Vanderbilt Law Review

Volume 25
Issue 6 *Issue 6 - November 1972*

Article 1

11-1972

Exclusionary Zoning Practices: An Examination of the Current Controversy

W. Harold Bigham

C. Dent Bostick

VANDERBILT LAW REVIEW

VOLUME 25 NOVEMBER 1972 NUMBER 6

Exclusionary Zoning Practices: An Examination of the Current Controversy

W. Harold Bigham & C. Dent Bostick***

I. INTRODUCTION

For the last 45 years the idea that local zoning administration is a highly desirable exercise of the state police power has become progressively more entrenched in urban thinking and planning. Although opponents of zoning have quarreled with details of administration or decried the failure of the Supreme Court to continuously oversee implementation of the zoning concept, they have assumed basic Euclidian zoning theory[1] to be beyond serious challenge. This assumption is no longer valid, for classic municipal zoning is on the firing line and its survival is by no means certain.

As the United States enters the last three decades of this century, its cities are declining with startling rapidity. Urban decay, which has brought the cities of a nation comprising six percent of the world's population and consuming 30 percent of its wealth to the point of collapse, is a shock to many Americans, and a puzzle whose solution so far has eluded the nation's best efforts. Part of the dilemma of the modern American city stems from the complex relationship between the central city and the suburb, for whatever may be said about motive, an effective function of municipal planning devices, especially the zoning device, has been to exclude the relatively less affluent from the suburbs. This exclusion has occurred at the same time that jobs have become progressively scarcer in the central city because of the development of suburb-based industry. A peculiar commuting pattern has developed in which white collar and professional workers commute from suburb to

* Professor of Law, Vanderbilt University. B.A. 1954, University of the South; J.D. 1960 Vanderbilt University.

** Professor of Law, Vanderbilt University. B.A. 1952, J.D. 1958, Mercer University. This paper was prepared under the terms of a grant from the Urban and Regional Development Center of Vanderbilt University and the authors gratefully acknowledge the Center's help and encouragement.

1. *See* notes 17-19 *infra* & accompanying text.

city, while blue collar workers commute from city to suburb.

One explanation for the exodus to suburbia is the automobile and the opportunity for mobility that it offers.[2] Equally significant, however, is the notably enhanced economic opportunity since World War II, which has created a much expanded middle class among blacks and whites. Indeed, United States Department of Commerce studies show a fifteen percent decline from 1959 to 1967 in the number of families living in poverty areas;[3] the white exodus, however, represented an eighteen percent drop in poverty area population—a rate double that represented by black departures.[4] One study has estimated that if present trends continue, 50 percent of New York City's population will be Negro and Puerto Rican by 1985.[5] To reverse this trend and to achieve a uniform ethnic composition in city and suburbs by the year 2001, almost 1,000,000 more Negroes and Puerto Ricans than presently projected would have to suburbanize by 1985, and another 700,000 between 1985 and 2000.[6]

Meanwhile, as the cities cope with crime, racial tension, massive welfare systems, and marginal schools, their tax bases are steadily eroded by the flight of industry and the affluent. Thus the problem is not simply a racial one, though certainly there are racial overtones; it is rather a problem of wealth and poverty, and as such, its solution is as elusive as the determination of who is rich and who is poor. Nevertheless, as talent, money, and thought have been directed to the definition and analysis of urban problems, it has become apparent that the same forces that led the civil rights battles of the 1950's and 1960's are gathering again for a new push—this time toward economic and racial integration of the suburbs—a push that may be far more dramatic than any past assault on American social patterns.

The movement toward change takes at least three directions—one is the federal government's efforts to built vast quantities of subsidized housing in the suburbs. Such an effort is apparent in the federal government's "Operation Breakthrough," a presently underfinanced program to subsidize low-cost housing.[7] The most formidable obstacle to this

2. Shipler, *New Highways Shaping Future of City's Suburbs*, N.Y. Times, Aug. 19, 1971, at 1, col. 1.

3. NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, TRENDS IN HOUSING, May 1970, at 1.

4. *Id.*

5. REGIONAL PLAN NEWS, No. 91, Sept. 1969, at 10.

6. *Id.* at 11.

7. C. EDSON & B. LANE, A PRACTICAL GUIDE TO LOW AND MODERATE INCOME HOUSING §§ 17:02-03; Loehwing, *Homebuilding Boom*, BARRON'S, Mar. 1, 1971, at 3; Reichley, *George Romney Is Running Hard at HUD*, FORTUNE, Dec. 1970, at 100.

program is that the necessary land is in the suburbs, and suburbanites do not want a large influx of subsidized city dwellers. Although the federal government may encourage the development of federally subsidized housing, it is obvious from the President's statement of June 11, 1971,[8] that there will be no "compelled" acceptance of low-cost housing by the present administration. Even less successful have been efforts in Congress to give federal aid bonuses to communities that lower barriers to low-income housing.[9]

A second direction is taken by advocates who promote change through the state legislatures;[10] this approach, however, has produced no more of a substantial, nationwide change than the federal effort, at the same time that suburban attitudes are hardening and becoming more hostile. The third, and most travelled, route at present is through the courts. There, a significant legal challenge is developing to the kind of economic discrimination that is both a cause and a product of the municipal planning devices currently in use. It is with that challenge that this Article deals.

II. THE HISTORICAL CONTEXT

Modern zoning is the creation of industrialization, population concentration, and the activities of a fervently dedicated group of proponents, who early in the century propagandized the concept to wide public acceptance. So-called "Euclidean" zoning is today's most widely employed land use control. It is variously praised for its ingenuity, cursed for its Balkanization of cities, and questioned as having no usefulness at all.[11] Perhaps too much has been expected of zoning, since zoning laws are often essentially prospective and negative in concept, as are the law of nuisance, subdivision regulations, and most privately imposed covenants, the other traditional land use devices. Nevertheless, its early victories were regarded by progressive forces as triumphs of enlightenment and social advancement; zoning was peculiarly an idea whose time had come.

Those who developed modern zoning from primitive forms and who obtained judicial approval for it employed remarkable talent in devising a theory of the legitimate exercise of police power that was able

8. Statement by President Richard M. Nixon on federal policies on equal housing opportunity, June 11, 1971. N.Y. Times, June 12, 1971, at 1, col. 8; *id.* at 14, col. 2.

9. On October 14, 1969, Senator Jacob Javits introduced a bill to provide bonuses to communities that lower their zoning barriers. S. 3025, 91st Cong., 1st Sess. (1969). The bill failed to pass in the Senate.

10. *See* notes 166-89 *infra* and accompanying text.

11. *See generally* R. BABCOCK, THE ZONING GAME (1966); C. BERGER, LAND OWNERSHIP AND USE 823 (1968); 1 J. METZENBAUM, LAW OF ZONING 52 (2d ed. 1955).

to withstand charges of constitutional impermissibility.[12] All the appealing arguments of state intervention to protect the populace in matters of safety, health, morals, and general welfare were mustered and articulated in terms of provision for adequate sanitation, prevention of the spread of fire, billboard regulation, and provision for adequate schools and parks. Despite the unquestionable worth of these objectives, the precise beneficial effects of zoning in advancing them have always been hard to identify. On the other hand, a clear effect—and a generally unstated but certainly often hoped for objective—of zoning has been the maintenance of property values and the perpetuation of ethnically homogeneous areas by the exclusion of minority groups from residential developments.[13]

A. Constitutionality of Zoning

Prior to the decisive case of *Village of Euclid v. Ambler Realty Co.* in 1926,[14] the United States Supreme Court, employing an analogy to the rationale of public nuisance, had recognized the principle of local government regulation of land use.[15] Only once had the Court refused to uphold a land use measure,[16] but on the eve of *Euclid* the constitutional fate of prospective land use control was a close question. A significant difference exists between the concept of zoning to eradicate a nuisance and a theory of zoning to implement a planned development. There was a distinct possibility that the Court would find use control pursuant to a prospective plan to be a violation of the due process clause of the fourteenth amendment. Such a finding would have been in line with traditional views of property rights and yet would have involved no blanket disapproval of governmental power to interfere with the use of property.

1. *The Euclid Decision.*—The lower court in *Euclid* found exactly

12. James Metzenbaum, who represented the Village of Euclid in its successful suit, describes at length the "efforts on the part of many noble men who consecrated themselves to the subject for the purpose of making possible such reasonable zoning and such reasonable regulation as would inure to the benefit of the people of this country, not for the then-present alone but for the years to come." 1 J. METZENBAUM, *supra* note 11, at 52. He refers to the pre-*Euclid* campaign as the "formative period of indoctrination." *Id.* at 53. Metzenbaum, discussing his role as attorney for Euclid, anticipates Churchillian rhetoric, saying, "To have become the spokesman for so splendid a cause, was an exceptional privilege which well warranted a consecration to the task." *Id.* at 57.

13. AMERICAN SOC'Y OF PLANNING OFFICIALS, PROBLEMS OF ZONING AND LAND-USE REGULATION 37 (Research Report No. 2, 1968).

14. 272 U.S. 365 (1926).

15. *E.g.*, Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915).

16. Eubank v. City of Richmond, 226 U.S. 137 (1912).

such a constitutional violation.[17] The matter reportedly was so close in the Supreme Court itself that only a change of two votes on rehearing assured the Village of Euclid of victory and granted judicial recognition to the constitutionality of the zoning principle.[18] In language as particularly appropriate today as when it was written more than 40 years ago, the Court explained its radical amendment of property rights:

> Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations . . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[19]

2. *The Aftermath of Euclid.*—The *Euclid* language implied that the Supreme Court would continue to exhibit concern and to exercise supervision over the newly validated zoning power. The Court seemed to confirm the general expectation by reviewing and declaring unconstitutional a zoning ordinance only two years after the *Euclid* decision,[20] but prospects of continuing close supervision were illusory. Having established the constitutionality of the zoning principle, the Court—perhaps fearing involvement in every street corner zoning dispute in the country—consistently has refused to review zoning cases since 1928. Some of the cases the Court has refused to review have involved ordinances so extreme that they leave no doubt of the Court's determination to maintain its aloofness in the field of zoning.[21] Thus the Court, activist in other areas of social change since 1926, has effectively abdicated the zoning area for two generations. In so doing, it has left the task of developing zoning law to the states, and has entrusted the application of federal constitutional standards in zoning cases to state courts.

---

17. 297 F. 307 (N.D. Ohio 1924). Metzenbaum comments that the district court found not only that the application of the zoning ordinance to complainant's land was unreasonable and unconstitutional, but also that the comprehensive zoning ordinance was fundamentally and basically illegal and unsupportable as a violation of the state and federal constitutions. J. METZENBAUM, *supra* note 11, at 56-57.

18. *See* McCormack, *A Law Clerk's Recollections,* 46 COLUM. L. REV. 710, 712 (1946).

19. 272 U.S. at 387.

20. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

21. *E.g.,* State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W. 2d 217, *cert. denied,* 350 U.S. 841 (1955). *See generally* Johnson, *Constitutional Law and Community Planning,* 20 LAW & CONTEMP. PROB. 199, 208 (1955).

B. Zoning in the States

1. *State Legislation.*—Even before the fundamental constitutional proposition had been settled, the states had moved quickly in the early 1920's to legislate zoning statutes.[22] Although scattered regulations governing height, fire zones, building sanitation, and nuisance had existed since earliest colonial times, the first ordinance worthy of the name "comprehensive zoning regulation" was enacted in New York City in 1916.[23] That ordinance, most notable for its exaggerated assumptions about the future,[24] is nonetheless important as the country's first comprehensive zoning of height, areas, and use.[25] The ordinance is also significant in that it proceeded on principles of police power and not eminent domain; at the time, the constitutional validity of this approach was highly questionable.[26] The most significant pre-*Euclid* development, in national terms, was the publication in 1926 of the Standard State Zoning Enabling Act by an advisory committee of the Department of Commerce.[27] Today every state has enabling legislation or direct constitutional provisions that grants zoning power to all cities or to classes of cities; most states permit counties to zone as well.[28]

Despite the overwhelming change in social, legal, and economic conditions since 1926, the popularity of the original model has endured. Most state statutes are closely patterned after the standard enabling act, lending a certain uniformity to the statutory provisions.[29] In the emerging struggle with which this Article deals, perhaps the most significant

22. By 1922, 20 states had passed enabling acts to facilitate local zoning. Kimball, *A Review of City Planning in the United States,* 1920-21, 2 NAT'L MUN. REV. 27 (1922). By 1930, enabling acts or existing constitutional authority had granted the right to municipalities in all 48 states to adopt zoning ordinances. U.S. DEP'T OF COMMERCE, SURVEY OF ZONING LAWS AND ORDINANCES ADOPTED DURING 1930, at 203 (1931).

23. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.07 (1968). This ordinance was sustained in Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920).

24. *See* C. BERGER, *supra* note 11, at 618 n.36 (1968).

25. E. BASSETT, ZONING 23 (1940).

26. *Id.* at 27.

27. This recommended act permitted the regulation and restriction of height, number of stories, and size of buildings; percentage of lot that could be occupied; size of yards and courts; density of population; and location and use of various types of structures—all for the purpose of promoting health, safety, morals, or the general welfare of the community. *See* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 3-1 (1969).

28. 8A E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.37 (3d ed. 1965); U.S. HOUSING & HOME FINANCE AGENCY, COMPETITIVE RIGHT OF MUNICIPAL & COURT ZONING ENABLING STATUTES ii (1952).

29. By 1925, even before its formal recommendation by the Committee, 19 states had adopted the model in whole or in part. C. HAAR, LAND-USE PLANNING 148 (1959). It remains a popular model today, although there have been some important changes, and undoubtedly the developing litigation on zoning is causing a rethinking of some of its basic premises.

provision in the entire standard act is that which names the "legislative body of cities and incorporated villages as the recipient of the power to regulate."[30] As this Article will later indicate, the designation of the local government as the decision maker for the general welfare, seemingly so desirable an arrangement in times past, may ultimately prove to be the weakness that leads to a dramatic curtailment of permissible exercises of zoning power.[31] One who writes in this field is impressed continually that the general welfare of the local municipality may be a chief cause of general detriment to the larger community just beyond the municipal limits. Nevertheless, the comparatively infinitesimal size of a local incorporated area does not prevent that community's exercising legislative zoning power for the general welfare of only that tiny unit of government. For example, there are more than 1,000 local government units laying down zoning rules in the Chicago area; there are approximately 1,400 such units in the environs of New York City.[32] An obvious alternative to such narrowly based decision making is metropolitan zoning power, and some attempts have been made in this direction.[33] Primarily, however, relief from the effects of fragmented general welfare decisions continues to be sought in the courts.

2. *State Courts.*—The basic constitutionality of state enabling zoning statutes has not been a viable issue for four decades. The constitutional questions litigated in state courts during this time have dealt only with specific ordinances enacted under the authority of the enabling acts; even in these cases, specific manageable guidelines have never been developed against which an ordinance may be measured. The statutes, without clear standards, require only that the ordinances prohibit things harmful to health, morals, safety, and welfare.[34] Generally, therefore, the question is whether the ordinance, as applied to a particular parcel, at a particular time, under existing circumstances, deprives the owner of his property without due process of law or operates to deny him the equal protection of the law.[35] Under the due process clause, which has

30. U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 1 (1926), *reprinted in* 3 A. RATHKOPF, *supra* note 27, at 100-1.

31. The rapid movement of industry to the suburbs away from traditional core city sources of labor residence has created a new class of "aggrieved persons" in fact, who nonetheless have no standing to challenge zoning at the new site of their jobs under traditional tests of standing.

32. U.S. NEWS & WORLD REPORT, June 22, 1970, at 39.

33. Note, *Extending Standing to Nonresidents—A Response to the Exclusionary Effects of Zoning Fragmentation*, 24 VAND L. REV. 340 (1971).

34. *See* Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), *aff'd*, 214 U.S. 91 (1909); 1 A. RATHKOPF, *supra* note 27, at 2-2.

35. Professor Sager has described the new and old equal protection and evaluated the new concepts evolved by the Supreme Court since 1954. Sager, *Tight Little Islands: Exclusionary*

provided the conventional route of attack on zoning ordinances, the courts have insisted that zoning restrictions bear a real relationship to the public welfare and not be arbitrary, unreasonable, or discriminatory.[36] Opponents have typically charged the ordinance as being unreasonable, and consequently unconstitutional, in that it is either confiscatory, arbitrary, or discriminatory.[37] The issue thus raised is not whether some of the attributes of property ownership have been diminished by the ordinance, for undoubtedly some have been, but whether too much diminution has occurred to be permitted. More specifically, an ordinance is said to be confiscatory if the property to which it is applied is not suitable for any of the permitted uses, arbitrary if there is no reasonable relationship between the evils apprehended and the ordinance provisions designed to prevent or cure them, and discriminatory if the ordinance does not operate evenly on all persons or property in like circumstances.[38]

C. The Failure of the Courts to Resolve Zoning Problems

Although there has been a notable uniformity in philosophy and procedure from state to state in the treatment of zoning disputes, there have been predictable differences in emphasis and thrust. The due process approach, which investigates the relation of the ordinance to health, safety, morals, or public welfare, has led to widely divergent results when applied to specific zoning restrictions, such as large lot requirements. Furthermore, one of the most consistent and most criticized trends has been the tendency of state appellate courts to defer to local legislative bodies on difficult problems of zoning development.[39] This deference can be attributed in part to a judicial feeling that courts are inadequately equipped to deal with problems often more technical than legal in nature. Certainly the advancing technical sophistication and complexity of land use planning is a reality that has led to increasingly less substitution of the court's view for the professional planner's view

---

Zoning, Equal Protection, and the Indigent, 21 STAN. L. REV. 767 (1969). He also explores the ramifications and possible application of this "energized" equal protection to exclusionary zoning power.

36. 6 R. POWELL, REAL PROPERTY § 871, at 153.7-.8 (1971); 1 A. RATHKOPF, *supra* note 27, at 4-2. *See* Florka v. City of Detroit, 369 Mich. 568, 120 N.W.2d 797 (1963).

37. Powell characterizes these terms as "weasel words" usable by a court to avoid a result it wishes to avoid while paying lip service to the "presumption of validity." 6 R. POWELL, *supra* note 36, at 153.8-.9.

38. 1 A. RATHKOPF, *supra* note 27, at 4-5 to -6.

39. Rogers v. North Am. Philips Co., 37 Misc. 2d 923, 236 N.Y.S.2d 744 (Sup. Ct. 1962); Shapiro v. Town of Oyster Bay, 27 Misc. 2d 844, 211 N.Y.S.2d 414 (Sup. Ct. 1961).

of what land use best serves the general welfare.[40] This unfortunate abdication has left the formulation of much zoning law to the more lethargic and pressure-sensitive legislative organs of local government.

Consistently with this trend, state appellate courts that do face the issue uniformly have presumed the validity of the local ordinance and placed the burden of proof on the challenger of the ordinance.[41] This burden has proved so onerous that it frequently forecloses any possibility of redress for a constitutional grievance. As Judge Hall of the New Jersey Supreme Court observed in his often-quoted dissent in *Vickers v. Township Committee*,[42] "our courts have . . . made it virtually impossible for municipal zoning regulations to be successfully attacked."[43]

Changing social structures and population growth have apparently rendered obsolete this conventional response of the courts to zoning law challenges. It is doubtful that the judiciary's tradition of measuring only the reasonableness of zoning facts in context against the nebulous concepts of public welfare, health, morals, and safety can endure much longer. As their problems proliferate, the burgeoning cities will make it progressively more difficult for courts to state, as they often have in the past decade, that zoning specifications are matters of local policy and of no concern to the court so long as they are reasonable.[44]

III. VULNERABLE ZONING PRACTICES

As this Article is written, lawsuits are mushrooming across the

40. This is reflected by the majority opinion in National Land & Inv. Co. v. Kohn, 419 Pa. 504, 521, 215 A.2d 597, 606-07 (1965), in which the court said:

"In the span of years since 1926 when zoning received its judicial blessing, the art and science of land planning has grown increasingly complex and sophisticated. The days are fast disappearing when the judiciary can look at a zoning ordinance and, with nearly as much confidence as a professional zoning expert, decide upon the merits of a zoning plan and its contribution to the health, safety, morals or general welfare . . . ."

41. The principle was established in *Euclid* and mentioned in *Nectow*. Further, the courts have said that if the issue of the reasonableness of a zoning ordinance is debatable, the courts will not interfere. *See, e.g.*, Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942); Brandt v. Zoning Bd. of Adjustment, 16 N.J. Super. 113, 84 A.2d 18 (App. Div. 1951). Although there are courts that point to some limits on the general rule, the limits are usually expressed in generalities. *See, e.g.*, State v. Modern Box Makers, Inc., 217 Minn. 41, 13 N.W.2d 731 (1944).

42. 37 N.J. 232, 181 A.2d 129 (1962).

43. *Id.* at 259, 181 A.2d at 143. In Kramer v. Board of Adjustment, 45 N.J. 268, 296, 212 A.2d 153, 169 (1965), the New Jersey Supreme Court said that "[the board of adjustment's] peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion. Courts cannot substitute an independent judgment for that of the boards in areas of factual disputes . . . . So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of government cannot interfere."

44. Loveladies Property Owners Ass'n v. Barnegat City Serv. Co., 60 N.J. Super. 491, 159

nation attacking suburban zoning policy.[45] In terms of current sensitivity, there are four aspects of zoning policy around which the pending legal battles are likely to be fought. One aspect is the large lot zoning requirement; a second is subdivision control regulation; a third is the minimum floor space requirement for residences; and a fourth is the exclusion or severe numerical restriction of multifamily dwellings.[46]

A. Large Lot Zoning Requirements

Density control has been recognized as an appropriate object of regulation since at least 1926, when the words "density of population" were included in the standard form of the U.S. Department of Commerce.[47] The enabling statutes of all 50 states include provisions permitting ordinances designed to "prevent the overcrowding of land."[48] As a rule, ordinances requiring minimum lot areas for residential dwellings have been justified in terms of police power exercise.[49] Local legislative bodies have doubtless been motivated by a broad spectrum of considerations in enacting minimum lot size requirements, but the usual desire is to create a valuable and enduring tax basis and a congenial and homogeneous neighborhood.[50] Implementation of these restrictions has usually resulted in an economic and class segregation of the community that has in turn assured protection of the homogeneous character and economic integrity of the neighborhood. This inescapable characteristic of zoning was recognized as early as the lower court decision in *Euclid*.[51] Nevertheless, the segregationist aspect of zoning seems so inseparable from the system that it has rarely been questioned unless the zoning provision was so drastic as to be economically unrealistic.

1. *Litigation.*—Until recently, attacks on minimum lot size requirements have not come from the excluded. Litigation customarily

---

A.2d 417 (App. Div. 1960).

45. *E.g.*, Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Kennedy Park Homes Ass'n. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Kit-Mar Builders, Inc. v. Township of Concord, 439 Pa. 466, 268 A.2d 765 (1970).

46. Fanale v. Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958).

47. U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (1926), *reprinted in* 3 A. RATHKOPF, *supra* note 27, at 100-1.

48. 3 A. RATHKOPF, *supra* note 27, at 100-1 to -6.

49. *See, e.g.*, Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 116 N.W.2d 816 (1962). The city contended in support of the reasonableness of minimum lot sizes imposed by ordinance that "[t]he present zoning of the subject parcels would create the maximum density of population that could be serviced by available sanitary sewers, and, therefore, bears a direct relation to the public health, safety and general welfare." *Id.* at 513, 116 N.W.2d at 818.

50. For the motives involved in large lot zoning and its relative efficiency in attaining desired goals see Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969).

51. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924).

involves either real estate developers who complain that the ordinances lower profits by making possible fewer houses and to that extent are confiscatory, or property owners who contend that too many of the prerogatives of ownership have been taken arbitrarily and without factual relation to the general welfare.[52] These attacks have been notably unsuccessful.[53] As they have with other "reasonableness" issues in zoning, the courts in these cases have applied a presumption that the legislative exercise is reasonable unless proved otherwise by the contestant. Except in the clearest cases of abuse, this combination of a heavy burden of proof and judicial deference to the legislative branch has sustained the ordinance.[54]

Reasons assigned by the judiciary for upholding minimum lot size regulations have become more sophisticated as attacks on these provisions have escalated. When first confronted with challenges to lot size regulations, the courts tended to define reasonableness in terms of the standard fictions of zoning objectives under the police power.[55] More recent opinions, while continuing lip service to police power analysis, have expressed concern for the subtler considerations of standard of living, preservation of neighborhood "character," tourist attraction, aesthetics, and maintenance of land values.[56] Although the decisions consistently declare that the primary purpose or effect of the ordinance must be to benefit the public interest rather than private interests, a public interest has been found even when the ordinance was construed by zoning board members to allow property transfers only to "substantial people" of "more than ample" means.[57] Legislation expressed in language subject to such interpretation has bolstered the claims of those who contend that government, through zoning, has been used to provide and maintain havens for the rich.

There have been some limitations on minimum lot zoning. Courts have been reluctant to permit minimum lot restrictions when the clear

52. Senior v. Zoning Comm'r, 146 Conn. 531, 153 A.2d 415 (1959); Levitt v. Village of Sands Point, 6 N.Y.2d 269, 160 N.E.2d 501, 189 N.Y.S.2d 212 (1959); Dilliard v. Village of North Hills, 276 App. Div. 969, 94 N.Y.S.2d 715 (1950).

53. But 2 examples of successful challenge on minimum lot size grounded at least partially in arguments of economic infeasibility are National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965), and Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 116 N.W.2d 816 (1962).

54. *But cf.* cases cited note 53 *supra.*

55. *E.g.*, Honeck v. County of Cook, 12 Ill. 2d 257, 146 N.E.2d 35 (1957); Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942).

56. *E.g.*, County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967); Bilbar Constr. Co. v. Board of Adjustments, 393 Pa. 62, 141 A.2d 851 (1958); Jones v. Town of Woodway, 70 Wash. 977, 425 P.2d 904 (1967).

57. County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967).

legislative objective has been not to direct growth, but to prevent it. Preservation of a community's character by total prevention of change and growth seems to be a judicially proscribed activity;[58] thus it has been said that zoning cannot be used to deny the future.[59] A scheme whose admitted purpose was to funnel low-income population into an area of the county in which governmental services could be provided more economically has been denied enforcement.[60] Even when municipal facilities are planned to grow at a given rate, population cannot be limited to conform to that preordained growth.[61]

With few exceptions, minimum lot regulations have been upheld when the minimum lot size was economically realistic and the regulations did not impose blatantly extravagant requirements.[62] The larger the minimum size, the more difficult is the justification, for there is a point of diminishing returns at which minimum requirements are so high as to be confiscatory in effect.[63] Nevertheless, five-acre minimum lots have been upheld,[64] and some communities apparently have provided for at least ten-acre minimums.[65] The courts have been quite permissive in permitting large lot zoning based on hazy justifications whose relation to the general welfare is often not clear.[66] Similarly, the courts have not been demanding in requiring wealthy communities to explain where land uses excluded by the large lot requirement should go. Finally courts often have accepted arguments that the tax revenues of an area are not sufficient to support the services required by a large

58. *See* Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964). *But see* Bilbar Constr. Co. v. Board of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958).

59. National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

60. Board of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959).

61. Albrecht Realty Co. v. Town of New Castle, 8 Misc. 2d 255, 167 N.Y.S.2d 843 (Sup. Ct. 1957).

62. *See, e.g.,* Honeck v. County of Cook, 12 Ill. 2d 257, 146 N.E.2d 35 (1957) (5 acres); Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952) (5 acres); State *ex rel.* Grant v. Kiefaber, 114 Ohio App. 279, 181 N.E.2d 905 (1960) (80,000 square feet).

63. *See* LaSalle Nat'l Bank v. City of Highland Park, 27 Ill. 2d 350, 189 N.E.2d 302 (1963); Bismark v. Village of Bayville, 49 Misc. 2d 604, 267 N.Y.S.2d 1002 (Sup. Ct. 1966).

64. Honeck v. County of Cook, 12 Ill. 2d 257, 146 N.E.2d 35 (1957); Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952).

65. *See* Editorial, 94 N.J.L.J. 116 (1971), which condemns the practice of New Jersey municipalities in encouraging immigration of desirable industry to their areas while at the same time zoning out those who work in these industries by basic lot zoning. The editorial suggests the legislative remedy as the most appropriate to the problem on a state-wide basis.

Despite recent flat assertions to the contrary—*see* Davidoff, Davidoff & Gold, *Suburban Action: Advocate Planning for an Open Society,* 36 J. AM. INST. PLANNERS 12 (1970), there are now available sketchy data that indicate that blacks are moving to the suburbs in significant numbers.

66. Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958).

influx of lesser uses, without requiring an explanation of why the wealthy area cannot levy increased taxes on itself to support the new services needed.[67]

2. *Current Status.*—Although zoning has always involved the use of fictions to achieve some effects intended but not stated, exploitation of this device has placed a noose around central city areas that grows ever tighter with increasing population pressures. The direct effect on core city spillover into the suburbs has been staggering. Within a 30-mile radius of midtown Manhattan, there are about 210 square miles of vacant land in Nassau, Westchester and Rockland counties. Under current zoning ordinances, vacant land in these inner suburban counties could accommodate about 470,000 people. If the same areas were developed at existing contiguous population densities, the same land would accommodate 1,300,000 persons, or 900,000 more.[68] In 1962, more than two-thirds of the vacant land of the 31-county region that surrounds the Port of New York was zoned for one-family houses on half-acre or larger lots, regardless of the suitability of the location or terrain; about two-fifths of this land was zoned for houses on at least an acre of land.[69] As of 1966, the lot size required for about 70 percent of all undeveloped zoned Connecticut lands was more than one acre.[70] One recent report indicates that 92 percent of all land zoned for restrictive use in Connecticut is subject to lot size requirements of one-half acre or more.[71]

Although abuse of the large lot ordinance has brought on closer judicial scrutiny as urban strangulation accelerates,[72] there is no simple judicial solution. Planning is a complex and imprecise art, and the judiciary suffers from a lack of technical expertise in the field. Moreover, the motives of the municipalities that enact these ordinances may be suspect, but they are exceedingly difficult to prove. Even more perplexing is the question of how relevant the municipalities' motives should be in judicial decision making. The effect, and not the motive, would seem to be crucial.

The large lot requirement as a planning tool has been damaged by insensitive use, but the concept itself is a functional one and should not

67. *See* Babcock & Bosselman, *Suburban Zoning and the Apartment Boom,* 111 U. PA. L. REV. 1081 (1965).

68. Regional Plan News, No. 91, Sept. 1969, at 17.

69. Regional Plan News, No. 91, Sept. 1969, at 5-6. The Regional Plan Association suggests on the basis of declining land availability that the problem is even more acute now.

70. Note, *supra* note 50.

71. U.S. NEWS & WORLD REPORT, June 22, 1970, at 39.

72. *See, e.g.,* LaSalle Nat'l Bank v. City of Highland Park, 27 Ill. 2d 350, 189 N.E.2d 302 (1963).

be arbitrarily discarded. Police and fire protection, sanitation, and educational facilities can be inundated by a massive influx of population occuring so rapidly that it outstrips bona fide efforts to provide these services. Although it is apparently seldom used in fact as a temporary expedient to direct orderly growth, the large lot ordinance does have this legitimate potential utility.[73] Additionally, large lot requirements may be useful in preventing dilution of municipal service quality stemming from increased population density. Since large lot requirements limit population density, they curtail the problems flowing from it—increased demand for public services accompanied by possibly lower tax revenues.[74] The difficult judicial task is to distinguish the ordinance designed and enforced to provide reasonable services to accommodate growth from the ordinance designed and enforced to avoid the burdens of growth by systematic exclusion of population.

B. Subdivision Regulations

Subdivision regulations that impose stringent requirements on the subdivision house builder for installation of capital improvements are closely related in their exclusionary effects to large lot requirements. Subdivision controls, like modern zoning methods, evolved largely in the second and third decades of this century.[75] It is doubtful that exclusionary designs figured prominently in the early thinking that supported these measures; control was the important factor.[76] Previously, the municipality, and through it the property-owning residents of the municipality, paid the entire expense of capital improvements for new subdivisions within the municipality. In times of modest growth, this took the form of paying for street, sidewalk, and sewer development in the new areas. However, frauds and speculative building in the spiraling economy of the 1920's[77] overloaded and finally swamped the fiscal structure of the cities. The subsequent collapse of the national economy in the Depression made mandatory a shift of the burden to the developer,[78] and

73. *See* Becker, *The Police Power and Minimum Lot Size Zoning*, 1969 WASH. U.L.Q. 263, 283.

74. *Id.* at 284.

75. For a discussion tracing and analyzing state statutes on subdivision regulations see Note, *An Analysis of Subdivision Control Legislation*, 28 IND. L.J. 544 (1953).

76. The need for control of subdivision development is obvious. Once an area is subdivided, its direction in terms of land use is settled for a long term. This direction may be adverse to community interest in terms of safety, health, and financial return measured against final outlay for services in the area by the city.

77. *See* P. CORNICK, PREMATURE SUBDIVISION AND ITS CONSEQUENCES (1938); E. FISHER, REAL ESTATE SUBDIVIDING ACTIVITY AND POPULATION GROWTH IN NINE URBAN AREAS (1928).

78. *See* Note, *supra* note 75.

hence to the purchaser.

Subdivision control ordinances have traditionally affected curb, gutter, sewer, sidewalk, and storm drain improvements. Courts have had little difficulty disposing of constitutional challenges to this type of assessment,[79] because the benefit of the capital improvements to the burdened property is direct and obvious. More difficult challenges to assessment came as municipalities attempted to require dedications of land or cash fees for schools and playgrounds as a prerequisite to subdivision approval. This type of assessment fared less well in the courts than did exactions for the more visibly beneficial capital improvements immediately incident to the subdivision lot itself.[80]

Thus litigation in this area generally has not been concerned with the objection that the subdivision control is invalid because it increases the cost of property and makes it more difficult for the poor to buy. It is not the exclusionary effect that has been attacked,[81] but rather the relation of the benefit to the specifically burdened property.[82] If the controls cause the subdivider to pay more than his share of the cost to the community of universally shared facilities, such as schools, then the controls may be discriminatory, and therefore unconstitutional. Some writers have suggested a simple, narrow test of constitutionality that requires the direct benefit of improvements financed by subdivision fees to inhere exclusively in the homeowners assessed; otherwise, the fees are unconstitutional.[83] Other writers have found this test unrealistic and would uphold the controls when there is a nexus between the subdivision development and the improvements built with the assessment, as long as some method exists to relate the costs to the exactions.[84] The latter

79. *E.g.*, Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371, 378-79 (1956); Mefford v. City of Tulare, 102 Cal. App. 2d 919, 228 P.2d 847, 851 (1951); *see* Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920).

80. *See* Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957); Ridgemont Dev. Co. v. City of East Detroit, 358 Mich. 387, 100 N.W.2d 301 (1960). *But see* Gulest Associates v. Town of Newburgh, 25 Misc. 2d 1004, 29 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962). For a complete discussion of the topic see Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

81. Some authors argue that subdivision exactions as presently implemented are too slight to contribute significantly to an exclusionary effect. The suggestion is that exclusionary tendencies would be better curtailed through appropriate legislative limitation on exclusive zoning, government subsidizing of housing, and enforcement of antidiscrimination legislation applicable to single-family housing. *See* Heyman & Gilhool, *supra* note 80, at 1155.

82. Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

83. Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 407 (1963).

84. Heyman & Gilhool, *supra* note 80, at 1133 n.59.

view seems to have found substantial approval,[85] perhaps because it seems reasonable that new residents should be charged for the enhanced costs of educational and recreational facilities occasioned by their presence, even if it cannot be shown that the newcomers alone benefit from the use made of their payments. Nonetheless, high requirements for curbs and sewers, sidewalks, streets and parks, and schools raise lot prices substantially.

Whether the exclusionary effect of increasing the cost of subdivision land beyond the reach of the poor by loading down each lot with assessments for community capital improvements can withstand the coming attack presents a novel and complex constitutional question. Again, it is the effect of such action, not the motivation for it, that likely will be subjected to close scrutiny.

C. Minimum Floor Space Requirements

A third zoning control measure likely to be attacked is the requirement of minimum floor space in residential buildings. Ordinances requiring minimum floor space customarily are supported in terms of the relation of the amount of living space to the health of a resident family.[86] This rationale can be difficult to support logically, as was pointed out in the scholarly debate that follows the case of *Lionshead Lake, Inc. v. Township of Wayne*,[87] which upheld a minimum space ordinance. In that debate, Professors Nolan and Horack defended the decision with a well-reasoned but narrowly defined analysis of the relationship between living space and public health.[88] Professor Haar, asserting a lack of any real relationship between health and the ordinance's space requirements,[89] argued more broadly that the *Lionshead* result would foster economic and social stratification of a highly undesirable nature.[90] Haar's position may well form the philosophy of the developing constitutional attack on the minimum floor space ordinance. The basis for

85. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966). *But see* Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961).

86. *See* Corning v. Town of Ontario, 204 Misc. 38, 121 N.Y.S.2d 288 (Sup. Ct. 1953). But minimum floor space requirements might still be struck down as being too vague. City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So. 2d 491 (1947).

87. 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

88. Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

89. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954).

90. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1062-63 (1953).

attack is that there is little relation between minimum floor space ordinances that use sliding scale controls and public health and welfare. If, for example, it is healthy for a family of four to live in a single-story dwelling of a required 1000 square feet, it would seem equally healthy for the same family to live in a two-story dwelling also of 1000 square feet.[91] Yet some ordinances do not recognize this equivalency and instead require a higher square footage for the two-story dwelling. This distinction cannot logically advance public health; its purpose is clearly to penalize two-story construction and to encourage one-story construction.

Far more likely as a motive for such ordinances than health and safety concerns is the concern for maintaining a sound tax base and the preservation of property values. Given that tax base and property values bear a relationship to minimum building size,[92] regulations designed solely to preserve that relationship may prove an improper exercise of the police power.[93] In practice, the courts have adopted pragmatic rules governing the legitimacy of minimum floor space requirements. One authority has concluded from an analysis of the cases that the courts will permit the minimum house size ordinance to stand if its requirements correspond to the average size of a single-family residential dwelling insured in the FHA program, and will overturn it if the ordinance requires a minimum size larger than the average size insured in that program.[94]

D. Restrictions on Multifamily Dwellings

The final zoning device considered here as a likely subject of attack is the restricting of multifamily residential construction, a practice to which challenge has been developing for some years.[95] As pressure for expanded urban housing has grown, there has emerged insistent and increasingly sophisticated resistance to construction of new apartment projects in suburbia. Whereas local citizens formerly took pride in increased population figures as a sign of healthy growth, those same

91. Appeal of Medinger, 377 Pa. 217, 225, 104 A.2d 118, 122 (1954); *see* American Veterans Housing Co-operative, Inc. v. Zoning Bd. of Adjustment, 69 Pa. D. & C. 449, 457-58, 66 Montgomery County L.R. 7, 14 (C.P. 1949).

92. *See* Haar, *supra* note 90.

93. Frischkorn Constr. Co. v. Lambert, 315 Mich. 556, 24 N.W.2d 209 (1946). *But see* Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex. Civ. App. 1948); Connor v. City of University Park, 142 S.W.2d 706, 712 (Tex. Civ. App. 1940). *See generally* Babcock, *Classification and Segregation Among Zoning Districts,* 1954 U. ILL. L.F. 186, 203.

94. D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 927 (1966).

95. Babcock & Bosselman, *supra* note 67, at 1040.

residents now enact zoning ordinances to limit or totally obstruct the construction of additional apartment units in their suburban municipalities.[96] Having moved to the suburbs to avoid congested, high-rise city living, and presently paying the commuting price to enjoy the single-family suburban pattern, these residents are not anxious to see the conditions that they paid so much to leave re-created in their new surroundings.[97] Communities challenged on this policy have been able to produce respectable authority bolstering their position. The Supreme Court in the *Euclid* decision addressed itself specifically to the subject of apartments,[98] advancing the notion that an apartment building was an undesirable neighbor, similar in nature to a parasitic nuisance. This idea has tended to persist in the suburbs despite able efforts to undercut the assumption factually.[99] Even after its vivid and unflattering characterization of apartments, the Court in *Euclid* did recognize that constitutional questions surround the practice of setting up a residential zone from which apartment houses are excluded. Despite the acknowledged doubt, however, it did uphold such districting. Most courts have followed this precedent, generally without logical expansion or new investigation of the matter.[100] Recent decisions suggest little judicial inclination to reverse the long-held position that apartment exclusion is a legitimate exercise of the zoning power.[101] Nonetheless, if one may judge from the number and nature of recent lawsuits, momentum is building to link this "settled" policy of apartment exclusion with unacceptable consequences of racial and economic segregation, and thus with urban decline.[102] Since multifamily units must be built somewhere in an urban society, and since the right of a municipality to exclude them has been upheld liberally by the courts, municipal activity concerning apartments has become something of a competition. The older or more aware municipalities move rapidly to develop a master plan with which to defend their exclusion of apartments, while the tardier or newer local governmental unit is left to cope with the problem of higher density housing. The problem

96. Babcock and Bosselman detail the methods employed by the suburbs to achieve minimum multifamily housing growth and suggest both open and furtive motives for this community response. *Id.*

97. NEWSWEEK, July 6, 1970, at 57; *id.* Nov. 15, 1971, at 63.

98. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

99. *See* Babcock & Bosselman, *supra* note 67, at 1062-65.

100. *E.g.*, Trendel v. County of Cook, 27 Ill. 2d 155, 188 N.E.2d 668 (1963).

101. *E.g.*, Westling v. City of St. Louis Park, 284 Minn. 351, 170 N.W.2d 218 (1969).

102. *E.g.*, Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Kit-Mar Builders, Inc. v. Township of Concord, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

has compounded as courts consistently have deferred to legislative bodies on these matters. Since the legislature is subject to the electorate, and since the electorate does not include those trying to enter the municipality for the purpose of living there in multifamily housing, those interested in change have little real leverage on the source of power.[103] Nor can the developer or landowner desiring to construct apartments operate easily in the face of significant opposition by residents to the introduction of multifamily housing.

Studies indicate that the dilemma may be especially acute in the decade of the 1970's. Available evidence demonstrates that households headed by 30-34 year olds typically seek a one-family house for the first time, while persons under this age tend to live in apartments. During the 1960's, however, the production of one-family households declined because of the low birthrate in the Depression years and the consequent lack of single-family housing demand 30 years later. This factor and the higher birthrate of the Second World War years combined to produce a higher ratio of multifamily housing demand to single-family housing demand in the 1960's than in the 1950's. This disparity may become even more apparent as the 30-34 age group begins to grow again, at the same time that its traditional demand for single-family units cannot be satisfied because of stringent large lot zoning, minimum cost, and floor area requirements.[104] Complicating matters further will be the parallel competition for available suburban apartment housing from older people, up to and beyond retirement age, who are moving to the suburbs at a significantly expanding rate.

IV. Theories of Attack

The clash of the economic and social pressures militating for the migration of low-income blacks and whites to the more affluent suburbs with the seemingly immovable political, economic, and legal barriers erected to maintain the stability of suburban areas, has given rise to a wide-ranging series of recent developments. Probably the two most significant occurrences thus far are the decision of the Supreme Court in *James v. Valtierra*[105] and the recent policy statement of the President of the United States concerning the economic and racial integration of suburban areas.[106] That the President felt constrained to issue such a

103. *See generally* Note, *supra* note 33, at 341.

104. Regional Plan News, No. 91, Sept. 1969, at 4-7.

105. 402 U.S. 137 (1971).

106. Statement by President Richard M. Nixon on federal policies on equal housing opportunity, *supra* note 8.

policy statement attests to the intense pressure and the acute political sensitivity generated by the clash of the forces described.

The United States Civil Rights Commission, the Suburban Action Institute, the National Association for the Advancement of Colored People, the National Urban Coalition, and other groups are attacking through public pronouncements, litigation, and other means the alleged failures of government at all levels, including the national, to move forcefully against extant exclusionary legal restrictions on the movement of the poor and the black to suburban areas.[107] Suburban rejection of the poor and the black can hardly be denied; it is equally clear that local land use policies have been the suburb's major means of closing out the poor. This section will discuss the litigation and legislation that have developed primarily from efforts to move low-income housing into more affluent residential suburban areas; it will also discuss other developments that have had, or are likely to have, an effect upon the outcome of the struggle with which this paper deals.

A. The Brief for the Excluded

It is clear that racial minorities and the economically disadvantaged have a constitutionally derived interest in freely choosing where they will live.[108] It is also clear, however, that this interest is not protected absolutely against any and all state action[109]—only action that discriminates arbitrarily, capriciously, or invidiously. For example, persons may not be fenced out of a particular residential area, city, or county because of their race;[110] no more may they be fenced out because

107. *See, e.g.*, Arnold, *Decision Nears on Whether to Force People to Integrate in Suburbia*, National Observer, Feb. 8, 1971, at 1, col. 4; Barker, *Open Housing: No Southern State Has Moved to Enforce the Law of the Land*, SOUTH TODAY, March 1971, at 4; Davidoff & Davidoff, *Opening the Suburbs: Towards Exclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Karmin, *Nixon on Housing: Caution Is the Word, What Does He Expect From the Suburbs?*, Wall Street J., Jan. 19, 1971, at 16, col. 3; Morris, *Suburbia, Civil Rights, Next Battleground*, NAACP HOUSING BULLETIN (July, 1969).

108. *See, e.g.*, Jones v. Alfred H. Mayer & Co., 392 U.S. 409 (1968); Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kraemer, 334 U.S. 1 (1948). The Supreme Court has stated: "[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969). *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *Cf.* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

109. *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971); Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970).

110. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

of low income.[111] This section will review briefly some of the arguments that have been or may be advanced as a basis for attack against land use tactics that result in such an exclusion of the poor.[112]

By analogy to the school desegregation cases, it is arguable that separate neighborhoods are even less equal than separate schools. This is so because separate neighborhoods deprive minority groups of not only equal educational opportunity but also equal access to jobs.[113] The emigration of industry to suburban areas and the sudden popularity of peripheral areas as sites for corporate headquarters and other professional and business offices have exacerbated this situation.[114] The nation's infatuation with the automobile and the resulting expenditure of a major portion of national resources on highways has left comparatively minuscule amounts for mass transit.[115] Hence, the inner city dweller finds that not only is it financially impossible for him to live near the work available in the suburbs, but also he is unable to transport himself economically to his new location of employment.[116]

It therefore is argued persuasively that territorial discrimination against the less affluent—who are frequently members of racial minorities[117]—cannot stand unless some rational basis in local conditions can

111. *Cf.* Dandridge v. Williams, 397 U.S. 471 (1970). On the question of whether there is "an economic right" to a house in suburbia see Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 TOLEDO L. REV. 297, 312-16 (1969).

112. In this connection see Bass, *Exclusionary Zoning; Suggested Litigation Approaches*, 3 URBAN LAWYER 344 (1971); Schwartz, *Exclusionary Zoning—Suggested Constitutional Attacks*, 4 CLEARINGHOUSE REV. 345 (1970); Comment, *A Survey of the Judicial Responses to Exclusionary Zoning*, 22 SYRACUSE L. REV. 537 (1971).

113. *See* NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, THE IMPACT OF HOUSING PATTERNS ON JOB OPPORTUNITIES (1968).

114. *See* Greenhouse, *Rise in Jobs Poses Problem in Suburbs*, N.Y. Times, August 18, 1971, at 1, col. 1 (city ed.).

115. *See* Shipler, *supra* note 2.

116. *Id.*

117. A recent finding by the President of the United States has brought this situation into focus. "Community opposition to low- and moderate-income housing involves both racial and economic discrimination. Under the Open Housing Act of 1968, it is now illegal to discriminate in the sale or rental of most housing on the basis of race. Strict enforcement of this and similar statutes will help establish an atmosphere in which such discrimination will be the exception rather than the rule. Nevertheless, the fact remains that it is difficult, if not impossible, in many communities to find sites for low- and moderate-income housing because the occupants will be poor, or will be members of a racial minority, or both. The consequence is that either no low- or moderate-income housing is built or that it is built only in the inner city, thus heightening the tendency for racial polarity in our society." PRESIDENT'S SECOND ANNUAL REPORT ON NATIONAL HOUSING GOALS, H.R. DOC. NO. 292, 91st Cong., 2d Sess. 42 (1970). Also the National Commission on Urban Problems has observed: "The number of persons of Anglo-Saxon and European stock in the public housing projects, therefore, probably does not exceed two-fifths and might be as low as one-third if the figures were brought up to 1968. While these racial stocks form about half of the elderly, they comprise less than a third of the children. This is merely a quantitative appraisal of

be offered to justify the discrimination.[118] Destruction of the environment, overcrowding of schools, loss of tax base, and intolerable pressure upon municipal services are advanced frequently to provide rational bases for the exclusion. Ultimately, the weighing of these factors against the interests of racial and economic minorities in enjoying the fruits of our society should be the constitutional determinant. It is highly unlikely that the courts will recognize an ostensibly valid community interest that is in fact asserted only to provide support for racial prejudice and opposition to desegregation.

B. Constitutional Attacks

1. *The Right to Travel.*—That the right to migrate freely throughout the country in search of new opportunities is a basic civil right is no longer open to dispute.[119] Freedom from arbitrary governmental restriction of the right to travel if and where one chooses within the country, although not expressly declared in the Constitution, has long been implicit in our form of government, and has been recognized by the courts: "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[120] The cases buttressing this argument deal with the arbitrary exclusion of a class of persons from a state and state efforts to deter or penalize those who wish to enter its borders.[121] It is not an altogether implausible argument, however, that exclusionary land use practices, either condoned or officially enforced by the state, fall within the proscription of the relevant cases when their effect is to restrict or destroy the "right to migrate and settle." This argument applies even when the movement is intrastate, if the onus of the restrictions falls on certain disfavored racial and economic groups.[122] Moreover, even if the constitutional right to travel

---

the actual facts without the slightest degree of judgment on the relative quality of the occupants. It does help, however, to explain some popular opposition to public housing. NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 114 (1969).

118. *See* Schwartz, *supra* note 112, at 346. *See also* Cutler, *Legality of Zoning To Exclude the Poor: A Preliminary Analysis of Evolving Law,* 37 BROOKLYN L. REV. 483 (1971).

119. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Edwards v. California, 314 U.S. 160 (1941); Brenner, *The Right to Travel—Even to Suburbia,* [1968-71 Transfer Binder] CCH POVERTY L. REP. ¶ 11,013 (undated). *See also* Note, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations,* 39 U. CHI. L. REV. 612 (1972).

120. Passenger Cases, 48 U.S. (1 How.) 282, 492 (1849).

121. *See* note 119 *supra.*

122. *Cf.* Dandridge v. Williams, 397 U.S. 471 (1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Western Addition Community Organization v.

applies only to interstate movement, land use restrictions that work to the disadvantage of the poor or black can prevent the immigration of those groups as effectively as more blatant prohibitions.

2. *Substantive Due Process.*—Even *Village of Euclid v. Ambler Realty Co.*[123] leaves an area of impermissible governmental intervention: "It is not meant by this, however, to exclude the possibility of cases where the general public interst would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[124] Hence, although the courts will defer to legislative expertise, unless it is shown that the regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare,"[125] at some point the interest of persons other than local residents and landowners must be considered.[126] The Supreme Court of Pennsylvania has recently found that exclusionary municipal ordinances which limit new housing to single-family homes on large lots do conflict with the general public interest:

> We . . . refuse to allow the township to do precisely what we have never permitted—keep out people, rather than make community improvements . . . . [C]ommunities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make."[127]

Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Note, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STAN. L. REV. 801 (1969).

123. 272 U.S. 365 (1926).

124. *Id.* at 390.

125. *Id.* at 395. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927). *See also* C. EDSON & B. LANE, *supra* note 7, at § 9:7.

126. Several cases have accorded standing to residents of neighboring municipalities in zoning litigation. *See, e.g.*, Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955); Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N.E.2d 315 (1953); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954). *See also* Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: the Beginning of the End?*, 1971 URBAN L. ANNUAL 9, 47-54; Note, *supra* note 33; Comment, *Standing to Challenge Exclusionary Local Zoning Decisions: Restricted Access to State Courts and the Alternative Federal Forum*, 22 SYRACUSE L. REV. 598 (1971).

127. Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 474-75, 268 A.2d 765, 768-69 (1970). *See also* Fletcher v. Romney, 323 F. Supp. 189 (S.D.N.Y. 1971); G & D Holland Constr. Co. v. City of Marysville, 12 Cal. App. 3d 989, 91 Cal. Rptr. 227 (Cal. App. 1970); Baskerville v. Town of Montclair, Docket No. L-25287-68 P.W. (N.J. Super. Ct., March 30, 1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); Board of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959).

3. *Equal Protection.*—The due process clause is helpful only if the court is willing to consider the interests of those excluded from local community housing. Since many courts have refused to look beyond the landowners and community involved,[128] the equal protection clause of the fourteenth amendment immediately becomes an attractive alternative weapon to counteract exclusionary land use practices and regulations.[129] For example, if it were shown that exclusionary zoning practices were designed to keep out blacks the constitutional precedents dealing with such disfavored racial discrimination could be utilized effectively to strike down the exclusionary practice.[130] It would be a foolish suburban community, however, that would enact or enforce such a racially discriminatory zoning ordinance.[131] This does not mean that the equal protection clause is available only in the unlikely event that a community has engaged in such overt racial discrimination. The Supreme Court has held that discrimination against the poor requires a searching review by the courts.[132] Indeed, the Court has stated: "[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[133]

When an exclusionary zoning device is shown to have been enacted by a legislative body with a clearly discriminatory motive, the equal protection clause provides a very effective means of attack.[134] It is probable, however, that in the original enactment of most zoning ordinances discrimination against racial and economic minorities was not intended, but has been only an incidental effect. The discriminatory motive attack therefore is most helpful in those instances when the

128. *See* Note, *supra* note 33, at 350-60. *But see* Park View Heights Corp. v. City of Black Jack, No. 72-1006 (8th Cir., Sept. 25, 1972).

129. As Edson and Lane have put it, "the [equal protection] argument can be utilized to challenge either the *motivation* of the municipality's action or its effect." C. EDSON & B. LANE, *supra* note 7, at § 9:9; Sager, *supra* note 35. Note, *Exclusionary Zoning and Equal Protection,* 84 HARV. L. REV. 1645 (1971).

130. The equal protection clause of the fourteenth amendment has been utilized to strike down discriminatory state legislation or state legislation discriminatorily enforced on the basis of race. McLaughlin v. Florida, 379 U.S. 184 (1964); Buchanan v. Warley, 245 U.S. 60 (1917); Yick Wo v. Hopkins, 118 U.S. 356 (1885).

131. *But see* Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); Dailey v. Lawton, 425 F.2d 1037 (10th Cir. 1970).

132. *See* note 108 *supra.*

133. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969): Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

134. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).

municipal legislative body has subsequently rezoned property to prevent its use for low-income or subsidized housing or has refused to rezone property to make possible such land use even though rezoning ordinances are customarily enacted in factual contexts that do not involve entrance of low-income groups. In some cases, the response of the citizens of the community may evidence discriminatory intent; if the municipality succumbs to this citizen pressure, official action aiding private prejudice may establish a cause of action.[135]

In more cases than not, however, the zoning ordinance at issue is neutral, disclosing no clear intent to discriminate. In the long run, these "neutral" zoning ordinances will be more of a deterrent to outmigration of the poor and blacks to the suburbs than the intentionally discriminatory zoning ordinances. Since legislation that acts unfavorably upon racial minorities and economically disadvantaged groups is subject to the most severe scrutiny by the Supreme Court, one might assume that the policy factors alleged to be supporting the exclusionary zoning practices would need considerable support in fact to overcome the restrictive and discriminatory effect upon the excluded classes.[136] The recent case of *James v. Valtierra,*[137] however, casts considerable doubt upon the ability of the excluded to demonstrate the invalidity of the policy factors supporting exclusionary land use practices.[138]

4. *The Supremacy Clause.*—The insufficient supply of decent housing has been one of the most intractable social problems that the United States has faced in recent years. It was discovered early that the housing problem is not manageable at the state or local level; the infusion of quantities of money available only at the federal level coupled with nationwide planning and supervision is necessary. Even so, the results of the national effort have been spotty.[139] Furthermore, if these

135. *See* text accompanying notes 163-65 *infra.*

136. *See* Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970); *cf.* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

137. 402 U.S. 137 (1971).

138. *See* text accompanying notes 147-52 *infra.*

139. The Kerner Commission warned us that "white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." The Commission makes it clear that it believes the low-income housing program has been one of these institutions. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 2 (1968). "Most of the projects have been built in inner city areas. Thus, at a time when increasing numbers of job opportunities are in the suburbs, the poor find that the only housing they can afford, be it public or private, generally is located in the inner-city." REPORT OF THE PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS 132 (1969). *See also* A. SCHORR, SLUMS AND SOCIAL INSECURITY 110-11 (1963): "If public housing is the vessel, perhaps Congress is the vintner, but one must ask about the grape and the palate of the taster. The recipe for populating a city of which

efforts to provide decent shelter for disadvantaged citizens are thwarted by exclusionary land use practices condoned and abetted by local authorities, the likelihood of a successful integratcd national housing program becomes almost nonexistent. Hence, an argument can be, and has been, made that article VI, clause 2 of the United States Constitution, which provides that the "Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land," takes precedence over local exclusionary zoning ordinances and practices when they defeat or limit the effectiveness of federal housing programs.[140]

Examination of legislation dealing with housing over a long period of time reveals that it has been the policy of the federal government to make available "shelter free from any racial discrimination fostered by federal, state or local governments."[141] Also, title VIII, section 801, of the Civil Rights Act of 1968, dcclared that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[142] This goes beyond previous statutes in that it prohibits discrimination on account of race, color, religion, or national origin in most private real estate transactions, whether or not federal assistance is involved. Moreover, the 1968 Act makes it the responsibility of all executive departments and agencies, and the specific responsibility of the Secretary of Housing and Urban Development, to administer programs and activities relating to housing and urban devel-

---

we have spoken, concentrates Negroes in public housing as in slums. Segregation is not entirely new, of course, but since 1954 it has become a more open insult. To the extent that public housing founded the sites chiefly in land cleared for renewal, large areas were devoted exclusively to public housing (St. Louis is an example). To the extent that the growing suburbs successfully resisted public housing, they confined it to the city core. Meanwhile as between 1935 and 1960, there was a great proportion of Americans who had never experienced priority personally or were trying to forget it. They contributed to a more critical, if not pious, public view of public housing. Thus, a conjunction of social and economic trends leads to the setting apart of families in public housing."

140. *E.g.*, Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich.), *rev'd*, 417 F.2d 321 (6th Cir. 1969). *See also* Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969).

141. *See* 42 U.S.C. §§ 1982, 1983 (1970); United States Housing Act of 1937, §§ 1 *et seq.*, *as amended*, 42 U.S.C. § 1401 (1970); Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1970); Fair Housing Act of 1968, §§ 801 *et seq.*, 42 U.S.C. §§ 3601 *et seq.* (1970); Demonstration Cities and Metropolitan Development Act of 1966, §§ 101 *et seq.*, 42 U.S.C. §§ 3301 *et seq.* (1970); DEP'T OF HOUSING AND URBAN DEVELOPMENT, LOW RENT HOUSING MANUAL § 205.1(g) (1965).

142. 42 U.S.C. § 3601 (1970). For an excellent discussion of the federal role in eliminating racial discrimination in housing see Statement by President Richard M. Nixon on federal policies on equal housing opportunity, *supra* note 8. Subsequent to President Nixon's statement, the Department of Housing and Urban Development issued new regulations setting forth project selection criteria for public and publicly supported housing programs. 37 Fed. Reg. 75 (1972); 37 Fed. Reg. 205 (1972). The 8 criteria emphasized are "need for low-income housing," "minority housing opportunities," "improved location for low-income families," "relationship to orderly

opment in an affirmative manner to further the purpose of this title.[143]

Ranjel v. City of Lansing[144] and *Shannon v. United States Department of Housing and Urban Development*[145] represent recent cases in which the supremacy clause argument has been essentially accepted, but this theory of attack has severe limitations. As suburban resistance to low-income housing stiffens, and as suburban political clout grows, expressions of federal policy that contravene the exclusionary land use policies of suburban areas undoubtedly will become considerably muted.[146] The clear federal policy may therefore be much more difficult for the courts to locate and identify.

C. *Recent Developments*

1. *The Referendum Cases.*—The Supreme Court in *James v. Valtierra*[147] has provided answers to many of the questions raised in this Article, but it leaves unanswered even more questions.[148] The case involved attempts by citizens of the city of San Jose and the county of San Mateo in California to overcome the effect of referenda conducted under article 34 of the California Constitution that had precluded the location of low-cost housing in certain local neighborhoods. A three-judge court, relying upon *Hunter v. Erickson,*[149] in which the Supreme Court had invalidated an Akron, Ohio charter provision requiring a referendum before antidiscrimination legislation could be enacted, struck down the referendum article.[150] The three-judge court in *Valtierra* held that the challenged article placed a special burden without rational basis on the poorer members of ethnic minorities, and thus violated the equal protection clause of the fourteenth amendment.[151] The Supreme

---

growth and development," "relationship of proposed project to physical environment," "ability to perform," "project potential for creating minority employment and business opportunities," and "provision for sound housing management." 37 Fed. Reg. 205 (1972).

143. 42 U.S.C. § 3608 (1970).

144. 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1970).

145. 436 F.2d 809 (3d Cir. 1970).

146. For an excellent discussion of the new independence of the so-called "outer cities" see Rosenthal, *Suburbs Shed City Dominance,* N.Y. Times, August 16, 1971, at 1, col. 5 (city ed.). It has been suggested that the political impact which the poor and black can bring to bear is comparatively small in the face of the burgeoning political influence of the suburbs. Delaney, *The Outer City: Negroes Find Few Tangible Gains,* N.Y. Times, June 1, 1971, at 1, col. 4 (city ed.).

147. 402 U.S. 137 (1971).

148. There has been an abundance of writing about *James v. Valtierra,* but by far the most perceptive and thorough is Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court,* 59 CALIF. L. REV. 1384 (1971). *See* Note, *James v. Valtierra: Housing Discrimination by Referendum?* 39 U. CHI. L. REV. 115 (1971).

149. 393 U.S. 385.

150. Valtierra v. Housing Authority, 313 F. Supp. 1 (N.D. Cal. 1970).

151. *Id.* at 5.

Court disagreed, however, noting that California had traditionally utilized the initiative and referendum device; the Court emphasized that "of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." Perhaps the most significant portion of the decision is the following paragraph:

> The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local government funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.'[152]

In earlier cases, now of diminished significance in light of *James v. Valtierra,* the Sixth Circuit held in *Ranjel v. City of Lansing*[153] that a reversal by referendum of a spot zoning ordinance for low-income housing did not violate the equal protection clause; the court also held that there was no federal law that overrode the Michigan referendum provisions under the supremacy clause.[154] The Ninth Circuit also held, in *Southern Alameda Spanish Speaking Organization v. Union City,*[155] that a California article 34 refcrendum designed to reverse the rezoning of an arca to a multifamily residential category would not be enjoined. The court in *Southern Alameda* determined that there could be many reasons, including social and environmental values, for the people to decide by referendum to invalidate the rezoning. Significantly, *James v. Valtierra* echoes this reasoning.

Although the ultimate impact of thcse referendum cases culminating in *James v. Valtierra* is by no mcans certain, they do provide a reasonable basis for some predictions about the Supreme Court's probable response to exclusionary zoning issues. Those who believe that economic discrimination is inextricably bound up with racial discrimination are pessimistic about the possibility of successful attack on exclusionary land use practices, at least when they are hedged about with initiative and referendum protections under state law.[156] Actually, as we have seen, *Valtierra* is consistent with prior cases that have rcfused to enjoin

---

152. 402 U.S. at 142-43.

153. 417 F.2d 321 (6th Cir. 1969).

154. *Id.* at 322-23.

155. 424 F.2d 291 (9th Cir. 1970).

156. *Cf.* Lefcoe, *supra* note 148, at 1386. Richard F. Bellman of the National Committee Against Discrimination in Housing has said that "the ruling appears to have immunized all exclusionary zoning and land-use practices from 14th Amendment attack except in those cases in which a clear racially discriminatory purpose can be established . . . ." *quoted in* Herbers, *Three Strikes Against Poor and Black,* N.Y. Times, May 16, 1971, § 4, at 5, col. 5 (city ed.).

referenda directed at the possible repeal of zoning variances that permitted low-income housing construction.[157] Additionally, as President Nixon has recently pointed out, "the term[s] 'poor' and 'black' are not interchangeable."[158] The Supreme Court in *Valtierra* has recognized this distinction and found that there are legitimate objections to the willy-nilly "economic integration" of suburban areas.[159] Nevertheless, the post-*Valtierra* enactment of referendum requirements similar to California's is likely to encounter difficulty in the Supreme Court.[160] This is particularly so when there is no tradition, as in California, of utilizing the initiative and referendum devices or when an unenthusiastic electorate is empowered to ban low-income projects that, unlike the *Valtierra* projects, could support themselves by property taxes.[161] It is clear, however, that courts faced with the conflict described in this Article will be required to analyze more thoroughly the basis for the allegedly discriminatory exclusion, and the equation of economic disadvantage with racial discrimination no longer will be accepted so readily.[162]

2. *Rezoning Cases.*—Upon a showing that a refusal to rezone or a rezoning that forestalls a low- or moderate-income housing project is for the specific purpose of discrimination, the courts have been quick to act on behalf of the excluded group under the equal protection clause of the fourteenth amendment. While it may be somewhat more difficult after *Valtierra* to find discriminatory purposes merely because of an incidental effect, there is every reason to believe that the courts will continue to be vigilant against discriminatory schemes. Two recent cases will suffice to demonstrate the factual genre and the judicial response.

In *Dailey v. City of Lawton,*[163] Columbia Square, Inc. proposed to construct a privately sponsored low-income housing project in a pre-

157. *See, e.g.,* Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969).

158. Statement by President Richard M. Nixon on federal policies on equal housing opportunity, *supra* note 8.

159. Among the objections were "physical aspects" (the community complained of the "institutional" quality and "mammoth" proportions of public housing), sociological impact (public housing is in a class by itself because it is controversial, tends to induce community anxieties, and is thought by many to have an adverse impact on environment), and "financial aspects," including loss of tax space, crowding of schools and other public services. For an analysis of some of the evidence on this question see *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, 124 & n.13 (1971). *See also* Note, *Low-Income Housing and the Equal Protection Clause,* 56 CORNELL L. REV. 343 (1971).

160. Lefcoe, *supra* note 148, at 1390.

161. *But cf.* Aloi & Goldberg, *Notes for a Revised Article: Exclusionary Zoning: Recent Developments and Approaches to Litigation,* in ZONING AND LAND USE 343, 349-50 (Practising Law Institute No. 54, 1972).

162. For a post-*Valtierra* treatment of the problem see English v. Town of Huntington, 448 F.2d 319 (2d Cir. 1971).

163. 425 F.2d 1037 (10th Cir. 1970).

dominantly white residential section of Lawton, Oklahoma. The City of Lawton refused to issue a building permit without a zone change and a request for the necessary change was denied. The property was owned by the Catholic bishop, who acquired it from the city in 1962. The city had operated a school on the premises and the Diocese continued to operate a school until 1966. In 1964, a new zoning ordinance was passed and the property was classified as PF, an abbreviation for "public facilities," even though at that time the land was owned by the church and not by any public agency. Most of the area around the block contained single dwellings, some of which rented rooms.

Efforts to rezone the property were opposed vigorously before the Lawton Metropolitan Area Planning Commission and before the Lawton City Council. Some 250 signatures of white residents were obtained on a petition that was circulated to oppose the change. Several factors pointed toward racial discrimination as the reason for the refusal to rezone: the area immediately surrounding the block in question was already zoned R-4 for higher density residential buildings; the City of Lawton was in large measure a racially segregated city, with the exception of the military personnel at Fort Sill, Oklahoma; the excluded housing project was designed to serve low-income groups consisting of Negroes, Spanish-Americans, and poor whites; the signers of the petition in opposition were all white; the racial situation was discussed in connection with the circulation of the petitions; and finally, the one dissenting member of the Planning Commission testified that opposition to the project was based on racial bias. The Tenth Circuit rejected the argument of the Lawton city officials that the project was opposed because it would overcrowd the neighborhood, the local schools, the recreational facilities, and the local fire fighting capabilities. The court pointed out that there was little proof of the problems alleged, and furthermore, the classification of the area immediately surrounding the block in question as high density residential demonstrated that the problems described would not be increased seriously by the proposed rezoning.

The result in *Dailey* is supported by an even more recent decision in the Second Circuit. *Kennedy Park Homes Association v. City of Lackawanna*[164] involved an effort by the city of Lackawanna to surround a housing site for low- and moderate-income blacks in a previously white section of the city with an open space and park area; the city also

164. 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). For an excellent discussion of this case and its utility see Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URBAN LAWYER 344, 351-54 (1971).

wished to impose a moratorium on all new subdivisions on the ground that the city's sewage system was inadequate. The complaint alleged that a property owner had committed itself to sell 30 acres of vacant land to Kennedy Park Homes Association, a nonprofit corporation formed by the Colored People's Civic and Political Organization to develop a low-income housing subdivision, but that in October, 1968, the city's zoning ordinances were amended to restrict the use of this land to a park and recreation area and to declare a moratorium prohibiting approval of all future subdivisions. Plaintiffs argued that these measures were passed for the purpose of denying low-income families equal protection of the law in obtaining decent housing, and therefore sought a judgment declaring that defendants' use of zoning and appropriation powers was an unconstitutional deprivation of their rights. Mandatory relief requiring defendants to approve the proposed subdivision was sought.

The court rejected defendants' arguments that the city needed a park, that construction of the subdivision would permanently foreclose the city from having such a park, and that the available sewers in the proposed subdivision could not tolerate the additional sewerage of a new subdivision. The court stated its conclusion succinctly: "Discrimination guided the actions of the City." The reasons given for the passage of the rezoning ordinance were found to be mere rationalizations and wilful contrivances. The court relied heavily upon the fact that of the three wards of the city, the one at issue had only a 0.2 percent white population, and had "the oldest, most dilapidated . . . houses, and the highest residential density with the greatest percentage of persons per unit in the city." The court declared that some discrimination resulted from "thoughtlessness" or failure on the part of city officials to consider or plan for the housing needs of all Lackawanna residents, and that defendants might not escape responsibility by ignoring community needs or by failing to consider alternative solutions to the city-wide problems.[165]

D. Legislative Attack by Regional Planning

One of the peculiarities of zoning is that it is basically selfish.[166] Until recent years, very little consideration has been given to city-wide or regional planning; in particular, individuals outside the particular area affected simply have been nonpersons in the eyes of the municipal bodies that enact zoning ordinances.[167] This antiquarian approach is

165. 436 F.2d at 114.

166. *See generally* D. MANDELKER, THE ZONING DILEMMA (1971).

167. The lack of American regional planning is in stark contrast to the English experience,

unrealistic because the interests of sections of a city or metropolitan area are inextricably bound one to the other and therefore simply cannot be islands unto themselves. Additionally, this insular philosophy, if accepted by the courts, can present severe difficulties for plaintiffs who wish to move into areas from which they are, as a practical matter, excluded by restrictive land use practices. There is a growing awareness that such parochialism in planning will not work in the kind of urban society that we are developing.[168] Given the Balkanization of metropolitan areas and the "every man for himself" syndrome that seems to afflict the suburbs, the beginnings of a move toward state and regional planning are heartening indeed.

Recognition that local domination of land use planning is very nearly over is reflected in the enactment of new state-wide land use planning statutes.[169] By no means does all of the legislation specifically deal with the exclusion of racial and economic minorities from suburban areas, the topics of this Article, but inevitably any state-level plan that impinges upon local control of land use will deal with the problem of relocating these now-excluded groups.

There is very little uniformity in the legislation that has been adopted so far; however, the American Law Institute is in the process of making available to the states a model land development code[170] that very well may develop into a popular pattern in the future. *Tentative Draft No. 3 of the Model Land Development Code* has been published and the methodology of its approach can be sketched briefly.

The ALI proposal recognizes "that at least 90% of the land use decisions currently being made by local governments have no major effect on the state or national interest," and that "[f]urthermore, most of these decisions can be made intelligently only by people familiar with the local social, environmental and economic conditions."[171] On the other hand, the proposal recognizes that land use planning decisions of important state or regional interest need to be controlled at the state or regional level.

---

where the Town and Country Planning Act, 10 & 11 Geo. 6, c. 51 (1947), provides for equal regional and even national land use planning "to assure the assignment of land to the best possible use for the nation as a whole . . . ." C. HAAR, LAND PLANNING LAW IN A FREE SOCIETY 5 (1951).

168. *See* Greenhouse, *The Outer City: Growth Crying Out for Guidance*, N.Y. Times, June 3, 1971, at 1, col. 1 (city ed.).

169. *See* Conti, *With Little Fanfare, States Are Broadening Control Over Land Use*, Wall Street, J., June 28, 1972, at 1, col. 6 (S.W. ed.). *See also* Comment, *Exclusionary Zoning: A Legislative Approach*, 22 SYRACUSE L. REV. 583 (1971). For an argument in favor of politicizing the planning process see Davidoff, *Advocacy and Pluralism in Planning*, 31 J. AM. INST. PLANNERS 331 (1965).

170. ALI MODEL LAND DEVELOPMENT CODE (Tent. Draft No. 3, 1971).

171. *Id.* at 5.

Under the ALI proposal the local government's land development agency remains the primary regulatory body. The state legislature and the state land planning agency created by the Code determine policies that will be administered by local land development agencies in conjunction with local policies. A state land adjudicatory board is created to provide an appellate tribunal for review of agency decisions.[172]

The supervening power of the state land planning agency comes into play in situations that involve three different categories of land use. The first occurs when a determination has been made that a "District of Critical State Concern" exists. A "District of Critical State Concern" is defined as:

> (a) [A]n area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment;
> (b) [A]n area containing or having a significant impact upon historical, natural or environmental resources of regional or statewide importance; or
> (c) [A] proposed site of a new community designated in a State Land Development Plan, together with a reasonable amount of surrounding land.[173]

The second category of land use that requires the approval and supervision of the state land planning agency is the "Development of State or Regional Benefit."[174] Uses having state or regional benefit include airports, public utility transmission lines, major highways and similar large developments. Finally, there are types of developments that may have only local impact if undertaken on a small scale but have state or regional significance when undertaken on a large scale. They are called "Large Scale Developments."[175]

The comments to section 7-301 of the Model Land Development Code make it clear that the construction of low- and moderate-income housing, even in areas where it is not wanted, is a development of state or regional benefit that needs state supervision and direction in order to serve the needs of the larger community.[176] For example, the comments state that "[i]t is important to insure that the local governments do not allow their own constituents' fears of the adverse effects of development to outweigh completely the interests of a broader section of society that might be entitled to greater concern."[177] Again, the draftsmen of the Model Land Development Code state:

> Local governments often believe that the heavily subsidized programs have an unfavorable cost-revenue impact, and there may be social and racial prejudice

172. *Id.* at 6.
173. *Id.* § 7-201(3).
174. *Id.* § 7-301.
175. *Id.* § 7-401.
176. *Id.* § 7-301, comment at 25.
177. *Id.* at 23.

against the anticipated occupants. Thus it has been difficult to find sites for housing of this type that will be approved by local governments. [Section 7-301] would permit the State Land Planning Agency to designate decisions involving subsidized housing as appealable to the State Land Adjudicatory Board. This is consistent with the recommendations of all of the commissions and task forces that have recently studied this problem.[178]

Massachusetts[179] and New York[180] already have legislation that purports to provide for state-level overriding of local exclusionary zoning practices. The Urban Development Corporation (UDC) of New York may override local zoning and subdivision laws when they conflict with UDC findings that a particular site is appropriate for low- or moderate-cost housing. Apparently this power has not been widely used by the Urban Development Corporation, and a rather congenial relationship exists with local agencies.[181]

The Massachusetts "Anti-Snob Zoning" law, enacted in 1969, provides that at least 0.3 percent of the vacant residential land of a community—or ten acres, whichever is larger—must be made available for development each year for a period of five years upon application for zoning changes by eligible nonprofit or limited profit housing sponsors.[182] Refusal by local jurisdictions to permit nonprofit or limited profit sponsors to proceed with development plans is subject to review by a special state zoning board of appeals.[183] As in the case of the Urban Development Corporation in New York, the state commission may override local authorities when it finds that a local jurisdiction has failed to make land available under the law.[184] The usefulness of this statute appears to be somewhat limited, since it acts upon such a small fraction of the available land and since there appears to be developing the same congenial relationship between the state agency and the local jurisdictions that exists in New York.

Several states, including Hawaii,[185] Vermont,[186] Colorado,[187] and Maine,[188] have enacted legislation to provide for some state-wide and regional planning. These states are tourist meccas; they also are being plagued by developments designed to appeal to nonresidents who want

178. *Id.* at 25.
179. MASS. ANN. LAWS ch. 40B, §§ 20-23 (Supp. 1971).
180. N.Y. UNCONSOL. LAWS § 6254 (McKinney Supp. 1971).
181. *See* C. EDSON & B. LANE, *supra* note 7, at § 9:13.
182. MASS. ANN. LAWS ch. 40B, § 20 (Supp. 1971).
183. *Id.* § 21.
184. *Id.* § 23.
185. HAWAII REV. LAWS §§ 205-1 to -15 (1968).
186. VT. STAT. ANN. tit. 10, § 6001-91 (Supp. 1972).
187. COLORADO REV. STAT. ANN. §§ 106-1-1 to -12, 106-2-1 to -34 (1963).
188. ME. REV. STAT. ANN. tit. 12, §§ 681-85c (Supp. 1972).

second homes in a pleasant climate. Environmental considerations seem to weigh heavily in the minds of the legislators in these states, and there is nothing specifically usable by racial and economic minorities seeking to break into presently inaccessible suburbs.[189]

V. APPRAISAL

Secretary of Housing and Urban Development George Romney has said of the resistance of white suburban homeowners to housing for low-income blacks and others, "[T]his problem is as complex and sensitive domestically as Vietnam is internationally, and I might add that it has been burdened by the same lack of accurate reporting."[190] Unfortunately, the intractability of the problem has been much more widely recognized than has the frequently unfair and inaccurate reporting. Refusal even to admit the existence of sound policy considerations opposing economic integration of suburbs has characterized the scholarly articles in the area. This Article has outlined the interests of the excluded groups and the arguments that can be and have been made on their behalf; this does not mean that the suburban landowner who wishes to keep his neighborhood as it is has no legitimate countervailing interests.[191] Thus the dismay that greeted *James v. Valtierra*[192] was largely the result of a tunnel-vision approach to a grave social problem, for that decision was in part a recognition of the legitimacy of the resisting suburbs' arguments. It must be admitted, however, that many of the pro-exclusionary zoning arguments have come to be a euphemistic expression of antipathy toward blacks and other racial minorities.[193] To

189. It has been suggested that the easiest way to integrate the suburbs in more than a token way would be to abandon zoning altogether, as is the case in Houston, Texas. *See* Siegan, *Tear Down the Fences?*, BARRON'S, June 21, 1971, at 7, col. 1. *See also* 94 N.J.L.J. 129 (1971).

190. FORTUNE, Dec. 1970, at 100, 134.

191. For perceptive and balanced discussions of the problems that low- and moderate-income housing can bring to a neighborhood see Bleiberg, *Trampling the Grass Roots*, BARRON'S, Dec. 13, 1971, at 7, col. 1; Glazer, *When the Melting Pot Doesn't Melt*, N.Y. Times, Jan. 2, 1972, § 6 (Magazine), at 12; Schleibla, *Raze or Lower?*, BARRON'S, Jan. 10, 1972, at 9, col. 1. The first 2 articles deal with the highly publicized federally supported project of the New York City Housing Authority in Forest Hills, while the last article relates the Housing and Urban Development problems with the huge Pruitt-Igoe high-rise project in St. Louis.

192. 402 U.S. 137 (1971).

193. It must also be admitted that most suburban areas are now "parasites" with the inner city as the "host." "Some functions are still left to the inner city. Rapid high-rise office development in many cities testifies to one. White collar professionals—lawyers, brokers, bankers, government workers—still require frequent face-to-face contact, a central verbal market place.

"Inner cities also remain cultural centers. But many suburban residents are willing to do without downtown museums, theaters and symphonies, satisfying their cultural needs at outlying universities or amateur performances.

"Most notably, the inner cities, despite the erosion of their economic strength, are still called

the extent this is so, and to the extent it is condoned and aided by local jurisdictions, there is every indication that the courts will respond with appropriate remedies. These remedies, however, will not reach the weighing of interests that constitutes the essence of the exclusionary zoning problem; metropolitan, regional, state, and federal planning must therefore strike a new balance between local and metropolitan needs in the housing field. Of necessity, ultimate responsibility for the supply of housing must be vested in an authority higher than the local level. At the same time, the exercise of authority at the metropolitan or higher level must reflect a creative search for solutions that satisfy the need for housing without abrogating the right of local choice.[194]

A. Socio-Economic Integration

In the twentieth century, American cities have been characterized by residential stratification along socio-economic class lines.[195] This is in part a natural phenomenon, for, given the very human desire to secure the best living conditions possible and assuming that the quality of these conditions is a function of cost, it is inevitable in a society such as ours that the well-to-do live better than the less affluent. Arguably, this socio-economic segregation therefore is not a product of governmental economic discrimination in land use practices, but is rather a logical incident of economic conditions and human behavior. Whether or not this viewpoint has substantial validity, a careful analysis of the problems of exclusionary zoning requires that it be examined. Thus, in the controversy over the exclusion of lower income groups from suburbia, altogether too little has been said about the "upward and outward" syndrome that has characterized the American people since at least the

---

on to perform a major social function: caring for the needy and societizing the poor." Rosenthal, *The Outer City: U.S. In Suburban Turmoil,* N.Y. Times, May 30, 1971, § 1, at 28, col. 6 (city ed.). *See also* Neenan, *Suburban-Central City Exploitation Thesis: One City's Tale,* 23 NAT'L TAX J. 117 (1970).

194. An example of the ingenuity of approach that needs to be brought to bear upon this problem is a recent experiment of the Department of Housing and Urban Development in Kansas City, where the federal government has taken 205 families, handed them rent money and told them to find better housing of their own choice. So far, the project seems to be eminently successful. *See* Bigart, U.S. HELPS POOR TO RENT OWN HOMES, N.Y. Times, July 9, 1972, § 1, at 1, col. 5 (city ed.). For another example of careful planning and voluntary "local initiative" see Karmin, *Forced Integration? Not in Fairfax,* Wall Street J., Sept. 29, 1971, at 10, col. 4 (S.W. ed.).

195. SOCIAL SCIENCE PANEL OF THE ADVISORY COMM. TO THE DEP'T OF HOUSING AND URBAN DEVELOPMENT OF THE DIVISION OF BEHAVIORAL SCIENCES, FREEDOM OF CHOICE IN HOUSING: OPPORTUNITIES AND CONSTRAINTS 48 (1972) [hereinafter cited as SOCIAL SCIENCE PANEL]. The footnotes to this study contain an excellent bibliography of the social science materials dealing with the problem of this paper and can be used profitably for research by both the lawyer and the the social scientist.

middle of the nineteenth century. Ethnic and other groups, as the economic opportunity has presented itself, have emigrated from the central city to more desirable areas. Henry James, speaking through one of his fictional characters, said in 1881: "At the end of three or four years we'll move. That's the way to live in New York—to move every three or four years. Then you always get the last thing. . . . So you see we'll always have a new house . . . you get all the latest improvements."[196] This attitude toward upward mobility appears to be widely held today, and is reflected by the loss of population in the inner city and the movement away from the inner city of both retail and wholesale jobs.[197] Although one may condemn the inherent selfishness in such an attitude, or doubt the desirability of the wanted move, no one has yet shown why this phenomenon should not be a permissible incident of social and economic success.

The arguments of those who deny any legitimacy to the socio-economic stratification supported by exclusionary zoning seem to be grounded upon the proposition that economically based residential separation represents the primary barrier to widespread social interaction that would ultimately provide the solution for problems of racial discrimination and unequal opportunity. In the context of exclusionary practices, however, a recent study concluded that "[t]he net effect of economic factors in explaining (racial) residential segregation is slight . . . . Clearly, residential segregation is a more tenacious social problem than economic discrimination. Improving the economic status of Negroes is unlikely by itself to alter prevailing patterns of racial residential segregation."[198] Another recent study stated: "Black disadvantages in educational attainment, in occupational achievement, and in income, account for only a small amount of their observable segregation in urban space. The web of discrimination is a principal factor underlying racial segregation. The blacks have sharply limited options with respect to housing choices."[199] Moreover, the recent report of an Advisory Committee to the Department of Housing and Urban Development concluded after an extensive study that "at present, the desirability of intervention to foster socio-economic mixing in residential areas is uncertain."[200] The study found that neighborhood heterogeneity does not necessarily produce tolerance and a more democratic order. It also con-

196. H. JAMES, WASHINGTON SQUARE 36-37 (Harper & Bros. ed. 1922).

197. *See* notes 114 & 193 *supra.*

198. *See* C. Marrett, Social Stratification in Urban Areas, Dec. 1970, at 2 (panel paper prepared for the Division of Behavioral Sciences, National Academy of Sciences).

199. SOCIAL SCIENCE PANEL, *supra* note 195 at 49.

200. *Id.* at 54.

cluded that the evidence does not necessarily sustain the argument that geographical proximity enhances social interaction among disparate groups. Hence, it is questionable "whether housing and residential distribution is the most effective way to eliminate barriers to equal opportunity."[201]

In addition to the questionable efficiency of socio-economic integration in achieving racial understanding, objective analysis compels one to conclude that the suburban dweller may not be motivated by racial antipathy or irrational fears when he opposes the location of government-assisted low-income housing in his area. Some of his fears may be unsupported in fact, but he feels that he is protecting both the largest investment he will ever make—his home—and the environment in which he is trying to rear his family. A certain amount of selfishness can be excused, for in many instances low-income housing projects such as Pruitt-Igoe in St. Louis have destroyed the livability of the entire surrounding neighborhood.[202] It is difficult, however, to generate much sympathy for the suburban dweller when he opts for zoning ordinances compelling lot sizes from two to ten acres in size, or when he and fellow citizens solicit business and industry for the neighborhood in order to obtain tax relief, but simultaneously oppose the efforts of workers to live near the place of their employment. His desire for suburban insularity also rings hollow when he parasitically enjoys the educational, cultural, and business advantages of the inner city without contributing anything toward its support.[203]

The extent to which courts will be able to lend support to the legitimate desires of the suburban dweller, when faced with constitutional attacks upon exclusionary land practices, remains to be seen. They should not, however, be summarily dismissed as mere evidence of selfishness and bigotry.

B. A Brighter Outlook

The problem of the exclusion of racial and economic minorities from the suburbs may, as events develop, be considerably more tractable than has been assumed. While industrial development has meant huge tax advantages for some suburban communities, many neighboring areas are not blessed equally with shopping centers or industrial parks, and stagger under huge tax burdens. If job opportunities are to be created in suburban areas, with concomitant tax relief to landowners,

201. *Id.*

202. *See* note 191 *supra.*

203. *See* Vernon, *The Changing Economic Function of the Central City,* in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 3 (J. Wilson ed. 1966).

housing for the workers simply will have to be provided.[204] Hence, although the courts are very unlikely to hold zoning unconstitutional, substantive due process and confiscation arguments are likely to be more successful in the future when suburban areas are resisting multifamily dwellings such as apartments and condominiums. In addition, since the rapid appreciation of land values in the last decade has compelled increased resort to multifamily dwellings and more efficient use of land, the utilization of substantial areas for apartments and condominiums will result in a "trickle-down" to less-advantaged groups. The trickle-down is an empirically demonstrable phenomenon.[205]

While there is no way to predict the eventual outcome, the spate of decisions such as *Rodriguez v. San Antonio Independent School District*[206] and *Serrano v. Priest*,[207] declaring that the financing of public schools by local property taxes is unconstitutional because it discriminates against areas with poor tax bases, undoubtedly will make it much more difficult for suburban areas to exclude racial and low-income groups.[208] The argument that the low-income housing projects do not pay their way in property taxes will be unavailing if the state is forced to adopt other methods of taxation to support the schools, and perhaps other public services as well.[209] Neil Gold of the Suburban Action Institute, an organization that has been highly active in opposing suburban efforts to keep out lower-income people, considers *Serrano*'s likely effect on industrial location "in the long run, by all odds it's most important" consequence.[210] If the *Serrano* and *Rodriguez* principle is

204. Liberal mayors are reportedly feuding, however, among themselves on the housing issue; middle class blacks already residing in suburban areas are unenthusiastic about absorbing large numbers of the poor. Thus, it seems that immediate change will come through judicial action. *See* Delaney, *supra* note 146; Herbers, *The Outer City: A Deep Uneasiness About the Future*, N.Y. Times, June 2, 1971, at 1, col. 4 (city ed.).

205. These considerations are discussed in a survey taken by the Institute of Social Research of the University of Michigan, in Siegan, *supra*, note 189.

206. 337 F. Supp. 280 (W.D. Tex. 1971), *prob. juris. noted*, 40 U.S.L.W. 3576 (U.S. May 30, 1972).

207. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

208. For an excellent discussion of these cases see Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504 (1972).

209. *Cf.* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971). For a discussion of an interesting tax base sharing system in use in Minnesota that, if adopted everywhere, would render moot *Serrano* and *Rodriguez*, see Fry, *The Plankinton Plan*, 3 INTELLECTUAL DIGEST 81 (1972). Fry suggests that the "Minnesota sharing system . . . could help encourage low- and moderate-income housing throughout [a] region by permitting such housing to 'pay its own way' through the sharing formula." *Id.* at 82.

Something like the Minnesota plan is a necessity after Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971).

210. Andrews, *School Ruling Is Seen Changing the Nature of U.S. Cities, Suburbs*, Wall Street J., Mar. 13, 1972, at 1, col. 6.

upheld, it is very likely to be of material assistance to the inner cities, even at the expense of the suburbs. In any case, it will compel the kind of metropolitan planning that the Balkanization of urban areas has made most difficult. This is the type of planning that is most likely to provide solutions to the problems described in this Article.

VI. CONCLUSION

The exclusion of racial and economic minorities from suburbs by restrictive land use practices is only one note in a discord of urban problems. It cannot and will not be resolved unless it is recognized as an integral portion of the much larger overall urban dilemma. Its resolution will require, among other things, innovative direction and planning all the way from the federal to the local level, education of suburban dwellers to demonstrate that some of their fears are unfounded, and perhaps most of all, a sensitive awareness on the part of the courts and others that there are compelling social forces at work on both sides of the controversy, and that failure to recognize the legitimacy of these interests will only result in stiffening of the opposition.

New political coalitions are being forged in the suburbs, and their weight is being clearly felt. President Nixon's statement of June 11, 1971 and the Supreme Court's decision in *James v. Valtierra* demonstrate that executive and judicial coercion of the suburbs is simply not likely to occur in the near future. Nevertheless, selfish restrictive land use practices, such as exclusionary zoning and straitjacket subdivision regulations, are likely to be examined much more carefully in the future than they have been in the past. To pass muster, the social and environmental values being served by exclusionary zoning will, of necessity, have to be much more easily demonstrable.