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Michael H. Schill

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The Federal Role in Reducing Regulatory Barriers to Affordable Housing in the Suburbs

by Michael H. Schill*

On July 8, 1991, Secretary of Housing and Urban Development Jack Kemp delivered to President Bush a report produced by the Advisory Commission on Regulatory Barriers to Affordable Housing. The report, entitled "*Not In My Back Yard*": *Removing Barriers to Affordable Housing*,¹ concluded that suburbs have erected regulatory barriers to housing for low and moderate income households and recommended a series of actions to relax these restrictions. The Commission's judgment is hardly surprising; since the late 1960s, a number of presidential commissions have decried the exclusionary practices engaged in by municipalities.² What makes this report noteworthy is that it envisions a fundamental role for the federal government in eliminating these barriers. If the Commission's recommendations are enacted into law, the federal government will, for the first time, deny certain forms of housing assistance to states that do not adopt barrier removal strategies.³

President Bush has incorporated the recommendations contained in *Not in My Back Yard* into his 1993 budget proposals.⁴ These proposals for the federal government to "crack down" on states and localities are all the more significant when viewed in the context of the Bush Admin-

* Professor of Law, University of Pennsylvania. I would like to thank Seth Kreimer and Stewart Sterk for their comments on an earlier draft.

¹ Advisory Commission on Regulatory Barriers to Affordable Housing, "*Not in My Back Yard*": *Removing Barriers to Affordable Housing* (1991) [hereinafter *Not In My Back Yard*].

² See, e.g., National Commission on Urban Problems, *Building The American City* 235 (1968) (urging action "to assure that local governments exercising regulatory authority are responsive to the needs of broad segments of the population. . . ."); President's Commission on Housing, *The Report of the President's Commission on Housing 199* (1982) ("Excessive restrictions on housing production have driven up the price of housing generally, damaging the new housing market and the filtering process that makes older units available to families seeking to 'move up' to more desirable accommodations."); President's Committee on Urban Housing, *A Decent Home* 142 (1968) ("In many urban communities, the net effect of public land policies is to reduce the supply of land available for modest-cost housing and thus to increase its cost.").

³ See *infra* text accompanying notes 20-27.

⁴ Budget of the United States Fiscal Year 1993, 182-183 (1992).

istration's professed belief that states and localities should be protected from federal interference.⁵ If the Commission's proposals are adopted, the federal government will, for the first time, take an active role in policing land use regulations, traditionally a function of local governments.

The Commission's report includes surprisingly little discussion of why the federal government should involve itself in regulations usually left to local discretion. In addition, the report does not fully explain one of its core assumptions — that members of Congress would be more likely to restrain the exclusionary practices of suburban municipalities than state legislators. In this article, I address both of these issues. In Part I, I briefly summarize the findings and recommendations of the Commission. In Part II, I show that under current doctrine, any constraints on the ability of Congress to limit or eliminate restrictive land use practices are political rather than legal. In Part III, I present a justification for the Commission's recommendation that the federal government take a more active role in policing local land use decisions. Finally, in Part IV, I discuss why I believe the Commission is correct in assuming that members of Congress would be more willing than state legislators to restrain the exclusionary practices of suburban municipalities.

I. NOT IN MY BACK YARD

The Advisory Commission on Regulatory Barriers to Affordable Housing was primarily concerned with housing affordability. For homeowners, affordability improved during the 1980s, after a previous decade of increasing real costs. According to the National Association of Realtors' homeownership affordability index, the median household in 1990 had ten percent more than the minimum amount needed to qualify to buy a house valued at the national median. The index value for 1990 showed that housing was more affordable than it was in 1981 but less affordable than in 1976. The aggregate index value, however, masked substantial regional differences. The average household in the West and Northeast had less than ninety percent of the amount neces-

⁵ See, e.g., John E. Yang, *Bush's Modest Domestic Proposals Contrast With Expansive World Role*, *Wash. Post*, Jan. 30, 1991, at A12 (In his 1991 State of the Union speech, President Bush extolled virtues of federalism and advocated turning twenty billion dollars in federal programs "over to the states for them to run free from federal regulations."); President George Bush, *Remarks at the National Governor's Association Meeting* (Washington, D.C., Feb. 3, 1992) ("I want Congress. . .to stop showering the states with these mandates, unfunded mandates.).

sary to purchase a median-priced home. In addition, first time homebuyers had less than eighty percent of the required funds.⁶

For renters, affordability problems were more grim. Unlike costs of homeownership, rents increased in real terms throughout the 1980s, rising nine percent for the nation as a whole. Again, aggregate statistics mask substantial regional variation; large metropolitan areas on the east and west coasts had real average rent increases in excess of twenty percent. The Commission stated that among poor households, affordability problems were especially severe. In metropolitan areas on the west coast the proportion of poor households that paid in excess of thirty-five percent of their income for rent in the late 1980s exceeded eighty-five percent.⁷

Secretary Kemp appointed the Advisory Commission on Regulatory Barriers to Affordable Housing to determine "the degree to which [federal, state, and local] regulations increase housing costs" and to recommend actions that "should be taken to remove or modify excessive, duplicative, or unnecessary regulations and requirements."⁸ Importantly, the Commission members understood that they were not to recommend proposals that would increase the amount of money spent by the federal government on housing assistance.⁹ Therefore, most of the Commission's findings and most of its recommendations were limited to regulation and regulatory relief.¹⁰

⁶ See *Not in My Back Yard*, *supra* note 1, at 1-2.

⁷ See *id.* at 1-2 - 1-5. A recent report by Harvard University's Joint Center For Housing Studies reports that the recession has not reduced rents for poor households, although it has dampened rent increases at the high end of the market. According to the report, more than three-quarters of poor, unsubsidized tenants paid more than 50% of their income for housing in 1990. See *Recession Hasn't Helped Low-Income Groups*, Report Says, 19 *Housing & Development Rep.* 469 (1991). A standard "rule of thumb" maintains that households that pay more than 30% of their income in rent are burdened by excessive housing costs. See Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 *Cornell L. Rev.* 878, 890 n.37 (1990).

⁸ "This review shall include, but not be limited to: zoning, impact fees, subdivision ordinances, standards, processing and permitting, rental control, codes and innovation, and environmental requirements." *Not in My Back Yard*, *supra* note 1, at C-1.

⁹ See Gale Cincotta, *Viewpoint*, *Planning*, Sept. 1991, at 46 (Commission member states that the Commission's scope was limited to regulatory barriers.); Anthony Downs, *The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments*, 2 *Housing Policy Debate* 1095 (1991) (Member of Commission states that "[t]his commission was heavily influenced by the chairman's desire not to make recommendations that would upset the Bush administration, such as suggesting big increases in federal spending on housing assistance.").

¹⁰ The Commission's failure to recommend additional funding for housing assistance has been criticized. See Chester Hartman, *Comment on Anthony Downs's "The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments,"* 2 *Housing Policy Debate* 1161, 1167 (1991) ("The best form of federal

The Commission found a relationship between suburban, central city, state and federal regulations and increased housing costs. It identified five types of suburban land use regulations that serve to restrict the amount of low income housing built in the suburbs: growth controls, zoning, subdivision controls, exactions and excessive permitting requirements.¹¹ Some communities enact growth control ordinances that place a ceiling on the number of building permits that may be issued annually. In addition, many suburbs seek to limit or eliminate growth by enacting excessive minimum lot zoning requirements or by placing large portions of the community's land in agricultural zones.¹² Municipal zoning ordinances also limit affordable housing by setting low maximum building heights and densities and by prohibiting multi-family housing.¹³ Local requirements for subdividing land came under especially severe attack by the Commission. According to the report, some communities "gold-plate" their subdivision ordinances by requiring developers to contribute costly improvements such as wide roads and expensive schools. Other municipalities require developers to contribute money, sometimes called "exactions," to the community to pay for infrastructure and off-site improvements, costs that are passed along to eventual homebuyers.¹⁴ Finally, many municipalities mandate that developers meet complex standards before obtaining building permits. The cost of complying with these requirements and delays in obtaining approvals add significantly to the price of suburban housing.¹⁵

The Commission speculated about the reasons why suburban municipalities enact laws that increase the cost of housing. Suburban residents may fear that an immigration of lower income households will

aid, of course, would be precisely that which the commission, by consensus, apparently agreed to reject a priori: more housing subsidies for low-income households.").

¹¹ The Commission's findings and recommendations were not limited to suburban barriers to affordability: it also cited the federal government, states, and central cities as maintaining regulations that add to the cost of housing. See *Not in My Back Yard*, supra note 1, at 3-1 - 4-12.

¹² See *id.* at 2-2.

¹³ See *id.* at 2-5 - 2-8.

¹⁴ See *id.* at 2-8 - 2-12. According to the Commission, exactions, dedications and fees add up to 30% to the cost of housing in New Jersey. *Id.* at 2-11. But see Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 *Vand. L. Rev.* 831 (1992) (In certain types of markets the owner of land will bear the cost of exactions rather than homebuyers.). For an analysis of the legal and economic issues involving land use exactions, see generally Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum. L. Rev.* 473 (1991).

¹⁵ See *Not in My Back Yard*, supra note 1, at 2-12 - 2-14. The Commission cited Orange County, California as having particularly expensive permitting requirements, the cost of which adds \$20,000 to the price of single-family housing units. *Id.* at 2-12.

reduce their property values. New development may also lead to despoilation of the environment and deterioration of local public services. Increased infrastructure and public service requirements may also necessitate an increase in taxes. Finally, some suburban residents may want to preserve the social or ethnic homogeneity of their communities and to achieve this objective enact laws that exclude lower-income and minority households.¹⁶

The states are at the center of the Commission's strategy to reduce suburban regulatory barriers. For "constitutional and practical reasons,"¹⁷ the Commission opines, states are in the best position to force localities to exercise their regulatory powers more responsibly. Local governments derive their regulatory powers from their states, giving states the leverage required to accomplish deregulation.¹⁸ Since housing markets are local, the states are in a better position than the federal government to take into account inter-regional variations; at the same time states are sufficiently centralized to take into account the extra-municipal effects of local actions.¹⁹

The Commission also sees a vital role for the federal government in "inspiring" state and local governments to reform their regulations.²⁰ *Not in My Back Yard* foresees a dual-pronged federal effort using "carrots and sticks." All states and localities receiving federal housing assistance are currently mandated by law to submit a housing strategy statement to HUD.²¹ The Comprehensive Housing Affordability Strategy (CHAS) must include a description of what the community is doing to remove or ameliorate the negative effects of regulatory barriers.²² At present, however, HUD may not disapprove a CHAS or limit housing assistance on the basis of a state or locality's failure to reduce regulatory barriers.²³ The Commission recommends that HUD be given such power to condition its assistance to state and local governments on satisfactory barrier removal strategies.²⁴ A state's failure to undertake

¹⁶ See *id.* at 1-5 - 1-9.

¹⁷ *Id.* at 7-1.

¹⁸ See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *Colum. L. Rev.* 1, 6-18 (1990) (analysis of the legal relationship between municipalities and states).

¹⁹ See *Not in My Back Yard*, *supra* note 1, at 7-2.

²⁰ *Id.* at 6-1 ("The Federal Government should undertake actions that inspire the States as well as local governments to reform housing-related regulations.").

²¹ 42 U.S.C.A. § 12705 (West 1991).

²² *Id.* § 12705(b)(4).

²³ *Id.* § 12705(c)(1)(B).

²⁴ *Not in My Back Yard*, *supra* note 1, at 7-1. A somewhat sketchy description of appropriate state barrier removal strategies is contained in Recommendation 7-1, which states: "At a minimum, this program should include a comprehensive assessment of State and

adequate efforts to remove regulatory barriers would result in loss of its ability to issue tax-exempt bonds for housing²⁵ and its authority to allocate federal income tax credits to developers of low and moderate income housing.²⁶ In addition, the Commission recommends that HUD waive certain federal regulations and provide funds for states to use in planning and initiating their deregulation efforts.²⁷

II. FEDERAL POWER TO REMOVE SUBURBAN REGULATORY BARRIERS

The cornerstone of the Advisory Commission's strategy lies in granting HUD the ability to condition receipt of certain forms of federal housing assistance on state efforts to remove regulatory barriers. The Commission's report did not discuss or propose more direct federal action to remove barriers by preemption. There is some indication from the report²⁸ and comments by commissioners²⁹ that this failure to

local regulations and administrative procedures, as well as State constitutional authority and enabling legislation. States should propose a program of State enabling reform and direct State action, as well as provide for model codes, standards, and technical assistance for local governments that are responsible for enacting and administering development controls." *Id.* at 7-6 - 7-7. More specific recommendations include the preparation of local housing elements subject to state review and approval, comprehensive planning requirements, inclusion of housing affordability and opportunity as objectives of state zoning enabling acts, authority for the state to override local barriers to affordable housing, state-established housing targets and fair-share standards, time limits on building code and zoning approvals and permits and the adoption of model subdivision regulations. See *id.* at 7-7 - 7-11.

²⁵ Federal tax law permits state finance agencies to issue tax exempt bonds to provide homeowners with below-market interest rate loans. See I.R.C. § 143 (1988). About 1.3 million housing units have been financed with these bonds. See *Not In My Back Yard*, *supra* note 1, at 6-4.

²⁶ Federal tax law permits developers of housing for low and moderate income households to receive tax credits whose present value is worth between 30 and 70 percent of the value of their investments. Each state is allocated an annual allotment of tax credits. See I.R.C. § 42. Over 440,000 units of low income housing have been built using the Low-Income Housing Tax Credit. See Nick Ravo, *Tax-Credit Program on Borrowed Time*, *N.Y. Times*, Nov. 24, 1991, § 10, at 3.

To the extent that state legislatures are either hostile or indifferent to the provision of low income housing, even if that housing were built in cities, the Commission's proposals could backfire. State and local inaction could result in the federal government cutting off housing subsidies to private developers, thereby harming the low and moderate income populations the Commission is seeking to assist.

²⁷ See *Not In My Back Yard*, *supra* note 1, at 6-5.

²⁸ See *Not In My Back Yard*, *supra* note 1, at 7-1 ("States are in a unique position, for both constitutional and practical reasons, to deal with regulatory barriers to affordable housing.").

²⁹ See *Downs*, *supra* note 9, at 1122 ("Only state governments have the constitutional power to regulate [local governments] and to override their local ordinances under defined circumstances."); Report By the Advisory Commission On Regulatory Barriers to Affordable Housing: Joint Hearing Before the Subcomm. on Policy Research and Insurance and the Subcomm. on Housing and Community Development of the Comm. on Banking, Finance and Urban Affairs, H.R. Rep. No. 57, 102d Cong., 1st Sess. 11 (1991) [hereinafter *Joint Hearing*

recommend more direct federal action may be attributable to a belief that the federal government does not have the power to regulate local land use decisions. In this part, I show that Congress has the power to adopt either an indirect or direct approach to removing regulatory barriers. Under current constitutional doctrine, the choice between conditioning federal housing assistance on deregulation or outright preemption is one of politics, rather than law.

A. Conditioning Federal Housing Assistance on Deregulation

The constitutionality of the Commission's recommendation that the federal government condition various forms of housing assistance on the adoption by states and localities of barrier removal strategies is clear. A recent Supreme Court decision supports the argument that even if Congress did not have the power to eliminate restrictive land use practices itself,³⁰ it could still encourage states to do so by adopting a strategy of conditional grants.

In *South Dakota v. Dole*,³¹ South Dakota challenged a federal statute that required the Secretary of Transportation to withhold a portion of a state's allotment of highway funds if persons under the age of twenty-one were permitted to purchase or possess alcoholic beverages. Because of the Twenty-first Amendment,³² it is questionable that the federal government had the power to set a minimum national drinking age directly.³³ Nevertheless, the Court held that Congress was not barred from achieving indirectly through the spending power³⁴ what it was unable to do directly. However, the Court in *Dole* did place some limitations on Congress's power: The exercise of the spending power must be in pursuit of the general welfare, the condition must be unambiguous and related to the federal interest in particular national projects or programs, and no independent constitutional bar to the

Report] (Statement by Commission Vice Chairman that "there is not a great deal of clout that the Federal Government has [in eliminating regulatory barriers] . . .").

³⁰ Congress does, in fact, possess the authority to remove restrictive land use barriers directly under its power to regulate commerce. See *infra* text accompanying notes 38-75.

³¹ 483 U.S. 203 (1987). See also *New York v. United States*, 112 S. Ct. 2408, 2427 (1992) (Congress may make grants to states on the condition that they attain a series of regulatory milestones.).

³² U.S. Const. amend. XXI (repealing the prohibition of intoxicating liquors).

³³ See *Dole*, 483 U.S. at 218 (O'Connor, J., dissenting) ("[T]he regulation of the age of the purchasers of liquor, just as the regulation of the prices at which liquor may be sold, falls squarely within the scope of those powers reserved to the States by the Twenty-First Amendment.")

³⁴ U.S. Const. art. I, § 8.

conditional grant can exist.³⁵ In its analysis, the Court also indicated that a condition might be invalid if it were “so coercive as to pass the point at which ‘pressure turns into compulsion.’”³⁶ The Court held that each of these requirements was met by the conditional highway grants, including the one providing that no independent constitutional bar to the condition exist. According to the Court, the “independent constitutional bar” limitation did not forbid the indirect achievement by Congress of objectives that it was not empowered to achieve directly, but instead prohibited Congress from using the spending power to induce states to engage in activities that would, themselves, be unconstitutional.³⁷ Finally, the Court observed that the condition at issue was not coercive since a state failing to adopt a minimum drinking age statute would lose only five percent of its highway subsidies.

If Congress chose to adopt the recommendations of the Advisory Commission on Regulatory Barriers to Housing and condition housing subsidies on state regulatory barrier removal, such a statute would easily meet the requirements set forth in *South Dakota v. Dole*. The Court would almost certainly accept Congress’s probable justification that land use restrictions increase the cost of housing and harm low and moderate income households.³⁸ The conditioning of subsidies, and the resultant lower housing prices would be closely tied to the federal interest in operating its low income housing programs. Furthermore, state removal of regulatory barriers would violate no independent constitutional protections. Finally, it is unlikely that the threat of a loss of relatively modest amounts of housing subsidies would be deemed coercive.³⁹

³⁵ *Dole*, 483 U.S. at 207-09.

³⁶ *Id.* at 211 (quoting from *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

³⁷ *Id.* at 210.

³⁸ See *id.* at 207 (Courts should defer to the judgment of Congress with respect to its view of the general welfare.).

³⁹ Congress has already influenced states and localities to adopt land use policies through its use of the spending power. For example, under the National Flood Insurance Program, Congress required all participating communities to adopt local flood plain management measures to reduce or avoid flood damage. In response to low rates of participation, Congress mandated that certain forms of federal housing assistance be denied to communities that chose not to participate in the program. In addition, property owners in participating communities were required to purchase flood insurance or become ineligible to receive direct federal housing assistance or mortgage loans from federally supervised financial institutions. See 42 U.S.C. § 4106 (1988). In 1978, a federal court rejected a lawsuit challenging the flood insurance program under the Tenth Amendment, the Takings Clause and the Due Process Clause. See *Texas Landowners Rights Assoc. v. Harris*, 453 F. Supp. 1025 (D.D.C. 1978), *aff’d*, 598 F.2d 311 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 927 (1979).

B. Direct Preemption

Rather than relying on the states to act in response to conditional grants, Congress could act directly to eliminate restrictive suburban land use practices by exercising its own constitutional power to regulate commerce.⁴⁰ States and localities might challenge federal legislation preempting restrictive zoning ordinances on the grounds that (1) land use regulation does not fall within Congress's power to regulate interstate commerce and (2) the states' powers to regulate land use are protected from federal interference by the Tenth Amendment. Neither of these challenges, however, would be likely to succeed.

The Supreme Court has, since the early days of the republic, repeatedly stated that Congress's power to regulate interstate commerce is extremely broad.⁴¹ Nevertheless, prior to the late 1930s, the Court repeatedly struck down federal laws on the ground that they were directed to intrastate rather than interstate concerns.⁴² According to the Court, the commerce power was limited to activities that directly affected interstate commerce.⁴³

Beginning in the late 1930s, the Court substantially relaxed its standards for determining the reach of the federal commerce power.⁴⁴ For example, in *Wickard v. Fillburn*,⁴⁵ a farmer challenged the power of the federal government to set quotas on the amount of wheat he could harvest. The quotas included wheat that he planned to consume rather than sell. In response to Fillburn's argument that these harvest limitations regulated activities that were local in nature, the Court stated that

even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."⁴⁶

⁴⁰ The Commerce Clause empowers Congress "to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8.

⁴¹ See *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

⁴² See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act of 1933); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating act that prohibited interstate transportation of goods manufactured using child labor).

⁴³ See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 544 (1935) (invalidating the application of minimum wage and maximum hour laws to a poultry farmer on the ground that the farmer's activities did not "directly 'affect' interstate commerce."). (emphasis in original)

⁴⁴ See *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act of 1935).

⁴⁵ 317 U.S. 111 (1942).

⁴⁶ *Id.* at 125.

Even though Fillburn's consumption of wheat might be a "trivial" component of aggregate demand, the Court ruled that when taken together with other similarly-situated farmers the effect would be significant.⁴⁷

Since its 1941 decision in *United States v. Darby*⁴⁸ upholding the Fair Labor Standards Act of 1938,⁴⁹ the Supreme Court has not invalidated any federal legislation on the ground that the subject matter was outside the scope of commerce susceptible to federal regulation. Federal regulation of seemingly local activities ranging from the exclusion of blacks from restaurants⁵⁰ to "loan sharking"⁵¹ has been upheld.

In determining whether a law enacted pursuant to the Commerce Clause is constitutional, the Court has adopted a two-pronged test. It will defer to a Congressional finding that a regulated activity affects interstate commerce "if there is any rational basis for such a finding."⁵² In addition, the Court will only require that the means selected by Congress be "reasonably adapted to the end permitted by the Constitution."⁵³ Under such a rational basis test, a Congressional preemption of local land use ordinances would be deemed well within the power to regulate interstate commerce. Restrictive suburban zoning ordinances may affect interstate commerce in a number of ways, including reducing the demand for building materials, inhibiting the migration of people to particular locales, and increasing the wages suburban employers must pay to attract a workforce.⁵⁴ Preemption of these land use practices would be directly related to alleviating their negative effects.

Opponents of federal preemption of local land use practices might also challenge deregulation on the ground that it interferes with integral state and local governmental functions. Courts and commentators have repeatedly noted that land use regulation is a governmental activ-

⁴⁷ *Id.* at 127-28.

⁴⁸ 312 U.S. 100 (1941).

⁴⁹ The provisions of the Fair Labor Standards Act challenged in *Darby* were those that prohibited the interstate shipment of goods produced by employees whose wages were below a prescribed minimum or whose hours were greater than a prescribed maximum. *Id.* at 110-11. The decision overturned *Hammer v. Dagenhart*, 247 U.S. 251 (1918). See *supra* note 42.

⁵⁰ See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding application of the Civil Rights Act of 1964 to a restaurant located over one mile from interstate highway).

⁵¹ See *Perez v. United States*, 402 U.S. 146 (1971) (upholding application of the Consumer Credit Protection Act to "loan-sharking" activities that took place entirely within New York State).

⁵² *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 17 (1990) (quoting from *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276 (1981)).

⁵³ *Id.*

⁵⁴ Suburban land use practices also contribute to the problem of concentrated poverty in central cities, necessitating increased federal expenditures for social welfare programs. See *infra* text accompanying notes 94-110.

ity particularly important to states and localities.⁵⁵ Nevertheless, with only a couple of notable exceptions, the Supreme Court since *Darby* has refused to invalidate federal exercises of the commerce power on the ground that the legislation interferes with the activities of states and localities. In 1976, the Court, in *National League of Cities v. Usery*,⁵⁶ invalidated a federal statute that prescribed labor standards for municipal employees. Based in part on principles derived from the Tenth Amendment,⁵⁷ the Court drew a distinction between regulating private citizens and the "States as States."⁵⁸ According to the Court, there are "attributes of sovereignty attaching to every state government which may not be impaired by Congress . . . because the Constitution prohibits it from exercising the authority in that manner."⁵⁹ Until *National League of Cities* was overruled in 1985, the Court applied a three-pronged test to determine whether a regulation enacted pursuant to the Commerce Clause was impermissible. To be invalidated, the statute must (1) have regulated the "States as States," (2) have addressed matters that were indisputably "attribute[s] of state sovereignty," and (3) have made apparent that compliance by the states would directly impair their ability to "structure integral operations in areas of traditional governmental functions."⁶⁰

In 1985, a closely-divided Supreme Court overturned *National League of Cities* and held that federally-prescribed labor standards could be applied to employees of a public transit authority, despite the transit authority's legal status as a local public body. In *Garcia v. San Antonio Metropolitan Transit Authority*⁶¹ the Court observed that the "principal means chosen by the Framers to ensure the role of the States in the

⁵⁵ See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (discussing importance of zoning to local communities); *Izzo v. Borough of River Edge*, 843 F.2d 765, 769 (3d Cir. 1988) ("Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong."); *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455, 462 (D. Md. 1978) ("Land use regulation by zoning is 'distinctly a feature of local government' which is 'outside the general supervisory power of federal courts'") (quoting from *Hill v. City of El Paso*, 437 F.2d 352, 357 (5th Cir. 1971)); cf. Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 Yale L.J. 1134, 1142 (1980) ("[A]bstention in land use cases may in fact have become the rule.").

⁵⁶ 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *New York v. United States*, 112 S. Ct. 2408 (discussed infra note 69.).

⁵⁷ U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

⁵⁸ *National League of Cities*, 426 U.S. at 845.

⁵⁹ *Id.*

⁶⁰ See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981) (quoting from *National League of Cities*, 426 U.S. at 854, 845, 852).

⁶¹ 469 U.S. 528 (1985).

federal system lies in the structure of the Federal Government itself.”⁶² After establishing that the Constitution builds protections for states into the federal system, the Court concluded that “the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result.”⁶³ In effect, the Court in *Garcia* held that the states may not look to the judicial branch to protect their constitutional status, but must instead rely upon the structure of the federal system. The Court, however, left open two possible avenues for challenging federal regulations on the ground that they interfere with state functions. First, the Court stated that it might step in to protect the states if it found some failure of the political process.⁶⁴ Second, the Court implied that some affirmative limits on federal action affecting states under the Commerce Clause might exist, but explicitly refrained from identifying those limits.⁶⁵

The Supreme Court’s decision in *Garcia* elicited sharp criticism from numerous quarters⁶⁶ as well as a prediction by now-Chief Justice Rehnquist that it would soon be overturned.⁶⁷ Even though two recent Supreme Court decisions⁶⁸ may signal an increased receptivity on the part of the justices to federalism-based challenges to federal regulation,⁶⁹ it is highly unlikely that federal preemption of restrictive zoning

⁶² Id. at 550. Among the structural protections against federal government overreaching mentioned by the Court are the states’ control over electoral qualifications, their role in the Electoral College, and their equal representation in the United States Senate. Id. at 551. See also Jesse H. Choper, *Judicial Review and the National Political Process* 176-80 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

⁶³ *Garcia*, 469 U.S. at 554.

⁶⁴ “Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and must be tailored to compensate for possible failings in the national political process. . . .” Id. at 554 (citation omitted). See also *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (“[S]ome extraordinary defects in the national political process might render regulation of state activities invalid under the Tenth Amendment.”).

⁶⁵ See *Garcia*, 469 U.S. at 556.

⁶⁶ For a summary of the dissents in *Garcia* and scholarly commentary, see Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829, 879 n.196 (1989).

⁶⁷ *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) (“a principle [that Congress may not act to infringe on certain fundamental aspects of state sovereignty] . . . will, I am confident, in time again command the support of a majority of this Court.”).

⁶⁸ See *New York v. United*, 112 S. Ct. 2408; *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).

⁶⁹ In *Ashcroft*, the Court held that state court judges were not protected by the Age Discrimination in Employment Act (ADEA) of 1967. After noting that the authority of state residents to determine the qualifications of their important government officials “lies at ‘the heart of representative government,’” the majority adopted a “plain statement rule” to “avoid a potential constitutional problem.” 111 S. Ct. at 2402-2403 (quoting *Bernal v.*

ordinances would be deemed to violate the Constitution. Even during the period in which *National League of Cities* was good law, the Court would have found such regulation unobjectionable, as is made apparent by *Hodel v. Virginia Surface Mining and Reclamation Ass'n*,⁷⁰ decided in 1981. In *Hodel*, the State of Virginia and Virginia mining interests challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977⁷¹ on the ground that the statute violated the Tenth Amendment.⁷² Under the Act, the federal government developed standards and requirements for strip mining, including the restoration of land and preservation of topsoil, which were to be enforced by states with satisfactory regulatory programs or by the federal government itself.⁷³ The district court had invalidated the Act on the ground that it interfered with the states' traditional governmental function of regulating land use.⁷⁴ The Supreme Court in reversing the district court's decision did not challenge the court's characterization of land use planning as an "integral governmental function." Nevertheless, the Court stated that the *National League of Cities* test required that the challenged regulation be addressed to the state itself and not merely be a regulation of private parties.⁷⁵ Under the same analysis, federal preemption

Fainter, 467 U.S. 216, 221 (1984)). The Court decided that Congress had not made clear that state judges were included in the coverage of the ADEA. A separate opinion by Justices White and Stevens stated that the majority's plain statement requirement "is not only unprecedented, it directly contravenes our decisions in *Garcia v. San Antonio Metropolitan Transit Authority* and *South Carolina v. Baker*." *Id.* at 2410 (White, J. and Stevens, J., concurring and dissenting) (citations omitted). In *New York v. United States*, the petitioner challenged the Low-Level Radioactive Waste Policy Act. The Act provided that if states failed to make arrangements for the disposal of low-level radioactive wastes by January 1, 1996, they would be required, upon the request a generator or owner of waste, to take title to and possession of the waste. The Court observed that the Constitution forbade Congress from compelling states to enact and enforce federal regulations. See 112 S. Ct. at 2420. The Court also stated that Congress could not transfer the waste from the generators to state governments. See *id.* at 2428. Therefore, the Court held that the "take title" provisions of the Act were unconstitutional since Congress lacked the power to offer the states a choice between two "unconstitutionally coercive" alternatives. See *id.*

⁷⁰ 452 U.S. 264 (1981).

⁷¹ 30 U.S.C. §§ 1201-1328 (1988).

⁷² The state and surface miners also challenged the Act on the ground that it violated the Commerce Clause by regulating intrastate activities and that it violated the Equal Protection, Due Process, and Takings Clauses of the Constitution. 452 U.S. at 273. The Court found that Congress had a rational basis for believing that surface coal mining had a substantial effect on interstate commerce. *Id.* at 280.

⁷³ 30 U.S.C. §§ 1253-54, 1265(b) (1988).

⁷⁴ *Virginia Surface Mining & Reclamation Ass'n v. Andrus*, 483 F. Supp. 425, 435 (W.D. Va.), prob. juris. noted, 449 U.S. 817 (1980), modified, 452 U.S. 264, and vacated, 453 U.S. 901 (1981).

⁷⁵ "[N]othing in *National League of Cities* suggests that the Tenth Amendment shields the States from pre-emptive federal regulation of *private* activities affecting commerce." *Hodel*, 452 U.S. at 290-91 (emphasis in original). See also *New York v. United States*, 112 S. Ct. at 2430

of restrictive suburban land use regulations would also present no constitutional problem since the federal government would merely displace local regulation of private individuals with federal oversight.

III. A JUSTIFICATION FOR INCREASED FEDERAL OVERSIGHT OF SUBURBAN REGULATORY BARRIERS

My conclusion in Part II that Congress has the power to force states and localities to relax restrictive land use regulations does not, of course, necessarily lead to the conclusion that Congress should exercise that power. Even if Congress were to adopt the moderate recommendations of the Advisory Commission on Regulatory Barriers to Affordable Housing, it would mark a sharp break with the "hands off" approach usually adopted by the federal government with respect to matters of local land use regulation. There are many reasons why the federal government should be reluctant to involve itself in regulating land use.⁷⁶ Regulating the use of land pursuant to the police power is traditionally one of the most important functions of state and local governments.⁷⁷ The Framers of the Constitution envisioned that state governments would provide a check against the power of the national government.⁷⁸ Interfering with or diluting the authority of states and localities to carry out their most basic functions may undermine their central role in our federal system, leaving them hollow shells rather than vibrant forums for local political participation and legislative activity.⁷⁹

(distinguishing permissible regulation of individuals from impermissible requirements that states adopt federal regulations.)

⁷⁶ Cf. Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law In the 1990s and the Implications of Changing Financial Markets*, 64 S. Cal. L. Rev. 1261, 1287 (1991) ("[P]roponents of preempting state real estate finance law bear the burden of persuasion.").

⁷⁷ See *supra* note 55. Municipalities have no inherent power to regulate land use. Local governments are created by the states and empowered to regulate the use of land either by a general delegation from the state of the police power, a state zoning enabling act, or a home rule charter. See Briffault, *supra* note 18, at 6-18 (analysis of the legal relationship between municipalities and states).

⁷⁸ According to Hamilton:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

The Federalist No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷⁹ The exercise of substantive power by state and local officials gives them the opportunity to develop competence, demonstrate their abilities at governance, and earn the support of

In addition to protecting individual liberty, exercise of independent governmental authority at state and local levels in many instances promotes economic efficiency. To be efficient, government must act in ways that correspond to the desires of its constituents. As long as tastes for government intervention can be expected to vary across states and localities, and government actions do not generate significant spillover effects, decentralized lawmaking will maximize utility.⁸⁰ In particular, if the responsibility for policy generation and legal rulemaking is situated at the local level, citizens who constitute a majority at the local level but are in the minority at the national level will be able to satisfy their preferences at no cost to the rest of the nation.⁸¹ Furthermore, the existence of governmental authority in states and localities enables these jurisdictions to try innovative systems of regulation which if successful can be emulated by other communities and which if unsuccessful will not harm the entire nation.⁸²

The demand for land use regulation is likely to vary across regions and localities. In part, this is attributable to the existence of regionally differentiated political cultures: People in some parts of the nation support an activist role for the public sector in regulating property, whereas those in other regions support a limited government role and the preservation of property rights.⁸³ In addition, preferences for different patterns of residential settlement differ greatly both within states and among regions. Some households prefer living in rural communities with an abundance of open space whereas others prefer the higher densities of metropolitan areas.

Local control over land use regulation in general, and exclusionary zoning in particular, plays a special role in the achievement of economic efficiency. A fundamental theorem of urban economics, the Tie-

their constituents. See George C.S. Benson, *Values of Decentralized Government—1961*, in *Institute For Studies in Federalism, Essays in Federalism* 1, 10 (1961); Arthur W. Macmahon, *The Problems of Federalism: A Survey*, in *Federalism: Mature and Emergent* 3, 11 (A. Macmahon ed. 1955); Schill, *supra* note 66, at 866-68.

⁸⁰ This point is explained in greater detail in Schill, *supra* note 76, at 1288-1304.

⁸¹ Cf. Gordon Tullock, *Federalism: Problems of Scale*, 6 *Pub. Choice* 19, 22 (1969) (“[T]he individual will suffer less cost from governmental activities of which he disapproves the smaller the government.”).

⁸² See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

⁸³ Cf. Daniel J. Elazar, *American Federalism: A View From the States* 114-22 (3d ed. 1984) (discussing how political cultures and attitudes toward government regulation vary across regions and states in the United States). For a summary of the empirical literature testing Elazar's observation see Schill, *supra* note 76, at 1301-03.

bout Model,⁸⁴ posits that competition among municipalities is likely to promote economic efficiency. Based upon a set of “heroic” assumptions⁸⁵ including perfect information, costless mobility, and the absence of external effects, Tiebout maintains that citizens are consumers who choose to reside in communities that offer their desired mix of public goods.⁸⁶ The existence of decentralized local governments with the power to regulate and provide public services permits individuals to “vote with their feet,” selecting a package of taxes and services that is more likely to reflect their preferences than any probable combination offered by a higher level of government.⁸⁷

A stable Tiebout equilibrium requires that all residents of a jurisdiction pay the same amount of taxes (head taxes) for public goods. Otherwise, a deadweight loss would occur as some individuals pay more for public goods than the benefits they receive, and others have their consumption of services subsidized. This subsidization of public goods would encourage households to migrate into the community to take advantage of the subsidy and lead households who received less value from services than they paid in taxes to migrate elsewhere. Exclusionary zoning can cause property taxation, the main form of locally-derived revenue in most municipalities, to approximate a head tax.⁸⁸ Zoning regulations such as minimum lot and floor area requirements can establish a minimum value for homes in a community and thus ensure that no household pays less in taxes than its pro rata share of the cost of goods and services provided by the municipality.⁸⁹

The Advisory Commission on Regulatory Barriers to Affordable Housing charges that restrictive zoning regulations increase the cost of housing and are therefore undesirable. It does not fully explain, however, why higher housing prices are undesirable, and more importantly, why the federal government should step in to remedy the problem.⁹⁰ At least in terms of economic efficiency, increased housing costs are not necessarily undesirable if the households who pay for the housing bear

⁸⁴ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 418, 422 (1956).

⁸⁵ See Wallace E. Oates, *An Economist's Perspective on Fiscal Federalism*, in *The Political Economy of Fiscal Federalism* 3, 7 (Wallace E. Oates ed., 1977).

⁸⁶ See Tiebout, *supra* note 84, at 418-19.

⁸⁷ See *id.* at 418, 420, 422.

⁸⁸ See Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 *Urb. Studies* 205, 206-07 (1975).

⁸⁹ *Id.*

⁹⁰ The report conclusorily states that “[i]t is inequitable and a waste of taxpayers' money to continue to provide housing assistance to governments that maintain policies limiting housing affordability.” *Not in My Back Yard*, *supra* note 1, at II-2.

the full cost of the regulations and receive benefits in excess of the increased expense. However, if higher housing values are caused not by increased community desirability, but by artificial supply restraints, then the allocation of resources will be less than optimal.⁹¹ Empirical studies demonstrate that existing homeowners do use restrictive land use regulations as a means of obtaining monopoly profits.⁹²

In addition to the inefficiencies generated by artificial supply restraints, restrictive land use regulations may waste resources because of the alternative locations chosen or forced upon firms and households. Suburban employees who cannot afford housing in close proximity to their jobs must devote more time to commuting. Increased use of cars leads to more rapid automobile depreciation, greater highway congestion, and air pollution.⁹³

Restrictive suburban land use practices also have enormously negative effects on low income households in central cities that result in both adverse efficiency and distributive consequences for the nation.⁹⁴ In recent years, the extent of concentrated ghetto poverty in large cities of the Northeast and Midwest has increased dramatically.⁹⁵ One study indicates that from 1970 to 1980, the number of people with incomes below the poverty level living in census tracts where over 40% of the

⁹¹ See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *Yale L.J.* 385, 404, 430-31 (1977) (Existing homeowners can use zoning to obtain monopoly profits in suburbs with unique geographic or cultural features.).

⁹² See, e.g., Bruce W. Hamilton, *Zoning and the Exercise of Monopoly Power*, 5 *J. Urb. Econ.* 116, 125-28 (1978) (Study of metropolitan areas suggests that house price variations between communities of as much as 50% may be attributable to monopoly zoning.); Louis A. Rose, *Urban Land Supply: Natural and Contrived Restrictions*, 25 *J. Urb. Econ.* 325, 344 (1989) (Forty percent of the interurban house price variation in 45 urban areas may be explained by monopoly zoning.). See also William A. Fischel, *Do Growth Controls Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulation* 36 (1990) (Study by Pollakowski and Wachter showing spillover effects of land use controls supports theory of monopoly zoning.).

⁹³ See *Not in My Back Yard*, *supra* note 1, at 2-3. Suburbs that zone out commercial and manufacturing land uses may exacerbate the problem by forcing firms to locate further away from areas of population concentration. An additional inefficiency of dispersed employment locations would be the possible loss of agglomeration economies. See William A. Fischel, *The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls* 261-69 (1985); David F. Bradford and Wallace E. Oates, *Suburban Exploitation of Central Cities and Governmental Structure*, in *Redistribution through Public Choice* 43, 54, 65-67, 84 (Harold M. Hochman & George E. Peterson eds., 1974).

⁹⁴ For purposes of this article, a government action that generates an adverse distributional effect is one that redistributes wealth from people with lower income to those of higher income. For a more detailed analysis of the effects of exclusionary zoning on poor central city residents see Michael H. Schill, *Deconcentrating the Inner City Poor*, 68 *Chi.-Kent L. Rev.* (forthcoming 1992).

⁹⁵ Paul A. Jargowsky & Mary J. Bane, *Ghetto Poverty in the United States, 1970-1980*, in *The Urban Underclass* 235, 252-54 (Christopher Jencks & Paul E. Peterson eds., 1991).

population were poor increased 29.5% from 1.9 million to 2.4 million.⁹⁶ Additional research shows that the concentration of the urban poor accelerated in the 1980s.⁹⁷ Concentrated ghetto poverty affects black households with much greater frequency than white households.⁹⁸

Restrictive suburban land use practices have contributed to the existence of concentrated inner city poverty and, at present, impede efforts to alleviate its effects. Over the past three decades, central cities have lost a tremendous number of their low-skilled jobs to the suburbs, other regions of the United States, and foreign nations.⁹⁹ Many of these jobs are inaccessible to the inner-city poor because they are unable to move to locations nearby due to the absence of affordable housing.¹⁰⁰ Public transportation is insufficient to enable potential employees living in central cities to reach many suburban locations. In addition, households living at great distances from centers of job creation are less likely to learn about the existence of employment opportu-

⁹⁶ *Id.* at 253. See also Mark A. Hughes, *Misspeaking Truth to Power: A Geographical Perspective on the "Underclass" Fallacy*, 65 *Econ. Geography* 187, 194 (1989) (Census tracts with concentrations of poor households increased from 1970 to 1980.); John C. Weicher, *How Poverty Neighborhoods Are Changing*, in *Inner-City Poverty in the United States* 68, 70 (Lawrence E. Lynn & Michael G. H. McGeary eds., 1990).

⁹⁷ See Richard P. Nathan & Charles F. Adams, *Four Perspectives on Urban Hardship*, 104 *Pol. Sci. Q.* 483, 501 (1989).

⁹⁸ See Jargowsky & Bane, *supra* note 95, at 252 (In 1980, 65% of the ghetto poor were black, 22% Hispanic and 13% non-Hispanic white and other races.); Nathan & Adams, *supra* note 97, at 504 (Over three-quarters of all poor urban black households lived in concentrated poverty tracts in 1986 as compared to 43% of poor urban white households.).

⁹⁹ See John D. Kasarda, *Urban Industrial Transition and the Underclass*, 501 *Annals of the Amer. Academy of Political and Social Science* 26, 29-30 (1989) (In the 1970s, large northern central cities lost large numbers of jobs in the occupational categories of clerical, sales and blue-collar employment whereas their suburbs gained jobs in all occupational categories.).

¹⁰⁰ The first proponent of the spatial mismatch hypothesis was John F. Kain, *Housing Segregation, Negro Employment and Metropolitan Decentralization*, 82 *Q.J. Econ.* 175 (1968). The bulk of empirical evidence supports the proposition that the residential locations of the inner city poor place them at a disadvantage in obtaining employment and higher salaries. See Harry J. Holzer, *The Spatial Mismatch Hypothesis: What Has the Evidence Shown?*, 28 *Urb. Stud.* 105, 118 (1991) ("It seems fair to say, therefore, that the preponderance of evidence from data of the last decade shows that spatial mismatch has a significant effect on black employment."). See also Schill, *supra* note 94, at — ("Although the results of these tests are not all consistent, the weight of the evidence supports the argument that the location of inner city poor households, especially black households living in the older cities of the North and Midwest, creates a disadvantage for them in escaping poverty."). But see Christopher Jencks and Susan E. Mayer, *Residential Segregation, Job Proximity, and Black Job Opportunities*, in *Inner-City Poverty in the United States*, *supra* note 96, at 187, 218 (The findings of empirical studies on the spatial mismatch hypothesis "tell a very mixed story.").

nities.¹⁰¹ Suburban zoning practices contribute to this spatial mismatch of jobs and residences by prohibiting multifamily housing and inflating the cost of existing and newly-constructed single family homes.

In addition to harming their prospects of finding employment, the absence of affordable housing in the suburbs has contributed to an array of problems confronting poor households in the inner city. As middle and working class households leave the ghetto, the poor, who are unable to move, have grown increasingly socially isolated. In his book, *The Truly Disadvantaged*,¹⁰² and in several recent articles,¹⁰³ William Julius Wilson argues that concentrated ghetto poverty generates a wide array of social problems that are both different in magnitude and kind from the problems poor people face in less concentrated surroundings. Children growing up in inner-city communities frequently develop weak attachments to the labor force as a result of an absence of both employed role-models and reasonable prospects of obtaining a job.¹⁰⁴ They often turn to deviant or illegal activities to earn income, thereby further distancing themselves from middle class norms.¹⁰⁵ Other people in the community who share similar views reinforce these attitudes and behaviors. The "concentration effects"¹⁰⁶ generated by living in ghetto poverty may intensify as communities become increasingly populated by unskilled residents who engage in deviant or illegal behaviors, and as employers relocate elsewhere to gain access to a more highly trained workforce and escape negative externalities. Recent empirical studies support Wilson's hypothesis that living in a poor inner-city community has an effect on residents that is independent from the effect of earning a low income.¹⁰⁷

¹⁰¹ Katherine M. O'Regan & John M. Quigley, Labor Market Access and Labor Market Outcomes For Urban Youth, 21 Reg. Sci. & Urb. Econ. 277, 290 (1991).

¹⁰² William J. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987).

¹⁰³ E.g., William J. Wilson, Public Policy Research and "The Truly Disadvantaged," in *The Urban Underclass*, supra note 95, at 460 [hereinafter Public Policy Research]; William J. Wilson, Studying Inner-City Social Dislocations: The Challenge of Public Agenda Research, 56 Am. Soc. Rev. 1, 9-10 (1991) [hereinafter Inner-City Social Dislocations].

¹⁰⁴ Inner-City Social Dislocations, supra note 103, at 10.

¹⁰⁵ See Public Policy Research, supra note 103, at 472.

¹⁰⁶ Inner-City Social Dislocations, supra note 103, at 11. "The issue is not simply that the underclass or ghetto poor have a marginal position in the labor market similar to that of other disadvantaged groups, it is also that their economic position is uniquely reinforced by their social milieu." Id. at 12.

¹⁰⁷ See Elijah Anderson, Neighborhood Effects on Teenage Pregnancy, in *The Urban Underclass*, supra note 95, at 375 (The street culture of ghettos supports early sexual activity, drug use and other forms of delinquency.); Jonathan Crane, The Epidemic Theory of Ghettos and Neighborhood Effects on Dropping Out and Teenage Childbearing, 96 Am. J. Soc. 1226, 1236, 1240 (1991) (Data show that as the proportion of high status jobs in a community

The harmful external effects that suburban exclusionary land use practices have on the residents of central cities thus emerge as strong justifications for the Commission's recommendation that the federal government step in to fight restrictive land use regulations. Neither suburbs nor the states in which they are located bear the full costs of restrictive land use practices. In many metropolitan areas such as New York City, Philadelphia and Washington, D.C., restrictive land use practices in the suburbs of one state have the effect of reducing the mobility of people who live in cities outside that state.¹⁰⁸ The federal government is the only existing governmental entity with the authority to internalize this externality. Even in those instances where cities and suburbs are all within the same state, a substantial portion of the costs of exclusionary zoning is not borne by residents of that state because of the central role played by the federal government in redistributing income.¹⁰⁹ Restrictive suburban zoning contributes to concentrated inner-city poverty which, in turn, contributes to the vicious cycle of inter-generational poverty in central cities. Since the federal government shoulders a major share of the financial responsibility for social welfare programs for these people, it also has a vital interest in eliminating impediments to their social and economic mobility, including suburban barriers to affordable housing.¹¹⁰

IV. THE POLITICS OF SUBURBAN LAND USE REGULATORY REFORM

Underlying the Commission's recommendation that the federal government "inspire" the states to reform local regulatory practices by threatening to cut off certain housing subsidies must be the assumption that the federal government is more likely to "crack down" on restric-

decreases, the proportion of teenage women who become pregnant and the proportion of teenage men and women who drop out of school increases in a non-linear fashion.).

¹⁰⁸ For example, residents of New York City may not be able to find affordable housing in the city's suburbs located in northern New Jersey and southern Connecticut because of restrictive land use practices.

¹⁰⁹ The federal government bears the major share of funding responsibility for many redistributive programs including direct transfer programs such as Aid to Families With Dependent Children and Supplemental Security Income as well as in-kind transfer programs such as Medicaid and Food Stamps. The federal government pays for three-quarters of the nation's public assistance programs. See Joseph E. Stiglitz, *Economics of the Public Sector* 39 (2d ed. 1988). The central role of the federal government in redistribution is supported by economic theory. See Wallace E. Oates, *Fiscal Federalism* 6-8 (1972) (Redistribution at the local or state level will cause an influx of low income households and an exodus of high income residents.).

¹¹⁰ The Advisory Commission seems to recognize the logic of this analysis, at least with respect to the effect suburban land use practices have on the cost of federal housing assistance. See *supra* note 90.

tive land use regulations than the states. Yet, nowhere in the report or in articles or statements by the commissioners is this assumption justified. In this part, I suggest that the Commission's assumption is correct: Although enormous obstacles exist to Congress taking effective action to eliminate restrictive suburban land use practices, members of Congress are nevertheless more likely to act than state legislators. Members of Congress who represent states where restrictive suburban land use practices are utilized are more likely than state legislators to represent constituents who live in both cities and suburbs and, on average, are likely to be more sympathetic to the needs of low income citydwellers. More importantly, interest groups that oppose exclusionary zoning practices are more likely to be influential in Washington than in state capitals.

A. The Limited Success of State and Federal Legislative Efforts to Remove Suburban Land Use Barriers to Affordable Housing

With only a few exceptions, state legislatures have failed to take action against exclusionary land use practices despite the repeated urgings of federal commissions, the housing construction industry, low income housing advocates, and in some cases, their own courts. The reticence of states to act on their own is ironically underscored by the two examples of state legislation the Commission characterized as "extraordinary State actions intended to produce significant change at the local level. . . ." ¹¹¹ The first, Massachusetts's so-called "anti-snob" zoning law, empowers a state agency to override local land use decisions that impede low income housing construction where the decisions are not "reasonable in view of the regional need for low and moderate income housing. . . ." ¹¹² This law is quite modest; it authorizes zoning overrides only if the developer of the proposed housing is a non-profit sponsor or a state agency. ¹¹³ In addition, if ten percent of the housing in a locality is already affordable to low and moderate income households, the state may not override local land use regulations, regardless of the magnitude of the regional need. ¹¹⁴

¹¹¹ Not In My Back Yard, *supra* note 1, at 7-3. More ambitious initiatives such as the New York Urban Development Corporation's efforts to override suburban zoning ordinances and build low income housing in the suburbs have failed in the face of vehement suburban opposition. See Michael N. Danielson, *The Politics of Exclusion* 320-21 (1976).

¹¹² Mass. Ann. Laws ch. 40B §§ 20, 23 (Law. Co-op 1983 & Supp. 1991).

¹¹³ *Id.* § 21.

¹¹⁴ *Id.* § 20.

New Jersey's Fair Housing Act,¹¹⁵ also cited by the Commission as an innovative state legislative effort to override restrictive local zoning ordinances,¹¹⁶ would more accurately be described as a legislative retreat from the objective of removing suburban barriers to affordable housing. The New Jersey legislature acted not out of a desire to "open up the suburbs," but rather in response to enormous pressure by suburban communities to protect them from the rulings of the New Jersey Supreme Court in the *Mount Laurel*¹¹⁷ litigation. In 1975, the court found that the land use practices of New Jersey communities violated the state constitution and ordered localities to take affirmative action to amend their zoning ordinances so as to permit housing affordable by low and moderate income households "at least to the extent of the municipality's fair share of the present and prospective regional need therefor."¹¹⁸

After several years of state and local legislative inaction, the court in 1983 instructed lower courts to award plaintiffs what became known as the "builder's remedy." If a developer proposed to build housing that included a substantial number of units affordable to lower income households and could show that the municipality had not met its fair share obligation, lower courts were instructed to order the municipality to permit construction of both market- and below-market-rate housing.¹¹⁹

In response to the uproar generated by the *Mount Laurel* litigation and the fear of suburban municipalities that they would lose control of their growth, the New Jersey legislature enacted the Fair Housing Act of 1985.¹²⁰ The Act established a moratorium on the ability of courts to order builder's remedies and set up a state agency, the Council on Affordable Housing (COAH), to determine fair share requirements for individual towns and to certify whether plans submitted by the munic-

¹¹⁵ N.J. Stat. Ann. §§ 52:27D-301 et. seq. (West 1986 & Supp. 1991).

¹¹⁶ The legislation was strongly supported by then-Governor Thomas Kean. See Harold A. MacDougall, *Regional Contribution Agreements: Compensation For Exclusionary Zoning*, 60 Temple L. Q. 665, 679-80, n.111 (1987) (Fair Housing Act contained virtually all of Governor Kean's proposed revisions; Robert Hanley, *Open Housing is Mired in Lawsuits Again*, N.Y. Times, Jan. 2, 1990, at B-1 (Governor Kean considers regional contribution agreements to be "ideal.") Kean later served as the Chairman of the Advisory Commission on Regulatory Barriers to Affordable Housing.

¹¹⁷ See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), appeal dismissed and cert. denied, 423 U.S. 808 (1975); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

¹¹⁸ 336 A.2d at 724.

¹¹⁹ 456 A.2d at 452-53.

¹²⁰ The Fair Housing Act was upheld by the New Jersey Supreme Court in *Hills Development Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986).

palities make “the achievement of the municipality’s fair share of low and moderate income housing realistically possible.”¹²¹ The legislation also permits a municipality to transfer up to one half of its fair share housing obligation to another city or suburb if the two municipalities consummate a “regional contribution agreement” establishing an appropriate amount of compensation for the receiving jurisdiction.

The Fair Housing Act has eviscerated much of the impetus toward suburban affordable housing embodied in the earlier *Mount Laurel* litigation. Thus far, the Act has had a very limited impact in increasing low income housing opportunities in the suburbs.¹²² Only a fraction of New Jersey municipalities have had fair share plans certified by COAH.¹²³ Of the relatively small number of units built under the Act most are either not affordable by low income households or are reserved for the elderly.¹²⁴ In addition, the moratorium on the builder’s remedy took effect just as the housing market in New Jersey was reaching its peak, thereby insulating municipalities from the possibility that large amounts of housing would be constructed by private developers. Finally, the ability of the suburbs to enter into regional contribution agreements effectively changed the focus of the *Mount Laurel* initiative from housing provision in the suburbs to housing renovation and construction in the central cities.

Federal efforts to fight exclusionary land use practices in the suburbs have also been few in number and largely unsuccessful. The most significant effort was undertaken by George Romney, HUD secretary during the early years of the Nixon Administration.¹²⁵ HUD’s Open Communities Program conditioned federal water and sewer assistance grants to suburbs on their acceptance of subsidized housing. In addition, HUD sought legislation from Congress that would have prohib-

¹²¹ Certification of fair housing plans by COAH protects a municipality from lawsuit for a period of six years. See N.J. Stat. Ann. § 52:27D-313 (West 1986 & Supp. 1991).

¹²² A number of municipalities have entered into regional contribution agreements, however, transferring their obligations to central cities. See Hanley, *supra* note 116 (From 1988 to 1990, COAH approved 21 transfer programs.).

¹²³ See 98 Towns Receive COAH Approval, 5 Council on Affordable Housing Newsletter 1 (1990) (As of May 16, 1990, COAH had certified the fair share plans of only 98 of New Jersey’s 567 municipalities.).

¹²⁴ See Martha Lamar et al., *Mount Laurel At Work: Affordable Housing in New Jersey: 1983-1988*, 41 Rutgers L. Rev. 1197, 1214-15 (1989) (Survey of 54 municipalities shows that 2,830 units of housing have been completed, but most units affordable to low income households are for the elderly.); Alan Sipress, *Despite Ruling Affordable Homes Still Scarce in N.J.*, Phil. Inquirer, Nov. 25, 1990, at 1 (Many communities are seeking to evade the Fair Housing Act of 1985.).

¹²⁵ A detailed description of Romney’s efforts to promote low income housing in the suburbs may be found in Danielson, *supra* note 111, at 213-42.

ited local governments from using land use regulations to prevent “the ‘reasonable’ provision of federally-subsidized housing.”¹²⁶ The program soon engendered tremendous controversy from communities that feared forced integration. President Nixon distanced himself from the plan so as to avoid offending suburban whites, one of his most important constituencies.¹²⁷ In the face of massive opposition, Romney backed away from confrontation with the suburbs and strongly endorsed local control over land use.¹²⁸ HUD’s legislative proposal to limit local zoning practices was defeated in Congress as were other contemporaneous bills to increase suburban low income housing opportunities.¹²⁹

B. The Relative Likelihood of Future Action by Congress and State Legislatures to Remove Suburban Regulatory Barriers

Based upon past experience, one cannot be optimistic about the likelihood that either the Congress or state legislatures will take action to limit the ability of suburbs to erect regulatory barriers to low and moderate income housing. The primary problem facing efforts to pass legislation at either the federal or state level is the intense opposition such legislation is likely to evoke. As the 1990 Census demonstrates, the proportion of this nation’s population living in suburbs and non-metropolitan areas now exceeds two thirds and is rapidly growing.¹³⁰ A majority of the population of even the most urbanized states can be

¹²⁶ *Id.* at 222. The proposed legislation only applied to undeveloped communities in the path of urbanization. Zoning would only have been subject to challenge if it were inconsistent with a comprehensive plan for the area. See *id.*

¹²⁷ At a news conference President Nixon stated, “[T]he kind of land use questions involved in housing site selection are essentially local in nature: They represent the kind of basic choices about the future shape of a community, or of a metropolitan area, that should be chiefly for the people of that community or that area to determine.” *Id.* at 229.

¹²⁸ *Id.* at 225.

¹²⁹ See *id.* at 236-39. The major piece of housing legislation passed by Congress during the 1970s did contain the objectives of reducing “the isolation of income groups within communities and geographical areas” and increasing the “spatial deconcentration of housing opportunities for persons of lower income. . . .” Housing and Community Development Act of 1974 § 101 (c)(6), Pub. L. No. 93-383, 88 Stat. 633, 634-35 (1976) (codified at 42 U.S.C. § 5301 (1985)). An amendment offered to prohibit suburbs from using local zoning to impede the construction of subsidized housing constructed pursuant to the Act was shouted down on the floor of the House of Representatives. See Danielson, *supra* note 111, at 242.

¹³⁰ In 1990, over 46% of all Americans lived in suburbs and 22.5% lived in nonmetropolitan areas. See U.S. Dep’t of Commerce, Bureau of the Census, 1990 Census Profile: Metropolitan Areas and Cities (No. 3, Sep. 1991).

expected to oppose efforts that would take away their power to control their communities.¹³¹

Nevertheless, if legislation is to be enacted, the Commission is probably correct in assuming that action by the federal government is more likely than action by state legislatures. The first reason has to do with the composition of legislative districts in the Congress and state legislatures. Congressional districts are much larger than most state legislative districts and more diverse.¹³² Individual members of Congress are therefore more likely to represent both urban and suburban voters than are state legislators, which should reduce the intensity of opposition among members of Congress to efforts to scale back suburban land use barriers, at least as compared to state legislators.

More importantly, the role played by special interest groups in the legislative process is likely to be different at the state and federal levels. If the maintenance of suburban regulatory barriers is a majoritarian preference,¹³³ then the level of government most likely to override this preference is the one at which the relevant interest groups in favor of deregulation have the greatest power. Both theoretical and empirical reasons support the belief that the interest groups most likely to be proponents of eliminating restrictive suburban land use barriers would be more successful in influencing members of Congress than state legislators.

Narrowly-focused special interest groups have an advantage over diffuse majorities in influencing government.¹³⁴ Individual voters who favor a government policy that would benefit a large number of citizens

¹³¹ The following table shows that in 1980, even for the seven states with over 90% of their population living in metropolitan areas, the proportion of the population living in the suburbs far exceeded the proportion living in central cities.

State	% in central city	% in suburbs	% in non-metro
California	38.6	56.7	4.7
Connecticut	35.2	56.8	8.0
Florida	31.4	59.8	8.8
Maryland	21.5	71.5	7.0
Massachusetts	34.9	61.2	3.9
New Jersey	16.8	83.2	0
Rhode Island	28.9	62.5	8.6

U.S. Dep't of Commerce, Bureau of the Census, *State and Metropolitan Area Data Book 363-501 (Table B) (1986)*; U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1991 28 (Table 35) (1991)*.

¹³² See Malcolm E. Jewell, *Representation in State Legislatures 95 (1982)* ("[S]tate legislative districts are smaller and more homogenous [than congressional districts], with fewer conflicting interests.").

¹³³ See *supra* text accompanying note 131.

¹³⁴ See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups 53-65 (1965)*.

often lack the incentive to organize and expend the resources necessary to collect information and lobby public officials. Since the benefits cannot be limited to those who invest in organization but instead must be shared among a large number of citizens, each individual voter has an incentive to leave the costly task of lobbying government to others and free-ride on their efforts. Small groups of intensely-interested citizens, however, have much lower organizational costs and are likely to have a disproportionate effect on the legislative process. Special interest groups favoring relaxed suburban land use regulations are likely to enjoy particular advantages in influencing legislators at the federal level.¹³⁵ Since the cost of organizing diffuse suburban majorities is significantly greater at the national as compared to the state level, the special interest groups' organizational advantage would likely be magnified at the federal level.¹³⁶

In the end, questions about the comparative strength of interest groups at the state and federal levels cannot be answered purely on the basis of theory. Interest group influence will vary depending upon the subject matter of the regulation and the industry involved.¹³⁷ Nevertheless, it appears that proponents of relaxing suburban land use barriers are, indeed, more influential at the federal than the state level. The special interest groups most likely to be involved in lobbying for deregulation are those that represent housing developers, low income tenants, and civil rights groups. Each of these interest groups is, in general, better organized and more influential at the federal than the state level.¹³⁸ In addition, housing developers, represented by the

¹³⁵ At the same time, special interest groups may be hindered at the federal level because of the relatively higher level of visibility of Congressional deliberations as compared to state legislative processes.

¹³⁶ See E. Donald Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 *J. L. Econ. & Org.* 313, 329 (1985) (It is easier for environmental groups to organize at the state level.); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 *Sup. Ct. Rev.* 341, 386 ("[T]he federal government may be a more likely subject of capture by a set of special minoritarian interests, precisely because the majority interest of the national constituency is so large, diffuse and enormously difficult to organize."); cf. Ellickson, *supra* note 91, at 407 ("As governmental complexity increases, majority sentiment on any single issue is less likely to prevail; organized minorities become ever more able to engage in logrolling and to take advantage of majority disorganization.").

¹³⁷ See Schill, *supra* note 76, at 1317.

¹³⁸ Interest groups representing housing developers and realtors are among the most influential lobbies in Washington, D.C. See *infra* note 140. In addition, civil rights groups such as the National Association For the Advancement of Colored People and the National Urban League, have developed effective lobbying organizations in the nation's capital. See Michael Pertschuk, *Giant Killers* 148-80 (1986) (describing successful efforts of Leadership Conference on Civil Rights to pass the Voting Rights Act of 1981); Letter From Professor Lani Guinier to the ABA Commission on Women in the Profession (Feb. 13, 1992)

National Association of Homebuilders, are a particularly powerful group in Washington¹³⁹ and would almost certainly dominate the interest groups that would lobby against legislation enacting the recommendations of the Commission.¹⁴⁰

(describing legislative efforts of Elaine Jones of the NAACP Legal Defense Fund). Surveys of interest group influence on state legislators show that both real estate interests and civil rights groups have modest levels of influence. See, e.g., Sarah M. Morehouse, *State Politics, Parties and Policy* 108-112 (1981) (The real estate lobby is "significant" in only three states and civil rights groups are not "significant" influences in any state.); Clive S. Thomas & Ronald J. Hrebemar, *Interest Groups in the States in Politics in the American States* 123, 144 (Virginia Gray et al., eds., 5th ed. 1990) (The number of states in which realtors' associations, contractors/builders/developers and women/minority groups are ranked among the most effective interest groups is 12, 8 and 1, respectively.). These surveys also reveal that the interest groups most likely to support local control over land use policies, local government organizations, are more frequently influential than any of the above groups. See Morehouse, *supra*, at 108-12 (Local government groups are influential in seven states.); Thomas & Hrebemar, *supra*, at 144 (Local government organizations were ranked among the most effective interest groups in 15 states.). See also Wayne L. Francis, *A Profile of Legislator Perceptions of Interest Group Behavior Relating to Legislative Issues in the States*, 24 *W. Pol. Q.* 702, 711-12 (1971) (In civil rights and land policy, interest groups exert relatively little influence on state legislators.); Robert J. Nowell, *One Thing We Did Right: Reflections On The Movement, in New Directions in Civil Rights Studies* 65, 74 (Armstead L. Robinson & Patricia Sullivan eds., 1991) ("The work of the major [civil rights] organizations to influence national policy overshadowed activism taking place at the local level. . . . The success of the movement's national strategy taught activists that changes in race relations came swiftly and completely when the federal government acted on their behalf.").

¹³⁹ See, e.g., Carol B. Meeks, *Housing* 238 (1980) ("The NAHB is one of the largest and most influential trade organizations in the country."); William Lilley, III, *The Homebuilders' Lobby, in Housing Urban America* 32 (Jon Pynoos et al., eds., 2d ed. 1980) ("Government officials and lobbyists close to the housing field regard NAHB as the most effective pressure group concerned with housing and urban development, and one of the most effective in all Washington."); Robert E. Mendelson, *The More We Build, The More We Waste: Housing In Older Urban Regions, in The Politics of Housing in Older Urban Areas* 6, 18 (Robert E. Mendelson & Michael A. Quinn eds., 1976) (NAHB is "one of the most effective lobbies in Washington."). In 1986, the political action committees (PACs) of the National Association of Homebuilders and the National Association of Realtors ranked among the ten largest PAC contributors to members of Congress. See James Q. Wilson, *American Government* 232 (4th ed. 1989).

¹⁴⁰ Opposition to efforts by Congress to encourage or coerce localities to remove land use barriers is most likely to be voiced by members of the intergovernmental lobby such as the National League of Cities, the Council of State Governments and the National Association of Counties. See, e.g., *Joint Hearing Report, supra* note 29, at 117-22, 179-89 (1991) (In prepared statements, representatives of the National Association of Counties and the National League of Cities criticized the Commission's recommendations that the federal government take actions to force municipalities to relax regulatory barriers.).

In recent years the intergovernmental lobby has lost significant strength. See Charles H. Levine and James A. Thurber, *Reagan and the Intergovernmental Lobby: Iron Triangles, Cozy Subsystems, and Political Conflict, in Interest Group Politics* 202, 216 (Allan J. Cigler & Burdett A. Loomis eds., 2d ed. 1986) ("For the Big Seven [state and local government interest groups] and their members, the cozy relationship they had enjoyed with the federal government during the period of growth in domestic spending from the 1960s to the late 1970s came apart [in the 1980s].").

CONCLUSION

Although efforts to relax suburban barriers to affordable housing are more likely to be enacted by Congress than state legislatures, the intensity of suburban opposition may well doom any legislative proposals at either level of government. In developing its recommendations, the Advisory Commission on Regulatory Barriers to Affordable Housing faced a dilemma. As demonstrated in Part II, the Commission could have advanced strategies such as direct preemption of land use regulations, which, if enacted, probably would be more effective in removing suburban barriers to affordable housing than its proposed strategy of conditional grants. At the same time, however, such a recommendation would have intensified suburban opposition, making the passage of any barrier removal program all the more unlikely.

In the end, for the objective of affordable housing in the suburbs to become a reality, suburban opposition must be diminished. Suburban residents oppose low cost housing for myriad reasons ranging from a reluctance to welcome households that do not pay their share of the public services they consume to the fear of racial transition and declining property values. If the vision of racially and economically integrated suburbs implicit in the recommendations of the Advisory Commission on Regulatory Barriers to Affordable Housing is to become a reality, it is likely that government must first act to allay the fears of suburban residents and eliminate the sources of their opposition. Among the strategies the federal government can adopt is to take over an even greater share of the cost of public services that have a large redistributive component such as health care, housing, and special education. Through increased intergovernmental grant-in-aid programs, suburban reliance on the property tax can be diminished. Race- and class-conscious efforts to promote neighborhood stability and integration may also be necessary to gain the approval of suburban residents for increased affordable housing.¹⁴¹ Although these initiatives were well beyond the scope of the Commission, they may be a prerequisite to the successful implementation of its recommendations.

¹⁴¹ These efforts might include limiting the amount of low income housing in any particular community to a level acceptable to existing residents and affirmative marketing practices to promote racial and economic diversity. See Schill, *supra* note 94, at —. Race- or class-conscious integration of the suburbs might require an amendment to the Fair Housing Act of 1968. See *id.* at —.