed *Mount Laurel II*. But the specialist interest of the books is compromised by the authors’ attempt to retain the interest of the general reader. Kirp, Dwyer, and Rosenthal insert a brief essay on “markets, politics, and rights” that feints at a theory of the dynamics of exclusionary zoning, but it is so breezy and brief as to be largely incoherent. Haar’s analysis has more intellectual seriousness, particularly his chapter on “Why Judges Intervene,” but it would have been stronger had he taken the time to make his arguments in detail and explicitly address contrary arguments, such as those of persistent *Mount

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96. OUR TOWN, supra note 13, at 3-4.
97. Id. at v.
98. Id. at 110.
99. Id. at 1-57, 112-36.
100. SUBURBS UNDER SIEGE, supra note 12, at 55-85.
101. OUR TOWN, supra note 13, at 143-47.
102. SUBURBS UNDER SIEGE, supra note 12, at 175-85.
Laurel critic Professor Jerome Rose. In general, the issues raised by Mount Laurel merit strenuous analysis by knowledgeable, thoughtful scholars, like the authors of these books, and writing to a wider public can be an obstacle to or an excuse for not grappling with hard questions.

The authors, however, plainly were committed to reaching broader audiences. They share a determination to persuade readers that Mount Laurel represents a fully justified and largely successful exercise in judicial power and that judges should be praised for addressing the persistent use of the law by the affluent to exclude the poor and minorities from their communities. But academic readers would have been more persuaded by more careful analyses that acknowledged the broader dimensions of the problems of the urban poor and the imperfections of the court’s efforts. Perhaps the injustice of exclusionary zoning burns too hot to permit such dispassionate consideration.

CONCLUSION

Are suburbs unconstitutional? Exclusionary zoning blossoms as the visible flower of a pattern of law, politics, and economics that has battered cities, consumed the countryside, and condemned poor minorities to social isolation and compounded poverty. Analyzing the legal judgment of the New Jersey Supreme Court that exclusionary zoning is unconstitutional, as well as the remedial efforts of the New Jersey courts, legislature, and administration, and their consequences, emphasizes the broader anomalies of urban power. Fragmentation of suburban jurisdictions, local control of land use regulation, and weak national provisions for social welfare have created powerful incentives to escape and exclude.

The New Jersey Supreme Court deserves credit for its essentially moral refusal to accept exclusionary housing as the inevitable, if regrettable, consequence of suburbanization. The books under review provide instructive accounts of the efforts of litigants, courts, and politicians to make that moral judgment operative. But both the courts and the books may be criticized for focusing too much on treating the endpipe effluent than on changing the inputs and processes that create the pollution. Exclusionary zoning flourishes in our constitutional structures of metropolitan power; it is not a discrete violation of an individual right.

Environmental justice and sustainable development come together in urban ecology. The concentrated poverty of inner city neighborhoods mirrors the excesses of affluent suburbs. Innovative structures and processes of regional governance are necessary if we ever can create just, inclusive political communities that live in harmony with natural environments.