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Exclusionary Zoning: State and Local Reactions to the *Mount Laurel* Doctrine

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THE EFFECTS OF POVERTY ON INDIVIDUAL OUTCOMES HAVE LONG BEEN A TOPIC OF SOCIAL SCIENCE. The intersection of land use planning and public policies aimed at addressing the growing problems of housing affordability has created much debate and concern. As the United States recovers from the Great Recession, more and more individuals find themselves relying heavily on governmentally subsidized, or affordable, housing as a last resort.[1] Researchers have determined that the first constructed public housing high-rises of urban America in cities like Chicago, New York, Baltimore, Philadelphia, and Washington D.C. have had detrimental effects upon the life chances of its residents due to their placement in areas of high concentrations of poverty;[2] policies concerning housing developed into complex debates about urban poverty, social isolation, and racial discrimination.[3]

Although public housing and affordable housing share the goal of providing suitable housing options for low- and moderate-income

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1. *See Who Needs Affordable Housing?*, U.S. Dept. of Housing and Urban Dev. (HUD), http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing (last visited Apr. 7, 2016). Families who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care. An estimated 12 million renter and homeowner households now pay more than 50 percent of their annual incomes for housing. A family with one full-time worker earning the minimum wage cannot afford the local fair-market rent for a two-bedroom apartment anywhere in the United States.

2. *See generally* ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN POSTWAR CHICAGO, 1940–1960 (Univ. of Chicago Press 1983); JOHN F. BAUMAN, PUBIC HOUSING, RACE, AND RENEWAL: URBAN PLANNING IN PHILADELPHIA 1920–1974 (Temple Univ. Press 1987); Ira Goldstein & W. Mark Keeney, *Public Housing, Blacks, and Public Policy: The Historical Ecology of Public Housing in Philadelphia*, *in* HOUSING DESEGREGATION AND FEDERAL POLICY (John M. Goering, ed., Univ. of North Carolina Press 1986).

3. *See generally* Alexandra M. Curley, *Theories of Urban Poverty and Implications for Public Housing Policy*, 32 J. SOCIOLOGY & SOC. WELFARE 97 (2005).

households, affordable housing and public housing are very different, and operate with very different structures.[4] "Affordable housing" is housing that is available at a price lower than comparable market-rate housing that does not impede on more than thirty percent of an individual's income.[5] The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") was enacted to "improv[e] financing for low- and moderate-income housing" through the use of the Affordable Housing Program.[6] The Affordable Housing Program ("AHP") could "be used for a wide range of purposes involving rental and homeowner housing for low- and moderate-income households" by requiring "that federal Home Loan Banks dedicate 10% of their annual net income to [AHP]."[7] The funds would be an incentive for private developers to pursue such developments where needed and become "landlords" themselves through the subsidization of construction financing.[8] Typically, the landlord is a private entity, either in the form of an individual, or a for- or non-profit organization. In this case, the landlord receives a subsidy by the federal government to rent to low- and moderate-income people. Their rent is decreased to make it more "affordable."

The term "public housing" identifies subsidized low-income housing units owned and operated by the government, usually through a local housing authority serving as a management agency of the housing development (along with other social programs).[9] While, in some cases, the building of the development or the development itself can be managed by a private entity; the local housing authority retains control of the housing development.[10] There are other differences between affordable housing and public housing in terms of tenant selection, eligibility, and funding streams; however, for the sake of this paper, the distinction is made in order to illustrate the resistance made by local municipalities to affordable housing but not to public housing. Yet

4. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 84-85 (2d ed. 2010).
5. *See* HUD, *supra* note 1 and accompanying text.
6. SCHWARTZ, *supra* note 4.
7. *Id.* at 85.
8. *Id.*
9. *Id*. at 125.
10. *But see Public Housing*, S. NEV. REG'L HOUS. AUTH., http://www.snvrha.org/about-us.htm (last visited Apr. 7, 2016). In some states, housing authorities are not operated at the municipal level but at the regional (or metropolitan) level. This largely depends on the form of governance assumed by the local government. Examples exist in Southern Nevada where housing programs are administered by the county encompassing multiple local areas including that of Las Vegas, North Las Vegas, and Clark County.

much of this resistance is due to the collective assumption that affordable housing and public housing, both governmentally-subsidized housing programs, retained similar, if not the same population; a population with limited economic means. The opposition towards affordable housing in areas outside urban cities was largely due to the issues public housing had inside these urban areas.

This resistance was sustained due to the changing nature of "who" resided in both public housing and affordable housing units. During the post-WWII era, housing became a political and social concern as returning veterans used public housing as a transient program to spring them into homeownership through the use of the GI Bill.[11] Yet, programs designed to aid returning veterans were not available to other groups in American society. Included among the other groups were African-Americans still trying to climb up the economic ladder persisting through years of overt segregation and racial tension that categorized America in the 20th century.[12] Many were members of the "working poor"—individuals who worked full-time, low-wage, service jobs in order to make ends meet. These individuals were largely excluded from certain neighborhoods as alternative forms of segregation persisted through the passing of Title VIII of the Civil Rights Act of 1968 at the federal level.[13] The federal response combined with state and local political and social tensions created a paradox—an inconsistency in the application of federal law to solve local circumstances.

Lawrence M. Friedman discusses this paradox stating, "Public housing no longer meant homes for less fortunate friends and neighbors, but rather, intrusions of "foreigners," the problem poor, and those least welcome 'forbidden neighbors,' the lower class Negro."[14] And while Friedman's analysis speaks more of the traditional nature of public housing, his remarks about the "problem poor" depict a relevant

11. See HIRSCH, *supra* note 2, at 22; NANCY A. DENTON & DOUGLAS S. MASSEY, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (Harvard Univ. Press 1993) for detailed analyses of housing developments during the post-WWII era.

12. *See* LEN ALBRIGHT, ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 2 (Princeton Univ. Press 2013). "Before the civil rights era, African Americans, especially, but also other religious and ethnic minorities, experienced systematic discrimination in real estate and mortgage markets and were excluded from federal lending programs designed to promote home ownership." *Id.*

13. *See generally id.*

14. Lawrence M. Friedman, *Public Housing and the Poor: An Overview,* 54 Cal. L. Rev. 642, 652 (1966).

interpretation of low- and moderate-housing for poor individuals. Realizing that both situating some developments in higher income areas with more resources and physically changing the structure of the buildings from high-rise concrete structures to low-rise, "suburban" communities may ultimately impact an individual's chances of escaping poverty altogether, policymakers have shifted to change the debate concerning affordable housing, politically, socially, and legally.[15] Yet, there has been much resistance.

This resistance was evident in the exclusion of low-income individuals from affordable housing units in suburban neighborhoods. Some middle- and upper-income communities have resisted the construction of affordable housing units based on perceptions that poor people behave immorally and quite differently from mainstream America, the fear of lower property values, and the rise of property taxes and crime.[16] This resistance would encroach upon the civil rights of individuals seeking affordable housing options in an effort to exclude them from entering these communities.[17] Such a dilemma gave birth to the *Mount Laurel* doctrine. This paper seeks to discuss the actions surrounding the *Mount Laurel* doctrine, including the causes of concern and subsequent legal responses. This decision is paramount to understanding not only the processes by which it was adopted into law, but the continued responses of communities to deflect the encroachment of the poor unto their normal exercises of life.[18] It also describes a specific case where the judicial branch of the government provided remedies in an environment where the other two branches of government failed to act.

A historical analysis of such events demonstrates the position of the justices and uncovers the motivations by which the *Mount Laurel* cases were decided on state constitutional grounds and not on federal grounds. The zoning practices at issue in Mount Laurel could have been reviewed and struck down on federal constitutional grounds

15. *See* SCHWARTZ, *supra* note 4.

16. *See generally* HIRSCH, *supra* note 2; WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (Univ. of Chicago Press 1987); ALBRIGHT ET AL., DO AFFORDABLE HOUSING PROJECTS HARM SUBURBAN COMMUNITIES? CRIME, PROPERTY VALUES, AND PROPERTY TAXES IN MT. LAUREL, NEW JERSEY (Office of Population Research, Princeton Univ. 2011) *available at* http://ssrn.com/abstract=1865231.

17. *See* ALBRIGHT, ET AL., *supra* note 12, at 3.

18. *See* S. Burlington Cnty. NAACP v. Mount Laurel, 336 A.2d 713, 723 (N.J. 1975) (*Mount Laurel I*).

using the 14th Amendment's due process and equal protection guarantees; however, this was not the basis of the court's decision.[19]

Mount Laurel proves useful in that the ongoing litigation between New Jersey municipalities and residents of the municipalities and numerous civic organizations is the foundation of national attention on the use of exclusionary zoning practices. In this article, particular attention is given to the New Jersey Supreme Court's interpretation of the New Jersey Municipal Zoning Enabling Act as authorized in the state constitution and the responses of local municipalities in implementing the law. Particular emphasis is also placed upon the concurring and dissenting justices' opinions in the rulings.

I. The Shortcomings of *Mount Laurel I*

Zoning has long been a tool of planning requiring processes by which land uses are identified and clearly defined. As a response to urbanization in the United States and consequently other social effects on changes in population (social, political, and economic), zoning has been a tool of not only preserving the present, but planning for the future.[20] John Levy refers to zoning as a "technique with apparently substantial power to alter events . . . it would take a while before its limits and its potential for abuse would become evident."[21] Such limitations of zoning and potential for legal abuse were under judicial review in the 1975 New Jersey Supreme Court case of *South Burlington NAACP v. Township of Mount Laurel,* the decision commonly referred to as "*Mount Laurel I*."[22]

The plaintiffs, the South Burlington NAACP, the Camden County NAACP, Ethel Robinson Lawrence, and other affected low- and moderate-income individuals, challenged the system of land use regulation then implemented by Mount Laurel Township on the grounds that low- and moderate-income families were unlawfully excluded from the municipality.[23] The zoning ordinance made it physically and economically impossible to provide low- and moderate-income housing.[24] By not providing land for (i.e. the "zoning out" of) low- and moderate-income, multifamily dwellings many individuals could

19. *Id.* at 725.
20. *See generally* JOHN M. LEVY, CONTEMPORARY URBAN PLANNING 43 (9th ed. 2012).
21. *Id.* at 46.
22. *Mount Laurel I*, 336 A.2d at 713.
23. *Id.*
24. *Id.*

not find housing within the municipality.[25] Thus, the municipality was seen as not providing its fair share of housing for its own residents. As demonstrated by the composition of the group of plaintiffs, African Americans of lower economic means were disproportionally affected by the zoning ordinances. "Fair housing" was the umbrella term under which many civil rights organizations brought the case against Mount Laurel Township.[26] Such land use patterns of economic and racial exclusion would reproduce systems of segregation and fortify it with zoning ordinances. The township argued that the introduction of affordable housing would greatly impede the existing quality of life of its residents and maintained that it was their duty to preserve the "general welfare" of the municipality.[27] Specifically, their argument was based on the police power of the municipality under the federal constitution.[28] Instead of the physical barriers existing during the era of traditional segregation, zoning presented a new legal barrier by which municipalities could exert their power to preserve their idea of the general welfare.

Under the New Jersey State Constitution of 1947, zoning powers were delegated to the legislature.[29] Article 4, Section 6 of the New Jersey Constitution states:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.[30]

This delegation of power granted municipalities certain rights to control the use of land, buildings, and other structural adjustments as long as it did not violate any other standards of law. Under this constitutional clause, municipalities, such as Mount Laurel Township, could create zoning ordinances governing the type of construction that would serve local housing needs in an effort to preserve the general welfare of that area.[31] The identity of those local needs was in question.[32] Yet, the plaintiffs challenged the intent of this effort at

25. *Id*.
26. *See Mount Laurel I*, 336 A.2d at 716.
27. *Id.* at 728.
28. *Id.* at 725.
29. *Id.* at 725.
30. N.J. CONST. art. IV, § 6.
31. *See id.*
32. See *Mount Laurel I,* 336 A.2d at 726.

preservation of the general welfare, urging the court to decide on federal grounds.[33] The court chose not to do so, however, and decided upon state constitutional grounds.[34] The police power of the municipality, under the guidance of the above mentioned constitutional clauses as well as the New Jersey Municipal Zoning Enabling Act was interpreted by the court,[35] as Harold A. McDougall summarizes, "to require that municipalities zone with the welfare of the entire state in mind, not merely for the benefit of their own villages and towns."[36]

The court held that the zoning power, as part of the overall delegation of police power to protect the health, safety, and welfare of its citizens, must be used to further the *general* welfare as opposed to the welfare of one particular, local segment of society.[37] Restricting new development to single-family dwellings, as well as requiring amenities such as central air conditioning and specified developer contributions in the creation of planned unit developments (PUDs), pushed rents and sales prices to high levels out of the reach of low- and moderate-income families.[38] Even the Township's 1969 Master Plan Report demonstrated that there was a need to take positive action in terms of providing housing options to its own residents, largely located in the neighborhood known as Springville.[39] However, the Township had thwarted all positive action to do so. While the Township had allowed some multifamily dwellings by agreement in PUDs, "the projects were designed

33. *Id.*
34. *Id.*
35. The applicable statutory provision, known as the *New Jersey Municipal Enabling Act,* states the following:

> Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. Such ordinance shall be adopted by the governing body of such municipality, as hereinafter provided, excepted in cities having a board of public works, and in such cities having a board of public works, and in such cities shall be adopted by said board.
>
> The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of the lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes. N.J. STAT. ANN § 40:55D-65.

36. Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 628 (1987).
37. *Mount Laurel I*, 336 A.2d at 724-25.
38. *Id* at 722.
39. *Id.*

to be beyond the reach of low- and moderate-income families and deliberately contained very few apartments having more than one bedroom in an effort to keep out school-aged children."[40] Therefore, individuals with children who could not afford single-family homes would not be able to acquire apartment-style housing as an alternative. And the argument did not simply rely on an economic limitation (i.e. an inability of people to pay for housing); it was a systematic approach by the municipality to exclude certain types of individuals from the area.[41] Thus, the trial court decided in favor of the plaintiffs, finding that the defendants were in violation of state constitutional law; the court found no need to consider federal constitutional law.[42] The court's decision was based on equal protection of the law as outlined in the New Jersey state constitution for all citizens including those who could not afford housing and the municipality's obligation to provide its fair share of low- and moderate-income housing.[43]

But the *Mount Laurel I* decision would prove limited in its implementation. According to McDougall, there was no impetus for the municipality to actively plan and develop affordable housing options:

> The facially simple remedy suggested by the holding (setting appropriate quotas of low- and moderate-income housing based on studies of economic development, demographic change, and ecological balance) required exceedingly technical and esoteric information, thus making it easy for proponents of exclusionary zoning to tie up a court proceeding in argument over details. Due to this conflict, and because the decision's guidelines were vague and allowed municipal stalling tactics, few lower-income housing units were built in the years immediately following the decision.[44]

This is not to say that development and construction of multifamily units was not already taking place, yet it was beyond the reach of low- and moderate-income individuals residing in the municipality.[45]

40. Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 49 (2001).

41. *Mount Laurel I*, 336 A.2d at 725.

42. *Id.* at 725.

43. See *Mount Laurel I*, 336 A.2d at 713. The court noted that:

> Every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do. *Id.* at 724-25.

44. McDougall, *supra* note 36, at 629-30.

45. *Id.* at 721.

The ordinance provided a landscape of exclusionary zoning practices, fundamentally driven by race and class differences, in which many minority groups of lower socioeconomic status could not benefit from the municipality supplying its fair share of affordable housing.[46]

Under the court's ruling, Mount Laurel Township was given 90 days to adopt amendments to correct the deficiencies in the use of its zoning power.[47] Municipalities were now charged to ensure that affordable housing would meet its "fair share" based on the demand of the region's lower-income housing need.[48] However, as commentators have pointed out, the effect would only go to "developing" municipalities, those that were undeveloped sufficiently to accommodate the demand needed.[49] The solution for many municipalities was to stop developing.[50] By not issuing any zoning permits for new housing developments, a municipality's "fair share" would be hard to determine.[51] Developers already engaged in building would finish their current projects, but future developments would be increasingly hard to attain.[52] Charles M. Haar discussed this as an effect of the *Mount Laurel I* ruling,[53] saying, "[t]heir role remained largely peripheral, however: on the whole, they were inclined to finish their deals, make concessions while retaining the option to litigate, receive their building permits, and move on. Soon enough suburban planning boards in New Jersey rendered it increasingly difficult for them to come in at all."[54] The actions taken by Mount Laurel Township demonstrate an adverse effect of the court's ruling while failing to remedy the initial problem making it susceptible to future litigation.

H.A. Span asserts that the problem with the *Mount Laurel I* decision was complex in that, while it changed the vision of zoning practices, it did not design a method for achieving such clarity.[55] Span writes:

> The problem with *Mt. Laurel I* was that it was both too ambitious and not ambitious enough. On the one hand, the court required more than just multi-family housing and more than just some lower-income housing. It required a fair share of regional

46. *Id.* at 745.
47. *Id.* at 734.
48. *Id.*
49. *See, e.g.,* McDougall, *supra* note 36, at 628.
50. *See* Span, *supra* note 40.
51. *See* Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 Stan. Tech. L. Rev. 767, 798-800 (1969).
52. *See generally* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 30-35 (Princeton University Press, 1996).
53. *Id.*
54. *Id.* at 31.
55. Span, *supra* note 40, at 49.

> lower-income housing and quite clearly had specific numbers in mind. On the other hand, the court not only failed to provide the numbers; it did not set out a procedure for providing them. Moreover, the court did not say what would happen if municipalities did not comply.[56]

Although this case caused concern for future litigation, Span's analysis of the *Mount Laurel I* decision was not unprecedented. The complexity of the use of exclusionary zoning and the inherent complications for judicial review were pointed out by Lawrence Gene Sager in 1969—a few years prior to the court's decision of *Mount Laurel I*.[57] In the case of applying the Equal Protection Clause in the instance of exclusionary zoning based on federal constitutional grounds, Sager wrote:

> The Supreme Court will have to begin to articulate standards and priorities . . . if the injury to the protected interest of social equality is to be balanced against the social utility of the challenged enactment, some means of appraising the injury must be explored. Questions like the difference between disfavored racial status, illegitimacy, and indigency will have to be faced, along with comparisons of criminal-defense potential, the franchise, housing, and the receipt of welfare payments.[58]

Sager's concerns are observed in Span's later discussion on the breadth, or lack of precision, of court decisions in changing integration of low- and moderate-income individuals into the suburbs.[59] However, Sager's analysis of the equal protection clause and exclusionary zoning, as expressed by the federal constitution, presents an interesting argument in not only the changing construction of judicial arguments, but the role of the courts in deciding methods of implementation in order to outline the process by which institutions will respond to their legal obligation.[60] Sager discusses the constitutionality of such decisions, stating, "the municipality's constitutional obligation goes beyond merely abstaining from exclusionary zoning and to more clear affirmative steps, as, for example, the requirement that subdivisions include some percentage of low-income housing units."[61] Such belief was exemplified in the decision of the court in *Mount Laurel I*.[62]

56. *Id.*
57. Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. TECH. L. REV. 767, 798-800 (1969).
58. *Id.* at 799.
59. *See generally* Span, *supra* note 40.
60. "Institutions" refers to the combination of local political actors as well as economic stakeholders. In theory, this concept refers to the actions jointly taken by each group in facilitating some type of process. Here specifically, I am referring to the local planning board (political agent) and developers (economic agents) in adhering to the Court's ruling of *Mount Laurel I*. *See Mount Laurel I*, 336 A.2d at 713.
61. Sager, *supra* note 57, at 124.
62. *Mount Laurel I*, 336 A.2d at 734.

There were two concurring opinions in *Mount Laurel I*, by Justices Mountain and Pashman.[63] Justice Mountain, although affirming the decision of the court, disagreed on the legal grounds.[64] Justice Mountain states,

> In one important respect, however, I disagree. The Court rests its decision upon a ground of State constitutional law. I reach the same result by concluding that the term, 'general welfare,' [. . .] can be interpreted with the same amplitude attributed to that phrase in the opinion of the Court, as well as otherwise in the manner there set forth.[65]

Justice Mountain's argument rests on an interpretation of the statute and not the state constitution.[66] His concurrence not only justifies the court's decision upon multiple legal grounds, it further supports its decision by providing future litigation an alternative approach of legal interpretation by the courts. By deciding on state constitutional grounds, the court was able to avoid review by the federal judiciary. The court's action here could also prove useful in avoiding legislative reversal. Haar writes, "[a]lthough [Justice Hall] could not make the *Mount Laurel* doctrine as a whole immune to change, he could fashion it so that its constitutional groundings could not be altered except by the drastic and time-consuming method of constitutional amendment."[67] The same idea is exemplified in Justice Pashman's concurrence.[68]

Justice Pashman begins his concurrence stating, "[w]ith this decision, the [c]ourt begins to cope with the dark side of municipal land use regulation—the use of the zoning power to advance the parochial interests of the municipality at the expense of the surrounding region and to establish and perpetuate social and economic segregation."[69] Justice Pashman exhibits a divergent pattern of behavior not normally taken by the court.[70] Judicial behavior, in this instance, has been argued by political scientists as more of an "interventionist approach" or "affirmative activism."[71]

63. *Id.* at 735-36.
64. *Id.* at 735.
65. *Id.*
66. "I reach the same result by concluding that the term, 'general welfare,' appearing in N.J. STAT. ANN. 40:55-32, can and should properly be interpreted with the same amplitude attributed to that phrase in the opinion of the Court, as well as otherwise in the manner there set forth." *Id* at. 735. (Mountain, J., concurring).
67. HARR, *supra* note 52, at 19.
68. *Mount Laurel I*, 336 A.2d at 735.
69. *Id.*
70. *Id.* at 736 (Pashman, J., concurring).
71. See Russell S. Harrison & G. Alan Tarr, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 514, 514-16 (1984) for an analysis of the legitimacy of the character of the

This is not traditional judicial behavior resting on the practice of judicial review, here normally a deferential review of acts taken pursuant to the police power of government. Rather, the court begins to alter the policymaking process which can ultimately change the effects of rulings on major social problems. And it is within this reality where rulings encourage or deter social conditions. Therefore, while *Mount Laurel I* provided a pivot in the use of zoning to exclude "the poor and indigent," it did not do so with attention to implementation. And so, the New Jersey Supreme Court's decision would lay the foundation for future litigation.

II. Beyond The Scope Of Judicial Review: *Mount Laurel II*

As discussed in the previous section, the *Mount Laurel I* court sought to prohibit municipal exclusion of the poor but the response of local governments was all but welcoming . . . "the dark side of municipal land use regulation."[72] *Mount Laurel I* stands for three propositions regarding exclusionary zoning: (1) zoning excluding the poor is unconstitutional because it is not consistent with promoting the "general welfare," (2) part of promoting the "general welfare" is providing housing for the poor, and (3) each "developing municipality" has the responsibility for its own "fair share" of the regional housing need.[73] This is now known as the *Mount Laurel* doctrine. However, much of the terminology used in the decision left a definitive gap in terms of appropriate resolutions. What does "developing municipality" mean? What is the "fair share" for a given municipality? Is the idea of the "general welfare" clearly defined? These types of questions plagued subsequent land use and zoning restriction cases statewide.[74] Eight years passed before *Mount Laurel II* was decided by the New Jersey Supreme Court.[75]

Court's intervention in *Mount Laurel II*. The authors argue that relief was needed to address major social problems due to legislative and executive inaction.

72. *Mount Laurel I*, 336 A.2d at 735 (Pashman, J., concurring).

73. Norman Williams, Jr., *The Background and Significance of Mount Laurel II*, 26 WASH. U.J. URB. & CONTEMP. L. 3, 8 (1984).

74. See Oakwood at Madison, Inc. v. Twp. of Madison, 371 A.2d 1192 (N.J. 1977) for further explanation. In this case, developers brought a suit against the township challenging the validity of the zoning ordinance. The New Jersey Supreme Court held that the township was a 'developing municipality' and subject to the requirements set forth by the *Mount Laurel* doctrine. *Id.* at 1201.

75. S. Burlington Cnty. NAACP v. Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*).

In 1983, *South Burlington NAACP v. Township of Mount Laurel (Mount Laurel II)* presented the court an opportunity to elaborate on the Mount Laurel doctrine.[76] Because of the heavy resistance by many municipalities in implementing these policies, this court case was a class action suit involving plaintiffs consisting of other civic organizations, such as the Urban League of New Brunswick and the Urban League of Essex County, and defendants of many townships in the suburban municipalities of New Jersey.[77] These six merged cases consisted of many stakeholders and were used as a catapult to further define principles of zoning and particulars of implementation. As Chief Justice Wilentz stated, "After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance . . . Mount Laurel is not alone; we believe that there is widespread noncompliance with the constitutional mandate of our original opinion in this case."[78] It was now the goal of the court to not only address again the issues presented in *Mount Laurel I*, but to further design a set of legal understandings for broader concerns around land use and exclusionary zoning efforts.[79]

Chief Justice Wilentz identified this needed corrective in the development of legal interpretation and policy implementation of the *Mount Laurel* doctrine stating, "[w]e intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it."[80] It was not in the power of the court to create policies in order to combat the problem of physical and economic segregation.[81] This was one limitation in the implementation of the *Mount Laurel* doctrine thus far. Although it made a strong shift to the proper use of zoning ordinances, the court could not enact legislation that would require municipalities to openly accept poor minorities into their planned, suburban communities. The decision in *Mount Laurel II* sought to remedy this situation.[82]

Span identifies the evolution of the approach of the judicial branch in establishing such guidelines as he discusses how the court in *Mount Laurel II* established a procedure whereby three trial judges would

76. *See id.*
77. *Id.* at 390-91.
78. *Id.* at 410.
79. *See id.*
80. *Id.*
81. *Id.* at 451.
82. *Id.* at 418.

"designate specific fair share numbers for every municipality in the state and see to their implementation" with the help of special masters.[83] These special masters were authorities appointed by the court to make sure the judicial orders were carried out.[84] This ultimately evolved or expanded the court beyond its usual interpretive nature into a quasi-legislative body which sought to evaluate the progress of municipalities based on its ruling.[85] This point was also identified in the explanation of the court's rulings as it stated, "[i]n the absence of adequate legislative and executive help, we must give meaning to the constitutional doctrine in the cases before us through our own devices, even if they are relatively less suitable."[86] This same gap was identified in Williams' analysis as he states, "[m]ore frankly than most, the opinion says almost directly that when a major constitutional right is involved and the Legislature does not act, the responsibility to act passes to the judiciary."[87] Because of the lax nature of the legislative branch to support the decision of the New Jersey Supreme Court in implementing this widespread doctrine, the court took upon itself to reassert the stance of its previous ruling.[88]

In order to determine which municipalities were in the path of development and their individual fair share obligations, the court used the State Development Guide Plan as a resource.[89] Under Governor Brendan T. Bryne's tenure, the State Development Guide Plan was a statewide land use guide or plan established to review major development projects for state input.[90] Within this plan were designations for growth across the state.[91] This allowed the court to further define the "developing municipality" of *Mount Laurel I* with an existing instrument of the state that would render information useful in determining growth patterns across the state as well as population and demographic shifts.[92] Now, the court had a mechanism for determining the actual need for low- and moderate-income housing across the state through its own means beyond the unresponsive legislature.

83. Span, *supra* note 40, at 52.
84. *Mount Laurel II*, 456 A.2d at 453.
85. *Id.* at 456.
86. *Id.* at 417-18.
87. Williams, Jr., *supra* note 73, at 18.
88. *Mount Laurel II*, 456 A.2d at 456-57.
89. *Id*. at 418.
90. STATE OF NEW JERSEY DEP'T. OF STATE, *Chronology*, http://www.state.nj.us/state/planning/spc-research-chronology.html (last visited Apr. 7, 2015).
91. *Mount Laurel II*, 456 A.2d at 419.
92. *Id.* at 433-34.

The goal of establishing the parameters for the realistic opportunity for the economically disadvantaged groups now had a judicial remedy for analysis of present and future litigation.[93] It also addressed the nature of building PUDs designed for multi-family housing.[94]

As discussed *supra*, following the decision in *Mount Laurel I*, many municipalities did not engage in affordable, multifamily developments.[95] The response to this effect would be known as the "builders' remedy."[96] In order to abate this problem, there needed to be some incentive for private builders to engage in the development of low- and moderate-income housing.[97] In theory, builders (or developers) presented another useful tool of evaluating the methods by which municipalities could adhere to their obligation.[98] The builders themselves would act as watchdogs, because they now were granted the power to seek litigation if they found that a municipality was not in accordance with the law.[99]

In one of the most controversial aspects of *Mount Laurel II*, builders were identified as "the most likely means of ensuring that lower income housing is actually built."[100] Builders sought to benefit from this ruling. The timing of this decision, as McDougall discusses, came when interest rates were declining and the overall housing industry was recovering.[101] This made the development of market-rate housing profitable while also providing legal support for developers to seek the legal obligation of developing municipalities to meet their fair share.[102] It also provided an environment in which developers could now sue municipalities for not allowing them to build at market-rates while also fulfilling their regional need for low- and moderate-income housing.[103] There now was to be a set aside for

93. *Id.* at 410-11.
94. *Id.* at 460-61. Due to the significant need for multifamily units, the State Development Guide Plan called for an increase in the amount of PUDs across the state in counties where there was a growing percentage of low- and moderate-income families. However, Mount Laurel had approved four PUDs pursuant to N.J. STAT. ANN. 40:55-54-67 (subsequently replaced by the Municipal Land Use Law), which would have provided 10,000 units by the year 2000 once completed. Although allowing multi-family housing, these PUDs were similarly too expensive for lower income families and thus adversely adherent to the recommendations made in the State Development Guide Plan.
95. *Mount Laurel II*, 456 A.2d at 460-62.
96. *Id.* at 452.
97. *Id.* at 443.
98. *Id.* at 452.
99. *See id.*
100. *Id.*
101. McDougall, *supra* note 36, at 630.
102. *Id.*
103. *Id.* at 631.

one in five units of new development for low- and moderate- income housing.[104]

The measures taken in this case were not the norm of how judicial review works, not just in land use policy, but across the board.[105] The ability of the court not only to rule on land use and zoning ordinances, but also to set in place methods for local municipalities to implement and adhere to its decision, demonstrates an evolution of the court in terms of judicial review.[106] Kirp et al. discuss this particular response as one of an "affirmative liberty" stating "most constitutional rights take the form of what philosopher Isaiah Berlin calls 'negative liberty'—that is, they protect individuals from government. But *Mount Laurel II* called for 'positive liberty,' an affirmative requirement that every town take responsibility for its 'fair share' of the state's poor."[107]

In *Mount Laurel II*, the court, having been brought numerous cases concerning zoning ordinances since *Mount Laurel I*,[108] took the opportunity to not only specifically define the parameters around which municipalities should act in zoning reforms, it created mechanisms to which future litigation could adhere.[109] The court substantially laid out guidelines for incentive zoning, mandatory set asides, zoning for mobile homes, as well as other builder stipulations.[110] The particular concern of the court's actions, as discussed by Harrison and Tarr, lies in two causes:

> First, although constitutional activism by state supreme courts may be more legitimate than similar activism by federal courts, the court in *Mount Laurel II* did not justify adequately the breadth and depth of its intervention in the political process. Second, the fact that the court failed to consider relevant research relating to

104. JOHN P. DWYER, DAVID L. KIRP, & LARRY A. ROSENTHAL, OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 102 (1995).

105. *Id.* at 107.

106. *Id.* at 102-107.

107. *Id.* at 101.

108. There were five other cases included in the *Mount Laurel II* case due to their similarities and relevance. The other five cases were Urban League of Essex Co. v. Township of Mahwah, 504 A.2d 66 (N.J. Super. Ct. Law Div. 1984); Glenview Development Co. v. Franklin Township, 397 A.2d 284 (N.J. Super. Ct. Law Div. 1978); Caputo v. Twp. of Chester, Docket No. L-42857-74 (Law Div. Oct 4, 1978) (unreported); and two trial court judgments that were reversed by the Appellate Division: Urban League of Greater New Brunswick v. Borough of Carteret, 359 A.2d 526 (N.J. Ch. 1976), rev'd, 406 A.2d 1322 (N.J. Super. Ct. App. Div. 1979); and Round Valley, Inc. v. Twp. of Clinton, 413 A.2d 356 (N.J. Super. Ct. App. Div. 1980), rev'd by S. Burlington Cnty. NAACP, 456 A.2d 390 (N.J. 1983), transferred by Hills Dev. Co. v. Bernards, 510 A.2d 621 (1986); rev'd by Urban League of Essex Cnty. v. Twp. of Mahwah, 559 A.2d 1369 (1989) (retrieved from http://njlegallib.rutgers.edu/mtlaurel/aboutmtlaurel.php (last visited Mar. 6, 2016).

109. *See Mount Laurel II*, 456 A.2d at 441.

110. *See id.* at 445-53.

> land use regulation and to possible adverse consequences of its decision raises serious doubts not only about the desirability of its policy prescriptions but also, more generally, about judicial capacity to contribute in a useful way to policy in this area.[111]

While seen as far-reaching and beyond the power of the court, it was now upon the municipalities to provide the "realistic opportunity" the court sought in the first place or combat the judicial branch altogether.[112] However, such "activism" potentially lends itself to further dispute by other courts.[113] Nonetheless, the court's methods taken here depict an active response of judicial review.

III. Legislative Response and The Fair Housing Act of 1985

Criticism of the New Jersey Supreme Court reached an all-time high as many municipalities resisted the court's authority to institute all of the remedies sought.[114] The court's controversial actions provided an environment for the executive and legislative branches to act. Under the governorship of Thomas Kean, who was not at all enthusiastic about the ruling in *Mount Laurel II*,[115] the other two branches of government pursued actions that would limit (or remove) the orders of the court.[116] In 1985, the Fair Housing Act ("the Act") was passed by the New Jersey legislature in response to *Mount Laurel II*.[117] The passage of this piece of legislation did not only signal that the concerns of exclusionary zoning were known to policymakers; it also stood as a signal to the judicial branch to get out of exclusionary zoning altogether.[118]

The Act established a Council on Affordable Housing ("COAH") in the Department of Community Affairs consisting of twelve members appointed by the Governor (with the advice and consent of the Senate), of whom "four are elected officials representing interests of

111. Harrison and Tarr, *supra* note 71, at 567.
112. *Id.* at 578.
113. *Id.* According to Harrison and Tarr, the extraordinary remedies taken in *Mount Laurel II* illustrate how "the court justified the posture and measures it had adopted by noting their resemblance to those taken by the federal courts in institutional litigation. However, the court failed to acknowledge that the legitimacy of such federal judicial intervention is itself a matter of dispute." *Id.* at 528.
114. *Id.* at 529.
115. DWYER, ET AL., *supra* note 104, at 111.
116. Paula A. Franzese, Mount Laurel III*: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 35 (1988).
117. McDougall, *supra* note 36, at 635.
118. DWYER, ET AL., *supra* note 104, at 137.

local government."[119] Of those four, at least one would be from an urban municipality and no more than one would be from a county government.[120] In addition, one would be the Commissioner of Community Affairs, four members would be appointed representing the interests of the low- and moderate-households, one representing the builders of such households, and three would be figures of public interests.[121] In order to decrease the possibility of partisanship, there would be no more than six members of the same political party on the Council.[122] As proposed by the court in *Mount Laurel II*, COAH could now preside over cases of exclusionary zoning rather than the state trial courts.

The Act also established an effective moratorium on the builder's remedy where any municipality in the state of New Jersey subject to or currently engaged in exclusionary zoning litigation in state court could (while their case was pending) petition the court to transfer the matter to COAH, theoretically a more suitable forum for such matters.[123] The state's actions now filled a void created by its previous inaction—a remedy the court initially wanted.[124] And so, as the state passed the Fair Housing Act of 1985, it shifted the dynamic nature of political concern back into the hands of the state actors other than the judiciary. As Kirp et al. discuss, this was a blunt message to the high court to get out of the business of exclusionary zoning.[125]

This shift of reaction to exclusionary zoning by the legislature was welcomed and upheld in the court in *Hills Development v. Bernards Township* (commonly known as *Mount Laurel III*).[126] This case involved challenges to the constitutionality of the Fair Housing Act of 1985.[127] While the court took dramatic approaches in *Mount Laurel I* and *II*, in this case the court returned to a more traditional role, upholding the Act and the establishment of COAH. The issues rested on the ability of COAH to uphold the responsibilities set forth by the guidelines under *Mount Laurel II*.[128] The plaintiffs presumably feared that COAH would act as a largely political body (due to COAH

119. N.J. STAT. ANN. § 52:27D-305(a).
120. *Id.*
121. *Id.*
122. *Id.*
123. McDougall, *supra* note 36, at 635.
124. *Id.* at 630.
125. DWYER, ET. AL., *supra* note 104, at 137.
126. Hills Dev. Co. v. Bernards, 510 A.2d 621 (N.J. 1986) (*Mount Laurel III*).
127. *See id.*
128. Span, *supra* note 40, at 64.

appointments by the Governor) and favor certain zoning ordinances restricting the need of affordable housing. As the court pointed out, the Act, as written and if properly carried out, should increase the realistic responsibility of municipalities to provide affordable housing.[129] This point was resolved in *Mount Laurel III*:

> Most objections raised against the Act assume that it will not work, or construe its provisions so that it cannot work, and attribute both to the legislation and to the Council a mission, nowhere expressed in the Act, of sabotaging the *Mount Laurel* doctrine. On the contrary, we must assume that the Council will pursue the vindication of the Mount Laurel obligation with determination and skill. If it does, that vindication should be far preferable to vindication by the courts, and may be far more effective.[130]

In matters concerning the future of COAH, such matters rested not in the court's decision of this particular case, but by the "determination and skill" of the Council to do right by its mission.[131] The validation of the court in upholding the Fair Housing Act provided the needed legal certainty in the future progression of exclusionary zoning litigation and municipalities adaptations.

In terms of litigation, constituencies concerned with the practice of exclusionary zoning now had a government body created by legislation, supported by court ruling, to decide on those questions of "fair share" and exclusionary zoning. In terms of municipal adaptations, there were mechanisms in place to resolve the issues of affordable housing throughout the state in terms of different incentives for developers such as tax abatements, as well as avenues for legal responses if exclusionary practices continued to occur.[132] The culmination of these court cases changed the legal scope of exclusionary zoning practices for decades to come. As a result, future patterns of physical and economic segregation would prove to be indicators of continued stagnation.[133]

As Kirp et al. discuss, this is a form of defeat by the court.[134] The written opinion of Chief Justice Wilentz demonstrates the court's willingness to become "active" if the other branches remain inactive on matters of

129. *Mount Laurel III*, 510 A.2d at 631.
130. *Id.* at 632.
131. *Id.*
132. *Id.* at 657.
133. *See generally* ALBRIGHT, ET AL., *supra* note 12; Naomi Bailin Wish & Stephen Eisdorfer, *Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268 (1997); Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, J. LAND USE & ENVTL L. (1996).
134. DWYER ET AL, OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 120 (Rutgers Univ. Press 1995).

police power. As he wrote, "[s]o while we have always preferred legislative to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build houses, but we do enforce the Constitution."[135] This was not a submission to the legislature by the New Jersey Supreme Court. This statement not only applauded the work of the court itself, it also re-enforced the circumstances upon which the court should act, while also noting the degree to which it would act to protect state constitutional rights, if another lax environment presented itself. Thus the trilogy of cases concerning the *Mount Laurel* doctrine presents a unique display of the legal responses in relation to the "affirmative activism" of the courts in matters allowed by judicial review when there is inaction by the legislative and executive branches. Such depiction serves as a demonstrative guide to social concerns in relation here to land use planning.

IV. Conclusion

This historical analysis tracing the processes by which exclusionary zoning evolved from the powers of local municipalities to the establishment of COAH demonstrates a unique look at the ability of the court to act through judicial review. It highlights a monumental point in the history of land use planning depicting the abusive nature of exclusionary zoning practices leading to the *Mount Laurel* doctrine and still litigated.[136] The findings in this analysis identify three critical, theoretical points: (1) *Mount Laurel I* was decided on state constitutional grounds, not statutory or federal constitutional grounds, (2) the court in *Mount Laurel II* acted in a fashion of judicial review that was of an "activist" or "interventionalist" approach, and (3) the effects of the *Mount Laurel* doctrine are still taking shape through the implementation of equitable zoning laws and affordable housing developments despite the resistance of local municipalities.

135. *Mount Laurel III*, 510 A.2d. at 634.

136. There is still ongoing litigation in reference to regulations taken by COAH. The Court is reviewing the process by which COAH adopted regulations that would define local government's affordable housing obligations for the period 1999 to 2018. The question before the Supreme Court is whether COAH should be able to use its "growth share methodology" in order to uphold the rulings of the *Mount Laurel Doctrine*. The agency of the council is thus in question. *See* Hank Kalet, *With Future of COAH Still Cloudy, Many Towns Shelve Plans to Build Affordable Housing*, N.J. SPOTLIGHT, Mar. 25, 2013, http://www.njspotlight.com/stories/13/03/25/with-future-of-coah-still-cloudy-many-towns-shelve-plans-to-build-affordable-housing/.

The New Jersey Supreme Court's intent to fill the gap left by inaction of the legislative and executive branches in this case demonstrates a unique situation in the course of judicial review. Such actions pinpoint a critical nexus in the field of social science as to the political behavior of the judicial branch in solving social problems related to housing issues. And while the decisions laid out in the *Mount Laurel* doctrine have changed the evolution of land use planning legally; moreover, it has also changed the nature of affordable housing concerns both politically and socially.