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Lawyers, Judges, and the Public Interest

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SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES. By *Charles Haar*. Princeton: Princeton University Press. 1996. Pp. xiv, 256. $29.95.

Charles Haar, the Louis D. Brandeis Professor of Law Emeritus at the Harvard Law School and a certified elder statesman of the housing and land-use community, was one of those scholar-politicians of the 1960s who spun out innovative theories in law reviews and then moved into government to see them applied. His generation inspired mine to pursue law as a means to serve the public interest. But the days of the Kennedy brothers' Camelot are long past. Today, big government and "big courts" alike are seen as parts of the problem. In the more austere political climate of the 1990s, however, Charles Haar is not the least bit repentant, and he has found a magnificent topic around which to reaffirm his faith in the capacity of big government and, particularly, big courts to move us collectively toward the just society. In *Suburbs Under Siege: Race, Space, and Audacious Judges,* Professor Haar dissects New Jersey's famous *Mount Laurel* cases,[1] finding in them not only a compelling demonstration of judicial success in the arduous task of law reform, but confirmation that courts can be *better* than legislatures at such a task.

Suburbs Under Siege is a very welcome book. For too long, commentary on the *Mount Laurel* doctrine, one of the most important social initiatives of our time, has been left in the hands of people like myself who are day-to-day players at the grassroots level, and who therefore inevitably risk commenting with an advocate's bias.[2] Charles Haar brings into the conversation not only his wealth

* Professor of Law and Justice Frederick Hall Scholar, Rutgers, Newark. B.A. 1963, Yale; J.D. 1970, Harvard. — Ed.

1. Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) *(Mount Laurel I);* Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) *(Mount Laurel II).*

2. Of course, I am now going to comment on Professor Haar's book from my perspective as a day-to-day player, and so it is only fair that I summarize briefly my involvement with this issue. I had no lawyer's role whatsoever in the first and second *Mount Laurel* cases themselves, but from 1983 onwards, I served as co-counsel to the public-interest plaintiffs in *Urban League of Greater New Brunswick, see infra* note 27. *Urban League* was one of the first fully litigated cases under the *Mount Laurel II* rules and it therefore became the laboratory for distilling into workable form many of the bold but untested remedies that had been author-

of experience and formidable analytic skill, but also his fresh perspective. He renewed my faith in what I have been doing for the past two decades. There was an unmistakable goodness about the best of the 1960s commitment to social reform through law, and that goodness pervades *Suburbs Under Siege.* If Professor Haar's vision sometimes exceeds his grasp, then as now, his unshakable conviction that humankind is perfectible and that lawsuits can lead the way reminds me of why I decided to become a public-interest lawyer in the first place. The book is about late-century land-use law, but it should be read by anyone who wishes to understand the heart and soul of postwar legal liberalism.

Despite my enthusiasm for *Suburbs Under Siege,* however, I have two fundamental disagreements with Professor Haar's approach to the *Mount Laurel* saga. Our differences are important, because the *Mount Laurel* doctrine has not traveled well beyond New Jersey, and it is important to understand why.[3] He and I are in complete agreement that there is a legitimate role for courts in breaking the political stalemate that has brought us exclusionary zoning, racial discrimination, and an unacceptable degree of social distress in sheltering our people. But our different takes on the *Mount Laurel* cases may explain why those cases have not sparked a land-use revolution. Specifically, it is my view that Professor Haar overvalues the importance of co-opting the private sector as a key element in the success of the *Mount Laurel* process. I also believe that he overstates the case for the legitimacy of the New Jersey Supreme Court's intervention into land-use policymaking by not inquiring closely enough into the precise nature of the constitutional violation at hand and the possibility of different paths to the goal of land-use equity.

The *Mount Laurel* Story

In all likelihood, the reader whose attention has been drawn to *Suburbs Under Siege* is already familiar with the New Jersey

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ized in principle by the New Jersey Supreme Court. In January 1986, I argued (unsuccessfully) the *Urban League* portion of the so-called *Mount Laurel III* case, described *infra* note 13 and accompanying text, before the supreme court, and in 1993 I represented the New Jersey affiliate of the ACLU *amicus curiae* in the *Warren Township* case, described *infra* text accompanying note 53. I was during this same period a founding member and President of the Alliance for Affordable Housing, a coalition of public-interest groups that successfully coordinated opposition to a proposed constitutional amendment that would (as its proponents urged on their bumper stickers) "Undo Mount Laurel Two." The Alliance also conducted the first major study of *Mount Laurel* compliance, *see infra* note 21. At present, I am representing a statewide advocacy organization, New Jersey Future, in as yet unpublished litigation against the Council on Affordable Housing that challenges approval of an inclusionary development on the basis that it violates the "sound planning" language in the second *Mount Laurel* case, *see* 456 A.2d at 430-31.

3. It has been expressly followed, and then only in a limited way, in New Hampshire. *See* Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991).

Supreme Court's bold experiment in law reform, the *Mount Laurel* doctrine, and it is not my intention to retell the story here under the guise of reviewing the book. Nor, in all frankness, would I send the reader to Professor Haar's account solely for the purpose of acquiring the narrative details of the events in question; while his telling of the tale is serviceable, his real interest in telling it — and mine in his telling — is so that he can then use the story as a case study in judicial activism.[4]

The Mount Laurel *Litigation*

Let this skeletal summary suffice, then. In 1971,[5] a team of young legal services lawyers in Camden, New Jersey came to the aid of black residents of Mount Laurel Township, a once-rural community that was rapidly developing as a bedroom suburb of Philadelphia. Their goal was to break the municipality's exclusionary land use system, which consisted of zoning laws and habitability codes operating in tandem to force demolition of the poor, rundown housing that was all the plaintiffs could afford — a chicken coop in one notorious example — and to preclude the construction of modest new homes and subsidized public housing that could have given them safe, sanitary, and affordable alternatives. When the case reached the New Jersey Supreme Court, it was welcomed by Justice Frederick Hall, who had been campaigning within the court for years to reform its excessive deference to municipal autonomy in land-use matters.[6] Justice Hall's opinion gave voice to what is now known as the *Mount Laurel* doctrine:

> We conclude that every such [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. . . . at least to the extent of the municipality's fair share of the present and prospective regional need therefor.[7]

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4. For an exhilarating recounting of the *Mount Laurel* story that fills in the bare outlines I have sketched here, the reader will want to seek out DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995).

5. Professor Haar erroneously dates the original lawsuit to 1974. Pp. 1, 17. The papers were actually filed in May 1971; the trial court opinion was issued on May 1, 1972, *see* Southern Burlington County NAACP v. Township of Mount Laurel, 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972), and the Supreme Court opinion on March 24, 1975, *see Mt. Laurel I*, 336 A.2d 713.

6. Justice Hall's dissent in *Vickers v. Gloucester Township*, 181 A.2d 129, 140, 145 (N.J. 1962) (Hall, J., dissenting), is commonly regarded as the opening judicial salvo in the campaign that eventually resulted in the *Mount Laurel* doctrine.

7. *Mount Laurel I*, 336 A.2d at 724. The "regional fair share" obligation of *Mount Laurel I* was originally interpreted to apply only to "developing" municipalities such as Mount Laurel Township. *See Mount Laurel II*, 456 A.2d at 422-23. This interpretation was modified in *Mount Laurel II* to apply to all municipalities throughout the state, insofar as they had "indigenous" housing need. Municipalities that encompassed land that was identified on state plans as appropriate for "growth" had further "fair share" obligations beyond their indigenous need. *See* 456 A.2d at 430.

This first *Mount Laurel* opinion prompted furious political opposition, municipal intransigence, and a flood of lawsuits, but very little actual progress toward breaking the back of exclusionary zoning. Then, in 1983, under the vigorous leadership of new chief justice Robert Wilentz, the court issued a second major decision, *Mount Laurel II*,[8] in which it reaffirmed the holding of the first *Mount Laurel* case and outlined a sweeping set of remedial steps designed to ensure that municipalities obeyed their obligations under the New Jersey Constitution. Three specially assigned trial judges were given responsibility for all *Mount Laurel*-related litigation throughout the state. They were told to develop a formula that would assign specific numerical "fair share" obligations to individual municipalities, and they were authorized to grant "builder's remedies" to plaintiffs who successfully demonstrated that a municipality's land use ordinances were exclusionary. Pursuant to a "builder's remedy," the successful developer-litigant could bypass the local zoning and win a court order permitting its project to be built, so long as the builder proposed an "inclusionary development" — that is, one in which at least twenty percent of the units were made affordable to low- and moderate-income households.[9]

The Legislative Response

When the *Mount Laurel* trial judges began implementing their *Mount Laurel II* powers vigorously in 1984 and 1985, the legislature finally responded, as the court had been urging it to do since 1975. It enacted the Fair Housing Act of 1985,[10] arguably the most progressive piece of state housing legislation anywhere in the country. The Act's centerpiece was a new agency, the Council on Affordable Housing (COAH), which was authorized to take over from the courts the task of calculating housing obligations and certifying compliance plans for any municipality that voluntarily submitted to the Council's jurisdiction. The bait for doing so was that "substantively certified" municipalities were effectively immunized from *Mount Laurel* litigation.[11] The Act also authorized municipalities to transfer up to fifty percent of their fair share obligations to other municipalities pursuant to so-called Regional Contribution Agreements (RCAs), so long as the "sending" municipality also financed the housing activity in the "receiving" municipality.[12] In practice,

8. 456 A.2d at 390. Justice Hall, the author of *Mount Laurel I*, retired from the court shortly after that decision was announced and had died by the time *Mount Laurel II* was decided.

9. *See Mt. Laurel II*, 456 A.2d at 452. On inclusionary zoning generally, see ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES (1984).

10. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1997).

11. *See* N.J. STAT. ANN. § 52:27D-322.

12. *See* N.J. STAT. ANN. § 52:27D-312.

this permitted a reallocation of fair share housing obligations — and the low-income housing itself — from all-White middle-class suburbs to poorer and non-White urban centers.

In 1986, in *Hills Development Co. v. Township of Bernards*,[13] the New Jersey Supreme Court upheld the constitutionality of the Act, even while acknowledging that in some respects it diluted the methods of compliance that had been developed judicially. Since then, the supreme court has largely withdrawn from the field. It has tinkered at the edges, generally in ways that are helpful to the proponents of housing equity,[14] but has not revisited first principles, as it did in *Mount Laurel II*. The process remains controversial, but not at the white-heat level of a decade ago — when the governor could score political points by denouncing *Mount Laurel II* as "communistic."[15] The Council on Affordable Housing has bent over backward to accommodate municipal interests and concerns, and while housing advocates have decried the slow pace of progress, they have lacked the political power to control the process to the extent that they did in the courts.

In recounting all of this, *Suburbs Under Siege* takes an understated approach, but Professor Haar leaves no doubt about his admiration for the *Mount Laurel* doctrine and the judges that produced it. He has a deft way of capturing points of the story in a phrase that is just right; he describes the odious RCAs, for example, as a "safety valve" (p. 114), the kind of messy compromise that politicians regularly craft and that judges must learn to accept if they are to infiltrate the politician's turf in law reform cases. His characterization of the internal division between "the infantry of the trial courts and the strategic headquarters of the supreme court" (p. 32) puts into clear perspective a problem that bedeviled administration of the first *Mount Laurel* opinion. Cases under the *Mount Laurel* doctrine prior to 1983 were so numerous, so complex, and so never-

13. 510 A.2d 621 (N.J. 1986). *Hills* is often erroneously referred to as *Mount Laurel III*, though Mount Laurel township was then no longer a party to any exclusionary zoning litigation.

14. In addition to the two major cases discussed later in the text, *Holmdel Builders Assn. v. Township of Holmdel*, 583 A2d 277 (N.J. 1990) (upholding municipal authority to levy development impact fees to support *Mount Laurel* compliance) and *In re Warren Township*, 622 A.2d 1257 (N.J. 1993) (limiting residency preferences in compliance plans), *see, e.g.*, Prowitz v. Ridgefield Park Village, 584 A.2d 782 (N.J. 1991) (*Mount Laurel* units to be assessed for property tax purposes at controlled, rather than market, price). For a less helpful, although arguably correct, decision, see *Alexander's Department Stores, Inc. v. Borough of Paramus*, 592 A.2d 1168 (N.J. 1991) (COAH does not have ancillary jurisdiction to resolve conventional zoning disputes that derive from a municipality's certified fair share plan).

15. *See* KIRP ET AL., *supra* note 4, at 121. The authors attribute the quote to an interview in the *New York Times* but do not provide a citation. For one version of the remark, see Robert Hanley, *Some Jersey Towns, Giving in to Courts, Let in Modest Homes*, N.Y. TIMES, Feb. 29, 1984, at A1, reporting that Governor Kean, in an interview, described forced economic mixing as "a 'communist' concept."

ending that the lower courts at times all but subverted Justice Hall's mandate in order to make them go away. This explains why the second *Mount Laurel* decision concentrated all implementing power in three specially assigned trial judges, who would have primary loyalty to the *Mount Laurel* opinion and the process it mandated, without any other docket pressures. He also points out, with just the right touch of irony, that a success of the *Mount Laurel* doctrine was to force the breakdown of stereotypes about poverty and race in the sensitive area of land use, where an instinctive defense of home can blind otherwise fair-minded people to the callousness of their attitudes: "Whenever a town absorbs new low- and moderate-income housing and the sky does not come tumbling down, other communities will be that much more likely to take the leap themselves" (p. 191).

Understanding the Mount Laurel *Story*

But I do not mean to suggest that the success of *Suburbs Under Siege* is solely one of style, although the readable text and well-paced eloquence are certainly welcome. Professor Haar also offers a number of thoughtful insights into the *Mount Laurel* process itself. He notes, correctly, that *Mount Laurel II* does little to explicate the moral and ethical basis of the doctrine, a crucial judicial mistake attributable, at least in part, to "hubris" on the part of the chief justice (p. 48). He then continues with this summary passage, which reveals the central problem of politics and judicial legitimacy:

> With the wisdom born of the litigation that followed Mount Laurel II, it is clear that the court should have focused more intensely on educating the public. . . . Mount Laurel II appears unwilling to stoop to the concerns and queries of the average citizen. Indeed, the most resounding chord in the opinion is not the court's desire to explain the necessity for, or the limited or temporary nature of, the judicial intervention, but a determination to put steel into its Mount Laurel Doctrine. [p. 50]

Other useful insights abound. Haar correctly notes that New Jersey's Fair Housing Act and the ensuing COAH regulations codified the core, although not always the details, of the *Mount Laurel* doctrine (p. 71) — a view quite unlike the more conventional view of the Act, and of the *Hills* decision sustaining the Act, as a "sellout." He points out that there is a strong parallel between the role of the court-appointed "expert" or master in *Mount Laurel* cases and the conventional role of a planner in advising governments as they make land-use decisions,[16] although he does not pursue the implications of this by also pointing out that the more the court's work looks like conventional planning activity, the more it

16. P. 79.; *see also* p. 82 (emphasizing the political skills of the masters).

appears to the average citizen to be encroaching on political terrain. Haar provides a good, balanced summary and critique of the Fair Housing Act and the *Hills* decision, in which he largely avoids the winners-losers trap[17] — if the municipalities won, then the good guys must have lost. Haar also gets the *Holmdel* decision right, pointing out that by essentially writing into the Act an authorization for development fees to subsidize lower-income housing that nowhere appears explicitly in the legislative text, the decision continues and reaffirms the court's pre-Fair Housing Act pattern of making policy.[18]

Inevitably, I have a number of small- and medium-sized cavils about Professor Haar's recounting of the *Mount Laurel* story, many of which are explainable by the different vantage points he and I have on the case. Eventually, it would be good to have a *Mount Laurel* memoir written by one of the original legal team, but I do not want to detract from Professor Haar's accomplishment by nitpicking. Rather, I see his book as the start of a dialogue about the courts and land-use policy, and to that end I turn to two major themes, the public-private balance and the legitimacy issue, about which I do have serious reservations.

Profiting in the Public Interest

A recurring, and somewhat surprising, theme of Professor Haar's book is that the court wisely entrusted the prosecution of exclusionary zoning cases to private developer-plaintiffs, rather than to public-interest groups. The central compliance technique of *Mount Laurel II,* the builder's remedy, provided a huge profit incentive for private developers. Equally important, the case not only shifted the initiative in *Mount Laurel* litigation from public-interest plaintiffs to the private sector, it also dramatically reduced the risk of litigation. The court simplified and objectified the *Mount Laurel* rules so much that, in the infamous comment of one developer's attorney, defeating a municipality "is as simple as clubbing baby

17. Pp. 96-98. He does miss a subtle, but key, point, however. To the extent that there were clear winners and losers in *Hills,* the losers were those builders and public-interest plaintiffs who were unable to prevent courts from transferring their cases to the newly created Council on Affordable Housing, so as to avoid a long hiatus while the COAH drafted its substantive rules. This delay was not mandated by the Act, which permitted the courts to retain cases where there would be a "manifest injustice" in transferring them, *see* N.J. Stat. Ann. § 52:27D-316[a], a standard that easily could have been met by cases that had been in litigation for a decade or more and were, in some instances, literally within days of final judicial resolution. *See Hills,* 510 A.2d at 635 (noting that the final Cranbury Township hearing was scheduled for December 2, 1985, 35 days before oral argument in *Hills*). By the time the transferred cases began emerging from COAH in 1988 and 1989, the huge building boom of the 1980s was deflating rapidly, and a great deal of affordable housing that could have been built in inclusionary developments was lost or seriously delayed.

18. P. 120 (analyzing *Holmdel,* 583 A.2d 277 (N.J. 1990)).

seals."[19] Prior to *Mount Laurel II,* there had been a mixture of public and private plaintiffs; the actual *Mount Laurel* case had no private developers participating as parties until after the decision in *Mount Laurel I* in 1975. Between 1983 and 1986, more than a hundred private developer suits were filed against some seventy municipalities, and no new public interest suits were filed.[20]

The "Builder's Remedy"

Commentators have generally applauded the court's endorsement of the builder's remedy, and with some justification; co-opting the private housing market in an era of declining public subsidies for low- and moderate-income housing produced results in the early years after *Mount Laurel II* that would have been otherwise unobtainable.[21] But Professor Haar warns us that these results came at a price — "the builder's remedy narrowed the scope of latent solutions, and once unleashed, it was potentially powerful enough to distort the impact of the Mount Laurel Doctrine" (p. 45). He is certainly right about that. As I have explained elsewhere, the ability to provide land to build "inclusionary developments" in satisfaction of the builder's remedy became the be-all and end-all of the compliance process, so much so that inclusionary zoning is now welded permanently into the fair share rules of the Council on Affordable Housing.[22] Through a "vacant land adjustment"[23] and a fair-share calculation based on the concept of the "reasonable development potential"[24] of the municipality, the COAH rules essentially exclude *Mount Laurel* compliance where large, new inclusionary developments are not feasible, such as in most of the older, built-up parts of the state. This is certainly, in Professor Haar's language, a "distortion" of the intent of *Mount Laurel II* (p. 45).

Haar also recognizes the broader implications of the reliance on private sector builder-plaintiffs:

> [I]t became clearer, as lawsuits accumulated, that the builders were in there for their own profit, and that this was not an unalloyed good. Adam Smith (or perhaps Hobbes) was proven right again. Most builders were ready to make any kind of agreement with a municipality — even where the outcome fed the exclusionary quality of the

19. The quotation in the text is a paraphrase. Not surprisingly for a remark so flamboyant, it can be found in KIRP ET AL., *supra* note 4, at 105, rather than *Suburbs Under Siege.*

20. *See* Alan Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the* Berenson *Doctrine,* 4 PACE ENVTL. L. REV. 37, 119 (1986).

21. *See* Martha Lamar et al., Mount Laurel *at Work: Affordable Housing in New Jersey, 1983-1988,* 41 RUTGERS L. REV. 1197, 1210 (1989).

22. *See* statutes cited *infra* notes 23-24.

23. *See* N.J. ADMIN. CODE tit. 5 § 93-4.2 (1998).

24. N.J. ADMIN. CODE tit. 5 § 93-4.2(e)-(g).

> zoning ordinance — as long as they obtained the zoning changes that would enhance their own profit. . . . "I had less uneasiness about the whole litigation process when a public interest group was the plaintiff, rather than a builder. Therefore I felt less of a need for the court appointed master in the public interest cases," explained one of the Mount Laurel judges. [pp. 63-64]

Professor Haar quickly puts this trenchant criticism aside, however. He describes the builder's remedy at one point as "the grand strategy for achieving social reform without dependence on the political actors within the executive and administrative branches who might have resisted the Mount Laurel Doctrine or implemented it in a hostile spirit."[25] Results count, in other words; the end justifies the means. He was right in his initial skepticism, however. There were other "latent solutions" to the problem of providing lower-income housing in the suburbs, and he not only misses an opportunity to explore why they remained "latent," he falls into what I regard as the most serious error in his overall telling of the *Mount Laurel* story. To understand why this is so, I need to drop back for a moment and introduce a specific example.[26]

Private Remedies in Action: Cranbury Township

Cranbury Township, which Haar mentions only in passing (p. 111), was a defendant in the *Urban League* litigation, one of the six cases that composed *Mount Laurel II*.[27] Cranbury Township presented a picture far different from the Mount Laurel Township

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25. P. 146; *see also* p. 134 ("[T]he courts cleverly buttressed themselves by enlisting the business sector").

26. I note here in passing that *Suburbs Under Siege* does not dig into the storytelling of post-1983 events with the same thoroughness that it applies to telling the story of Mount Laurel Township. By the time of the *Hills* decision in 1986, Mount Laurel Township had settled its litigation and was no longer a significant player in the *Mount Laurel* story, and this leaves the storytelling without a focus. As a result, Professor Haar's discussion of the consequences of *Mount Laurel II* through implementation, legislation, and finally administrative procedures lacks the strong anchor in practical reality that informs the earlier part of the book. Much more attention needs to be given to the day-to-day implementation of the doctrine in the cases that became prominent after 1983. These cases can be told as stories, just as the Mount Laurel Township story is told, so that they are not known only from the slender evidence of the published judicial decisions. The lack of a strong, specific storytelling focus may be what leads Professor Haar astray in his enthusiasm for the market solution to the *Mount Laurel* problem, as I shall try to show by telling a bit more of the post-1983 *Mount Laurel* story.

27. Urban League of Greater New Brunswick v. Mayor of Carteret, 359 A.2d 526 (N.J. Super. Ct. Ch. Div. 1976), *revd.*, 406 A.2d 1322 (N.J. Super. Ct. App. Div. 1979), *modified*, 336 A.2d 713 (N.J. 1975). The narrative that follows in the text is based on my personal experiences during the *Urban League* litigation. I became co-counsel to the Urban League of Greater New Brunswick — it later changed its name to the Civic League of Greater New Brunswick — at the time of the remand and participated extensively in the subsequent proceedings. Documentation is available in the author's voluminous but unpublished litigation files in the case, which are available at Rutgers Law School for inspection by interested readers.

of 1970. Although Cranbury's land-use ordinances were hopelessly exclusionary — at least as Justice Hall would have understood the term — the town had better reasons to regret growth than did Mount Laurel. A small farming village surrounded by actively worked fields, its Main Street and adjacent residential district, dating from the turn of the nineteenth century, were listed on the National Register of Historic Places. "Preserving" Cranbury was an instantly marketable idea, the value of which could be understood readily by the average citizen of goodwill. Unfortunately for Cranbury, however, holding back time was not really an option: it was served by an adjacent exit on the New Jersey Turnpike, it was five miles or so due east of the burgeoning Route One Corridor area of office and research parks centered on Princeton University, and its elegant older homes made it a favorite for upper-level bureaucrats and private-sector lobbyists working in Trenton, the state capital, just a few miles to the south. Nor did Cranbury Township totally resist change, so long as it was in the form of tax-paying commercial development or upscale, large-lot subdivisions. Cranbury was, in short, an exclusionary community whose land-use ordinances stood in violation of the New Jersey Constitution, but in remedying that wrong there was a significant risk that the courts would do more harm than good by creating yet another example of a nice community ruined by sprawl development.

Prior to the decision in *Mount Laurel II,* Cranbury Township was in litigation on two fronts, against the Urban League plaintiffs — a public-interest group acting directly on behalf of lower-income people — and against a private builder's-remedy plaintiff whose principals included Carl Bisgaier, the lawyer who had brought the original *Mount Laurel* suit in 1970. Bisgaier and his colleagues, who remained committed to the social goals of the *Mount Laurel* doctrine, were out to prove that those goals could be combined with profitmaking in what might be seen as a form of socially responsible capitalism. Cranbury fought both plaintiffs fiercely.

After *Mount Laurel II,* however, it did not require rocket science to realize the profit potential of a builder's remedy. Cranbury, with its historic district, sylvan fields, and access to high-end employment, became a magnet for *Mount Laurel* lawsuits. Within a few months of the *Mount Laurel II* decision, eight additional developers sued Cranbury, offering a total of more than three thousand acres for development.[28] Had all of this land been developed as proposed, some 12,223 dwelling units would have been built at gross densities ranging from 4.8 to 10 dwelling units per acre; of

28. *See* Cranbury Township Comm. & Planning Bd., *Mount Laurel II* Compliance Program 1-2 (maps), tbl. 6 (Dec. 1984) (unpublished document on file with author) [hereinafter Compliance Program].

these, 2444 units would have been set aside for low- and moderate-income — that is, *Mount Laurel* — households,[29] more than the total number of *Mount Laurel* units that were eventually built statewide in the five years after 1983.[30] Cranbury, at the time of the 1980 Census, had a population of 1927 people and approximately 750 occupied dwelling units.[31]

The Urban League plaintiffs did not disagree that this amount of development was much more than a small community could realistically absorb over a short period of time, nor did they disagree that this amount of development would present potentially serious planning problems — including the destruction of valuable farmland. Had the Urban League been in the lawsuit by itself, these concerns would have been addressed with a view not only to building affordable housing but to the larger public interest as well. Each proffered site, and perhaps others, would have been examined by the plaintiff's experts for compliance purposes. But because none of the landowners or developers would have had a preemptive builder's-remedy claim in this alternative scenario, any one site could have been passed over had the Urban League and Cranbury chosen to do so in proposing a settlement to the court. Indeed, the Urban League would have been free to discuss with the township alternate ways of encouraging low- and moderate-income housing that did not involve inclusionary zoning at all.

This is exactly what happened in the neighboring township, Plainsboro, where for idiosyncratic reasons, the Urban League litigated by itself, without a single builder's-remedy claimant.[32] Plainsboro informed the Urban League that it would settle quickly to reduce litigation costs, so long as it could settle without a major infusion of new inclusionary developments. The town had grown rapidly from an agricultural village to a sprawl of garden apartments during the 1970s, and it had learned its planning lesson, even if a bit belatedly. An innovative settlement was concluded in due course that involved only 200 units in an inclusionary development — forty of which were for *Mount Laurel* households. The remainder of Plainsboro's fair share was to be met partly in a subsidized development consisting of 413 *Mount Laurel* rental units with no market rate units, and partly by taking development fees from new commercial developments in the Route One corridor and applying the money to buy down the cost of 120 rental units already in place

29. *Id.* at tbl.6, col. 7.

30. *See* Lamar et al., *supra* note 21, at 1210.

31. *Compliance Program, supra* note 28, at 4.

32. As with Cranbury, the Plainsboro narrative is drawn from my personal experience during the litigation and is documented in litigation files as explained *supra* note 27.

from the earlier phases of Plainsboro's growth — a kind of home-grown housing voucher program.[33]

In Cranbury, however, the builder-plaintiff sites drove out all strategies other than inclusionary zoning. No one could stop the builder plaintiffs from suing, and once they did, the supreme court had decreed, in effect, that at least one of them had valuable "rights." Worse, the glut of would-be builder's-remedy claimants made it impossible for the Urban League and any single builder plaintiff to settle with the township, because the losers were virtually guaranteed to challenge the settlement in court, eliminating any time-and-money incentive to settle in the first place. The Urban League had no choice but to sit by in frustration while the feeding frenzy proceeded apace, knowing that the defendant municipality was also sitting by, not in frustration, but in the enviable position of being able to avoid serious talk about settling a case that it could not win on the merits, hoping that the various plaintiffs would eventually exhaust themselves. In the end, it was not exhaustion but passage of time that mattered most, and Cranbury eventually did emerge as the winner. Cranbury was still in the midst of the court-supervised remedial process — violation of the *Mount Laurel* doctrine had already been determined by Judge Serpentelli — when the Fair Housing Act and the *Hills* decision transferred the whole mess to COAH.[34] COAH reduced the township's fair share number from 816 to 153, and most of the builder plaintiffs got nothing — including the Bisgaier group, which had borne the expense of litigation for years and which sold its site for development of expensive single-family homes on large lots when it became clear that it could not prevail with its inclusionary plan.[35]

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33. *See Urban League of Greater New Brunswick v. Mayor of Carteret, Consent Order Re: Plainsboro Township*, No. C-4122-73 (N.J. Super. Ct. Ch. Div. Apr. 22, 1985). This settlement later collapsed because the key subsidy for the 100% *Mount Laurel* development, tax-sheltered depreciation write-offs, was eliminated by Congress in the Tax Reform Act of 1986. *See* Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 871, 883 nn.62-64 (1993). But the principle behind the settlement remains sound: without a clutter of builder plaintiffs, a broader range of strategies can be considered seriously. The Plainsboro settlement could be roughly replicated today using the Low Income Housing Tax Credits that Congress eventually provided to replace the traditional tax-sheltering schemes. *See id.*

34. *See* Hills Dev. Co. v. Township of Bernards, 510 A.2d 621, 635 (N.J. 1986).

35. COAH eventually certified Cranbury's *Mount Laurel* compliance plan in 1987. *See* COAH, Mediation Report-Cranbury Township/Middlesex County, Audrey M. Winkler, Mediator, Aug. 24, 1987. The plan included an RCA transfer of 76 units to Perth Amboy, New Jersey, an old and poor port town at the mouth of the Raritan River; rehabilitation of 10 units of substandard existing housing; and two developments totaling 58 units. One was a senior citizen development, 100% low and moderate units, tucked in behind the historic Main Street shops and houses, adjacent to the public school and athletic field, and barely encroaching on the farm fields that stretched west from the village. The other was an inclusionary development of large, single-family homes on large lots, also sited as an extension of the existing village, and in this instance moving toward the highways that had already obliterated the rural character of the village in that direction. Most significant, the inclusionary —

The Urban League plaintiffs did try at one point to unclog the Cranbury litigation by supporting the township in a motion to strike the largest builder's remedy claimant on the ground that the developer, Lawrence Zirinsky, had used *Mount Laurel* as a "threat" to obtain other favorable, non-*Mount Laurel* development approvals before intervening as a *Mount Laurel* plaintiff. Professor Haar speaks favorably of the "threat" language in *Mount Laurel II* as a "further hedge[ ] about a remedy so powerful" (p. 45), but he does not connect it to the Cranbury experience. If he had, he might not have been so approving. To the astonishment of the other builder-plaintiffs, who thought that a public-interest party would, by definition, support them uncritically since they were offering to build lower-income housing, the Urban League argued that the court should define the "threat" exception to eliminate plaintiffs who did not come to the court "clean" — that is, whose first offer to the town was not for *Mount Laurel* housing. Unless the court adopted such a rule, the Urban League argued, the exact kind of tangle that was strangling the Cranbury litigation would result. Judge Serpentelli, perhaps understanding the supreme court's preference for private litigants better than the Urban League did, denied the motion. The "hedge," in other words, was flimsy and has not, so far as I am aware, had any significant use in the years since *Mount Laurel II*.

The Limits of Privatization

As for Professor Haar, there is no guessing about his admiration for the use of private litigants as the primary moving force in the *Mount Laurel* story, and this is the least successful theme of *Suburbs Under Siege*. Although Haar makes a gesture toward the public-interest bar by describing the "unusual combination of energies" that resulted when both public and private parties were bringing cases, he proceeds immediately to praise "[t]he rare coincidence of private- and public-sector interests [that] testifies to the ingenuity of Mount Laurel II in harnessing the expertise and profit drive of the private sector — the developer — in order to achieve a public end" (p. 63). It is the private sector, in other words, that he sees as essential to making the *Mount Laurel* doctrine a success. Nor is it simply that he sees the private sector as a useful addition to the mix; he appears to be deeply skeptical about the capacity of the public-interest bar to sustain this type of litigation. Thus, in a pas-

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Mount Laurel — units in this latter project are four-family units fitted into structures that have the scale and massing of the adjacent single-family homes, so that they do not appear incongruous in context. Except for the RCA and the smaller fair share, Cranbury's compliance plan easily could have been accepted by the *Urban League* plaintiffs in 1984. But the hammerlock of the builder's remedy made that kind of negotiation impossible.

sage soon after the words quoted above, he criticizes public-interest plaintiffs for delaying compliance in one unnamed case for six years because "they were not . . . equipped to monitor the development process" (p. 64). He is certainly correct that compliance dragged on for years in many cases, but it did so for a variety of reasons — including municipal creativity in finding ways to slow the process — and these problems were not confined to the public interest cases.[36] Moreover, as the Cranbury experience demonstrates, the "unusual combination of energies" that Professor Haar applauds at least nominally — the mix of public-interest and developer plaintiffs — has at least as much potential for slowing down the process as it does for benefiting from the enforcement capacity of the private sector.

Professor Haar's enthusiasm for private remedies leads him to several debatable conclusions. He is much too generous, for example, in appraising the work of COAH. I doubt that there is any public-interest housing advocate in the state of New Jersey who would agree with him that COAH has adopted an "aggressive posture in pursuing the Mount Laurel doctrine" (p. 104). As Professor Haar recognizes and describes accurately elsewhere in his book (pp. 92-93), the Fair Housing Act was adopted only grudgingly by a legislature in a political bind: home rule notwithstanding, it had to do something to get the courts off the back of outraged municipalities. COAH was set up to dissipate constitutional pressure, not to further expand constitutional confrontation by pursuing aggressive new policies. As I have explained, however,[37] COAH incorporated into its rules a single-minded focus on measuring compliance through large-scale inclusionary developments constructed by private developers, and this is apparently what Professor Haar sees as COAH's "aggressive" stance. Maybe so, but only to the extent that the public's interest in affordable housing coincides with the private interest of large-scale developers. *Suburbs Under Siege* does not do

36. For one example, see *Urban League of Greater New Brunswick v. Mayor of Carteret, Restraining Order re: Old Bridge Township,* No. C-4122-73 (N.J. May 31, 1985) (Serpentelli, J.). The builder was Oakwood at Madison, which had won the first builder's remedy that the New Jersey Supreme Court approved, *see Oakwood at Madison, Inc. v. Township of Madison,* 371 A.2d 1192 (N.J. 1977). The development could not be built in the housing recession of the late 1970s, and the Urban League, investigating the status of the township's compliance in 1984 after *Mount Laurel II,* found that the township, whose name had since been changed to Old Bridge, already had approved a market rate "phase" of the Oakwood development, without making any provision for the required *Mount Laurel* units. Because the normal rule in *Mount Laurel* development is that the lower-income units must be phased with the market units, to prevent the developer from walking away at the end with the subsidized units unbuilt, the Urban League had little difficulty persuading Judge Serpentelli that stern measures were in order. But the episode demonstrates that in proving "Adam Smith (or perhaps Hobbes) . . . right again," as Professor Haar puts it (p. 63), there is no obvious reason to prefer private to public litigants in *Mount Laurel* cases.

37. *See supra* text accompanying notes 23-24.

much to identify, let along explicate, the inherent tension between these two interests.

Later, in commenting on the court's willingness to uphold the Fair Housing Act, which undercuts some of the remedies developed by the *Mount Laurel* judges, Professor Haar offers the astonishing comment that "[h]ad there been more visible support from public interest groups, the court might have struggled harder [in *Hills*] to make the actions of the three trial judges more broadly applicable and to elaborate still further the principles of its doctrine" (p. 98). What Professor Haar overlooks is that by embracing the builder's remedy, the private-sector remedy, so wholeheartedly, the court, in effect, drove the public-interest bar out of the *Mount Laurel* area. Although public-interest litigation often depends heavily on the unpaid labors of volunteer attorneys, planning experts, and others, it still is not free; the Urban League litigation was supported by a substantial grant from a New Jersey foundation to pay for depositions, travel expenses of witnesses, and so forth. Furthermore, volunteerism has its limits. To be done well, public-interest litigation requires paid counsel that can devote adequate time to the case, just as any private-interest litigant would prefer. Thus, it remains a total mystery to me why the supreme court was so willing to award private-sector *Mount Laurel* litigants a substantial financial "bonus" in the form of a builder's remedy, while at the same time explicitly denying civil rights attorney's fees to public-interest plaintiffs.[38]

The baneful results of this tilt toward privatization include some of those that Professor Haar himself notes, but which he ultimately seems willing to disregard in his admiration for the court's genius in co-opting the private sector. Criticizing the standard 4:1 ratio of market rate to *Mount Laurel* units as too rigid, he observes that "[a]s time passed, it became clear that the court's formula had not squeezed the developers hard enough" (p. 166). But if the builders are the only parties before the courts, who is to do the squeezing? Certainly not the builders, whose profit margins are at stake. Haar points out that the emphasis on the builder's remedy shrinks the range of possible solutions, which in turn exacerbates the public-relations problem that he criticizes the court for not dealing with effectively. Because the builder's remedy gobbles up land — four units of market-rate housing to build each *Mount Laurel* unit — inclusionary zoning is a fat target for anyone who is concerned about overdevelopment and sprawl. This in turn provides a conve-

38. The *New Jersey Rules of Court*, N.J. R. Ct. 4:42-9, lists all of those cases in which fees are recoverable, without including *Mount Laurel*. The unavailability of state fees is implicit in *Urban League v. Mayor of the Borough of Carteret*, 559 A.2d 1369 (N.J. 1989) (denying a fee claim under federal attorney's fee law).

nient cover for those whose exclusionary motives are less admirable. As Haar correctly notes, the *Mount Laurel* process "may be faulted for failing to stress rental housing" (p. 166). This is of critical importance to low-income families, because they often lack the cash reserves and credit history to qualify for even a subsidized home purchase. But this dearth of rental housing results not because, as Professor Haar suggests, the trial judges and masters failed to require it; it results because the private sector did not want to build it and would not participate — even for the reward of a builder's remedy — if rental was a condition.[39]

Moreover, reliance on the private sector causes some of the disinterest among public-interest groups that Professor Haar decries. It is true that many of those whose advocacy is on behalf of the seriously poor have lost interest in the *Mount Laurel* process, but the overemphasis on the builder's remedy bears a significant share of the blame. The typical builder's willingness to subsidize *Mount Laurel* units ceases at about the point where a household earns less than forty percent of the regional median income. Even though techniques are available to adjust the mix in an inclusionary development so that families below this income level can be made eligible, most developers simply balk. So *Mount Laurel* is left open to the criticism that it does not serve the interests of the "poorest of the poor," those whose plight makes the most appealing case for changing public policy. The criticism is at least in part justified, but Professor Haar misses an opportunity to explain how the court missed an opportunity to make things better by thinking harder about the role of public-interest agencies in the process.

A Role for Public-Interest Plaintiffs

The supreme court got it exactly backward, I would argue, and in applauding the court's approach, so does Professor Haar. Because "Adam Smith (or Hobbes)" is alive and well in the spirit of the business community, the court should have recognized that the natural seat of public-interest law reform is in the public-interest community (p. 63). The court should have taken steps to bolster the ability of civil rights organizations, legal services offices, and other civic groups to investigate, sue, and then monitor compliance with *Mount Laurel* orders, through the simple device of civil rights attorney's fees on the model of federal law.[40] In the extreme, one could argue that the builder's remedy, the most celebrated feature

39. Note, for example, that in the Urban League settlement with Plainsboro Township, *supra* note 33, the public-interest plaintiffs bargained for 413 of 453 new construction units to be rental rather than sales units, by relying on not-for-profit and public sponsorship and avoiding private market developers.

40. *See* 42 U.S.C. § 1988 (1994).

of the *Mount Laurel* doctrine, was unnecessary. All the court needed to do was to endorse the concept of inclusionary zoning. Public-interest plaintiffs then would have looked for appropriate inclusionary sites and cooperated with willing developers, retaining, along with the courts, some greater measure of discretion to avoid having to approve a development just because a builder had a "remedy."

But a court did not need to go as far as to take this extreme position. Public-interest and builder's-remedy claims could both have been allowed, had the court recognized that the builder's remedy — the inducement to sue — was unnecessary when there was already a competent public-interest litigant handling the case. In Cranbury, for example, the Urban League plaintiffs had been in the litigation for years; it was ludicrous even to consider rewarding the late-coming builders as if they were the ones responsible for proving Cranbury's ordinance unconstitutional.[41] Had it retained control of the litigation, the Urban League would have considered the various builder sites and proposed the best ones to the town for settlement, and Cranbury likely would have had affordable housing in the ground years earlier than actually occurred.

That the model I am describing would have worked is not just speculation — it *did* work. Piscataway Township, another township included in the *Urban League* suit, had experienced rapid growth because of a new interstate highway across its northern edge, and it was therefore suitable for inclusionary zoning solutions. Initially, however, no builder's-remedy plaintiffs were involved in the case because Piscataway, unlike Cranbury, was open to development. Developers did not need the Hobbesian *Mount Laurel* wedge to gain access to the community. Instead, the public-interest plaintiffs spent an agonizing period of discovery, poring over township tax maps with their planning expert, and eventually taking three full days of deposition testimony from the township's planner, to identify and evaluate every significant piece of vacant, developable land for possible inclusion in the court-ordered compliance plan. Only then did inclusionary developers begin to pay attention, but on the public-interest plaintiffs' terms — which included genuine concern for sound planning solutions.[42]

41. Judge Serpentelli did deny some would-be builder's-remedy plaintiffs the right to intervene, but on the kind of old-fashioned civil procedure ground that Professor Haar decries elsewhere, *see* p. 137, namely, that the intervention came on the eve of trial and would disrupt the discovery schedule.

42. *See* Urban League of Greater New Brunswick v. Carteret, Letter-Opinion, No. C-4122-73, July 23, 1985 (unpublished); Urban League of Greater New Brunswick v. Mayor and Council of Borough of Carteret, Judgment as to Piscataway, No. C-4122-73, Sept. 17, 1985. It is also interesting to note in this regard that the largest inclusionary developer in New Jersey, the K. Hovnanian Company of Red Bank, has seldom if ever, so far as I am aware, been a builder's-remedy plaintiff in a *Mount Laurel* case. Rather than assuming an adversarial role

If I am critical of Professor Haar's analysis of "public interest" and "market" solutions to the *Mount Laurel* problem, and I am, it also bears stating that his is the prevailing wisdom and mine the dissenting view. I have dwelt on it here at some length in part because Professor Haar's lifelong commitment to sound planning values, which ought to have made him skeptical of the builder's remedy, apparently was not enough to overcome the siren song of the quick and tangible results that could be obtained from the court's potentially Faustian bargain with the developers. This tells me that revising the conventional wisdom will not be easy. My concerns also relate directly to the "legitimacy" and "public relations" themes of his book, to which I now turn, because in my view the popular stereotype of the builder's remedy and, on occasion, the tangible evidence of its misuse — suburban sprawl development — have been a very large factor in the inability of the courts and the public interest community to sell the *Mount Laurel* doctrine as a legitimate exercise of public policy.

Activist Courts: The *Mount Laurel* Process

Suburbs Under Siege hits its stride at about the midpoint, where Professor Haar shifts his focus from narrative to critique; the heart of his thesis is found in Chapters Ten and Eleven, entitled, respectively, "Leadership in Institutional Reform: Rallying Support for a Vision," and "The Last Recourse: Why Judges Intervene." The two chapters should be considered in reverse order, however. The "Leadership" chapter, which is very brief, criticizes the New Jersey Supreme Court for not "selling" its *Mount Laurel* decisions effectively to the public. But selling the decisions assumes that the justices had a legitimate basis for rendering them in the first place, and so "Why Judges Intervene" is really the first and more important question.

A Theory of Judicial Activism

Professor Haar's answer is succinct:

> The Mount Laurel litigations bring to the fore the residual role of the courts in the checks-and-balances system of a constitutional democracy. Local governments, ordinarily endowed with total discretion in the exercise of zoning power, are found to be seriously and chronically in constitutional default. In such a state of affairs,

and engendering the animosity of the township — on whose goodwill the developer inevitably depends for numerous small matters during the course of development — Hovnanian typically came in after a *Mount Laurel* suit was finished, acquired the compliance site, and thereafter built what is generally regarded to be a very acceptable affordable housing product. Achieving *Mount Laurel* goals, in other words, is not dependent so much on the builder's remedy as it is on inclusionary zoning, which public-interest plaintiffs are quite capable of negotiating.

> whatever a court's adherence to the separation of powers as usually enunciated or whatever the loyalty to the conventional division of powers among the levels of government as typically argued, the strict rules of judicial insulation become inapposite. [p. 175]

The "usual," "conventional," or "typical" rules of separation of powers can be set aside, he argues, because it is both "appropriate" and "necessary" to vest in the courts "a residual role" (pp. 175-82). It is *appropriate* for four reasons: because a constitutional right is at stake (p. 176); because the courts are institutionally disinterested other than in the correct application of the rules of law (p. 176); because courts, unlike legislatures, are capable of acting as trustees for future generations against the "long-term, potentially irreversible, and frequently incalculable harms" of present-day political decisionmaking (p. 177); and because it is a peculiar characteristic of the judicial system that it can stimulate "reasoned discourse" about "a more generous vision of the social order" than can the political process (p. 177). It is *necessary,* in the *Mount Laurel* cases, because there is no reason to believe that the political system will correct the violation of the constitutional order on its own and because the decentralization of political power in state and local governments makes it impossible to bring a regional perspective to land use issues (p. 181).

Some of this framework is essentially unarguable. The dynamic of modern-day politics certainly places a premium on short-term fixes that can pay off before the next election rather than on long-term solutions — particularly if they carry short term costs — and land-use decisionmaking is extremely fragmented because of the tradition of deference to local control in this field. Beyond these basic points, however, agreement fades. Even if we can readily accept that judges are more likely to keep an eye on the interests of future generations, the future remains essentially unknowable, even to conscientious judges. Thus, it may not be obvious to the present generation that a judicial decision is legitimate simply because it is forward-looking. Nor, in connection with political fragmentation and the abuses of local control, is it correct to identify the state *courts* as the only institution with a sufficiently broad perspective to correct any perceived abuses. The governor and the state legislature have a statewide perspective, even if imperfect. To many people, these political institutions' acceptance of a decentralized land-use process reflects the legitimate resolution of the pushes and pulls of a myriad of interest groups. In the abstract, I would agree readily with Professor Haar that the enlightened New Jersey Supreme Courts of Justice Hall and Chief Justice Wilentz had the capacity to do a better job than the governors and legislatures of those times at reforming the abuses of land-use power — witness Governor Kean's "communistic" crack — but the "best" solution is not neces-

sarily the only solution that can claim to be a legitimate one in a complex world. On the factors thus far enumerated, Professor Haar's claims for the legitimacy of structural reform litigation and judicial decisionmaking have a slightly conclusory or makeweight character about them.

Professor Haar's broader claims are also problematic. For example, one has to approach his assertion that courts are "disinterested" with caution. The disinterestedness of judges has been the classic defense of the legitimacy of judicial review since the time of John Marshall and *Marbury v. Madison*.[43] But as Professor Haar himself carefully acknowledges, "pressed by the force of events, even the court may become an advocate for a particular position or side" (p. 176). His solution, imposing "curbs" on judges — "both traditional and adjusted for the new situation" — that will "confine *too extensive* an exercise of discretion" (p. 176; emphasis added), will not do much to persuade the skeptical observer that judges are truly "disinterested," at least without a much more thorough exploration of what may constitute "too extensive" an exercise of legitimate judicial power.

Finding the Constitutional Basis for Judicial Activism

The core of the problem with Professor Haar's justification for an activist judiciary, at least as revealed through the example of the *Mount Laurel* cases, lies in his first premise — namely, that there is an unredressed constitutional violation that will remain unredressed unless the court intervenes and acts for the benefit of the victims of such behavior. In principle, he is certainly correct. Our preference for legislative control in a democratic society notwithstanding, when the legislature disregards the constitution, as New Jersey's did in the eight years between *Mount Laurel I* and *Mount Laurel II* and even for some years thereafter, Professor Haar is surely right to say that the legislature has forfeited much of its claim to primacy. Judicial action becomes *necessary* — that is, legitimate — to vindicate the higher mandate of the constitution itself (p. 177). So, too, it is easier to accept a judge's slipping from disinterestedness to advocacy, for present as well as future generations, when such one-sidedness is on behalf of an accepted constitutional principle. Holmes and Brandeis were not disinterested when it came to the First Amendment, but their views are now accepted as legitimate nonetheless.

But is there an accepted constitutional principle that undergirds the vigorous and controversial activism of the *Mount Laurel* cases? The simple answer, and the one that apparently convinces Professor

43. 5 U.S. (1 Cranch) 137 (1803).

Haar that he need go no farther, is that in *Mount Laurel I* the New Jersey Supreme Court *held* that there was a constitutional principle that had been violated — the principle of regional "fair share" that Justice Hall found to be embodied in the constitutional concept of "general welfare." As a constitutional lawyer, I have no quarrel with the New Jersey Supreme Court's analytic use of the general welfare approach, but in accepting it as the basis for explaining the legitimacy of the court's activist stance in political terms to the lay public, Professor Haar inevitably commits himself to an argument that is, again, a bit circular. The New Jersey Constitution does not contain the phrase "fair share," and the phrase "general welfare" is, well, *general.* It can mean many things to many people, and one can certainly perceive how the average person in the street — particularly if that person is faced with an unpopular order to rezone in his or her backyard for development that he or she does not welcome — might think that the court interpreted the constitution the way it did in order to be able to pursue, as the modern-day conservative would have it, its liberal agenda.[44]

This problem of the relationship between judicial legitimacy and the general welfare theory has dogged the *Mount Laurel* process from the outset. I wrote about it in 1976;[45] less friendly critics have heaped scorn on the theory.[46] I regret that Professor Haar did not turn his formidable experience and analytic skills more fully to the problem. In saying this, I hope that I am not falling into the customary book-review mode of complaining that the author should have written the book that I think he should have written. Without a more probing inquiry into the condition precedent of a *popularly acceptable* constitutional theory crying out for enforcement, Professor Haar's very valuable analysis of the conditions subsequent that justify judicial activism simply does not persuade those who, unlike me, are not already persuaded.

The uncompleted task of Professor Haar's analysis, therefore, is to inquire whether a reformulation of the underlying constitutional obligation that animates the *Mount Laurel* doctrine might lay a better, stronger foundation for convincing the fair-minded citizen-in-the-street that judicial intervention was both appropriate and neces-

44. Application of the general welfare concept is, after all, essentially the doctrine of substantive due process, which has had scant legitimacy even in more sophisticated professional circles since the demise of *Lochner v. New York,* 198 U.S. 45 (1905). While substantive due process is still encountered fairly often in state courts, the lack of clear standards for its use ought to send state courts the same warning signals about legitimacy as are so clearly sent and received under federal law.

45. *See* John M. Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning,* 29 RUTGERS L. REV. 803, 808-19 (1976).

46. *See, e.g.,* Jerome G. Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation,* 14 SETON HALL L. REV. 851, 865 (1984).

sary in order to foster a just reordering of society's use of land.[47] Without limiting the possibility that other theories might also meet the test of legitimacy as I discuss it here,[48] I propose that the theory that cries out for reincorporation into the *Mount Laurel* doctrine is that of race discrimination.

Race and Exclusionary Zoning

A singular aspect of the first *Mount Laurel* case is that it totally eschewed race in favor of economic discrimination as the basis for its holding, although there was not much doubt, then or now, that racial concerns play a large part in suburban attitudes toward low-income housing. Hindsight suggests that the court may have made the wrong choice, at least insofar as protecting its own legitimacy is concerned. At the time, however, the focus on economic class rather than race seemed quite inspired. The law of race discrimination was the law of the Federal Equal Protection Clause, and by 1975 law reformers were anxious to keep their cases out of the federal courts to avoid the more restrictive rulings of the post–Warren Court era. It was also becoming clear that the U.S. Supreme Court would not prohibit economic discrimination on federal constitutional grounds,[49] and so placing the *Mount Laurel* doctrine on income-related state constitutional grounds made it virtually immune to federal court revision. By glossing over race, however, the New Jersey Supreme Court lost the opportunity to draw the clearest of moral lines, and hence to defend the legitimacy of its intervention on the compelling grounds that Professor Haar urges — namely, that the state constitution must be enforced, and the court must do it if no other institution will.

I do not wish to be naïve about this. I am not suggesting that by 1975, the people of New Jersey had achieved such a state of beatific colorblindness that we would all have thanked the supreme court for pointing out the racially discriminatory consequences of suburban exclusionary zoning and immediately complied. There would

47. Recall that Professor Haar, too, criticizes the court for failing to explain its constitutional theory adequately. *See* pp. 48-49.

48. I have suggested elsewhere that the shift from passive remedies in *Mount Laurel I* to "affirmative" remedies in *Mount Laurel II* implies that *Mount Laurel II* is based on an unarticulated constitutional right to shelter. *See* John M. Payne, *Norman Williams, Exclusionary Zoning, and the* Mount Laurel *Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 683 (1996). Because of its speculative — some might say grandiose — nature, this theory might not survive my reformulation of Professor Haar's defense of judicial legitimacy, although I think my idea can be stated with sufficient clarity and moral force to pass the test. I do not pursue the right to shelter as an alternative theory here, however, because it is not fairly within the scope of Professor Haar's book. In any event, judicial legitimacy is for judges, not law professors; it is our professorial duty to concoct the fanciful ideas out of which legitimate judicial innovation may eventually result, somewhere way down the line, and that is the only appropriate context within which a right to shelter can be discussed.

49. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

have been a brawl, possibly even a bigger brawl than the one that ensued over the actual terms of *Mount Laurel I.* But that reaction, in whatever form, would have put the defenders of suburban exclusionary zoning much more on the defensive than did the actual *Mount Laurel* case. By 1975, two decades after *Brown v. Board of Education,*[50] the legitimacy of *judicial* enforcement of constitutionally based racial equality was broadly accepted, even if specific judicial decisions remained controversial. Also by 1975, it had become virtually impossible, except at the extremist fringes, to speak openly the language of racial discrimination, as had been the case in earlier decades. "I'm not a racist, but . . ." may still have been a cover for race-conscious thought, but the norm of *legitimate* public debate required at least formal adherence to the principle of nondiscrimination that *Brown* and the civil rights movement had taught us. It would have been difficult to deny the legitimacy of that principle when carried over into a race-based theory of the *Mount Laurel* doctrine.

From the earliest days of the *Mount Laurel* doctrine, perceptive commentators have recognized the perils of a theory that deemphasized race.[51] Simply put, there are so many more poor White families than there are poor minority ones that, absent a massive infusion of resources into producing affordable housing that has not happened and realistically could not have happened, it was foreseeable that the lion's share of the housing that could be produced would go first, whenever possible, to White households, which, if suspect because of their poverty, were nonetheless not so frightening to many middle-class suburbanites as poor Black families. These concerns came to pass. The available data, although far from perfect, reveal that minorities have not benefitted from the *Mount Laurel* process in anywhere near the proportion that they ought to have in a colorblind world.[52]

Race: The Warren Township *Opinion*

The deemphasis on race also leads Professor Haar into one of the rare errors of reportage in *Suburbs Under Siege.* He considers at some length the New Jersey Supreme Court's decision in *In re Township of Warren,*[53] in which the court held that the *Mount Laurel* doctrine prohibited municipalities from establishing priorities

50. 347 U.S. 483 (1954).

51. *See, e.g.,* Robert C. Holmes, *A Black Perspective on* Mount Laurel II: *Toward a Black "Fair Share,"* 14 SETON HALL L. REV. 944 (1984).

52. *See* Lamar et al., *supra* note 21, at 1256; Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mt. Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants,* 27 SETON HALL L. REV. 1268, 1302-05 (1997).

53. 622 A.2d 1257 (N.J. 1993).

for local — read White — residents in occupying newly available *Mount Laurel* units. Haar applauds the decision as evidence of the court's continued vigor as an engine for law reform. Insofar as the specific holding is involved, he is correct, but the full story is more complex and not so encouraging.

The *Warren Township* plaintiffs initially challenged two provisions in the Warren Township substantive certification and proposed two separate legal theories to explain how each provision was invalid. The plaintiffs challenged the residency requirement and, in addition, a provision in the township's certified plan permitting it to transfer fifty percent of its *Mount Laurel* obligation — 166 units of housing — to New Brunswick through an RCA.[54] They alleged that both provisions violated both the *Mount Laurel* doctrine and the race discrimination provisions of the Federal Fair Housing Act.[55] The challengers lost on both issues and on both theories in the appellate division of superior court, where the case was first heard, and they appealed to the supreme court. Under New Jersey practice, there is an appeal as of right only when there is a dissent in the appellate division, and the dissenting judge in the *Warren Township* case dissented only on the residency issue. The petitioners therefore had to seek leave to appeal as to the RCA provision, which presented the racial issue in its starkest form, as the lower-income housing was being transferred from a virtually all-White suburb to an urban municipality with a significant minority population. Because the court had to hear the other branch of the case as of right, and the petitioners had raised the race issue there as well, the petitioners were confident that the justices would hear the entire case. Not so. The court refused to touch the RCA issue.[56] While the court included an extensive — and quite helpful — dictum about the applicability of Title VIII to *Mount Laurel* issues in the residency preferences opinion, it expressly declined to hold that the residency preferences violated Title VIII, instead explicitly resting the decision only on the *Mount Laurel* ground.[57]

The court, in other words, appears to remain deeply ambivalent about the relationship between race, exclusionary zoning, and affordable housing. The longer I stay in this business, the more convinced I become that this is a mistake. Housing mobility is one of the keys to reducing race consciousness in our society, because mobility offers members of minority groups access to the good schools and good jobs that have built the American middle class and be-

54. *See Warren Township*, 622 A.2d at 1258-61, 1278.

55. 42 U.S.C. §§ 3601-3631 (1994). The Fair Housing Act is also known as Title VIII of the Civil Rights Act of 1964.

56. *See* 606 A.2d 369 (N.J. 1992) (denying certiorari).

57. *See Warren Township*, 622 A.2d at 1276, 1277.

cause racially integrated neighborhoods force all of us to deal with the race issue as people rather than as stereotypes. Professor Haar's careful analysis of the legitimacy of judicial activism reinforces these convictions of mine, because it convinces me that the morality of a constitutional rule requiring municipalities to exercise their land-use power in a racially fair way would command broad, if sometimes grudging, respect as a legitimate exercise of judicial power. Such a rule therefore would achieve greater and better results than has the complex, hard-to-explain *Mount Laurel* doctrine. Alas, however, Professor Haar misses the opportunity to make this point to the wide audience his book will command, instead giving the constitutional theory of the *Mount Laurel* doctrine a more respectful obedience than it in fact deserves.

I suggest, in other words, that the legitimacy of judicial activism in the *Mount Laurel* cases rests on a slender reed, if that reed is merely the court's interpretation of the general welfare clause of the New Jersey Constitution. Make no mistake about it, it is the popular view of legitimacy that counts for these purposes, not the exquisitely spun theories of scholars and judges, no matter how convincing those theories may be to other scholars, judges, and professionals, myself included. So I would add a major qualification to Professor Haar's exploration of when it is appropriate and necessary for courts to intervene in matters of social policy. The legitimacy of doing so, I would argue, is related directly to the clarity and precision with which the court can articulate an underlying constitutional principle that a fairminded person would find obvious. This is not to say that soft constitutional principles, such as the general welfare clause, cannot be enforced or can only be enforced in unaggressive ways. But a court, mindful of its own finite stock of legitimacy, should interfere with political choices only in proportion to its confidence that the constitutional mandate is clear and unambiguous. The general welfare approach of the *Mount Laurel* cases has failed this test. In practice, the fair-share rules are too complicated to be readily understood, too arbitrary and counterintuitive on occasion to be perceived as fair — the sprawl problem — and, despite their superficial objectivity, too subjective to be anchored unambiguously in the vague language of the constitution.

Representation and Exclusionary Zoning

There is a way to reformulate the general welfare approach, however, and most of its elements are suggested by Professor Haar's legitimacy analysis. He argues, for example, that one reason why judicial activism is appropriate is that it can stimulate a broad public debate on matters of social policy that might otherwise be ignored if the status quo of entrenched interest groups is allowed to

govern (p. 177). He is certainly right about this as a matter of practical politics. One of the great achievements of the *Mount Laurel* cases was that they forced the legislature to consider the consequences of exclusionary zoning, even though the interest group that benefited — poor people — was relatively powerless and the interest group that was burdened — suburbanites — was the dominant political voice in statewide politics. As a matter of law, however, and particularly in providing an argument that judicial intervention is appropriate and legitimate, Professor Haar proves too much. If the source of legitimacy in judicial activism is that the court is enforcing a constitutional norm, then it would seem to follow that the constitutional norm provides the answer, not the starting point, for a new dialogue. If the court is disinterestedly doing what *Marbury* courts do — resolving disputes in accordance with law — how much leeway is there for the legislature, or various pressure groups, to decide after suitable dialogue not to follow the court's pronouncement? Not all that much, if judging in constitutional cases is to remain *judging* and not become the work of a council of revision.

Professor Haar also argues for the necessity of judicial intervention when political power is territorially dispersed and "[n]o one agency in front of the court, acting alone, has the governmental authority or ability to clear up the situation created by the multitude of local authorities responsible only to local constituencies" (p. 181). As I noted above, however, it simply is not correct to identify the judiciary as the only statewide institution capable of bringing a regional perspective to bear.[58] But if we take these two points and combine them with Professor Haar's further observation that, both before *Mount Laurel I* and between *Mount Laurels I* and *II,* the statewide political system was manifestly disinterested in the problem of exclusionary zoning (pp. 177-81), we may then have a way of defending the legitimacy of the court's general welfare approach.

Approached with a view toward making the application of the general welfare concept obvious, as I proposed above, the constitutional violation that is the essential precondition to Professor Haar's theory of judicial legitimacy is not the failure to provide poor people with a "regional fair share" of housing opportunities, but rather the failure to provide them with a political forum in which they can fairly compete with other interest groups for their "fair share" of society's beneficence. Rather than a "dialogue" between the court and the people, as Professor Haar envisions, I suggest that the court can and should *mandate* a fairer dialogue among the people themselves, *all* of them, by mandating a reconsideration of the forum in which the debate takes place. So long as land use power, and hence the power to control the creation of housing af-

58. *See supra* Section: A Theory of Judicial Activism.

fordable to lower-income groups, is delegated to municipalities unconditionally, those municipalities will have not only the power to exclude but the ability to ignore the voices of those now excluded.

The constitutional right that is implicated in this approach to the problem of exclusionary zoning is the right to have fair participation in the political process — the right, as the late Richard Babcock described it, to play "the zoning game"[59] on the same playing field as everyone else. The remedy for such a reformulated right is much more straightforward than the substantive implementation of "fair share" rules that has preoccupied the *Mount Laurel* process for the last twenty years. All that is required is that the court order the state to reclaim the delegated zoning power from the gaggle of fragmented, parochial municipalities and either exercise the power itself, redelegate it to new state or regional planning agencies, or redelegate it to municipalities subject to tighter standards that protect the interests of prospective as well as present residents of the decisionmaking community.[60] This is, undoubtedly, a softer remedy than the *Mount Laurel* fair-share rules, if those rules were fully implemented, but that of course is the point. By building a very aggressive judicial remedy on a hard-to-explain constitutional base, the supreme court virtually guaranteed that controversy would be maximized and that much of the focus of the controversy would be shifted to the supposed *illegitimacy* of judicial activism, rather than remaining where it belongs, on the callousness of ignoring the needs of poor people. The representation theory, by contrast, would justify judicial activism on a ground that fair-minded people could understand and accept — namely, that in a democracy the willingness to lose a political fight depends on having the chance to win the battle on some other occasion. Under the regime of exclusionary zoning, that could not happen.[61]

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59. *See* RICHARD F. BABCOCK, THE ZONING GAME (1966).

60. I made this argument to no avail more than twenty years ago. *See* Payne, *supra* note 45. The majority opinion in *Oakwood at Madison, Inc. v. Township of Madison,* 371 A.2d 1192, 1219 n.41 (N.J. 1977), characterized that argument as "a highly novel idea" but did not suggest following it. The supreme court also took note of the approach during the briefing that led up to *Mount Laurel II, see* John M. Payne, *Housing Rights and Remedies: A "Legislative" History of* Mount Laurel II, 14 SETON HALL L. REV. 889, 899-900, 931 (1984), but none of the parties was willing to embrace it and the court made no mention of it in the subsequent opinion.

61. I am grateful to my colleague, Professor Eric Neisser, for pointing out an interesting parallel to this argument. The recent controversy involving the President's "Don't Ask, Don't Tell" policy on gays in the military and the passage through Congress at lightning speed of the so-called Defense of Marriage Act, 28 U.S.C.A. § 1738C (West 1994 & Supp. 1997), indicate that Americans remain deeply troubled about departures from traditional norms of sexuality. Yet the U.S. Supreme Court's decision two years ago in *Romer v. Evans,* 517 U.S. 620 (1996), striking down a Colorado initiative that effectively denied proponents of gay rights access to conventional political processes, caused barely a ripple of protest. Fair process, it would seem, has independent value in the American system.

Arguably, the representation approach that I am suggesting can be teased out of the history of the *Mount Laurel* doctrine. As Professor Haar's narrative describes quite accurately, the New Jersey Supreme Court and its three designated trial judges, after the requisite period of *Sturm und Drang,* convinced the politicians of New Jersey that the *Mount Laurel* decision would be enforced vigorously. In the face of judicial orders rezoning specific towns, the legislature put aside traditional home rule concerns and created a state-level decisionmaking institution, the Council on Affordable Housing, which brings together — imperfectly — municipal and housing advocates to hash out ground rules within which municipalities must then act in the exercise of their delegated zoning powers, though compliance with the Act is voluntary. As a housing advocate, I now have a political forum within which to lobby, scheme, and intrigue, just as any other interest group does, with recourse to the cabinet officer who oversees COAH and, on those occasions when the stakes are high enough — usually just before an election — to the office of the governor herself.

But at what cost was this access purchased? Instead of the decade of heated debate about the legitimacy of the court's acting at all — a debate the continuing legacy of which is evident in that the phrase *"Mount Laurel"* still arouses knee-jerk opposition — might it not have been preferable to have attended more carefully to the legitimacy problems up front, fashioning the doctrine to maximize both its legitimacy and its effectiveness? Of course, this is hindsight. Given the choice of repeating the *Mount Laurel* process as it was or doing nothing at all, I unhesitatingly would cast my vote with Justice Hall and Chief Justice Wilentz and Professor Haar. But we do have the benefit of hindsight, and I would caution the reader understandably swept up in the enthusiasm of Professor Haar's commitment to judicial activism to take his defense of judicial legitimacy as a starting point rather than a roadmap, at least insofar as *Mount Laurel* is Exhibit A.[62]

Selling Judicial Activism

Finally, let me comment briefly on Professor Haar's third overarching theme, the failure of the New Jersey judiciary to explain adequately its *Mount Laurel* doctrine to the public, to convince them of its legitimacy and, correlatively, of the legitimacy of the court itself. While I certainly share Haar's view that the *Mount*

62. The argument for the legitimacy of judicial enforcement of race-based equality is independent of the representation argument made here. The mandate for racial equality has a strong, explicit foundation in the federal and state constitutions and is not subject to a popular override to the extent that less explicitly protected interests may be. *See, e.g.,* Hunter v. Erickson, 393 U.S. 385 (1969) (holding unconstitutional a referendum on open housing law).

Laurel doctrine was a public relations disaster,[63] I disagree with his argument that the court should have waded more vigorously into the world of talk shows and op-ed columns. To be fair to Professor Haar, I do not think that that degree of engagement is what he has in mind. But that in turn is my underlying point, for selling a controversial issue is an all-or-nothing process. Politics is a tough business, as I learned when I strayed from the classroom and the courtroom to lobby on behalf of affordable housing issues — and specifically in opposition to a constitutional amendment that would have reversed *Mount Laurel.* A state senator once reprimanded me at a public hearing for having the temerity to oppose his anti-*Mount Laurel* bill, on the grounds that as a teacher at the state university, I worked for the legislature and should therefore obey the boss's — that is, his — lead. Imagine how judges would fare in even the outer orbits of this world — keeping in mind, as Professor Haar points out, that Chief Justice Wilentz and Justice Pollock both ran into reconfirmation troubles as a result of their participation in the *Mount Laurel* case.

The problem, ultimately, is the same problem of judicial legitimacy. In order for judges to act boldly, as both Professor Haar and I believe they should, they must convince the public at large that they are acting within the special competence of judges, rather than as unelected — and therefore illegitimate — politicians. Selling their product ultimately connects judges to the political, rather than to the judicial, side of our system of governance and thus undercuts their legitimacy. Hence my preceding argument: reformist, activist judges must place their decisions on clearly understandable and easily acceptable bases, such as fair representation or racial equity, so that the decisions sell themselves.

Conclusion

To sum up, then, I disagree with Professor Haar's celebration of the role that private litigants can play in structural reform litigation, and I have reservations about the extent to which the *Mount Laurel* doctrine, as actually formulated and defended, can sustain all of his claims for the legitimacy of judicial activism. The two criticisms, moreover, are related: the perceived self-interest of private builder-litigants undercuts the perceived legitimacy of the entire process, particularly when the absence of public-interest litigants requires the judges to rely extensively on planning masters to gain a balanced picture.[64] When the process no longer looks very much like litigation, doubters are more likely to ask why the decision be-

63. This is my phrase, not Haar's. *See* John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies,* 16 Real Estate L.J. 20, 27 (1987).

64. *See supra* text accompanying note 16.

longs to an — unelected — judge at all. Law reform is still *law,* even if the law in question is heavily infused with policy and planning expertise.

But it is also important to emphasize our broad areas of agreement. I fully agree that there is a legitimate role for the courts to play in stimulating social reform — I do not subscribe, in other words, to the "hollow hope" thesis,[65] because I have seen the results in New Jersey — and I also agree that there is a great deal of room for creative thinking about the role of private actors in the process. Inclusionary zoning is a marvelous addition to the armament of a housing advocate, so long as it is the public interest that controls and not the private developer. Professor Haar's detailed and thoughtful exploration of the *Mount Laurel* story helped me to focus on how much has been achieved and how much remains to be done. His work offers the start of a dialogue that can result in a further refinement of the *Mount Laurel* doctrine, that can suggest new and better ways to defend it, and that ultimately can take the cause of fair housing to heights yet unimagined.

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65. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).