

CONTEMPORARY AUTHORITATIVE CONCEPTIONS OF FEDERALISM AND EXCLUSIONARY LAND USE PLANNING: A CRITIQUE

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During the Middle Ages, many cities in Europe erected walls around their perimeters for the purpose of protecting themselves from invasion. In recent years, many local communities in this country have reinstituted a variation of this ancient practice through extensive use of exclusionary land use planning ordinances. The perceived enemies of the modern community are different in the sense that they are prospective residents of the community rather than hostile military forces. Some of these modern communities erect exclusionary walls because they fear an invasion by hordes of nonresidents; an invasion which may change the character of their community or severely damage its environment. Other communities erect these walls with a view toward excluding only certain classes of nonresidents, specifically those who cannot afford to pay for all of the community services that they will require.

It is increasingly recognized that such exclusionary land use planning ordinances affect many people—particularly those of limited economic means—in a variety of ways.¹ The most obvious of these adverse effects is the limitation that such ordinances impose on the freedom to choose a community in which to live. Exclusionary land use planning ordinances typically increase the cost of housing in affected communities, thereby forcing many families to overpay for housing,² live in overcrowded conditions or in substandard housing, or to look elsewhere for their housing needs.³ Local exclusionary land use ordinances thus are working against the national policy of providing a decent home and a suitable living environment for every American family.⁴

Yet, neither Congress nor the Supreme Court has prescribed policies that deter to any significant degree local governments from enacting exclusionary

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¹ See, e.g., R. BABCOCK & F. BOSSELMAN, *EXCLUSIONARY ZONING* (1973) [hereinafter cited as BABCOCK & BOSSELMAN]; E. BERGMAN, *ELIMINATING EXCLUSIONARY ZONING* (1974) [hereinafter cited as BERGMAN]; Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

² It is generally agreed that a family is "overpaying" for its housing when it expends more than 25 percent of its income for housing.

³ In 1966 it was estimated that there were 6.7 million occupied substandard units, 6.1 million families living in overcrowded conditions, and 7.8 million families who could not afford decent housing. The President's Comm. on Urban Housing, *A Decent Home* 44 (1968).

⁴ National Housing Act of 1949, 42 U.S.C. §§ 1141-1190 (1970).

ordinances.⁵ While possessing the power to deal with local exclusionary land use planning, Congress so far has not adequately addressed the problem. The Supreme Court, acting under its present conception of federalism, generally has deferred to state and local control in the land use planning area. While some states have prescribed policies designed to meet their responsibility under this concept of federalism to deal with the exclusionary practices of local governments, other states have been less successful or have not perceived or addressed the problem at all.

This article first will identify the local rationale and the more significant modes of local exclusionary land use planning. Next, the effect of local exclusionary land use planning will be examined, with emphasis placed on the impacts on low income⁶ nonresidents. The national reaction, both by Congress and the Supreme Court, to the problem of exclusionary land use planning then will be examined. The Housing and Development Act of 1974, and the recent line of relevant Supreme Court decisions will be discussed in this section. Next, state response to local exclusionary land use planning will be investigated. Four representative states, Connecticut, California, New Jersey and Oregon, will be examined in order to analyze the broad spectrum of state responses to local exclusionary policies. These examinations will reveal that the responses to this problem by Congress, the Supreme Court, and most states have been insufficient and largely ineffectual. In conclusion, several recommendations for future action will be offered.

1. THE PROBLEM DELIMITED

A. *The Perceived Specter of Growth*

In the last two decades, suburban communities have absorbed more than seventy percent of the nation's residential growth;⁷ indeed, more Americans today live in suburbs than in central cities.⁸ Many suburban communities, however, failed to anticipate this trend and neglected to formulate adequate plans for managing the demand for rapid expansion. As a result, these communities soon found themselves unable to maintain the quality and quantity of community services and facilities that they desired and needed.

⁵ See notes 54-104 *infra* and accompanying text.

⁶ Generally, a low income family is deemed to be a family whose income is less than 80 percent of the median income for the area in which they reside. This is the Department of Housing and Urban Development's (hereinafter HUD) definition for purposes of determining eligibility for a subsidy under the section 8 Housing Assistance Payments Program. See Low Income Housing—HUD, 24 C.F.R. § 883.202 (1978). The definition of a moderate income family is less clear. Presumably it is a family whose income is less than the median income for the area. In the Section 235 Housing Program, Congress permits participation by those whose incomes are less than 95 percent of the median for the area. 12 U.S.C.A. § 1715Zh(2) (Supp. 1980). Thus those families who make more than 80 percent but less than 95 percent would presumably be classified as moderate income families.

⁷ See *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1625 n.7 (1978) [hereinafter cited as *Developments*].

⁸ *Id.*

Other communities in "sun-belt" states,⁹ and in states with attractive natural environments,¹⁰ have experienced rapid population growth throughout the past two decades. Facing the potential impact of such urbanization upon local character and ecology, these communities have abandoned their traditional philosophy that "growth is good" for a "growth is bad" approach.¹¹ Even serene, bucolic communities have felt the pressure for expansion and have attempted to avoid intrusion by "second home" builders.¹² In many of these communities, exclusionary land use planning is seen as an effective method for combating the perceived problems of growth.

The underlying phenomena of growth produced different rationales for exclusionary land use policies in different communities. Some communities were particularly concerned with potential growth of low and moderate income families. First, low and moderate income families would require community services and facilities far in excess of their tax contribution.¹³ Second, many residents of these communities had moved from the central city precisely to escape the problems that low income families (at least in their view) create.¹⁴ In order to discourage or preclude these people from becoming residents, many suburban communities enacted ordinances which effectively increased the cost of housing in the community, thereby placing it beyond the economic means of low income families.¹⁵

Other communities have enacted exclusionary land use ordinances for more subjective reasons. Some partisans of limited development fear that unrestricted growth will spawn a wide range of undesirable urban problems such as crime, noise, and pollution, others merely want their community to retain its present character, while others are primarily concerned with the environ-

⁹ California's population increased at an annual average rate of 4 percent from 1950-60, 2.3 percent from 1960-70, and 1.4 percent from 1970-78 (total 74.2 percent since 1950). Florida's population increased at the rate of 5.9 percent from 1950-60, 3.2 percent from 1960-70, 2.8 percent from 1970-78 (total 113.4 percent since 1950). U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1979, 14 (100th ed.). National annual growth figures were 1.7 percent from 1950-60, 1.3 percent from 1960-70, and 0.8 percent from 1970-78 (total 36.3 percent). *Id.*

¹⁰ Between 1970 and 1978, for example, New Hampshire was growing at a rate slightly over twice the national annual average rate (2.0 versus .8), as was Oregon (1.9 versus .8). *Id.*

¹¹ See THE URBAN LAND INSTITUTE, I MANAGEMENT & CONTROL OF GROWTH 85-86 (1975) [hereinafter cited as I MANAGEMENT & CONTROL OF GROWTH].

¹² These pressures produced the contested large-lot zoning in Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972).

¹³ See BERGMAN, *supra* note 1, at 5.

¹⁴ See *Developments*, *supra* note 7, at 1627 n.15 (race probably equally strong as class bias in motivating some exclusionary practices).

¹⁵ The initial attempts were ordinances designed to exclude racial minorities. Such ordinances were stricken as being unconstitutional before zoning became a popular method of land use planning. See *Buchanan v. Warley*, 245 U.S. 60 (1917). The more subtle ordinances which were designed to exclude on the basis of wealth appeared not long after the Great Depression. See, e.g., *Baker v. Somerville*, 138 Neb. 466, 293 N.W. 326 (1940) (2,000 square feet minimum floor area). See generally Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317, 335-39, 343-46 (1955) [hereinafter cited as Williams, *Planning Law and Democratic Living*].

mental and ecological impact of growth.¹⁶ Groups seeking to preserve areas of historical or architectural significance also may advocate exclusionary land use planning. In response to these objective and subjective concerns, local and suburban community planners designed an impressive variety of exclusionary land use devices.

*B. An Identification of the Various
Types of Exclusionary Practices*

The diversity of exclusionary land use practices which may be utilized is limited only by the imagination of local communities. As a result, a wide range of devices to effectuate exclusionary policies currently exists. For convenience, the exclusionary practices can be identified in relation to four categories: 1. quantity limits, 2. quality requirements, 3. community fees and 4. political impediments.

Quantity limits are local practices that directly restrict the number or size of dwellings. Large lot zoning—requiring unnecessarily large residential lots—is perhaps the most common form of quantity restriction.¹⁷ The prohibition of certain types of dwellings such as mobile homes¹⁸ or multi-family buildings,¹⁹ and the zoning of large areas for industrial or commercial purposes are other techniques available to limit directly the quantity of dwelling units in a community. Limits on the number of building permits,²⁰ or the enactment of moratoria²¹ on the issuance of permits also are employed to reduce the gross number of units available.

Quality requirements are local practices purportedly designed to ensure quality housing. Minimum floor area provisions are common quality requirements.²² Building codes also are frequently modified to require more expensive building materials or procedures that allegedly will produce better quality but more expensive dwellings.²³ Building costs also are increased by the imposition of community charges such as "front end fees" for building permits, zoning changes, anticipated school costs appearing as a fee for each bedroom, water and sewer hook-up charges, and inspections.²⁴

The fourth type of an exclusionary practice utilizes cumbersome and contentious political processes to control growth. For example, some communities have established referendum requirements for the approval of public

¹⁶ See THE URBAN LAND INSTITUTE, II MANAGEMENT AND CONTROL OF GROWTH, 299-329 (1975) [hereinafter cited as II MANAGEMENT AND CONTROL OF GROWTH].

¹⁷ See BABCOCK & BOSSELMAN, *supra* note 1, at 10.

¹⁸ N. WILLIAMS, AMERICAN LAND PLANNING LAW § 57.25 (1974) [hereinafter cited as WILLIAMS].

¹⁹ *Id.* at § 66.11.

²⁰ This was made popular by the City of Petaluma, California. For a description of its limits on building permits, see text accompanying notes 174-79 *infra*.

²¹ This is the tactic made popular by Dade County, Florida. See II MANAGEMENT AND CONTROL OF GROWTH, *supra* note 16, at 276-77.

²² For a discussion of this device and the cases involving such practice, see WILLIAMS, *supra* note 18 §§ 63.01-63.13.

²³ See BABCOCK & BOSSELMAN, *supra* note 1, at 13-14.

²⁴ *Id.* at 11-13. See also 6 HOUS. & DEV. REP. 398 (BNA 1978).

housing,²⁵ or for any change in existing permissible land uses in the community.²⁶ A popular alternative to a formal political process is an intentionally slow administrative process with respect to zoning changes, issuance of building permits, and other development procedures.²⁷

Communities frequently employ several types of exclusionary practices together. For example, in Petaluma, California the community adopted excessive subdivision restrictions involving the dedication of large tracts of land for parks and schools or fees in lieu thereof, the installation of unnecessarily large storm sewers, and a provision for costly site improvements and landscaping.²⁸ Such policies directly affect the quality of life of moderate and lower income families. In addition, exclusionary practices also may affect adversely the quality of life for local residents in less obvious ways.

C. Impacts of Exclusionary Practices

Exclusionary land use practices produce a variety of economic and social effects on both residents and nonresidents of the community. Such practices have both regional and national repercussions as well. A clear appreciation of the wide ranging effects of local exclusionary land use practices is a prerequisite to a realistic evaluation of the appropriate degree of deference that national and state decision makers should accord to local decisions implementing such practices.

Nonresidents who desire or plan to move from their present community are directly affected by local exclusionary land use practices. The lack of available housing at a reasonable cost limits the choice of possible living areas for many nonresidents. Some of the exclusionary practices employed by communities, such as the exclusion of mobile homes and multi-family dwellings, obviously are designed to exclude from the community persons lacking the financial resources necessary to purchase a single family residence. Even those who have the financial resources to purchase modest single family dwellings are excluded from those communities which employ practices like exorbitant "front-end fees," excessive subdivision, large minimum floor areas, and large lot zoning since these practices increase the cost of housing²⁹ in the community beyond the economic means of persons with modest financial resources. Because housing costs are increasing at almost twice the rate of personal incomes,³⁰ such practices are excluding an ever increasing portion of the population.

²⁵ See, e.g., CAL. CONST. art. XXXIV.

²⁶ Such a referendum requirement engendered the controversy in *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976).

²⁷ See *BABCOCK & BOSSELMAN*, *supra* note 1, at 14-17.

²⁸ *Construction Industry of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

²⁹ See generally L. SAGALYN & G. STERNLIEB, *ZONING AND HOUSING COSTS: THE IMPACT OF LAND USE CONTROLS ON HOUSING PRICE* (1973).

³⁰ Between 1970 and 1976 housing costs were increasing at approximately 15 percent annually, while family income was increasing at 7.8 percent annually. U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS AND U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, *CHARACTERISTICS OF NEW HOUSING*, 1975 (1977).

In a less obvious fashion, growth control devices such as limitations on the annual number of building permits or on the number of dwelling units in a particular community, or successive moratoria on the issuance of various other permits also operate to increase the cost of housing.³¹ The ultimate effect, which apparently has been reached in some metropolitan areas already, is to lock the overwhelming majority of low and moderate income persons into the dismal inner city housing market.³² This effect is particularly disconcerting when viewed in light of the movement of employment opportunities from central cities to suburbs. Because inexpensive mass transit systems from central city to suburbia rarely exist,³³ exclusionary practices limit not only housing opportunities, but also employment opportunities for many persons.³⁴

When one or more communities in a regional housing market engage in exclusionary practices, considerable pressure is placed on other communities in the region to engage in similar practices, since a reduction in the supply of housing in one area of the market will shift the demand for housing to other areas in the market.³⁵ Those communities not utilizing exclusionary practices thus may sustain growth beyond their normal rates. As this occurs, economic and political pressure to adopt exclusionary devices will increase in those communities.

Although the housing situation in central cities is already dismal, it may become critical in the not too distant future. As a result of housing costs accelerating at a far higher rate than incomes, a steadily increasing number of people may find it necessary to obtain housing other than a single family dwelling in suburbia.³⁶ Consequently, those who would have in the past moved to suburbia will be forced to compete for housing in the central cities. These slightly higher income persons then will be competing with lower income persons for existing housing. If this competition for housing occurs, low and moderate income families will be forced to overpay for their housing to a greater extent than at present, live in increasingly overcrowded conditions, or seek housing that is substantially substandard. One need not be a sociologist to perceive the adverse social implications of worsened conditions for low and moderate income persons in central cities.³⁷

Moreover, those choosing to live in exclusionary communities may be forced to pay higher rents or to purchase homes at inflated prices.³⁸ As a

³¹ See generally Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 390-403 (1977) [hereinafter cited as Ellickson].

³² See *Developments*, *supra* note 7, at 1626.

³³ *Id.* at 1627.

³⁴ *Id.*

³⁵ Ellickson, *supra* note 31, at 402-03.

³⁶ In 1970, 46.2 percent of all families were able financially to purchase a median price new house, and 44.8 percent were able financially to buy a median price existing home. By 1976, these percentages had dropped to 27 percent and 36 percent respectively. See JOINT CENTER FOR URBAN STUDIES, MIT AND HARVARD UNIVERSITIES, *THE NATION'S HOUSING 1975-1985*, 124, 126 (1977).

³⁷ For a brief description of some of the social implications of slum housing, see L. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING* 3-21 (1968).

³⁸ See Ellickson, *supra* note 31, at 402.

result, businesses within such communities may have to pay higher wages in order to attract employees.³⁹ These businesses will pass some of this increase on to the consumers in the community.⁴⁰ Because most inquiries have focused on those who are locked in the central city rather than on those who live in a largely homogeneous suburban community,⁴¹ the social impact on those living in homogeneous communities is an unknown quantity.⁴² Nevertheless, the direct impact of exclusionary devices on moderate and low income families, coupled with the serious implications for society which such an impact portends, should be considered in evaluating exclusionary land use policies.

II. PREFERRED COMMUNITY POLICIES APPLICABLE TO EXCLUSIONARY LAND USE PLANNING

An individual's living environment influences his health, behavior, attitude, family, and social relationships. For many individuals, the community in which they live determines the scope of their employment opportunities. Because the community has such significant impact, and because freedom of choice is a fundamental tenet of free democratic society, a basic national community policy should afford each individual the widest possible choice of communities in which to live. Land use planning practices which unduly limit the availability of residential areas are incompatible with preferred community policy.

Since most land use planning devices play a vital role in a community's attempt to achieve a rational use of land within its boundaries, a healthy and safe environment for its residents, and an overall pleasant place in which to live, the rejection of all land use planning devices that increase the cost of housing is unacceptable. The difficult task is determining which of the various land use planning practices, from the perspective of the larger community, unduly limit the choice of individuals. Abstract formulations of policies or doctrines to simplify this task are not available; each community plan must be examined in its total context. For example, restrictions on the number of dwelling units in a particular community may be justifiable if incorporated within a regional plan for environmental or ecological protection and ample housing provisions for all economic segments are available in nearby com-

³⁹ *Id.* at 402 n.40.

⁴⁰ *Id.* If they are able to pass these costs on to the consumers in the communities, then renters and new homeowners will suffer even greater economic losses by living in the community. Resident landlords' and existing homeowners' economic gains in the price of their housing, assuming they remain in the community for any length of time, will be offset by the increased cost of living they sustain. Of course, in many instances, merchants, because of competition in nearby communities, will be unable to pass these costs on to the consumers and thus will have to absorb the additional costs and reduce their profits.

⁴¹ For an early recognition and discussion of the social problems associated with exclusionary practices, see Williams, *Planning Law and Democratic Living*, *supra* note 15.

⁴² For an analysis of the social consequences of a national zero population growth, see I MANAGEMENT & CONTROL OF GROWTH, *supra* note 11, at 378-89.

munities. But the same limits on dwelling units rarely are acceptable when they are not a part of an integrated regional plan. A subdivision regulation standing alone which requires the dedication of ten percent of the land in a subdivision for park purposes may be viewed as unduly increasing the cost of housing in the community. If it were coupled, however, with other programs designed to ensure the availability of housing within the community for all economic groups, such a dedication requirement would be justifiable.

From the perspective of the larger community, whether it be defined as the state, the region, or the nation, reasons propounded by isolationist communities to support their exclusionary practices are rarely acceptable. Exceptional instances exist when unique environments or significant ecological systems must be protected. Justifications based upon the preservation of the community character, fiscal integrity, or other purely provincial concerns, however, cannot be given much weight when their effect will be to limit the potential choice of living conditions for millions of people. While rejection of these justifications impairs the ability of individual community residents to direct community development, this infringement is limited. By proper land use planning, such communities can accommodate additional people of all economic levels and still retain much of their local flavor and fiscal integrity.⁴³

The elimination of exclusionary practices other than those promoting preferred policies must be viewed as only the initial step in providing individuals in this country with the widest possible choice of communities in which to live. Elimination of the problems created by exclusionary practices does not mean that housing affordable to millions of Americans will be built. The actual provision of affordable, decent housing in communities across the nation is a major problem unto itself. Widespread availability of such housing, however, is not possible until the exclusionary walls constructed by many communities in this country are destroyed.

Because the free movement of people across state lines has long been a matter within the scope of federal authority,⁴⁴ the federal government could

⁴³ Conflicting studies exist on the fiscal impact of growth. Some indicate that growth improves the fiscal strength of a community, while others indicate the opposite. This situation may stem from disagreement over the manner for measuring the fiscal impacts of growth. For discussions of the methods to be employed in analyzing the fiscal impacts of growth, see I MANAGEMENT & CONTROL OF GROWTH, *supra* note 11, at 494-554.

⁴⁴ In 1941, California asserted that a high influx of migrants caused health and morals problems and threatened the state's fiscal integrity. California, therefore, claimed to be justified in prohibiting any person from bringing a nonresident indigent person into the state. The Supreme Court rejected the justifications and declared the statute unconstitutional on the grounds that it was a burden on interstate commerce.

And none [limitations on state legislative authority] is more certain than the prohibition against attempts on the part of a single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its border . . . For the social phenomenon of large-scale interstate migration is as certainly a matter of national concern as the provision of assistance to those who have found a permanent or temporary abode.

Edwards v. California, 314 U.S. 160, 173, 175 (1941).

play a major role in removing exclusionary land use planning practices as a barrier to such movement. Congress recently promulgated the goals of obtaining full employment and balanced growth,⁴⁵ but because of its present conception of federalism, it has failed to enact meaningful legislation designed to achieve such goals. Similarly, the approach to federalism espoused by the Supreme Court under Chief Justice Warren Burger permits local exclusionary practices to flourish.

III. NATIONAL RESPONSE TO LOCAL EXCLUSIONARY LAND USE PRACTICES

A. Congressional Action

Four decades ago, Congress declared a national goal to be the provision of a "decent home and a suitable living environment for every American family."⁴⁶ In pursuit of this goal, Congress through the years has enacted legislation establishing and funding a variety of programs designed to provide low and moderate income housing, to clear or rehabilitate slums and blighted areas, and to supply needed community services and facilities.⁴⁷ None of this legislation, however, provides for federal implementation of the programs, nor does it require specific action by local governments. Instead, the legislation merely attempts to induce local communities to undertake necessary projects by offering substantial federal financial assistance.⁴⁸ Its failure to address the problem of exclusionary zoning through preventive legislation suggests a high degree of federal respect for local self-determination.

Traditionally, however, Congress has been willing to infringe upon local autonomy whenever local governments applied for and received federal financial assistance. Believing that local governments should use federal funds to promote declared national objectives, Congress itself imposed, and frequently authorized appropriate federal agencies to impose stringent conditions on the use of federal wealth.⁴⁹ This infringement upon the autonomy of local governments, however, drew criticism.⁵⁰ As experience with the var-

⁴⁵ See Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523.

⁴⁶ National Housing Act of 1949, 42 U.S.C. § 1441-1490 (1970).

⁴⁷ For a discussion of various programs that have been terminated, see REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1968); L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING (1968) [hereinafter cited as FRIEDMAN].

⁴⁸ See FRIEDMAN, *supra* note 47, at 190-91.

⁴⁹ See Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 URB. LAW. 189, 195-97 (1975).

⁵⁰ President Ford, on signing the Housing and Community Development Act of 1974, summarized the position of these critics: "In a very real sense, this bill will help return power from the banks of the Potomac to people in their own communities. Decisions will be made at the local level. And responsibility will be placed squarely where it belongs—at the local level." Gerald R. Ford, Statement on the Housing and Community Development Act of 1974, August 22, 1974, *Public Papers of the Presidents* 43. See also Richard M. Nixon, Special Message to the Congress on Special Revenue Sharing for Urban Community Development, March 5, 1971, *Public Papers of the Presidents* 395.

ious programs grew, these critics claimed that the federal strings attached to various programs made them unnecessarily lengthy, unduly complex, and excessively expensive. The philosophical premise underlying much of this criticism was the belief that state and local governments, rather than federal bureaucrats, were best able to solve local problems. With the election of Richard M. Nixon as President, these critics gained a powerful advocate. The Nixon Administration introduced several bills in Congress which sought to achieve a new federalism in the area of federal financial assistance to local governments.⁵¹ Congress, partially in response to the prodding of the Nixon Administration, enacted the Housing and Community Development Act of 1974.⁵² A close examination of Title I—Community Development (CD)—and Title II—Assisted Housing (AH)—of this Act reveals the extent to which Congress has adopted the “no strings” or “minimal strings” approach to federal financial assistance.

1. Title I, Housing and Community Development Act of 1979 —Community Development

Congress stated its primary purpose in enacting the CD program to be “the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for person of low and moderate income.”⁵³ In part, the program aims to reduce the isolation of income groups within communities and geographical areas, to promote an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income, and to revitalize deteriorating or deteriorated neighborhoods to attract persons of higher income.⁵⁴ The Act also seeks to encourage “areawide development planning,”⁵⁵ and, thus, may be viewed as a federal attempt to discourage local exclusionary land use practices.

This interpretation is strengthened by a requirement that each CD application contain a Housing Assistance Plan (HAP).⁵⁶ Such plans must include

⁵¹ See, e.g., Urban Community Development Revenue Sharing Act of 1971, H.R. 8853, 92d Cong., 1st Sess. (1971); S. 1618, 92d Cong., 1st Sess. (1971); Better Communities Act, H.R. 7277, 93d Cong., 1st Sess. (1973); S. 1743, 93d Cong., 1st Sess. (1973).

⁵² Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 12, 42 U.S.C.).

⁵³ See 42 U.S.C. § 5301(c) (Supp. V 1975).

⁵⁴ *Id.* at § 5301(c)(6).

⁵⁵ *Id.* at § 5301(d)(2).

The legislation does not reflect a firm commitment to areawide planning. The House Report on the bill states:

It should be noted that, with respect to comprehensive areawide planning, the bill contemplates only that areawide planning be fully recognized by each applicant as a guide to governmental action Applicants would not be rigidly bound by comprehensive plans, nor would areawide agencies be given any power they do not now possess under State law to disapprove proposals that are inconsistent with comprehensive plans.

H.R. REP. NO. 1114, 93d Cong., 2d Sess. 6-7 (1974).

⁵⁶ 42 U.S.C. § 5304(a)(4) (Supp. V 1975).

an accurate assessment of the housing needs of lower income persons "residing in or expected to reside in the community," plus both an annual and a three year goal relative to the provision of needed housing.⁵⁷ This provision, when coupled with the areawide planning objective, appears to promote consideration of inter-community housing needs by applicant communities.

Nevertheless, closer examination of the CD program, particularly as it exists after several recent amendments, reveals that the commitment of Congress to the elimination of exclusionary land use practices is extremely weak. The entire CD program is optional; communities desiring to engage in exclusionary practices may refuse to participate⁵⁸ or even continue their exclusionary practices while participating in the CD program.⁵⁹ This may occur primarily because of three provisions of the Act.

The CD provisions presume that each application is entitled to approval by the Secretary of HUD. The Secretary can disapprove an application only a) when on the basis of generally available significant facts and data the applicant's assessment of its housing needs is "plainly inconsistent" with such facts or data; b) when the proposed projects are "plainly inappropriate" to congressional objectives; or c) when the application does not comply with the requirements of the title or other applicable law.⁶⁰ No authorization is provided for the Secretary to make an in-depth independent investigation into the applicant's own assessment of its housing needs before final approval is given. In addition, the Secretary of HUD clearly bears the burden of demonstrating that an applicant's proposal will not further congressional objectives.

The possibility of disapproval on grounds that the applicant would not further congressional objectives became even more remote following a 1978 amendment to the CD legislation. This amendment clearly prohibits disapproval of any application unless "the Secretary determines that the extent to which a primary purpose is addressed is plainly inappropriate to meeting the community's efforts to achieve the primary objective of this title."⁶¹ Prior to this amendment, the Secretary apparently could disapprove an application on the grounds that the proposed projects furthered only some of the specific objectives of Congress while slighting or ignoring others.⁶² In a second

⁵⁷ *Id.*

⁵⁸ See Comment, *Symbolic Gestures and False Hopes: Low Income Housing Dispersal After Gautreaux and the Housing and Community Development Act of 1974*, 21 ST. LOUIS U.L.J. 759, 773-74 (1978); Comment, *National Problems and Local Control: Tension in Title I of the Housing and Community Development Act of 1974*, 13 COLUM. J.L. & SOC. PROB. 409, 443-44 (1977).

⁵⁹ A report prepared by Community Legal Services, Inc. of Philadelphia, which is based on surveys of 46 communities, found that housing assistance performance rates were very low in almost every city surveyed. In some, the rate was zero. See 7 Hous. & Dev. Rep. 1008-09 (BNA 1980).

⁶⁰ 42 U.S.C. § 5304(c) (Supp. V 1975).

⁶¹ Housing and Community Development Amendments of 1978, Pub. L. No. 95-557 § 103(d), 92 Stat. 2080 (to be codified in 42 U.S.C. § 5304).

⁶² H. CONF. REP. NO. 95-1792, 95th Cong., 2d Sess. 61 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4872, 4881. For example, the proposal might further the congressional objective of restoring and preserving property of historic or

amendment,⁶³ Congress dispelled any notion that a community's Housing Assistance Plan required an assessment of low income housing needs created by other factors than increased employment opportunities within the community.⁶⁴ As a result, a bedroom suburban community's assessment of its low income housing needs can approach, if not reach, zero.

While these recent amendments have not removed all "federal strings," those that exist are extremely thin and can be rarely pulled by the Secretary of HUD. The Assisted Housing provisions contained in Title VI do not substantially alter this approach.

2. Title II, Assisted Housing

The first sessions of the AH legislation are concerned with public housing much as it was envisioned in the original Housing Act of 1937.⁶⁵ These housing projects are built only when a local community opts to participate. It is unlikely that any community engaging in exclusionary practices will opt to participate in any meaningful degree. This program has been in existence for more than half a century and has done little to disperse spatially low and moderate income persons. In fact, it can be viewed as having had the opposite effect.⁶⁶

Section 8 of the AH legislation, however, appears to offer some hope for the spatial deconcentration of low and moderate income persons. It authorized the Secretary of HUD to assist from annual contribution contracts eligible persons in rental payments.⁶⁷ Because it contains expanded income limits,⁶⁸ the rental assistance is available to the whole range of low income families. The contracting authority of the Secretary under section 8 embraces not only local housing agencies, but also private owners.⁶⁹ These latter con-

architectural value, but not further its objective of spatial deconcentration. 42 U.S.C. § 5301(c)(7) (Supp. V 1975).

⁶³ *Id.* at § 5301(c)(6).

⁶⁴ The amendment inserted after the phrase "expected to reside in the community" the following: "as a result of existing or projected employment opportunities in the community." Housing and Community Development Amendments of 1978, Pub. L. No. 95-557 § 103(c), 92 Stat. 2080 (to be codified in 42 U.S.C. § 5304).

A draft HUD handbook indicates that HUD will begin monitoring communities more closely with regard to their implementation of their HAP. *See* 6 Hous. & Dev. REP. 719-20 (BNA 1978). If this draft is approved by the Secretary, it is difficult to envision how HUD's strict scrutiny in light of this amendment to the HAP requirement will be successful in achieving spatial deconcentration.

⁶⁵ Act of Sept. 1, 1937, Ch. 896, § 1, 150 Stat. 888, as amended 42 U.S.C. § 1401 *et seq.* (1978).

For a discussion of the evolution and modification of the public housing program, *see* Catz, *Historical and Political Background of Federal Public Housing Programs*, 50 N. DAKOTA L. REV. 25 (1973).

⁶⁶ *See* FRIEDMAN, *supra* note 47, at 122-23.

⁶⁷ 42 U.S.C. § 1437f(b) (Supp. V 1975).

⁶⁸ *Compare* 24 C.F.R. § 860.3 (1979), which sets forth HUD guidelines for public housing income limits, *with* 24 C.F.R. § 880.102 (1979), which defines a low income family for section 8 housing.

⁶⁹ 42 U.S.C. § 1437f(b) (Supp. V 1975).

tracts are permissible only in the absence of a local housing agency or when the Secretary determines that the local agency is unable to implement the provisions of section 8.⁷⁰ Under these contracts, private owners lease rental units to eligible low and moderate income persons.⁷¹

Local governmental agencies must be notified of such proposed action by the Secretary and afforded an opportunity to comment.⁷² If the local government objects by claiming that a proposal is inconsistent with its Housing Assistance Plan, the Secretary must first determine if such a conflict exists before the proposal can be approved.⁷³ If there is no HAP for the community, the Secretary must establish a need for the assisted housing and the existence of adequate public services and facilities for the proposed housing. Thus, Congress has conferred on the Secretary of HUD authority to override the desires of local governments in limited instances. The number of instances in which this actually will occur, however, is limited not only by the Secretary's willingness to approve a proposal in the face of local opposition, but also by the scarcity of private owners willing to undertake such projects,⁷⁴ and on the availability of land within a community subject to land use controls that make such a project possible and economically feasible. Although the section 8 legislation does reflect some federal overriding of local autonomy, the various barriers to the location of low and moderate income housing in unwilling communities preclude the conclusion that this legislation represents a major contradiction to the concept of federalism reflected in the CD provisions. It does permit, however, a conclusion that Congress's commitment to local autonomy is less firm than that of the Supreme Court.

B. *The Action of the Burger Court*

The willingness, in principle, of Congress to override local land use policy to accomplish national housing policy has not been matched by the Supreme Court. The Burger Court accords great deference to local communities; the Court has been very hesitant to apply constitutional guarantees to strike local exclusionary practices. The Court's deference to local decisions is grounded in a strong belief in local autonomy. This conception of federalism has slowly emerged in a series of recent cases involving either equal protection or due process challenges to local exclusionary land use policies.⁷⁵ The Court has uniformly upheld local action against a claimed

⁷⁰ *Id.*

⁷¹ *Id.* at § 1437f(c).

⁷² *Id.* at § 1439(a).

⁷³ *Id.*

⁷⁴ HUD set a goal of obtaining reservations for 288,500 section 8 rental units. With slightly more than a month left in the fiscal year, it was falling short by 175,000 units. See 6 HOUS. & DEV. REP. 388 (BNA 1978).

⁷⁵ See, e.g., Little, *The United States Supreme Court and Land Use Regulation: The Latest Round*, 52 TUL. L. REV. 476 (1978); Mandelker, *Racial Discriminatory and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977); Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978); Wright, *Constitutional Rights and Land Use Planning: The New and the Old Reality*, 1977 DUKE L.J. 841.

violation of the equal protection clause; due process challenges have been only slightly more successful. This section of the article will briefly discuss the major cases attempting to identify the impact of the Court's conception of federalism on local land use policy.

1. Equal Protection Challenges

In the 1971 case of *James v. Valtierra*,⁷⁶ the Burger Court first considered the constitutional ramifications of local exclusionary zoning. An article of the California Constitution requires local governments to obtain authorization from their electors before undertaking the development, construction, or acquisition of a low rent housing project. Pursuant to this Article, the City of San Jose and San Mateo County submitted proposals for low rent housing projects to their respective electors. After both electorates had rejected these proposed projects, local citizens instituted suits, alleging eligibility for the low rent housing projects and claiming that the referendum requirement denied them equal protection of the laws. A majority of the Supreme Court⁷⁷ first determined that the referendum provision was not aimed at a racial minority and then found no violation of the equal protection clause because "provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."⁷⁸ In this decision a majority of the Court refused to override local zoning provisions on equal protection grounds absent evidence of racially discriminatory intent.⁷⁹ The Court thereby revealed a strong commitment to the principles of local self-determination.

This commitment was reinforced by the 1973 case of *Village of Belle Terre v. Boraas*.⁸⁰ There the village had adopted an ordinance prohibiting more than two unrelated persons from living in a house located within a single family residential zone. Six unrelated college students were living in such a house when the village served an Order to Remedy Violations on the owner. The owner, with three of the students, filed suit contending that the ordinance violated the equal protection clause and the rights of travel, privacy, and association. The Court rejected the various constitutional challenges summarily,⁸¹ and stated that a community could "lay out zones where family

⁷⁶ 402 U.S. 137 (1971).

⁷⁷ Justice Douglas took no part in the case. Justices Marshall, Brennan, and Blackmun dissented. The dissenters believed that the referendum provision, which was applicable only to low income housing and not to other types of public housing, such as housing for veterans or public employees, was a classification based on poverty and, therefore, a suspect classification. Applying strict judicial scrutiny, the dissenters concluded that the referendum provision "tramples the values that the Fourteenth Amendment was designed to protect." *Id.* at 145.

⁷⁸ *Id.* at 141.

⁷⁹ *Id.* at 143.

⁸⁰ 416 U.S. 1 (1973).

⁸¹ Mr. Justice Brennan dissented on the grounds that the case presented by the students had become moot because they had vacated the premises and the owner lacked standing to present the case because there was no claim that the owner faced economic loss and the owner could not assert the constitutional rights of prospective unrelated tenants. He believed the Court should not have addressed the merits of the case, but should have remanded the case to determine if it presented a "case or controversy." 416 U.S. at 10.

values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."⁸²

Two years later, in *Warth v. Seldin*,⁸³ the Court confronted a more broadly based exclusionary policy. Penfield, a suburb of Rochester, New York, had zoned 98% of its vacant land for single family residences. It was alleged that the town also had imposed unreasonable lot size, floor area, setback and habitable space requirements. Only 0.3% of available land was zoned for multi-family dwellings. Even in this limited area, low and moderate income housing was effectively precluded by low density requirements. Nevertheless, the Court refused to address the merits of the case. Instead, the Court determined that none of the various classes of plaintiffs had standing to contest the constitutionality of the Penfield practices. One effect of this decision is to make it extremely difficult, if not impossible, for a wide range of individuals or concerned non-profit organizations to pierce the threshold barrier of standing in order to test the exclusionary practices of local governments. The major significance of this case, however, is that the Court set forth, albeit in summary form, its conception of federalism in the land-use planning area:

We also note that zoning laws and their provisions, long considered essential to effective urban planning, are *peculiarly within the province of state and local legislative authorities*. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.⁸⁴

This statement effectively summarizes the approach espoused earlier by the Court in *Valtierra* and *Belle Terre*.

The Court again considered an equal protection challenge to allegedly racially discriminatory exclusionary land use practices in *Arlington Heights v. Metropolitan Housing Corp.*⁸⁵ In *Arlington Heights*, the Metropolitan Housing Development Corporation (MHDC), a non-profit corporation created to develop low and moderate housing, sought rezoning of a fifteen acre tract of land, which it had leased and would purchase pursuant to a contract of sale if the rezoning was obtained, from single family to multi-family residential. It sought the rezoning in order to build a federally financed cluster of townhouses for low and moderate income persons. The Village of Arlington Heights, a suburb of Chicago with a 1970 population of 64,000 of which only 27 were black, denied MHDC's request for a rezoning. MHDC filed suit contending that the denial of the rezoning was racially discriminatory and therefore violated the equal protection clause and the Fair Housing Act. Several other parties joined MHDC as plaintiffs including Ransom, a Negro who asserted that he worked in Arlington Heights but lived twenty miles away. Ran-

Mr. Justice Marshall dissented on the basis that the ordinance violated the students' fundamental rights of association and privacy which means that the ordinance had to protect a substantial and compelling state interest. He found no such interest and thus found the ordinance unconstitutional. 416 U.S. at 12, 19-20.

⁸² *Id.* at 9.

⁸³ 422 U.S. 490 (1975).

⁸⁴ *Id.* at 508 n.18.

⁸⁵ 429 U.S. 252 (1977).

som also alleged that he would qualify for MHDC's proposed project and would move into it if given the opportunity.

The initial portion of the decision was concerned with the standing of the parties attempting to present the equal protection claim. There the Court determined that Ransom had standing. With respect to the merits of the case, however, the Court found that discriminatory effect alone was insufficient to constitute a violation of the equal protection clause. It required proof of racially discriminatory intent or purpose before the equal protection clause would become efficacious.⁸⁶ The Court determined that the plaintiffs had not proven that a discriminatory purpose was a motivating factor in the denial of MHDC's rezoning request, and thus there was no violation of the equal protection clause.⁸⁷ Because it will be extremely difficult in most instances to prove that a local government engaged in land use practices for racially discriminatory purposes, the effect of this decision is to give deference to local self-determination even when the determinations have severe racially discriminatory impacts. Thus, even the equal protection clause, as interpreted by the Burger Court, imposes limited restraints upon local autonomy.⁸⁸

⁸⁶ *Id.* at 264-65. Mr. Justice Stevens took no part in the case. Mr. Justice Marshall and Mr. Justice Brennan concurred in most of the decision, but believed the merits of the case should have been remanded to the court of appeals for review in light of the decision in *Washington v. Davis*, 426 U.S. 229 (1976). *Id.* at 271-72. The *Washington* decision was rendered after the court of appeal's decision in *Arlington Heights*.

Mr. Justice White dissented. He agreed with the other dissenters that the case should have been remanded to the court of appeals for reconsideration in light of *Davis*, but also believed that the court of appeals should consider the Fair Housing Act before reaching the constitutional issue. *Id.* at 272-73.

⁸⁷ The Court remanded the case to the court of appeals for consideration of alleged violations of the Fair Housing Act. *Id.* at 271.

⁸⁸ Two recent circuit court decisions indicate that the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1976 & Supp. II 1980) imposes restraints upon local autonomy. The Seventh Circuit Court of Appeals, upon remand of *Arlington Heights*, 558 F.2d 1283 (1977), determined that in certain instances the Fair Housing Act of 1968 would preclude land-use planning activities that have racially discriminatory effects. It began its analysis with a determination that the Act should be interpreted broadly to ensure integrated housing patterns in the country. The Court then recognized that in many instances it will be impossible to prove overt bigotry because bigots have become more discreet in recent years. It decided that Congress in enacting the Act had no intention to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly. *Id.* at 1290. Yet, the court decided that a showing of racially discriminatory effect alone was not sufficient to establish a violation of the Act. It identified four factors that should be examined in determining whether the Act was violated:

(1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) What is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Id. These factors, in the court's opinion, should not be viewed as essential elements of a claim based on the Act, because a violation may have occurred even though one or more of the factors is missing. If an examination of these factors reveals a close case, it

2. Due Process Challenges

In another local referendum case, *City of Eastlake v. Forest City Enterprises, Inc.*,⁸⁹ a real estate development firm sought to have an eight acre tract of land rezoned from light industrial to a zone which would permit it to construct a multi-family, high rise apartment building. While the firm's application was being processed, the voters of Eastlake adopted a charter amendment requiring all changes in permissible land uses within the city approved by the city council to be submitted to the electors of the city. The rezoning sought by the firm subsequently was approved by the city council, but was rejected by the electorate when submitted to them pursuant to the charter amendment. The firm filed suit in state court contending that the referendum requirement constituted an unconstitutional delegation of legislative power to the people. Relying to a large extent on their decision in *Valtierra*, a majority of the Court determined that a referendum on a legislative matter could not possibly be characterized as an unconstitutional delegation of power.⁹⁰ It also rejected a contention that the referendum requirement was a standardless delegation of power and thus violated the due process clause because it might produce arbitrary and capricious decisions based on the whims of the electors.⁹¹ In rejecting this contention, the Court noted the absence of any assertion that the particular decision in the case was arbitrary and capricious, and observed that if such were the case, a particular decision could be attacked on such grounds.⁹² The Court thus rejected yet another constitutional challenge to an exclusionary land use practice.

Although the Court in *Warth* indicated that local autonomy was subject to judicial review in a proper case, to date the Court has rejected almost every conceivable constitutional challenge to a wide variety of exclusionary techniques. It appears questionable whether any constitutional limitations on local exclusionary practices exist other than, perhaps, a demonstration of racial discrimination. This, of course, does not mean that the Court perceives no

should be resolved by finding a violation of the Act because such a resolution will promote the congressional policy of providing integrated housing.

In *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (1977), the Third Circuit Court of Appeals agreed with the Seventh Circuit's interpretation of the Act. In further support of such an interpretation, the court noted that Senator Baker had introduced an amendment to the Act that required proof of discriminatory intent before violation would exist. This amendment was defeated, 114 CONG. REC. 5221-22 (1968). The defeat indicates that the Senate believed proof of discriminatory intent was not a prerequisite to a violation of the Act.

These two cases offer some hope of future federal control of local exclusionary practices. But they cannot be viewed as being expansive enough to control more than a limited number of exclusionary plans.

⁸⁹ 426 U.S. 668 (1976).

⁹⁰ Mr. Justice Powell dissented because he believed that singling out an individual parcel and subjecting it to a vote of the electorate was a fundamentally unfair procedure. *Id.* at 680.

Mr. Justice Stevens and Mr. Justice Brennan dissented on the grounds that "the popular vote is not an acceptable method of adjudicating the rights of individual litigants." *Id.* at 693.

⁹¹ *Id.* at 672-73.

⁹² *Id.* at 676-77.

constitutional restraints on local autonomy. There will be certain instances when a local government's actions are so incredible that a majority of the Court will intervene and strike them as unconstitutional. One such instance is found in the Court's recent decision in *Moore v. East Cleveland*,⁹³ a sequel to the *Belle Terre* decision.

East Cleveland's housing ordinance limited occupancy of a dwelling to members of a family. Moreover, the ordinance defined "family" as encompassing a few categories of related persons. Mrs. Moore had a son, his son, and another grandson living with her. This latter grandson, age ten, had been living with Mrs. Moore since his mother died when he was one year old. He, however, did not fall within the definition of family in the ordinance, and the city notified Mrs. Moore that he was an "illegal occupant" who had to be expelled from her home. She refused and criminal charges were filed against her. In the criminal proceeding, she contended that the ordinance was unconstitutional, but her contentions were rejected. She was found guilty, sentenced to five days in jail, and fined twenty-five dollars.

A majority of the Supreme Court⁹⁴ was willing to strike the ordinance on the basis that it deprived Mrs. Moore of her liberty and thus violated the due process clause. A plurality believed the extended family to be an institution so deeply rooted in this country's history and tradition that any legislative interference with the living arrangements of such a family requires the Court to examine carefully the importance of the governmental interests advanced by any legislative interference. East Cleveland justified the ordinance on the grounds that it prevented overcrowding, minimized traffic, and avoided placing an undue financial burden on the city's school system. The plurality found that the ordinance attained those interests only tenuously, and thus could not withstand the due process attack.⁹⁵ In a concurring opinion, Mr. Justice Brennan, joined by Mr. Justice Marshall, agreed with the plurality opinion but felt constrained to emphasize the impact which such an ordinance would have on racial and ethnic minorities, many of whom live in extended families.⁹⁶ Although the *Moore* decision could signal the beginning of a trend away from a strong belief in local autonomy, such a possibility in light of its prior decisions appears unlikely. The intervention of the Court in *Moore* most probably is attributable to an outrageous criminal ordinance which interfered

⁹³ 431 U.S. 494 (1977).

⁹⁴ Mr. Justice Stevens concurred in the judgment, but believed the ordinance should have been stricken because it did not bear any "substantial relation to the public health, safety, morals, or general welfare." *Id.* at 520.

Mr. Chief Justice Burger dissented on the basis that the plaintiff had not exhausted her state administrative remedies.

Mr. Justice Stewart, with whom Mr. Justice Rehnquist joined, dissented on the merits. He concluded: "The city has undisputed power to ordain single-family residential occupancy And that power plainly carries with it the power to say what a 'family' is." *Id.* at 538-39 (citations omitted).

⁹⁵ *Id.* at 500.

⁹⁶ Mr. Justice Brennan noted that the extended family is a product of "brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household." *Id.* at 508.

with a basic American institution, the family. Consequently, the decision reflects no more than the Court's reaction to such a factual pattern.

Standing restrictions, an unwillingness to expand equal protection guarantees, and a difficult standard of proof for due process challenges are all products of the Burger Court's conception of federalism—almost unfettered local government self-determination. This concept of federalism is supportable in this area of federal concern, however, only if the states and local governments are shouldering their responsibility by eliminating exclusionary land use practices. This article now will turn to an examination of state and local government actions, or inactions, with respect to exclusionary land-use practices.

IV. STATE ACTION

Traditionally, state officials, like the Burger Court and Congress, have firmly believed in the concept of local autonomy in the land use planning area. Until relatively recently,⁹⁷ all of the states have followed the path envisioned by the early advocates of zoning and have enacted enabling legislation authorizing local governments to undertake and implement individual plans.⁹⁸ Consequently, local governments have had complete control over their land use planning process which traditionally included the option of having no process at all.⁹⁹

State response to the current problems of local exclusionary land use practices varies widely. Many states, Connecticut for example, have not responded in any meaningful manner. Other states, such as California, have responded in a limited manner. Two states, however, New Jersey and Oregon, have prescribed policies designed to meet the challenge of exclusionary local land use practices. The Supreme Court of New Jersey has been the cathartic force in that state, while the Oregon legislature has served that role in Oregon. This section will examine the experience of these four states in an attempt to identify the variety of state responses and determine whether Congress and the Supreme Court are justified in according so much deference to state and local authorities.

A. Connecticut

A 1974 survey of housing needs in Connecticut indicated that between 1974 and 1980 there would be a need for 164,000 units.¹⁰⁰ Of these units,

⁹⁷ Until 1965, only one state, Hawaii, strayed from the traditional approach. Hawaii adopted a combined state and local approach to land use planning in 1961. Since 1965, several states have enacted legislation conferring some authority on state agencies. See T. PELHAM, *STATE LAND-USE PLANNING AND REGULATION* (1979); Comment, *State Land Use Structures: A Comparative Analysis*, 45 *FORDHAM L. REV.* 1154 (1977).

⁹⁸ The Standard State Zoning Enabling Act, Department of Commerce 1926 has been adopted, at least in a modified form, at some time in all fifty states and continues in effect in the vast majority of states. See WILLIAMS, *supra* note 18, at § 18.01.

⁹⁹ *Id.* at § 18.02.

¹⁰⁰ COMPREHENSIVE PLANNING DIVISION, CONNECTICUT OFFICE OF POLICY AND MANAGEMENT, *CONNECTICUT PROPOSED CONSERVATION AND DEVELOPMENT POLICIES PLAN—REVISION OF 1979*, 42 (1979).

approximately eighty-six percent would be needed by households with incomes less than \$10,000.¹⁰¹ Approximately half of the total number of units would be needed by the elderly and minorities.¹⁰² Rather than increased construction and rehabilitation to meet these needs, Connecticut witnessed a dramatically slowed pace of construction.¹⁰³ Connecticut's Office of Policy and Management attributes this to several factors including "zoning practices of some towns [which] have the effect of limiting the availability of land suitable for housing for families having limited incomes."¹⁰⁴

This conclusion by the Office of Policy and Management is not mere speculation. A comprehensive survey of local government zoning undertaken in 1970¹⁰⁵ supports the conclusion. A compilation of the data revealed that the largest amount of land in the state was zoned single family residential and required a minimum lot size of between one-half to two acres.¹⁰⁶ Another substantial portion was zoned the same and required a lot of more than two acres.¹⁰⁷ An examination of the composite map prepared in connection with the survey¹⁰⁸ reveals that every major city in the state is surrounded by such zoning. In addition, out of the approximately 150 municipalities which had zoning, one-third did not permit any multiple family dwellings, and many of those that did, permitted only low density multi-family units.¹⁰⁹

Although the state legislature has recognized the existence of exclusionary practices and the need for state planning,¹¹⁰ it has decided that there should be no direct state intervention in local land use planning processes.¹¹¹ A state conservation and development policies plan, which will include goals and policies relevant to housing, is to be adopted by the legislature.¹¹² The

¹⁰¹ *Id.*

¹⁰² *Id.* at 42-43.

¹⁰³ *Id.* at 41.

¹⁰⁴ *Id.* at 42.

¹⁰⁵ See Office of State Planning, Connecticut Dep't of Finance & Control, Proposed a Plan of Conservation & Development for Connecticut, 33-40 (1973).

¹⁰⁶ *Id.* at 37.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 38-39, entitled State of Connecticut Zoning 1970 Composite of Local Regulations.

¹⁰⁹ *Id.* at 38.

The existence of exclusionary practices in Connecticut is also suggested in *City of Hartford v. Town of Glastonbury*, 561 F.2d 1032 (2d Cir. 1976). The City of Hartford and two of its low income residents filed suit seeking an injunction prohibiting seven of its suburban communities from receiving or expending grants from HUD because their grant applications contained no estimate or an inaccurate estimate of persons "expected to reside" in their community. The court determined that the plaintiffs lacked standing to object to HUD's waiver of the HAP requirements. This failure to file an accurate HAP indicates these communities had no interest in providing low and moderate income housing.

¹¹⁰ After the Conservation and Development Plan for Connecticut was prepared in 1973, see note 105 *supra*, the Connecticut legislature decided that the plan should be updated and revised and then adopted by the legislature. CONN. GEN. STAT. ANN. §§ 16a-24 *et seq.* (West Supp. 1978).

¹¹¹ The plan is to be an advisory document, *id.* at § 16a-31. Thus, it will have no direct effect on local land use planning processes.

¹¹² *Id.* at § 16a-30.

goals and policies set forth in the plan should guide future state administrative action in program planning, priorities evaluation, and expenditure of state funds.¹¹³ Although the adoption of such a plan must be viewed as an appropriate step, its advisory nature reduces its effectiveness as a method for implementing the stated goals and policies. It is highly unlikely that such a plan will deter in any meaningful degree local governments from engaging in exclusionary practices.

The reluctance of Connecticut's legislature to interfere with the autonomy of their local governments is particularly disappointing because the state has entered into two interstate compacts with expectations of addressing regional problems. In 1971, Connecticut joined New Jersey and New York in converting the existing Tri-State Transportation Committee and Commission into the more comprehensive Tri-State Regional Planning Commission.¹¹⁴ The region encompassed by this compact includes counties in all three states that can be viewed as comprising the New York City metropolitan area.¹¹⁵ Recently the Tri-State Regional Planning Commission has published the housing element of its comprehensive plan for the region.¹¹⁶ If all three states undertook coordinated actions in accordance with the plan, major strides toward alleviating the severe housing shortage in this area would be made.¹¹⁷ It is difficult to perceive how Connecticut can coordinate effectively its housing production with New York and New Jersey when it has delegated its land use planning authority to its local governments thereby foreclosing any means of assuring the availability of land zoned for the needed housing units. The same is true with respect to its participation in the New England Interstate Planning Compact wherein it joined with Maine, New Hampshire, and Rhode Island to undertake coordinated planning of the region.¹¹⁸

The widespread existence of large lot zoning in Connecticut is attributable in part to the view of its Supreme Court of Errors that almost any reason given by a local government will justify such zoning. This judicial deference to local self-determination is reflected in the 1959 case of *Senior v. Zoning Commission of New Canaan*.¹¹⁹ New Canaan, which allegedly had the highest per capita income of any city in the country in 1950, upzoned over 4,000 acres from minimum lot sizes of two acres to minimum lot sizes of four acres. A landowner who claimed to have plans for a development of two-acre lots attacked the rezoning on the grounds that it was unreasonable, arbitrary, and illegal. In rejecting this contention, the court began with the presumption that large lot zones in semi-rural areas are valid. Then it noted that the per capita wealth of the community was a proper fact for the commission "to consider in

¹¹³ *Id.* at § 16a-31.

¹¹⁴ CONN. GEN. STAT. ANN. § 16-339 (West Supp. 1978).

¹¹⁵ The specific counties within the compact region are set forth in *id.* at Art. VI (d).

¹¹⁶ See TRI-STATE REGIONAL PLANNING COMMISSION, PEOPLE DWELLINGS & NEIGHBORHOODS (1978).

¹¹⁷ The estimated need for the region between the present and the year 2000 is 1.5 million units. *Id.* at 6. The Connecticut portion of the total units is 150,000. *Id.* at 7.

¹¹⁸ CONN. GEN. STAT. ANN. § 8-37c (West 1971).

¹¹⁹ 146 Conn. 531, 153 A.2d 415 (1959).

deciding whether the establishment of a superior residential district would be the most appropriate use of this unspoiled area."¹²⁰ It noted that New Canaan's zoning ordinance did not limit new residential development to homes for the wealthy because in addition to the 625 four-acre sites, there were 1,879 two-acre sites, 753 one-acre sites, 87 half-acre sites, and about 1,100 sites requiring less than a half-acre. Without any further analysis of the commission's reasons, the court upheld the rezoning.

Since the *New Canaan* decision, the Connecticut court has consistently employed the same uncritical and nonpenetrating analysis that it used in the *New Canaan* case.¹²¹ When this judicial deference to local autonomy is coupled with the legislature's unwillingness to interfere with local land use planning processes, it becomes obvious that exclusionary zoning is alive and well in Connecticut.¹²² A similar state of affairs exists in a number of other states including Georgia¹²³ and Illinois.¹²⁴ A few states, however, have

¹²⁰ *Id.* at 535, 153 A.2d at 418.

¹²¹ See WILLIAMS, *supra* note 18, at § 39.03.

¹²² Although some may exist, research and inquiry have revealed no innovative program by a local government in Connecticut.

¹²³ A recently prepared Georgia housing survey reveals that many communities in Georgia engage in exclusionary practices, see Georgia State Office of Housing, Georgia Department of Community Affairs, State of Georgia Housing Element, Part I, 131 (1977). The practices employed by these communities include large lot zoning, large minimum floor areas, substantial set-back and open space requirements, excessive subdivision standards and design criteria such as expensive storm drainage facilities and large block lengths and widths, and a failure to provide a sufficient number of sites for multi-family dwellings, see *id.* at Part V, 131-32. These practices present a major hurdle to the provision of an additional 695,000 residential units that are projected as the number of units and units needed to replace lost substandard units and units needed for projected growth by the end of this year. *Id.* at Part II, 104.

A combination of an almost unbelievable "home rule" provision in the Georgia Constitution and an equally unbelievable judicial attitude suggest that neither the Georgia legislature nor judiciary will do much of anything to eliminate exclusionary practices. The Georgia legislature, even if it decided to undertake actions, is hamstrung by a constitutional provision that states: "The General Assembly shall not, in any manner, regulate, restrict or limit the power and the authority of any county, municipality, or any combination thereof, to plan and zone as herein defined." GA. CONST. art. IX, § IV, para. 11 (1976) (GA. CODE ANN. § 2-6102 (1977)). In *Vulcan Materials Co. v. Griffith*, 215 Ga. 811, 114 S.E.2d 29 (1960) the Georgia Supreme Court responded to a claim that they should invalidate a zoning ordinance by first observing that the people of the state by adopting a constitutional amendment authorizing the General Assembly to enact legislation to permit local governments to zone and district the use of land had "voluntarily subjected their property to unlimited control and regulation of legislative departments." *Id.* at 814, 114 S.E.2d at 31-32. Then, after quoting the constitutional provision and the implementing statute, the court states:

It would seem that the foregoing quotations from the Constitution and the statutes demonstrate plainly that the county commissioners have complete freedom to create any number of zones and districts and of such size and shape as they may arbitrarily choose. This means they have authority to create zones or districts of any size, whether 10 feet square or any number of acres in any conceivable shape.

Id. at 815-16, 114 S.E.2d at 32 (emphasis added). This complete deference to local government decisions was hedged only slightly in a recent decision, *Cross v. Hall*

County, 238 Ga. 709, 235 S.E.2d 379 (1977), wherein the court indicated that anything in the *Griffin* case contrary to the following statement was overruled: "When neighbors of rezoned property challenge the rezoning in court on its merits, it will be set aside only if fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors." *Id.* at 711, 235 S.E.2d at 382. If these judicial attitudes continue and the General Assembly remains constitutionally restrained from intervening, exclusionary practices will undoubtedly flourish in Georgia.

¹²⁴ Exclusionary practices are also prevalent among Illinois local governments. A Zoning Laws Study Commission created in 1969 by the Illinois legislature, Act of Sept. 16, 1969, Ill. Pub. Law 76-1344 (H.B. 179), undertook several surveys, three of which are of particular interest. One was concerned with large lot zoning. After deciding that a 5,000 to 6,000 square foot lot was the size of a lot needed to construct a reasonably priced single-family residence, the Commission through a survey discovered that fifty-eight percent of the land zoned residential in urban communities was zoned to require minimum lot sizes in excess of the needed lot size. Dep't of Urban and Regional Planning, University of Illinois at Champaign-Urbana, Zoning Problems, Supplementary Statistical Report for the Illinois Zoning Laws Study Commission 19 (1971). In urban counties the percentage of land so zoned jumped to seventy percent. *Id.* at 20. Another survey found that mobile homes were not permitted in fifty-seven percent of the Illinois local governments that had adopted a comprehensive plan and that in those which permitted mobile homes, slightly more than eighty percent permitted them only in commercial or industrial zones. *Id.* at 31. The third survey which polled local government officials to determine whether they thought zoning was "fair to all" found that seventy-five percent thought it was or had no opinion on the matter. This response by local government officials suggests they are not aware of the adverse impacts of exclusionary practices on regional housing needs. *Id.* at 39. In light of the considerable publicity exclusionary practices have received in the ensuing decade, the validity of this survey as far as the perceptions of local government officials today is highly questionable.

After its study, the Commission made a variety of recommendations to the legislature including one which would reverse the traditional presumption in favor of the validity of local government actions "when such actions result in a denial of housing opportunity to persons employed within a jurisdiction and when there is a demonstrable need for such housing within the jurisdiction." Bureau of Urban and Regional Planning Research, University of Illinois at Champaign-Urbana, Zoning Laws Study Comm'n Rep. 147 (1971). The Illinois legislature adopted none of the Commission's recommendations. A survey of existing Illinois legislation reveals only one act that is of significance to the present inquiry. The Act, ILL. ANN. STAT. Ch. 111-1/2, §§ 711 *et seq.* (Smith-Hurd 1977), after recognizing the role mobile homes could play in alleviating the serious shortage of low and moderate income housing in Illinois, authorizes the Department of Health to approve and license mobile home parks. *Id.* at § 715. Because the Act makes such parks subject to local zoning ordinances and building codes, it appears to be a rather innocuous piece of legislation. Yet, the Act when coupled with certain judicial decisions affords at least limited control over local exclusionary practices.

With regard to the exclusion of mobile homes, an intermediate appellate court of Illinois decided in *High Meadows Park, Inc. v. City of Aurora*, 112 Ill. App. 2d 220, 250 N.E.2d 517 (1969), that a city ordinance which expressly prohibited any trailer parks within the city was void because municipalities lacked the authority to exclude a lawful business. Shortly thereafter, the Illinois Supreme Court in *City of Sparta v. Brenning*, 45 Ill. 2d 359, 259 N.E.2d 30 (1970), voided an ordinance, in a city without a zoning ordinance, that attempted to exclude all trailers except those located within a trailer park. More recently, an intermediate appellate court in *Oak Forest Mobile Home Park, Inc. v. City of Oak Forest*, 27 Ill. App. 3d 303, 326 N.E.2d 473 (1975) decided that a city with a zoning ordinance could not exclude mobile homes by either failing to provide locations for mobile home parks or expressly excluding them. Thus, communities in Illinois must make at least limited provisions for one form of low and moderate income housing.

promulgated some policies designed to cope with the problem of local exclusionary land use practices. California exemplifies such states.

B. California

Although many California communities employ exclusionary land use planning practices, recent enactments by the California legislature impose both actual and potential barriers to a continuation of these practices. The California Supreme Court also has imposed certain barriers that such communities must scale if they are to continue such practices. In addition, some California communities have enacted programs designed to encourage mixed income housing. All of these affirmative actions have followed in the wake of a dire housing problem in California.

The housing shortage in California has reached a crisis level. More than one million new housing units need to be constructed within the next five years to accommodate new households and to replace units lost from the housing stock.¹²⁵ In addition, another one million units need to be rehabilitated if all Californians are to have decent housing available.¹²⁶ Eighty percent of those needing new housing or rehabilitated housing are low or moderate income persons, that is, earn less than eighty percent of the median income in California.¹²⁷ More than 1,765,000 households, which constitute approximately twenty-three percent of all households, presently are overpaying for their housing.¹²⁸ Although the construction industry may meet some of this need, particularly for new housing,¹²⁹ it is unlikely to be able to satisfy a substantial portion of the general need in the absence of considerable governmental financial aid.¹³⁰

Beyond these mobile homes cases the Illinois judiciary has been far less aggressive in striking exclusionary practices. Their tone was established in *Honeck v. County of Cook*, 12 Ill. 2d 257, 146 N.E.2d 35 (1975) wherein a five acre minimal lot requirement was attacked as being an unconstitutional taking. The court placed great weight on the presumption of the validity of zoning ordinances and found the ordinance valid because there was testimony that the land was hilly and full of ravines and that there was a market for five acre tracts which supported the reasonableness of the ordinance. See also *De Bruler Homes, Inc. v. County of Lake*, 78 Ill. App. 2d 177, 222 N.E.2d 689 (1966).

Although the legislation and judicial decisions concerning mobile homes reflect some sensitivity to the exclusionary land use planning problem, they fall far short of reflecting any real commitment by the authoritative decisionmakers of Illinois to alleviate the plight of low and moderate income families seeking housing in Illinois.

¹²⁵ Comment, *California Lower Income Housing Policy: At Legislative and Judicial Crossroads*, 29 HASTINGS L.J. 793, 811 (1978) [hereinafter cited as Comment].

¹²⁶ *Id.*

¹²⁷ D. BRYANT, J. SOLOWAY, C. CHIU, CALIFORNIA AND FEDERAL LOWER INCOME HOUSING LAWS: A COMPLICATION AND ANALYSIS 18-1 (1978) [hereinafter cited as BRYANT & SOLOWAY].

¹²⁸ *Id.*

¹²⁹ Although the low and moderate income households may not be able to afford the new housing, they may be able to afford the housing vacated by those purchasing the new housing.

¹³⁰ See Comment, *supra* note 125, at 811.

In recent years a substantial number of local governments in California have enacted exclusionary ordinances.¹³¹ Some have acted out of environmental concern, some to preserve the character of their community, and some specifically to exclude low income families and racial minorities.¹³² More recently, many have increased their charges for planning and permit fees, and have imposed "impact taxes" on new construction in order to replace revenue lost as the result of Proposition 13.¹³³ These exclusionary practices undoubtedly have exacerbated the low and moderate income housing crisis in California. The California constitutional provision, upheld by the Supreme Court in *James v. Valtierra*,¹³⁴ requiring a referendum before a local government could undertake a public housing project, also has contributed to the crisis. The electors of the various local governments in California rejected forty-eight percent of all the proposed projects between 1951 and 1974.¹³⁵

In 1965 the California legislature enacted a new planning and zoning law pursuant to which all local governments must adopt a general plan.¹³⁶ One of the mandatory elements of the general plan is a housing element wherein the local government must make "adequate provision for the housing needs of all economic segments of the community."¹³⁷ Although the legislation is mandatory, local governments in California were slow in responding to the legislative mandate.¹³⁸ Even when they responded, there was no assurance that the housing plan accurately reflected the housing needs of the community much less those of the region in which it is located.¹³⁹ In addition, this planning legislation imposes no obligation on the local governments to take affirmative action to provide low and moderate income housing.¹⁴⁰

Apparently because of the recalcitrance of the local governments and the ever increasing shortage of low and moderate income housing, the California legislature in 1975 created the State Department of Housing and Community Development.¹⁴¹ One of the major tasks of this agency was the preparation and adoption of regulations applicable to the housing element of a local government's general plan.¹⁴² According to the regulations subsequently adopted by this agency, a local government's housing element must contain (1) a survey of both market rate and non-market rate housing needs (2) a

¹³¹ For an identification and outline of some of these, see Clark & Grable, *Growth Control in California: Prospects for Local Government Implementation of Timing and Sequential Control of Residential Development*, 5 PAC. L.J. 570, 595-602 (1974).

¹³² *Id.* at 572.

¹³³ Letter from J. Soloway, Office of Planning and Research, State of California (Dec. 14, 1978) on file at the author's office, Tulane University.

¹³⁴ 402 U.S. 137 (1971).

¹³⁵ BRYANT & SOLOWAY, *supra* note 127, at 3-36. This trend was reversed in 1976 when the electors approved 24 out of 36 proposed projects, but this reversal in the trend must be weighed in light of the fact that most of the proposals were to provide housing for the elderly. *Id.*

¹³⁶ CAL. GOV'T CODE § 65300 (Deering 1974).

¹³⁷ CAL. GOV'T CODE § 65302(c) (Deering Supp. 1978).

¹³⁸ See Comment, *supra* note 125, at 796.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ CAL. HEALTH & SAFETY CODES §§ 50400 *et seq.* (Deering 1978).

¹⁴² *Id.* at § 50459.

statement of the locality's housing goals and policies and (3) a description of the course of action which the locality intends to pursue in its achievement of the stated goals and policies.¹⁴³ Although the regulations require the locality to use its police powers that affect housing, such as land-use controls, in a manner compatible with its housing policies and goals, they do not require a locality to undertake "economically infeasible" programs.¹⁴⁴ The regulations do require the housing element to take into account market area needs.¹⁴⁵

The ultimate effectiveness of this program hinges to a high degree on the remedies available to the agency if a locality refuses to file a housing element or files an inadequate housing element. The agency has not yet determined what it will do when these situations arise.¹⁴⁶

In 1979 the California legislature enacted several provisions that reflect its continuing concern about exclusionary practices in the state. One provision added a requirement that a community when developing the housing element of its general plan must consider "not only site-built housing, but also manufactured housing, including mobile homes and modular homes."¹⁴⁷ Another provision, which is specifically designed to "contribute significantly to the economic feasibility of low- and moderate-income housing in proposed housing developments,"¹⁴⁸ requires communities to grant one or more bonuses to developers building five or more units who agree to provide at least 25 percent of their units to low- and moderate-income families.¹⁴⁹ The community must grant either a density bonus defined as a density of at least 25 percent or more than the density permitted by the applicable zoning ordinance. Or if a density bonus is not granted, the community must grant two or more other bonuses such as exemption from park and recreational dedication or in lieu of payment requirements and exemption from public improvements requirements such as those requiring construction of streets, sidewalks, and sewers. Finally, and perhaps most significantly, the legislature enacted a provision requiring communities to consider the effects of land-use planning ordinances "on the housing needs of the region in which the local jurisdiction is situated and balance these needs against the public service needs of its residents and available fiscal and financial resources."¹⁵⁰ These provisions reflect at least some commitment by the California legislature to eliminate exclusionary practices, but only the future will reveal whether they will actually force recalci-

¹⁴³ See BRYANT & SOLOWAY, *supra* note 127, at 2-10. These regulations are printed in 25 CAL. AD. CODE §§ 6400 *et seq.*

¹⁴⁴ *Id.* at 2-12.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2-9.

¹⁴⁷ Cal. Gov't CODE § 65302(c) (Deering Supp. 1980).

¹⁴⁸ CAL. GOV'T CODE § 65917 (Deering Supp. 1980).

¹⁴⁹ CAL. GOV'T CODE § 65915 (Deering Supp. 1980).

¹⁵⁰ CAL. GOV'T CODE § 65863.5 (Deering Supp. 1980). This statute also attempts to place some controls on Petaluma type plans, see text and accompanying notes *infra* at notes 176-180. It provides: "Any ordinance adopted pursuant to this chapter which, by its terms, limits the number of housing units which may be constructed on an annual basis shall contain findings as to the public health, safety, and welfare of the city or county to be promoted by the adoption of the ordinance which justify reducing the housing opportunities of the region."

trant local governments to eliminate such practices. The effectiveness of these provisions hinges to a large extent on the willingness of the Department of Housing and Community Development and the courts to scrutinize local plans closely and reject local plans that only feign compliance with these new requirements. If they fail to so scrutinize local plans, the legislature, if it is in fact committed to the elimination of exclusionary practices, may be forced to increase the authority of the Department of Housing and Community Development with regard to the elimination of exclusionary plans. Although one can think of a variety of ways in which the California legislation and regulations could be modified to make them more effective,¹⁵¹ this effort indicates that the California legislature is willing, at least at present,¹⁵² to shoulder some responsibility for the elimination of exclusionary practices.

The same can be said about the judiciary in California. The primary example of this willingness is found in *Associated Home Builders v. City of Livermore*.¹⁵³ Through an initiative procedure, the City of Livermore enacted an ordinance which prohibits the issuance of building permits until the city's educational facilities, sewage treatment capacities, and water supplies meet specified standards.¹⁵⁴ With respect to the allegation that the ordinance infringed migrants' constitutional right of travel, the court determined that the "indirect" burden which this ordinance imposed on the right to travel did not justify the application of the compelling state interest standard required when there is a "direct" abridgment of the right to travel. The court noted that the ordinance impartially prohibits all residential construction, expensive and inexpensive, and therefore, does not single out racial minorities or the poor for differential treatment. It concluded that the appropriate test to apply in the case was the less stringent one "which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects."¹⁵⁵ In the next sentence, however, the court expanded the scope of those who must be considered: "[I]f, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, *judicial inquiry must consider the welfare of that region.*"¹⁵⁶

¹⁵¹ For example, to ensure implementation of adequate housing elements, legislation could confer authority on the State Department of Housing and Community Development to prepare and implement, by repealing or amending restrictive ordinances, housing elements when local governments refuse to prepare an adequate plan. This suggestion may pose a home rule question under CAL. CONST. art. XI, § 5. It is, however, difficult to believe that housing in the present state of affairs can be deemed a "municipal affair." See *Birkenfeld v. Berkeley*, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) (holding rent control eviction procedures not a municipal affair).

¹⁵² The California legislature recently has considered several bills designed to weaken the program outlined in the text. See Comment, *supra* note 125, at 802-03. Whether the legislature will hold firm in its position, particularly in view of the fiscal pressures on local governments as a result of Proposition 13, appears doubtful.

¹⁵³ 18 Cal.3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

¹⁵⁴ For a discussion of the reasons why this ordinance was adopted and its content, see Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA LAW. 1, 12-14, 22-24 (1974).

¹⁵⁵ 18 Cal.3d at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.

¹⁵⁶ *Id.* (emphasis added).

When employing this test, a trial court should employ a three step process. First, it should forecast the duration of the growth controls and the controls' probable effects.¹⁵⁷ Second, it should identify the competing interests affected by the ordinance, for example, conflicts between the interest of residents in environmental protection and the interest of outsiders who are faced with a growing housing shortage.¹⁵⁸ Third, the court should "determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests."¹⁵⁹ In making this final determination, the court should make sure that the ordinance bears a "*real and substantial* relation to the public welfare."¹⁶⁰ This almost suggests a presumption against controlled growth ordinances, but the California Supreme Court was unwilling to establish, at least, explicitly, such a presumption.¹⁶¹ Justice Mosk in his dissenting opinion, however, was willing to presume that absolute prohibitions against new residential construction are invalid, and that regulations imposing limits on population growth are invalid unless the community will absorb its reasonable share of the region's needs.¹⁶²

Although many California local governments are engaging in exclusionary practices, some have undertaken inclusionary practices, that is, practices designed to encourage mixed income housing in their community.¹⁶³ One of the first communities to adopt such a program was Los Angeles.¹⁶⁴ A brief description of its ordinance will present an outline of what these communities are seeking to accomplish. The ordinance provides that all new housing developments of five or more units must make a diligent effort to include units affordable by lower income families.¹⁶⁵ If the developer is unable to provide such units, which none have been able to do,¹⁶⁶ they must execute an agreement with the Los Angeles Housing Authority wherein the developer grants the Authority the right to lease or purchase up to fifteen percent of the units at market value. This permits the Authority to seek federal subsidies to make the units available to lower income persons. In recent years, the Authority has been able to use section 8 subsidies to make some of these units available to such persons.¹⁶⁷ Participation in the section 8 program apparently does not

¹⁵⁷ *Id.* at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56.

¹⁵⁸ *Id.* at 608-09, 557 P.2d at 488, 135 Cal. Rptr. at 56.

¹⁵⁹ *Id.* at 609, 557 P.2d at 488, 135 Cal. Rptr. at 56.

¹⁶⁰ *Id.* at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57 (emphasis in original).

¹⁶¹ *Id.*

¹⁶² *Id.* at 623, 557 P.2d at 497, 135 Cal. Rptr. at 65.

¹⁶³ For a general discussion of inclusionary practices, see Kleven, *Inclusionary Ordinances-Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. (1974).

¹⁶⁴ LOS ANGELES, CAL. MUNICIPAL CODE §§ 12.03, 12.30, 12.39, 13.04 as amended by Ordinance No. 145, 927 Apr. 30, 1974 (reprinted in BRYANT & SOLOWAY, *supra* note 127, at Appendix A).

¹⁶⁵ Six percent of the total number of units should be provided for low income families and at least an additional nine percent for moderate income families. *Id.* at § 12.39 .1.

¹⁶⁶ BRYANT & SOLOWAY, *supra* note 127, at 3-28.

¹⁶⁷ *Id.* The Los Angeles Housing Authority has 440 section 8 subsidies which it plans to use in connection with the units made available through the inclusionary ordinance.

fall within the constitutional referenda requirement involved in the *Valtierra* case.¹⁶⁸

Two other inclusionary ordinances should be mentioned. Orange County has a program similar to the one in Los Angeles. Its program, however, is an informal one whereby the Board of Supervisors negotiates with developers of planned communities located in unincorporated portions of the county and seeks to have them set aside a portion of their development for lower income families.¹⁶⁹ This program is important because it offers more opportunity for spatial deconcentration than is possible in a central city's inclusionary ordinance such as adopted by Los Angeles.

The City of Palo Alto has an inclusionary ordinance which applies only to new owner occupied housing. Its plan envisions a developer selling at least ten percent of the units constructed to lower income families at the cost of construction.¹⁷⁰ This cost excludes land cost, profit, and marketing costs. The program is voluntary, unless the developer needs a rezoning or a subdivision plan approved, but participation is encouraged by offering expedited permit procedures.¹⁷¹ Once a developer participates, the developer must execute and record covenants wherein the owners of the designated units must live on the premises, are prohibited from leasing the premises, and if they decide to sell, must give the City or its designee the right of first refusal at a designated price.¹⁷² Because low income families, in the absence of additional governmental subsidies, ordinarily will be unable to purchase such housing even at its reduced cost, this plan must be viewed as affording relief principally for upper moderate income families.

One would be remiss in discussing local governments in California to ignore the City of Petaluma, which is known nationally as a result of its involvement in *Construction Industry of Sonoma County v. City of Petaluma*.¹⁷³ In that case the Ninth Circuit reversed a federal district court decision striking Petaluma's growth control ordinance, which limited the annual number of residential building permits that could be issued, as an infringement of nonresidents' right of travel. The Ninth Circuit determined that none of the plaintiffs had standing to assert an infringement of the right to travel, and then reviewed the case on the alternative argument that the limited growth ordinance also violated the due process clause of the fourteenth amendment. Relying primarily on the Supreme Court's decision in *Belle Terre*,¹⁷⁴ the Ninth Circuit determined that Petaluma's desire to preserve its small town character was a "legitimate state interest" being furthered by the ordinance, and therefore did not violate the due process clause.

¹⁶⁸ *Id.* at 3-42.

¹⁶⁹ *Id.* at 3-28.

¹⁷⁰ *Id.* at 3-30.

¹⁷¹ *Id.*

¹⁷² The price set is the original purchase price plus an increase based on the rise in the Cost of Living Index. *Id.*

¹⁷³ 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

¹⁷⁴ For a discussion of the *Belle Terre* case, see text accompanying notes 88-90 *supra*.

Recently the City of Petaluma has enacted a new residential development control ordinance¹⁷⁵ and adopted an environmental design plan for 1978-1985.¹⁷⁶ The ordinance was adopted to promote five policies: preserving the quality of life in the community; protecting the green open-space frame of the city; insuring the adequacy of the City facilities and services within acceptable allocation of City and school revenues; insuring a balance of housing types and values in the City which will accommodate a variety of families *including families of moderate income* and older families on limited, fixed incomes; and insuring the balanced development of the City, east, north, and west of the central core.¹⁷⁷ The ordinance then establishes a development allotment system to ensure that the building permits issued in a single year will not produce more than an annual growth rate of five percent of the city's population.¹⁷⁸ Low income projects approved by the city are exempted from the allocation system. In addition, a development is evaluated in terms of an elaborate point system. For example, points are received for such items as architectural design, innovative site design, or provision of open space. A developer obtains additional points if the proposed project includes either on or off site low and moderate income housing.

Petaluma's environmental plan states a goal to be to "provide for a balance of housing types throughout the City to afford all Economic Levels housing opportunities."¹⁷⁹ The plan indicates that this goal will be pursued by providing more multi-family units, encouraging the private sector to produce such housing, and seeking county, state, and federal financial assistance for such housing. Although the plan seeks a balance, the residential development ordinance, which was enacted subsequently, states that the City's policy goal with respect to low and moderate income housing is only eight to twelve percent of the annual production of housing.¹⁸⁰ Thus, the balance is weighted heavily in favor of middle and upper income housing. Such a low percentage for low and moderate income housing certainly cannot be viewed as a willingness to accept a fair share of the regional need for such housing when state statistics indicate that approximately twenty-three percent of the population of the state are low or moderate income persons.¹⁸¹ Petaluma's new scheme, however, is encouraging in that it reflects local legislative sensitivity to the low and moderate income housing problem, and thus can be viewed as inclusionary, albeit in a limited form.

Unlike California, New Jersey, through its supreme court, has undertaken a broad attack on local exclusionary practices.

¹⁷⁵ PETALUMA, CAL. MUNICIPAL CODE Ch. 17.26 as added by Ordinance No. 1321 N.C.S. Sept. 21, 1978 [hereinafter cited as PETALUMA ORDINANCE].

¹⁷⁶ Environmental Design Plan 1978-1985, City of Petaluma, California adopted by Resolution No. 8174 N.C.S. April 24, 1978 [hereinafter cited as Petaluma Plan].

¹⁷⁷ PETALUMA ORDINANCE, *supra* note 175, at Ch. 17.26.010.

¹⁷⁸ *Id.* at Ch. 17.26.030.

¹⁷⁹ Petaluma Plan, *supra* note 176, at 6.

¹⁸⁰ PETALUMA ORDINANCE, *supra* note 177, at Ch. 17.26.060.

¹⁸¹ BRYANT & SOLOWAY, *supra* note 127, at 18-1.

C. New Jersey

In 1970, the Division of State and Regional Planning of the New Jersey Department of Community Affairs undertook a statewide study of zoning in New Jersey.¹⁸² The study focused on 1.7 million acres of developable land¹⁸³ and found that 81.7% of this land was zoned for residential use, thus suggesting an ample supply of land in New Jersey for residential development.¹⁸⁴ It then analyzed this residential zoning to determine how much land was zoned for multi-family dwellings, how much was zoned to permit mobile homes, what were the minimum lot sizes permitted, and what were the minimum floor areas required.¹⁸⁵ The findings of the Planning Division must be viewed as shocking when considered in light of another study it prepared which revealed that between 1970 and 1980 an additional three hundred thousand low and moderate income housing units would be needed in New Jersey.¹⁸⁶ The zoning study found that only six percent of the residential land was zoned for multi-family dwellings.¹⁸⁷ This figure is misleading because most of the land so zoned was located in six rural municipalities which would absorb little growth. If land in those municipalities was excluded, then only one percent of the land zoned residential in areas where growth was most likely to occur was set aside for multi-family dwellings.¹⁸⁸

Even this incredible figure fails to reveal the whole truth. The study found that the zoning ordinances contained multi-dwelling bedroom restrictions, which meant that fifty-nine percent of the multi-family dwelling units had to be one bedroom or efficiency apartments.¹⁸⁹ Mobile homes suffered an even worse fate. Only one-tenth of one percent of developable land in New Jersey was zoned for mobile homes.¹⁹⁰ As one might suspect, these exclusionary practices were accompanied by zoning ordinances establishing

¹⁸² See Division of State and Regional Planning, Dept. of Community Affairs, State of New Jersey, *Land Use Regulation: The Residential Land Supply* (1972) [hereinafter cited as *Land Use Regulation*].

¹⁸³ *Id.* at 5. The study covered all the state except five counties—Atlantic, Cape May, Cumberland, Salem, and Hudson—the first four are primarily rural and would not be subjected to pressures for extensive residential development in the near future and Hudson County is virtually all developed. *Id.* at 4. Developable land included all land in the remaining 16 counties in New Jersey that was capable of being developed. It excluded land that was already developed, incapable of being developed, or owned by federal, state, or local governments. *Id.* at 5 n.2.

¹⁸⁴ *Id.* at 6.

¹⁸⁵ The study also examined minimum frontage requirements and found that only 13.5 percent of the land permitted lots of less than 100 feet in width. *Id.* at 17. (32.2 percent required widths between 100-149 feet; 23.3 percent required widths between 150-199 feet; and 31.1 percent required widths in excess of 200 feet. *Id.* at 17A.) These figures further substantiate a conclusion that low and moderate income families were being choked by exclusionary practices in New Jersey.

¹⁸⁶ See New Jersey Division of State and Regional Planning, *A Revised State-wide Housing Allocation Report for New Jersey* 8 (May 1978).

¹⁸⁷ *Land Use Regulation*, *supra* note 182, at 10.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 11.

¹⁹⁰ *Id.* at 13.

sizeable minimum lot sizes. Almost fifty-five percent of the developable single family residential land supply was in a zone requiring one to slightly less than three acres.¹⁹¹ Only slightly more than five percent was zoned to permit single family dwellings on lots of one-quarter acre or less.¹⁹² Employing certain health standards,¹⁹³ the study determined that a minimum floor area of 1,150 square feet would be adequate for the average New Jersey household of 3.17 persons.¹⁹⁴ Approximately fifty-two percent of the land zoned single family residential required floor areas in excess of 1,150 square feet.¹⁹⁵ Although this percentage is not as unsettling as the other figures, when coupled with the other exclusionary practices, it nevertheless reveals that in 1970 exclusionary ordinances pervaded the areas of New Jersey that were susceptible to growth.

Against this background of extremely widespread exclusionary practices, the New Jersey Supreme Court was confronted with a case attacking the legality of the exclusionary practices of one township in *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel*.¹⁹⁶ Mount Laurel, a sparsely populated community approximately twenty miles from Camden, had increased in population from 2,817 in 1950 to 11,221 in 1970. Sixty-five percent of the township was either vacant or in agricultural use. In 1964, the township had enacted several devices designed to exclude low and moderate income families. These included placing 29.2 percent of the land in the township in noncumulative clean industrial zones; zoning all residential areas single family residential, thereby not allowing townhouses,¹⁹⁷ apartments,¹⁹⁸ or mobile homes anywhere in the township; and placing slightly more than half the township in residential zones requiring minimum lot sizes of about one-half acre. The New Jersey Supreme Court concluded that exclusionary practices, in the absence of special circumstances, were incompatible with the New Jersey Constitution because they failed to promote the general welfare. It deter-

¹⁹¹ *Id.* at 15.

¹⁹² *Id.*

¹⁹³ The Planning Division employed the recommendations of Dr. C. E. Winslow, Professor of Public Health, Yale Medical School, presented in his testimony in *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 167, 89 A.2d 693, 695 (1952).

¹⁹⁴ Land Use Regulation, *supra* note 182, at 19.

¹⁹⁵ *Id.* at 20.

¹⁹⁶ 67 N.J. 151, 336 A.2d 713 (1975).

¹⁹⁷ In 1968, Mount Laurel enacted an ordinance creating a cluster zone. The court analyzed the provision of the ordinance and concluded that one-family houses, which were the only type of residences permitted in the zone, would be comparable in value and character to those permitted in the other residential zones. *Id.* at 165, 336 A.2d at 720.

¹⁹⁸ Between 1967 and 1971 Mount Laurel had a planned unit development ordinance which permitted the construction of multi-family housing. The ordinance, however, imposed sufficient requirements to ensure that these units would be occupied by middle and upper middle income families. *Id.* at 167, 336 A.2d at 721. One of the provisions should be mentioned. A developer was required to execute a covenant running with the land on all multi-family units providing that if more than .3 school children per unit lived in the apartment, the developer would be responsible for the tuition and other school expenses for any excess number of students attending school in Mount Laurel. *Id.* at 168, 336 A.2d at 721-22.

mined that the general welfare requirement could not be viewed solely from the parochial perspective of an individual community when their actions were having impacts beyond their boundaries. A broader view, that of the region, must be employed. Every community in the state was required to "bear its fair share of the regional burden."¹⁹⁹ The court refused to indicate what constituted a region because it believed that the composition of an appropriate region would vary from situation to situation. It stated that there is a presumptive obligation for every municipality: "affirmatively to plan and provide, by its land use regulations the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires, and resources of all categories of people who may desire to live within its boundaries."²⁰⁰ Stated negatively, a municipality cannot adopt practices that limit the variety and choice of housing.

In light of the community policies previously identified,²⁰¹ the *Mount Laurel* decision must be viewed as the most enlightened court decision yet to be rendered in this country. It offers the prospect that the exclusionary walls surrounding most New Jersey communities will be destroyed thereby dramatically increasing the potential choice of residence for millions of people who live in or near New Jersey. Such a prospect could have been enhanced further by state legislation designed to ensure that New Jersey municipalities were engaging in practices designed to encourage the construction of low and moderate income housing and not engaging in exclusionary practices.²⁰² Although the New Jersey legislature enacted a new Municipal Land Use Law the year following the *Mount Laurel* decision, the legislation fails to provide any devices, such as state-wide or regional surveillance of and control over local land use practices, designed to implement the *Mount Laurel* decision in a more efficient and effective manner than a series of cases attacking local practices. This failure is particularly disappointing in light of one of the legislation's avowed purposes: "To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the state as a whole."²⁰³

In two subsequent decisions, the New Jersey Supreme Court further clarified the scope and content of its *Mount Laurel* decision. In *Oakwood at Madison, Inc. v. Township of Madison*²⁰⁴ the court rejected the argument that it should abandon its holding in *Mount Laurel* because the actual production of substantial amounts of low and moderate income housing as a result of municipalities rezoning land within their boundaries to accommodate such housing was highly unlikely in view of the current economy, and thus judicial enforcement of the *Mount Laurel* decision would be futile. After noting that it was fully aware that substantial amounts of such housing would probably require governmental subsidies or external incentives to private enterprise, the court observed: "it is incumbent on the governing body to adjust its zoning

¹⁹⁹ *Id.* at 189, 336 A.2d at 733.

²⁰⁰ *Id.* at 179, 336 A.2d at 728.

²⁰¹ See text preceding note 43 *supra*.

²⁰² N.J. STAT. ANN. §§ 40:550-1 *et seq.* (Supp. 1978).

²⁰³ *Id.* at § 40:550-2d.

²⁰⁴ 72 N.J. 481, 371 A.2d at 1192 (1977).

regulations so as to render possible and feasible the 'least cost' housing, consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share."²⁰⁵ In order to ensure that each municipality in New Jersey provides its fair share of least cost housing, the court determined that each municipality must overzone for such housing. The court believed such over-zoning was necessary to increase the possibility that least cost housing would be produced because in many instances land zoned for such housing may not be used for such purposes, at least not within the needed period of time.²⁰⁶

Although the court refused to impose an affirmative duty on municipalities to create low and moderate income housing because it felt there was no legal basis for such an imposition,²⁰⁷ it did require developing municipalities to employ density bonuses in their zoning ordinances.²⁰⁸ The required density bonus is the type wherein a developer would be permitted to build additional one bedroom or efficiency apartments for each three or four bedroom apartment included in the complex.²⁰⁹ The court believed that this type of incentive to developers would encourage them to build the type of housing required by many low and moderate income families.²¹⁰

In *Pascack Ass'n v. Mayor of Washington*,²¹¹ the township's zoning ordinance was attacked on the grounds that it failed to provide for multi-family housing. The township contended that it had no obligation to provide for multi-family housing because it was a small municipality substantially developed with detached single-family residences and thus was not a "developing" municipality discussed in *Mount Laurel*. The New Jersey Supreme Court agreed with the township:

[M]aintaining the character of a fully developed, predominately single-family residential community constitutes an appropriate desideratum of zoning to which a municipal governing body may legitimately give substantial weight in arriving at a policy legislative decision as to whether, or to what extent, to admit multi-family housing in such vacant land areas as remain in such a community.²¹²

²⁰⁵ *Id.* at 512, 371 A.2d at 1207.

²⁰⁶ *Id.* at 519, 371 A.2d at 1210-11.

²⁰⁷ *Id.* at 546, 371 A.2d at 1224-25.

²⁰⁸ *Id.* at 517-18, 371 A.2d at 1210.

²⁰⁹ The court also discussed an ordinance requiring a mandatory percentage of moderately priced dwellings to be included within each subdivision or multi-family unit. Because the court had serious doubts about the legality of such an ordinance in the absence of express legislative authorization, it was unwilling to impose an obligation on municipalities to enact such an ordinance. *Id.* at 518, 371 A.2d at 1210.

²¹⁰ The court again refused to accept a formulaic approach to the determination of the appropriate region from which a municipality should absorb its fair share of low and moderate income housing. *Id.* at 539, 371 A.2d at 1221. With respect to Madison Township, it believed that the county in which it is located was not an appropriate region, rather that the area from which people would move to Madison Township in light of available transportation and employment opportunities was the appropriate region. *Id.* at 537, 371 A.2d at 1219.

²¹¹ 74 N.J. 470, 379 A.2d 6 (1977).

²¹² *Id.* at 483-84, 379 A.2d at 13.

Although the court continuously employed the phrase "developing municipality" in *Mount Laurel*,²¹³ *Pascack* reflects an unnecessary retreat from the *Mount Laurel* philosophy. A more acceptable approach would have been to require such communities to absorb their fair share of low and moderate income housing *to the maximum extent possible*.²¹⁴ Such a decision would have prevented exclusionary pockets throughout New Jersey. It also would minimize the number of additional low and moderate income housing units developing communities will have to absorb²¹⁵ and would achieve a better spatial deconcentration of such housing which should be viewed as a desirable goal.

A recent study²¹⁶ prepared by the New Jersey Division of State and Regional Planning pursuant to gubernatorial executive order²¹⁷ should aid the state's judiciary in implementing the *Mount Laurel* decision. The study, after ascertaining the state's probable need for low and moderate income housing between 1970 and 1990, identifies twelve sub-state regions for housing allocations.²¹⁸ It then determines the housing needs of each region and ultimately of each municipality of each region.²¹⁹ In allocating the prospective housing needs among the municipalities of a region, the study considered each municipality in terms of its vacant developable land, employment growth, municipal fiscal capability and personal income.²²⁰ The allocation arrived at on the basis of these criteria was then adjusted on the basis of the municipalities' present share of low and moderate income housing and its ability to absorb additional housing.²²¹ This study could operate as the foundation for estab-

²¹³ 67 N.J. 151, 173, 179, 180, 185, 188, 190, 336 A.2d 713, 724, 727, 728, 731, 732, 733.

²¹⁴ For a similar suggestion, see Judge Pashman's dissenting opinion, 74 N.J. 496-505, 379 A.2d 19-24.

²¹⁵ A developing community after *Pascack* will have to absorb not only its "fair share" of the region's housing needs, but also a portion of each developed community's fair share in order for the region as a whole to absorb all of the housing demands. This will place an additional strain on the fiscal resources of developing municipalities and undoubtedly make the *Mount Laurel* decision even less politically popular. This may cause some communities to try to delay or thwart the *Mount Laurel* decision to a larger extent than they would if they believed all municipalities were being treated equally.

²¹⁶ New Jersey Division of State and Regional Planning, A Revised Statewide Housing Allocation Report for New Jersey (1978) [hereinafter cited as Revised Housing Allocation Report].

²¹⁷ Governor Byrne issued Executive Order No. 35 (April 2, 1976) directing the Division of State and Regional Planning to prepare a statewide housing allocation plan. A preliminary plan was completed in December, 1976. This plan was referred to in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 531 n.37, 371 A.2d 1192, 1217 n.37 (1977). When Governor Byrne released the preliminary report, he issued Executive Order No. 46 (Dec. 8, 1976), requiring a modification to take into account current programs designed to revitalize the cities in New Jersey and redevelopment opportunities for such cities. The Revised Housing Allocation Report, *supra* note 216, was produced as a result of this second Executive Order.

²¹⁸ With the exception of two regions, the report identifies most counties as being their own region. Region 11 consists of Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset, and Union Counties. Region 12 consists of Burlington, Camden, and Gloucester Counties. Housing Allocation Report, *supra* note 216, at 13.

²¹⁹ *Id.* at App. A.

²²⁰ *Id.* at 15-17.

²²¹ *Id.* at 20.

lishing a prima facie case that a municipality has or has not made adequate provision for its fair share of least cost housing.²²² Such a prima facie case could be overcome by a demonstration that the study made an error with respect to a particular municipality.

It is interesting to note the study's indication that Mount Laurel should provide 1,445 additional low and moderate income housing units by 1990.²²³ The study confirms the supreme court's decision in *Oakwood at Madison* since it indicates that Madison Township (now Old Bridge Township) needs to provide 4,684 such units.²²⁴ But the study also suggests that the court's conclusion in *Pascack* was erroneous by indicating that, even when vacant developable land and the community's ability to absorb additional housing are taken into account, Washington Township should provide 464 low and moderate income housing units by 1990.²²⁵

A scanning of the study's statistics with respect to the population and vacant, developable land of the municipalities in the same region as Washington Township, reveals several other municipalities in the region with approximately the same population and remaining developable land.²²⁶ A scan also reveals several municipalities with no developable land.²²⁷ When these two types of municipalities are withdrawn from the pool of those that must absorb their share of least cost housing, it is apparent that the remaining "developing" municipalities must bear the brunt of a substantial amount of the region's fair share of such housing. This means that there will probably be a concentration of such housing in a few portions of the region. Such a concentration could produce "suburban slums" comparable in most respects to present "urban slums." If this occurs, *Mount Laurel* must be viewed as a decision holding out false promises and hopes.

Recently, in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*,²²⁸ the revision of Mount Laurel's zoning ordinance which purported to comply with the supreme court's decision was assailed as not being in compliance with the decision. Mount Laurel had determined its present fair share of low and moderate income housing to be 103 units, 36 attributable to occupied substandard housing and 67 resident "financially deficient" families. It projected its need by the year 2000 to be 515 units and adopted a "housing timetable" which projected a need, over and above the present need, of seven-

²²² In *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 538, 371 A.2d 1192, 1220 (1977), The New Jersey Supreme Court suggested that it might give prima facie judicial acceptance to official fair share housing plans prepared by a group of counties or municipalities. It appears that a statewide agency study would be equally, if not more, valuable to the judiciary.

²²³ Revised Housing Allocation Report, *supra* note 216, at App. A, 36.

²²⁴ *Id.* at App. A, 25.

²²⁵ *Id.* at App. A, 21.

²²⁶ Washington Township's 1970 population was 10,577 and it has 191 acres of developable land. Other municipalities with comparable statistics include Park Ridge Borough, River Vale Township, Westwood Borough, West Caldwell Borough, and Monroe Township. *Id.* at App. D, 11-20.

²²⁷ There are 39 such municipalities listed. *Id.* at App. D, 1-23.

²²⁸ 161 N.J. Super. 317, 391 A.2d 935 (1978).

teen units per year for the next five years. These figures contrast sharply with the 1,445 figure found in the state study.

Mount Laurel amended its zoning ordinance to provide zones for such units. The ordinance rezoned only twenty acres of the township's 14,300 acres, and each tract of land placed in one of three new zones was owned by a single owner.²²⁹ One zone, R-5, permitted the construction of ten units per acre. This zone, which was carved out of an industrial zone, was thirteen acres in size and located in a swampy area presently covered with rank and dense underbrush.²³⁰ Another zone, R-6, permits the construction of single-family residences on 6,000 square foot lots. The zone covers 7.45 acres of land with all but 1.25 acres being in either a flood plain or in the path of a proposed route for a high speed commuter rail line. The third new zone, R-7, permits a developer to opt to exempt 10% of a planned unit development in which certain conditions otherwise applicable to such developments would be waived. Testimony revealed that prices of such units would be approximately \$27,000 for a one-bedroom, \$33,000 for a two-bedroom, \$36,500 for a three-bedroom, and \$37,500 for a four-bedroom. The planner for Mount Laurel contended that these units were least cost housing. The ordinance also contained "control provisions." One of these provisions tied Mount Laurel's provision of a fair share of least cost housing to other municipalities in the county fulfilling the same obligation. Another of these provisions required a developer to make a Traffic Impact Study, a Municipal Services Study, an Economic Cost-Benefit Study, an Environmental Impact Study, and an Impact on Fair Share Allocation.

The trial court accepted Mount Laurel's determination of its fair share because such a determination is "a legislative rather than a judicial function."²³¹ The court also accepted the three new zones as being compatible with the New Jersey Supreme Court's *Mount Laurel* decision.²³² These two portions of the decision, if permitted to stand make a mockery of the fair share concept enunciated in the supreme court's *Mount Laurel* decision. They will permit municipalities to feign compliance with *Mount Laurel* while effectively retaining their exclusionary walls. Thus, only a small trickle of least cost housing will be built in developing communities in New Jersey. Most of the remainder of the decision, however, must be applauded. It strikes all of the "control provisions" as being incompatible with the New Jersey Supreme Court's decision in *Mount Laurel*. In addition, the court refused to follow *Vickers v. Gloucester Township*,²³³ a 1962 New Jersey Supreme Court decision upholding the ability of a municipality to exclude mobile homes, on the

²²⁹ 161 N.J. Super. at 333, 391 A.2d at 944.

²³⁰ *Id.* at 334, 391 A.2d at 944. The planner for the township justified the selection of this site on the grounds that it affords easy access to employment opportunities. *Id.* at 338, 391 A.2d at 946.

²³¹ *Id.* at 344, 391 A.2d at 949.

²³² The court states: "I am convinced that Mount Laurel has sought to exercise that function in good faith and with the express intent of compliance with the requirements of the court." *Id.* A more accurate statement would have been: Mount Laurel had made an effort to see how little it could do and be found in compliance with the decision.

²³³ 37 N.J. Super. 232, 181 A.2d 129 (1962).

grounds that social, economic, and technological changes have occurred since *Vickers* which make it no longer controlling authority. The court emphasized that mobile homes are an extremely important method of providing standard and economically feasible low and moderate income housing. The mobile home issue was raised by an intervenor in the suit who had purchased a 107 acre tract of land for the purpose of developing a mobile home park. The court directed the appropriate authorities in Mount Laurel to review the intervenor's application for a mobile home park, and required them to give written reasons for any conditions they imposed on the development of the park.²³⁴ The practical effect of this portion of the opinion may be to force Mount Laurel to accept a fair share of the region's low and moderate income housing in numbers approaching those reflected in the state study which are, of course, far in excess of those indicated in the Mount Laurel study.

Unless the *Pascack* decision and the initial portion of the recent trial court's decision in *Mount Laurel II* signal a judicial retreat from the original *Mount Laurel* decision, New Jersey could become a model for all states in the elimination of exclusionary ordinances. All that is needed is legislation, which the New Jersey Supreme Court has requested,²³⁵ conferring authority on a state administrative agency to review municipal land use plans to ensure that they provide sufficient developable lands for least cost housing to absorb their fair share of low and moderate income housing. If a municipality has not provided sufficient developable lands, the state agency would so notify them and give them the opportunity to cure the deficiency. If the municipality fails to provide sufficient developable land within a reasonable period of time, the state agency would have the authority and power to modify the local ordinance to the extent necessary to provide such lands or seek judicial enforcement of their determination. In contrast to the New Jersey legislature, the Oregon legislature has been active in attempting to eliminate local exclusionary land use practices.

D. Oregon

Although statewide statistics are not available, a recent study of zoning in the Portland metropolitan area undertaken by 1000 Friends of Oregon²³⁶ indicates that exclusionary practices are fairly widespread. The study found that ninety-three percent of the vacant developable land was zoned for single family residences with the average minimum lot size being in excess of 12,000 square feet.²³⁷ Because seven percent of the land is zoned for multi-family residential,²³⁸ the communities in Oregon can be viewed as less exclusionary than those in other states.²³⁹ Yet, the seven percent figure must be viewed in

²³⁴ 161 N.J. Super. at 359-60, 391 A.2d at 957.

²³⁵ See *Oakwood at Madison v. Township of Madison*, 72 N.J. 481, 534-35, 371 A.2d 1192, 1218-19 (1977).

²³⁶ 1000 FRIENDS OF OREGON, VACANT LAND STUDY PORTLAND METROPOLITAN AREA (Oct. 6, 1978 prepared by Mielke) [hereinafter cited as VACANT LAND STUDY].

²³⁷ *Id.* at 6.

²³⁸ *Id.* at 7.

²³⁹ See, e.g., Division of State and Regional Planning, Dept. of Community Affairs, State of New Jersey, Land Use Regulation: The Residential Land Supply (1972) at 10-11.

light of the need for multi-family dwellings in the area. A Portland regional planning agency estimated a need for 82,513 new multi-family units between 1978 and 2000 in the Portland metropolitan area.²⁴⁰ The land presently zoned multi-family can accommodate a maximum of 38,669 such units, or only forty-seven percent of the estimated need.²⁴¹ These figures suggest that Oregon will be facing a critical shortage of housing in the not too distant future.

Other recent figures indicate the scope of the housing crisis. Research by the State Housing Division revealed that the median cost of a house in Oregon in 1977 was \$50,000.²⁴² It is estimated that fewer than twenty-three percent of Oregon's households can afford a \$50,000 house.²⁴³ The least expensive house available was \$35,000.²⁴⁴ Only forty-five percent of all Oregon households can afford even this minimum priced house.²⁴⁵ One commentator states that local land use plans in the Portland area add \$10,000 to the cost of a house in the area.²⁴⁶ The same commentator contends that even if large lot zoning is excluded, "unjustified subdivision procedures, delays and fees may have added another \$5,460 to the cost of an average single-family home."²⁴⁷ The high cost of housing in Oregon affects not only those buying a house but also those renting. The average monthly rental for a new two-bedroom apartment in 1978 was estimated at \$255.²⁴⁸ Almost half of the renters in Oregon would be "overpaying" if they rented such an apartment.²⁴⁹ In fact, it is estimated that about 100,000 Oregon renters are already overpaying for their rental units.²⁵⁰

In 1973, the Oregon legislature enacted legislation substantially increasing the role of state government in Oregon's land use planning processes.²⁵¹ A Land Conservation and Development Commission (LCDC) was established²⁵² which has several duties, including the establishment of statewide planning goals and guidelines.²⁵³ The legislation requires all cities and counties in the state to prepare and adopt comprehensive plans and to implement them by enacting zoning, subdivision regulations, or other ordinances.²⁵⁴ Each city's and county's plan and ordinances must be consistent with the LCDC's statewide planning goals.²⁵⁵ To ensure this consistency, the Oregon

²⁴⁰ VACANT LAND STUDY, *supra* note 236, at 1.

²⁴¹ *Id.*

²⁴² Richmond, *Housing Costs and "Local Control"*, 1000 FRIENDS OF OREGON NEWSLETTER, June, 1978.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ OR. REV. STAT. §§ 197.005 *et seq.* (1977).

²⁵² *Id.* at § 197.030.

²⁵³ *Id.* at § 197.040(2)(a) & (d).

²⁵⁴ *Id.* at § 197.175(2).

²⁵⁵ *Id.* at § 197.250.

legislature granted authority to LCDC to review local plans and implementing ordinances to determine if they conflict with statewide planning goals.²⁵⁶ If LCDC determines that a local plan or program conflicts with statewide planning goals, LCDC can order the local government to take necessary action to bring its plan or ordinances into conformity with statewide goals.²⁵⁷ Those who may request an LCDC review of a local plan or ordinance include "any person or group of persons whose interests are substantially affected."²⁵⁸ An order of LCDC is subject to limited judicial review.²⁵⁹

In its first significant decision concerning a local government's compliance with its housing goal, LCDC further clarified the housing goal. In *Seaman v. City of Durham*,²⁶⁰ the petitioner challenged an ordinance increasing single family minimum lot sizes from 8,000 to 15,000 square feet and increasing minimum lot sizes for multi-family dwellings from 4,000 to 8,000 square feet per dwelling unit. The city had only sixteen multiple family units. In finding this change incompatible with the statewide housing goal, LCDC emphasized that "planning jurisdictions must consider the needs of the relevant region in arriving at a fair allocation of housing types."²⁶¹ Future implementation of the fair share concept should become relatively easy because the LCDC staff and the Housing Division of the Department of Commerce are jointly preparing a *Housing Goal Handbook* which will serve as a detailed guide to satisfying the statewide housing goal.²⁶²

Other significant decisions by LCDC include one invalidation of a city's building moratorium, and another ruling that all cities must permit multi-family dwellings and mobile home parks in some zones.²⁶³ In *State Housing Council v. City of Lake Oswego*,²⁶⁴ LCDC considered a petition attacking a Systems Development Charge Ordinance of the City of Lake Oswego which requires a new development to pay not only the cost of services to the development itself, but also costs for general system improvements beneficial to the entire community. The Housing Council contended that these latter charges

²⁵⁶ *Id.* at § 197.300. In addition, the local government can seek a compliance acknowledgment from LCDC. *Id.* at § 197.251. The procedures for obtaining review have recently been amended. For these changes see notes 267-68 and accompanying text *infra*.

²⁵⁷ *Id.* at § 197.320. The commission may institute court proceedings to enforce its orders. *Id.*

²⁵⁸ *Id.* at § 197.300(d).

²⁵⁹ *Id.* at § 197.320(3). A court can reverse, modify, or remand an order only when it finds: (a) the order to be unlawful in substance or procedure shall not be cause for reversal, modification or remand unless the court shall find that substantial rights of any party were prejudiced thereby; or (b) the order to be unconstitutional; or (c) the order is invalid because it exceeds the statutory authority of the agency; or (d) the order is not supported by substantial evidence in the whole record. *Id.*

²⁶⁰ LCDC Opinion and Final Order No. 77-025 (Feb. 24, 1978).

²⁶¹ *Id.* at 9.

²⁶² Letter from David O'Brian, Housing Cost Evaluator, Department of Commerce, Housing Division to author (Dec. 14, 1978) (on file in author's office, Tulane University).

²⁶³ *Id.*

²⁶⁴ LCDC Opinion and Final Order No. 78-030 (Aug. 9, 1979).

were inappropriate and should be borne by the entire community.²⁶⁵ Although the petition was dismissed on the grounds that the ordinance was "not proven to be a land use action to which the statewide goal requirements apply", LCDC warned communities that ordinances, standing alone or in combination with other ordinances, that significantly increase the cost of housing may be presumed to be incompatible with the statewide housing goal.²⁶⁶

Since these decisions the Oregon legislature has modified the procedures for attacking local land-use planning decisions on the grounds that they are incompatible with state goals. A Land Use Board of Appeals, which has exclusive jurisdiction over *all* petitions attacking local land-use decisions, has been created.²⁶⁷ As to petitions reviewing decisions not involving statewide planning goals, the Board of Appeals can enter a final order which can be appealed to the Oregon Court of Appeals. As to petitions contending that a local decision is incompatible with statewide goals, the Board makes a recommendation to LCDC as to what LCDC's decision should be. LCDC then makes its decision and advises the Board which then enters a final order incorporating LCDC's decision. In either instance, the Board must enter a final order within 90 days from the date the petition is filed. This innovative approach to reviewing local land-use decisions should enhance the potential that exclusionary local decisions will be discovered and thwarted because the Board will be reviewing *all* local decisions that are attacked and thus may uncover some exclusionary practices that have not been attacked for incompatibility with statewide planning goals.²⁶⁸

Oregon thus joins New Jersey as a state willing to assume considerable responsibility for providing the widest possible choice of living locations to existing and potential residents. Oregon's approach is perhaps even more encouraging than New Jersey's because the state legislature and the agency it created, rather than its courts, have taken the lead in attempting to eliminate exclusionary practices. The Oregon experience indicates that state legislators and administrators, by creating an appropriate atmosphere in the state, can overcome the usual bitter political opposition to a fair share housing program.

V. APPRAISAL AND RECOMMENDATIONS

The survey of selected states indicates that exclusionary land use practices are being employed by local governments across the country. In fact, such practices are far more common than one might suspect. A continued deference by the Supreme Court and Congress to local governmental autonomy over exclusionary land use matters cannot help but cause more and more local communities to engage in such practices at an ever increasing degree of exclusivity. With the fiscal constraints being imposed on local governments by constitutional amendments comparable to California's Proposition 13,²⁶⁹ the pressures for exclusionary practices will be even greater.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ 1979 Or. Laws ch. 772.

²⁶⁸ Whether the Board has the authority to raise this issue *sua sponte* is unclear.

²⁶⁹ See Gelfand, *The Court and the New Federalism: Preliminary Reflections on the Role of Local Government*, 21 B.C. L. REV. (1980).

Such continued deference may be justified if state governments are actively attempting to preclude their local governments from engaging in such practices. Yet, an examination of the actions of representative states reveals that few are shouldering their responsibilities in this respect. Although some, like New Jersey and Oregon, are engaged in serious efforts to prevent their local governments from employing exclusionary practices, several other states like Connecticut, Georgia, and Illinois have undertaken no significant actions. Many states fall somewhere between these two extremes. They have undertaken some actions, but not sufficiently strong actions to predict that their local communities will abandon their exclusionary practices in the near future. It appears unlikely that they will undertake additional significant action in the near future.

Because most states and their local governments are not accepting the responsibility that the Supreme Court and Congress has been willing to permit them to shoulder, the Supreme Court and Congress must bear the responsibility before the housing situation in this country passes beyond even its present crisis level. Because the effects of local exclusionary practices transcend state lines, the Constitution provides the Supreme Court with several provisions, explicit and implicit, that it could employ to strike such practices as unconstitutional.²⁷⁰ Whether the Burger Court will be willing in the not too distant future to bear its Constitutional obligation and declare such practices unconstitutional is questionable. Recent decisions offer little hope of this eventuality.

Congress is in a prime position to provide the impetus for elimination of exclusionary practices. If the Supreme Court meets its obligation and strikes unduly burdensome land use practices, Congressional action could aid a rapid termination of such practices. If the Supreme Court fails to act, then Congress should be willing to bear the responsibility. Several alternatives are available. There is little doubt that Congress could constitutionally enact anti-exclusionary legislation.²⁷¹ If express national goal of providing a decent

²⁷⁰ For example, Professor Sager suggests the applicability of the equal protection clause. See Sager, *supra* note 1. Judge Burke relied on the right to travel in *Construction Ind. Ass'n of Sonoma City v. City of Petaluma*, 375 F. Supp. 574 (1974), *rev'd on other grounds*, 522 F.2d 897 (9th Cir. 1975). The interstate commerce clause is another possibility. See *Edwards v. California*, 314 U.S. 160 (1941).

²⁷¹ If Congress chose to rely on the interstate commerce clause to support such legislation, the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), would pose some question as to the constitutionality of Congress's action. For a discussion of the *Usery* case, see Gelfand, *supra* note 269, at notes 51-88 and accompanying text. Although land use planning is a function that traditionally has been performed by local governments, thus apparently bringing it within the scope of the limitation on congressional power enunciated by the Court in *Usery*, it is difficult to believe that exclusionary practices promote legitimate expectations of the citizenry of local governments. *Id.* at note 80 and accompanying text. In addition, the relationship between exclusionary practices and the undue burdens on interstate movement of people is far more obvious and direct than that between minimum wage and maximum hour limitations applicable to state and local governments and interstate commerce. Therefore one can make very strong arguments that the *Usery* rationale would not preclude anti-exclusionary legislation.

home for every American is to be achieved,²⁷² Congress must address eventually the exclusionary land use planning problem. Because integrated land use planning can be performed more efficiently at the state governmental level, legislation should be applicable only in the absence of effective state control of the exclusionary problem. Such an approach should encourage state legislatures to establish effective state programs designed to eliminate exclusionary practices by their own local governments.

As a supplement to that anti-exclusionary legislation, Congress should amend the Community Development legislation²⁷³ to preclude any community that engages in exclusionary practices from receiving any funds under the program.²⁷⁴ As an incentive for rapid elimination of such practices, the amendment could provide rewards to those local communities that undertake an affirmative program to provide their fair share of their region's low and moderate income housing. Amendments to the Community Development legislation should be viewed as supplemental action, not as a primary method of eliminating exclusionary practices. Because local governments can opt not to participate in the Community Development Program,²⁷⁵ many local governments may be willing to forgo such federal funds in order to remain exclusionary. If federal funds are to be used as a stick or a carrot in the elimination of exclusionary practices, consideration should be given to attaching strings to General Revenue Sharing Funds as well. Because at present such strings would be viewed as contrary to the "new federalism," it appears highly unlikely that Congress would be willing to restrict the distribution of such funds to communities which are not engaging in exclusionary practices. Such strings are unnecessary if Congress enacts anti-exclusionary legislation. If Congress fails to enact such legislation, the elimination of exclusionary practices in many states appears remote.

If a state decides to address the exclusionary problems within its boundaries either because it decides to bear its responsibility or because Congress enacts anti-exclusionary legislation which is applicable in the absence of effective state legislation, the legislation should contain certain basic provisions. First, it should require the preparation of a statewide fair share housing allocation plan which accurately reflects housing needs of the state in relation to the region in which the state is located. This plan is necessary so that the state may determine areas in which only limited growth may be desirable. For example, several areas may be identified as areas of environmental or ecological importance and other areas may be identified as containing prime agricultural land that should be preserved. Only statewide planning can effectively

A safer course of action would be for Congress to rely on U.S. CONST. amend. XIV, § 5 to support such legislation. The Supreme Court has construed this clause as giving Congress far more leeway in interfering with local governmental activities. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

²⁷² See note 46 and accompanying text *supra*.

²⁷³ For a discussion of this legislation, see notes 53-62 and accompanying text *supra*.

²⁷⁴ There is little, if any, doubt that Congress can constitutionally impose conditions when exercising its spending powers. See Gelfand, *supra* note 269 and text accompanying notes 79-89.

²⁷⁵ See note 53 and accompanying text *supra*.

integrate the fair share housing plan with other state land use planning goals. Second, a state agency, whether it be the state land use planning agency or a special commission like the LCDC in Oregon, should have the authority to review local plans and ordinances to determine if they are unduly exclusionary.

Review should be available at the request of the local government, upon petition by any person who is aggrieved, or upon the agency's motion. After initial review, any changes or modifications would be subject to the agency's review. Finally, the state agency should have the ability to enforce its determination that a local government's plans or ordinances are unduly exclusionary. The ability could be in the form of authority to seek judicial enforcement of its orders as the present Oregon legislation does,²⁷⁶ or it could be in the form of authorizing the state agency to amend the local ordinances to eliminate the exclusionary practices when the local government has refused to comply with the state agency's determination. Although the latter form may be more efficient, the former may be viewed as affording an approach that is less violative of local autonomy.

If the Supreme Court, Congress, and the state legislatures fail to respond to the exclusionary problem, the state courts are the last hope. As a result of the New Jersey Supreme Court's decision in *Mount Laurel*,²⁷⁷ state courts have a model that can be followed. If a state court has the opportunity to adopt the *Mount Laurel* approach prior to any legislative action in the state, it should do so thereby taking some of the political pressure off of state legislators who can then adopt anti-exclusionary legislation on the grounds that they are merely doing what the state constitution compels them to do.

If the people in this country are to be afforded the widest possible choice in regard to where they may live, most or all of the recommended actions must be implemented. To minimize the ever increasing housing and employment opportunity crisis facing millions of people in this country these actions must be implemented in the immediate future. Failure to undertake the recommended actions cannot help but exacerbate a problem that is already at a crisis level. The consequences of such a failure cannot help but be dire. To permit some philosophical view of federalism to produce such dire consequences is madness.

²⁷⁶ See notes 257 and accompanying text *supra*.

²⁷⁷ For discussion of the *Mount Laurel* decision, see notes 196-201 and accompanying text *supra*.