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Construction Industry Ass'n of Sonoma County v. City of Petaluma: Constitutional Limitations Placed on Controlled Growth Zoning

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CONSTRUCTION INDUSTRY ASS'N OF SONOMA COUNTY v. CITY OF PETALUMA: CONSTITUTIONAL LIMITATIONS PLACED ON CONTROLLED GROWTH ZONING

The City of Petaluma, California is within commuting distance of San Francisco and is part of the San Francisco Bay Area Metropolitan region. Through the early 1960s Petaluma's government operated under the assumption that "growth was good."[1] In response to the desires of the community expressed by way of questionnaires, the Petaluma City Council adopted an official development policy in 1971.[2] The "Petaluma Plan" placed a ceiling on new construction of housing within the city and created an "urban extension line" or "greenbelt" of unannexed property encircling Petaluma, many square miles larger than the city itself.[3]

In 1973, in *Construction Industry Association of Sonoma County v. City of Petaluma*,[4] the United States District Court for Northern California held that the plan was an unconstitutional violation of the right to travel unsupported by any compelling state interest which could not be served by alternatives. The court concluded that the Petaluma Plan was exclusionary because it set a growth rate below that dictated by prevailing "market demand,"[5] and granted the petitioners a declaratory judgment and permanent injunction.

The purpose of this Comment is to demonstrate the inconsistency of the *Petaluma* holding with prior Supreme Court rulings on the constitutional scope of municipal zoning authority; in addition,

1. PETALUMA, CAL., ENVIRONMENTAL DESIGN PLAN FOR PETALUMA, *Introduction* (1972).
2. PETALUMA, CAL., ENVIRONMENTAL DESIGN PLAN FOR PETALUMA, RESOLUTIONS No. 6028 N.C.S., 6724 N.C.S. and 6725 N.C.S. (1972).
3. *Id.*
4. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *appeal docketed*, No. 74-2100, 9th Cir., June 12, 1974. Note: As this Comment went to press the United States Court of Appeals for the Ninth Circuit, in an opinion compatible with the views expressed herein, reversed the District Court decision. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, No. 74-2100, 9th Cir., Aug. 13, 1975.
5. *Id.* at 576.

the discussion will analyze the court's inappropriate application of the strict scrutiny standard of review under the fourteenth amendment to the facts in this case.

The method of zoning embodied in the Petaluma Plan, known as time control-sequential zoning,[6] developed as a response by communities surrounding metropolitan centers to the threat of overdensity raised by accelerating growth rates.[7] The technique places a moratorium on development, and the pace and sequence of city growth are controlled in relation to the city's capacity to furnish adequate public facilities and services. Unlike exclusionary zoning measures such as minimum lot size,[8] time control-sequential zoning is not permanent.

The purpose of the Petaluma Plan is "to protect [the] small town character and surrounding open spaces."[9] The Plan's building limitations apply only to subdivision homes and multi-family dwellings of over four units. There is no limitation on construction of individual residences. The development ceiling was calculated in light of the city's water contract with Sonoma County and the rate of development of the city's sewage treatment facilities. Building permits would be issued for the 500 permissible annual units according to an intricate rating system weighted in favor of applicants proposing to construct low-cost housing.

In 1972, the New York Court of Appeals upheld a similar time control-sequential zoning plan in *Golden v. Planning Board of the Town of Ramapo.*[10] The court's analysis of the Ramapo plan, which limited growth more severely than the Petaluma Plan, is useful to an understanding of the startling departure from precedent of *Petaluma.* Noting that "phased growth was well within the ambit of existing enabling legislation," the court went on to comment,

6. For a further discussion of this zoning method see Elias, *Significant Developments and Trends in Zoning Litigation,* in INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 1 (1973).

7. *Id.* at 24; see Blank, *Time Control, Sequential Zoning: The Ramapo Case,* 25 BAYLOR L. REV. 318, 319 (1973); Note, *Golden v. Planning Board: Time Phased Development Control Through Zoning Standards,* 38 ALBANY L. REV. 142 (1973).

8. *See generally* Sussna, *An Attempt at Realism—or Another Look at Exclusionary Zoning,* in INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 83 (1974); Comment, *Exclusionary Zoning: An Overview,* 47 TULANE L. REV. 1056 (1973); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767 (1969).

9. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 576 (N.D. Cal. 1974).

10. Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

> It is the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district and to that extent such restrictions invariably impede the forces of natural growth. Where those restrictions upon beneficial use and enjoyment of land are necessary to promote the ultimate good of the community and are within the bounds of reason they have been sustained. . . . Zoning assumes that development shall not stop at the community's threshold but only that whatever growth there may be, shall proceed along a predetermined course.[11]

The court alluded to possible violations of the right to travel but clearly indicated that planning concerns outweighed any such consideration.

> Although zoning must include schemes designd to allow municipalities to more effectively contend with the increased demands of evolving and growing communities, under its guise, townships have been wont to try their hand at an array of exclusionary devices in the hope of avoiding the very burden which growth must inevitably bring. . . Though the conflict engendered by such tactics is certainly real, and its implications vast, accumulated evidence, scientific and social, points circumspectly at the hazards of undirected growth and the naive, somewhat nostalgic imperative that egalitarianism is a function of growth.[12]

The New York court emphasized that Ramapo's goal was planned growth and prevention of community deterioration rather than a permanent ban on expansion and change. Exactly the same phased growth plan was struck down in *Petaluma* as unconstitutional. A review of the decisions of the Supreme Court suggests that the *Petaluma* ruling is out of line with the high court's approach to zoning issues.

The first zoning case considered by the Supreme Court was *Village of Euclid v. Ambler Realty Co.*[13] which has become a land-

11. *Id.* at 377, 285 N.E.2d at 301-02, 334 N.Y.S.2d at 151 (citations omitted).
12. *Id.* at 375, 285 N.E.2d at 300, 334 N.Y.S.2d at 149 (citations omitted).
13. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

mark in this area of the law. In response to a claim by a individual landowner that the diminution in the value of his land caused by a zoning restriction resulted in a taking of his property without due process of law, the Court upheld the regulation.[14]

The Supreme Court did not hear another significant zoning case for forty-eight years.[15] In 1974, in *Boraas v. Village of Belle Terre*,[16] the Court upheld an ordinance restricting land use to one-family dwellings and prohibiting occupancy of a dwelling by more than two unrelated persons. The Court in a statement reminiscent of *Euclid* said that

> lines drawn by legislators in economic and social legislation will be respected by the Supreme Court against the charge of violation of equal protection if the law is reasonable, not arbitrary and bears a rational relationship to a permissible state objective.[17]

Although *Euclid* was decided on due process grounds and *Belle Terre* on equal protection, the test used in reviewing the zoning regulations was the same.

While *Petaluma* was decided on equal protection grounds, the court did not apply the standard established in *Euclid* and maintained in *Belle Terre*. To understand the variation of the *Petaluma* ruling, a brief review of the evolution of the modern equal protection doctrine is useful. The rational basis test used by the Court in *Euclid* was first announced in 1911 in *Lindsley v. Natural Carbonic Gas Co.*[18] By 1964, however, a new "strict scrutiny" test for infringements of equal protection had been articulated. *Reynolds v. Sims*[19] held that a governmental body must show a compelling state interest to overcome an equal protection challenge wherever a statute or regulation creates a suspect classification or violates a fundamental right. Definition of what constitutes a suspect classification has been on a case by case basis and at present includes only race, national origin, alienage and illegitimacy.[20] Factors articulated by the Court

14. Because the decision rested on procedural due process grounds, it was, therefore, not diminished in importance by the decline of the substantive due process theory after 1930's.
15. *But see* Nectow v. City of Cambridge, 277 U.S. 183 (1928).
16. Boraas v. Village of Belle Terre, 416 U.S. 1 (1974).
17. *Id.* at 8.
18. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).
19. Reynolds v. Sims, 377 U.S. 533 (1964).
20. Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); Oyama v. California, 332 U.S. 633 (1948) (na-

as determinative of a suspect classification[21] might suggest that classification on the basis of wealth would be suspect. Although wealth (or poverty) has been expressly rejected as a suspect category,[22] it seems in several cases to have played a role in the Court's decision by increasing the importance of the right involved to fundamental right status.[23] This has been particularly true where the fundamental right identified is interstate travel as further discussed below.

Identification of fundamental rights has also proceeded on an ad hoc basis and has proved to be the more troublesome element of the strict scrutiny test. The main area of controversy concerns how a fundamental right is identified. Justice Stewart, in *San Antonio Independent School District v. Rodriguez*,[24] said that the Court does not

> pick out particular human activities, characterize them as "fundamental" and give them added protection. . . To the contrary, the court simply recognizes, as it must, an established constitutional right and gives to that right no less protection than the constitution itself demands.[25]

In *Lindsey v. Normet*[26] Justice White reiterated that social importance is not the critical determinant for subjecting state legislation to strict scrutiny. "Absent constitutional mandate the assurance of adequate housing . . . is a legislative, not a judicial function."[27] Justice Powell confirmed that "it is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[28] The key to discovering fundamental rights is in the constitution. And yet one need only look at several

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tional origin). For a discussion of race as a suspect category see Loving v. Virginia, 388 U.S. 1 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Bd. of Education, 347 U.S. 83 (1954); Korematsu v. United States, 323 U.S. 214 (1944); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969); Sager, *supra* note 8. Sex has not yet been considered a suspect classification. Geduldig v. Aiello, 417 U.S. 484 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

21. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (characteristics over which individuals have no control); Reynolds v. Sims, 377 U.S. 533 (1964) (classifications that are invidiously discriminatory); United States v. Carolene Products Co., 304 U.S. 144 (1938) (discrimination against discrete, insular minority).

22. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971).

23. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

24. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

25. *Id.* at 31.

26. Lindsey v. Normet, 405 U.S. 56 (1972).

27. *Id.* at 74.

28. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

of the fundamental rights recognized by the Court to see that they are, in fact, not expressly stated in the constitution. Neither procreation, privacy, nor interstate travel are rights expressly guaranteed and yet all have been identified as fundamental.[29]

Justice Marshall's dissent in *San Antonio* stated that the Court has not been following the majority's declared two level test for equal protection.[30] In reality, they have been applying a spectrum of standards with the degree of scrutiny dependent upon the constitutional and societal importance of the interests adversely affected. Marshall asserted that the test to identify fundamental rights should be

> the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interests draws closer, the nonconstitional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjudged accordingly.[31]

The application of the dual level test to zoning regulations was illustrated by three lower federal court decisions in 1970. In each, exclusion of a suspect category through zoning was the critical issue. In *Southern Alameda Spanish Speaking Org. (SASSO) v. City of Union City,*[32] the Ninth Circuit upheld a referendum vote which prevented an outlying agricultural area from being rezoned for low cost subsidized housing for predominantly Spanish-speaking Americans. The court distinguished *Reitman v. Mulkey*[33] where the only conceivable purpose of a similar referendum was to restore racial discrimination. The court found additional environmental and societal justifications for the *SASSO* referendum. There appear to be two reasons for the court's refusal to apply strict scrutiny in *SASSO*. First, although Spanish-speaking Americans are a minority often dis-

29. Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).
30. 411 U.S. at 99.
31. *Id.* at 102. *But see* United States v. Kras, 409 U.S. 434 (1973); Ortwein v. Schwab, 410 U.S. 656 (1973).
32. Southern Alameda Spanish Speaking Org. (SASSO) v. City of Union City, 424 F.2d 291 (9th Cir. 1970).
33. Reitman v. Mulkey, 387 U.S. 369 (1967).

criminated against, they do not create a racial classification within the historical confines of the fourteenth amendment; second, the method by which the statute was enacted, i.e. referendum, deserves special consideration. A referendum is especially significant to courts because it is the voice of the people and is a process which has been widely used throughout California's political history.[34] For these reasons, the court's application of the rational basis test is more understandable.

In *Dailey v. City of Lawton*[35] the court overturned an ordinance which re-zoned an all-white area of Lawton from multi-famliy dwellings to open space in order to prevent construction of low-cost housing for blacks. The court held that the racial motivation for the re-zoning affected a long recognized suspect classification and required application of the strict scrutiny test.

The ordinance in question in *Kennedy Park Homes Association v. City of Lackawanna*[36] was very similar to the one in *Dailey* with the addition of a moratorium on all building in the area. It was found that the ordinance was motivated by the desire to deny decent housing to low-income and minority families and that this violated equal protection. Because the ordinance created a suspect classification of race, the court said that the city must show a compelling interest to overcome the unconstitutionality of the ordinance. The test applied and the result reached in both *Dailey* and *Kennedy* are what one would expect. *Sasso* is troublesome but distinguishable on its special facts.

Equal protection challenges to zoning have been confined in the past to allegations that the regulation created a suspect classification.[37] *Petaluma* was decided on equal protection grounds, but the court based its decision on the questionable fundamental right to interstate travel. As shown above, the fundamental rights element

34. *See* James v. Valtierra, 402 U.S. 137 (1971).
35. Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).
36. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970).
37. *See* Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd.*, 457 F.2d 788 (5th Cir. 1972); South Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 290 A.2d 465 (1972). For cases argued on equal protection grounds in which the ordinance was upheld see Boraas v. Village of Belle Terre, 416 U.S. 1 (1974); Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970). The exclusionary zoning cases have been almost consistently decided on the due process approach of Euclid. *See, e.g.*, Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971); National Land Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1967); Appeal of Kit-mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970). *See also* Elias, *supra* note 6.

of the strict scrutiny test is, at best, unclear. In order to analyze *Petaluma's* holding of a violation of the right to interstate travel, one must look to the Supreme Court's method of dealing with cases involving alleged infringements of this right. To identify a fundamental right, one first looks to the constitution as Justice Powell advised. The right to travel has been tied to several clauses.[38] Even though not expressly mentioned in the constitution, it has been recognized as a basic element of freedom and liberty and clearly within the penumbra of constitutional guarantees.

> This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[39]

However, as significant as this right may be, travel has never been able to stand on its own as a fundamental right in order to invoke the compelling state interest test. Perhaps this is because the possible effects of such a holding are so far reaching as was mentioned by Justice Brennan in *Shapiro v. Thompson*,[40] the first in a series of fourteenth amendment travel cases. In *Shapiro* a statutory prohibition of welfare benefits to residents of less than one year was held to create a classification which constituted invidious discrimination denying those residents equal protection of the laws. The Court said that "the purpose of deterring immigration of indigents cannot serve as justification for the classification created by the one year waiting period, since that purpose is constitutionally impermissible."[41] The Court said that the fundamental right to travel was being penalized and, therefore, required the application of strict scrutiny. Clearly, though, the Court did not look at this right in a vacuum. The decision was prompted by the interplay between the right to travel and a classification discriminating against indigent newcomers.

> An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless

38. Kent v. Dulles, 357 U.S. 116 (1958) (fifth amendment); Edwards v. California, 314 U.S. 160 (1941) (commerce clause and fourteenth amendment); Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825) (Art. IV, § 2).
39. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).
40. *Id.* at 638 n.21.
41. *Id.* at 631.

> hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residency when his need may be most acute.[42]

It appears that the Court balanced the right of indigents to move into Connecticut and the right of those indigents to the same welfare assistance as long time residents against the interests of the state government. Welfare has never been put into the established group of fundamental rights. Although travel is in that group, it is difficult to find language in *Shapiro* which separates welfare rights from travel rights in such a way as to indicate that travel alone would suffice to invoke the compelling state interest test.

> In sum neither deterrance of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.[43]

Five years later in *Memorial Hospital v. Maricopa County*,[44] the Supreme Court struck down a statute requiring that an indigent live in the county for twelve months before becoming entitled to free non-emergency medical care in the county hospital. The Court said that the statute created an invidious classification that impinged on the right to interstate travel by denying newcomers the basic necessities of life, thereby giving rise to the compelling state interest standard of review. *Maricopa* is very similar to *Shapiro* in both facts and analysis. Marshall, writing for the majority, relied heavily on *Shapiro* and likened the importance of medical care to that of welfare benefits.

> It is at least clear that medical care is as much a "basic necessity of life" to an indigent as welfare assistance. And, governmental privileges and benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.[45]

Even more than in *Shapiro*, the Court emphasized that the impact of the violation of one's rights to interstate travel is as significant as

42. *Id.* at 629.
43. *Id.* at 633.
44. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).
45. *Id.* at 259.

the violation itself. Marshall said that durational residency requirements that infringe on travel are not unconstitutional per se. He cited *Shapiro* as an example that the degree of impact required to give rise to the strict scrutiny is not clear. Unfortunately, *Maricopa* does no more to clarify this.

The impact on interstate travel of the statute in *Maricopa* was denial of hospital care to new indigent residents. The greater danger lies in the discrimination against the poor by denying them medical treatment rather than simply deterring the poor from moving into the county. Although only mentioned in Douglas's concurring opinion,[46] clearly one of the elements balanced with travel against the state interest was the quasi-suspect classification of wealth. It is because of this combination of infringement on travel, classification by wealth and denial of medical care that strict scrutiny was necessary.

In 1972, in *Dunn v. Blumstein*,[47] the Court used the compelling state interest test to strike down a statute requiring would be voters to have resided in the state for one year and in the county for three months before registering to vote. Although the Court said that Tennessee's durational residency requirement was a violation of the right to travel, one need only look at the impact of the violation to see how much greater it is than the violation itself. The impact is to deny some citizens the right to vote, "a fundamental political right preservative of all rights."[48] Here there is one indisputable fundamental right, voting, which would necessarily subject the statute to close judicial scrutiny regardless of any classification created by the durational residency requirement. There is an interplay in *Dunn* between the class created by the residency requirement and the rights of voting, but it does not appear to be as necessary because of the certainty that voting could stand on its own. By contrast, *Shapiro* and *Maricopa* intertwine with travel and the classification of non-residency, the quasi-suspect classification of wealth and two very basic necessities of life for the indigent, welfare and medical benefits, neither of which is a fundamental right.

The above cases constitute the present state of the law of the right to travel as a fundamental right in equal protection analysis. It is significant that each of these cases involved a durational

46. *Id.* at 270.
47. Dunn v. Blumstein, 405 U.S. 330 (1972).
48. Reynolds v. Sims, 377 U.S. 533, 562 (1964), *cited in* Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

residency requirement. The Court has attempted to present a simple, straightforward set of guidelines, but to the contrary, they appear to be juggling a confusing set of facts and legal theories.[49]

In the category of fundamental rights, other than the right to travel, the only right possibly involved in *Petaluma* was housing. The Supreme Court recently had the opportunity to add housing to the list of fundamental rights. They declined to do so. In *Lindsey v. Normet,* Justice White, adhering to the view that a fundamental right must be found in the constitution, said:

> We do not denigrate the importance of decent, safe and sanitary housing but the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality.[50]

Turning to the question of suspect classifications created by the Petaluma ordinance, no possible wealth discrimination seems involved since the regulation scheme specifically provides for a percentage of annual construction to be low cost housing. Moreover, both rich and poor are equally constrained from provisions of additional housing above the ceiling.

The only other possible suspect classification left to be considered is that class of people who are non-residents of Petaluma. No Supreme Court cases have established non-residency in a community or a city as a suspect classification. The durational residency requirement cases discussed above refer to this classification only in relation to a fundamental or near fundamental right. This, therefore, is just one of the elements used in balancing against governmental interests. However, in *Petaluma* there appears to be no classification at all. All residents and would-be residents are treated alike in an attempt to provide orderly growth. Residents who want to move from one block to the next, Californians who want to move from one town to Petaluma and American citizens who wish to move from one state to California are similarly situated.

What we are left with in *Petaluma* is the right to travel standing alone. Although it is a fundamental right, there have been no cases that have found it sufficient on its own to subject a state regulation

49. *Cf.* Vlandis v. Klein, 412 U.S. 441, 462 (1973) (dissenting opinion).
50. 405 U.S. at 74.

to strict scrutiny. The durational residency cases have all used an approach similar to Marshall's sliding scale, always coupling travel with some other significant right.

In holding the Petaluma Plan to be an unconstitutional violation of the right to travel, the court commented upon what the case did not hold.

> The issue here has not been whether or not local government may engage in any number of traditional zoning efforts which have been common throughout our history, such as providing for a certain density of population in a given neighborhood, or standards for the type and quality of construction, etc. The only issue presented here, for the first time, is whether or not a municipality can claim the specific right to keep others away. . . . No 'traditional' powers to zone are affected by the holding in the case.[51]

What are the traditional powers to zone? For fifty years comprehensive zoning has been the principal tool of municipalities. Since *Euclid,* land use restrictions have been upheld as valid exercises of the police power so long as they bear a rational relationship to the health, safety, morals or general welfare of the community.

Upon examination of the type of zoning involved in *Petaluma,* we conclude that its purpose and impact are indeed the same as those of traditional zoning methods. To characterize the issue in *Petaluma* as a municipality's right to keep others away is essentially to ignore the fact that this is much of what zoning has always done. If Petaluma's ordinance is exclusionary, then by definition most other zoning ordinances must be as well.

The decision in *Petaluma,* if upheld on appeal, would have far reaching effects upon the judicial approach to zoning. The first effect is in the use of market demands as a measure for a community's growth. Petaluma, by curtailing "natural growth" is, according to the district court, excluding people from entering the city, thereby impinging on their constitutional right to interstate travel. The unfortunate result of this is that the market demand becomes a yardstick of constitutional law.

Second, if the right to travel is accepted and used as a basis

51. 375 F. Supp. at 587.

for invalidating the Petaluma Plan, the standard of review for zoning regulations would shift from the rational basis standard applied since *Euclid* to the compelling state interest test which shifts the burden to the governmental body responsible for the legislation. The motivations and purposes of zoning ordinances which clearly have a rational relationship to a legitimate government objective often may fail to rise to a compelling state interest. How much pollution must there be before a city has a compelling interest in reducing it? How overloaded must public facilities become before a city can claim a compelling state interest in controlling growth? With such an approach to zoning the court would be put in a position it has long sought to avoid of a "super legislature"[52] overseeing, reviewing, and invalidating legislation that controls the nature and rapidity of a community's growth.

The courts have recognized in the past that the legislature is in a better position to analyze and investigate the requirements of a town's growth patterns.[53] As zoning methods become more technical and require the expertise of trained city planners, the court must maintain its traditional position of judicial deference except when legislation is so arbitrary and irrational as to warrant invalidation.

We must conclude that the district court erroneously placed the right to interstate travel in issue in this case. Not only is this case an improper vehicle in which to delineate the boundaries of the right to travel, but the facts of this case do not involve the right to travel at all. As a zoning ordinance, the Petaluma Plan should be judged by a rational basis test. Until the adoption of a more effective alternative, the power to zone should remain within the realm of local governments.

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52. Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (dissenting opinion).
53. *See, e.g.*, Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).