Florida Law Review

Volume 26 | Issue 4 Article 2

June 1974

Limiting Population Growth in Florida and the Nation: The Constitutional Issues

Julian Conrad Juergensmeyer

K. Lawrence Gragg

LIMITING POPULATION GROWTH IN FLORIDA AND THE NATION: THE CONSTITUTIONAL ISSUES

JULIAN CONRAD JUERGENSMEYER* and K. LAWRENCE GRAGG**

A recent poll of Florida voters revealed that the most common concerns of Floridians are whether the population growth of the state should be limited and, if so, how such a policy should be formulated and effectuated.[1] This concern with growth is not surprising. During the three decades from 1940 to 1970 Florida's population increased by a whopping 258 per cent – nearly five times the national average.[2] The population boom is continuing into the seventies with a projected compound annual growth rate of 4.2 per cent,[3] compared to a national figure of 1.1 per cent,[4] and the predicted population of Florida for 1980 has recently been revised upward from 8.7 to 9.4 million[5] with an estimated 14 million inhabitants by the year 2000.[6] The uneven distribution of Florida's population further complicates the problem.[7]

The recent enactment by the municipality of Boca Raton, Florida, of a "population cap"[8] has served to highlight the growing legal controversy over the validity of the various growth control measures already taken or being contemplated by local governments in response to Florida's population boom. The Boca Raton "cap" attacks the growth problem directly and drastically by simply limiting to 40,000 the total number of dwelling units that can be constructed within the municipal boundaries.[9] Other local governments in Florida

*Professor of Law and Director of the Institute for Cuban American Lawyers, University of Florida.

**Instructor of Law, University of Florida.

1. *See* Gainesville (Fla.) Sun, May 5, 1974, at 5, col. 4.

2. *See* U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION 1970 (1971). The population of the United States increased from some 132 million to 203 million during the 1940-1970 period, whereas Florida's population increased from 1,897,414 to 6,789, 443 during the same period. *Id.* at 11-7. Florida's rate of growth can be compared to a 189% population increase in California, a 19% increase in Pennsylvania, and an actual *decrease* in the number of inhabitants of Arkansas, West Virginia, and North Dakota during the same time span. J. Burns & M. James, Migration Into Florida 1-2 (prepublication draft, Work Paper No. 4, Division of Planning and Analysis, University of Florida, Oct. 10, 1973).

3. The estimates indicate a jump of some 588,000 residents between July 1, 1970, and July 1, 1972, which amounts to a 4.2% compound growth rate. *See* FLA. BUREAU OF ECONOMIC AND BUSINESS RESEARCH, FLORIDA STATISTICAL ABSTRACT 25 (1973).

4. U.S. COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 17 (1972).

5. Burns & James, *supra* note 2, at 154.

6. FLA. BUREAU OF ECONOMIC & BUSINESS RESEARCH, *supra* note 3, at 25.

7. Seven counties (Broward, Dade, Duval, Hillsborough, Orange, Palm Beach, and Pinellas) contain more than 60% of the state's residents although they comprise less than 16% of the state's land area. Burns & James, *supra* note 2, at 127. The combined population of these seven counties is larger than that of thirty-five of the fifty states. *Id.*

8. Boca Raton, Fla., Ordinance 1733, Oct. 3, 1972. Boca Raton, Fla., Resolution No. 109-72, Nov. 8, 1972.

9. The charger amendment reads: "The total number of dwelling units within the existing boundaries of the city is hereby limited to 40,000. No building permit shall be issued

have responded less dramatically but with equal enthusiasm by imposing land use or impact fees for the issuance of building permits,[10] by lowering dwelling unit maximum densities,[11] by declaring building moratoriums,[12] and by enacting optimum population and growth plans designed to discourage rural development.[13]

Florida's local governmental units are by no means alone in their response to population pressures. Comparable growth limitation plans have been enacted in other jurisdictions. Nearly all population growth limitation schemes in Florida and the nation, however, have been or are being subjected to attack through litigation or otherwise on the basis that they violate or unduly restrict state and federal constitutional principles or guarantees.[14] This article will discuss the constitutional principles allegedly violated by population growth control measures of all types. The first to be examined are the particular and somewhat peculiar Florida constitutional doctrines regarding municipal power and home rule. Next, the nationally applicable concepts of substantive due process, equal protection, right to travel, and the taking of property without compensation will be considered.

MUNICIPAL POWERS AND HOME RULE

The Florida Constitutional Experience

The first constitutional issue that must be considered regarding the validity of growth control measures enacted by Florida local governmental units is that of home rule powers.

The general theory of the relationship between state and local government in American constitutional law is that in the absence of express constitutional limitations, the power of the legislature over municipal corporations is plenary.[15] Thus, the Florida Legislature under the 1885 constitution possessed all

---

for the construction of any dwelling unit within the city which would permit the total number of dwelling units within the city to exceed 40,000." *Id.* Boca Raton's population increased from 6,961 in 1960 to 28,506 in 1970, a 309% increase. U.S. BUREAU OF THE CENSUS, *supra* note 2 ,at 11-24.

10. Broward County, Fla., Ordinance No. 73-2 (1973). *See also* FT. LAUDERDALE, FLA., CODE §48-29 (1973).

11. *See generally Local Government Action To Control Present and Future Growth in Florida,* 1 FLA. ENVIRONMENTAL & URBAN ISSUES No. 4, at 10 (1974). *Cf.* Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (4th D.C.A. Fla. 1973).

12. Dade County recently imposed a four-month building moratorium on 250 square miles of the county. St. Petersburg (Fla.) Times, Jan. 24, 1974, §B at 1, col. 5.

13. *See* A POLICY TO ENCOURAGE OPTIMUM POPULATION AND URBAN GROWTH IN MANATEE COUNTY, FLORIDA, Nov. 7, 1972.

14. *See, e.g.,* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974); Golden v. Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed,* 409 U.S. 1003 (1972).

15. Municipal corporations have consistently been refused protection against the state legislature under the Federal Constitution by the United States Supreme Court. *See, e.g.,* City of Trenton v. New Jersey, 262 U.S. 182 (1932); *see* 2 E. MCQUILLIN, MUNICIPAL CORPO-

legislative power except that prohibited by the federal or state constitution,[16] municipalities in Florida having no inherent power.[17] The legislature was empowered to charter municipalities and to amend or revoke the charter at any time.[18] This legislative supremacy over municipal affairs was strengthened by the adoption of three rules by the Florida supreme court. First, the municipal charter was declared the organic law of the municipality and thus the source of all its power.[19] Second, the court adopted Dillon's Rule,[20] which allows municipalities only such powers as are expressly granted, or as are necessarily implied from express grants.[21] Finally, grants of municipal powers were required to be strictly construed with all doubts resolved against the municipality.[22]

These rules and their counterparts in other jurisdictions drew heavy criticism from legal commentators and municipal associations,[23] which lead to the evolution of a new concept called "home rule," providing for a distribution of power between state and local government.[24] Depending upon the asserted source of home rule power, three main categories of implementation have

---

RATIONS §4.03 (3d ed. rev. 1966). This position has also been recognized by the Florida supreme court. State v. City of Boca Raton, 172 So. 2d 230 (Fla. 1965); Gate City Garage, Inc. v. City of Jacksonville, 66 So. 2d 653 (Fla. 1953).

16. The most pervasive of the limitations upon the power of the legislature under the 1885 constitution was article III, §20, which prohibited the enactment of special or local laws in a number of enumerated cases. However, prohibitions of special or local laws relating to municipalities were noticeably absent. FLA. CONST. art. III, §20 (1885). An amendment to article III, §24, adopted in 1934, had great potential for the development of municipal government in Florida. It provided in part: "[N]o special or local laws incorporating cities or towns, providing for their government, jurisdiction, powers, duties and privileges shall be passed by the Legislature." Fla. Laws 1933, S.J. Res. 582, at 881. The intended effect of this amendment, however, was nullified by a supreme court decision holding that the prohibitions were not self-executing and, as the legislature had not acted, the section was inoperative. State *ex rel.* Matthews v. Alsop, 120 Fla. 628, 163 So. 80 (1935). *See also* Sparkman, *The History and Status of Local Government Power in Florida,* 25 U. FLA. L. REV. 271, 277-78 (1973).

17. Cobo v. O'Bryant, 116 So. 2d 233 (Fla. 1959).

18. FLA. CONST. art. VIII, §8 (1885).

19. Clark v. North Bay Village, 54 So. 2d 240, 242 (Fla. 1951).

20. 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §237 (5th ed. 1911). The author states: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensible."

21. *See, e.g.,* Malone v. City of Quincy, 66 Fla. 52, 56-57, 62 So. 922, 924 (1913).

22. *See, e.g.,* Liberis v. Harper, 89 Fla. 477, 104 So. 853 (1925).

23. *See* Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts,* 48 MINN. L. REV. 643, 652-53 (1964). *See also* Comment, *Municipal Powers in Florida: By Constitutional Right or Legislative Grace?,* 25 U. FLA. L. REV. 597, 598 (1973).

24. The term "home rule" is susceptible of a variety of meanings. This results from the dual roles, as political symbol and legal doctrine, it serves. As a political symbol, home rule describes a state of autonomy that allows the local government to pursue self-determined goals without legislative interference. As a legal doctrine, it is simply a grant of power to a local governmental unit. *See* Sandalow, *supra* note 23, at 644-45.

emerged.[25] The strongest is self-executing constitutional home rule in which the grant of municipal initiative flows directly from the state constitution.[26] In the second type, non-self-executing home rule, the grant of power is statutory with the constitutional provision merely authorizing the legislature to pass enabling legislation.[27] The weakest form is legislative home rule, which is based solely on a statutory grant.[28]

Although the modern constitutional home rule movement dates from an 1875 amendment to the Missouri constitution,[29] Florida did not follow the trend until the ratification of a revised constitution on November 5, 1968.[30] The revised constitution provides for home rule from two directions: by granting power to local governments[31] and by restricting the power of the legislature.[32] The heart of municipal home rule is found in article VIII, section 2(b) of the present Florida constitution, which provides in part:[33]

> Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

This constitutional grant is considered self-executing,[34] but it remains subject to legislative supremacy[35] by way of special[36] or general law.

---

25. Professor Sandalow suggests "a more useful classification would divide the categories according to the *terms of the grant,* whatever its source." *Id.* at 670.

26. Sparkman, *supra* note 16, at 283-84.

27. This form is usally a compromise resulting from judicial invalidation of legislative home rule as an unconstitutional delegation of power, local demand for a degree of autonomy, and legislative reluctance to acquiesce in self-executing proposals. It is, then, little different from constitutionally authorized legislative home rule. *Id.* at 284.

28. This type of home rule is extremely vulnerable to attack as an unconstitutional delegation of power. State *ex rel.* Brown v. Emerson, 126 Fla. 576, 171 So. 663 (1936). It is also subject to being withdrawn by subsequent legislative act. Vanlandingham, *Municipal Home Rule in the United States,* 10 WM. & MARY L. REV. 269, 276 (1968).

29. MO. CONST. art. VI, §§19, 31 (1875).

30. Prior to the 1968 constitution two changes in the direction of home rule were made. A 1915 law granted to cities the limited power to modify local government structures, election procedures, and mode of exercise of existing powers. Fla. Laws 1915, ch. 6940, §§1-15, at 312, §312.18. By far the most important move toward home rule was the 1955 adoption of an amendment to the 1885 constitution authorizing the electors of Dade County to "adopt, revise, and amend from time to time a home rule charter government for Dade County." FLA. CONST. art. VIII, §11 (1885), *as amended,* 1956.

31. FLA. CONST. art. VIII, §§1(f), (g), 2(b). These subsections apply to noncharter counties, charter counties, and municipalities respectively.

32. FLA. CONST. art. III, §§10, 11. Section 10 is derived from article III, §21, of the 1885 constitution and preserves the notice referendum requirement for special laws. Section 11 lists the subject matter prohibitions for special laws and is primarily a derivation of article III, §20, of the 1885 constitution.

33. FLA. CONST. art. VIII, §2(b).

34. *See* Sparkman, *supra* note 16, at 290.

35. Where the legislature retains the ultimate authority to determine the scope of home rule powers it has been subjected to the same criticism as legislative home rule. "To the

Although it was generally agreed that the intent of the constitutional provisions was to secure broad home rule powers for municipalities, the question remained whether this had actually been accomplished in the face of continued legislative supremacy.[37] In this light, the Florida Legislature in 1969 sought to clarify both the scope of home rule powers and the extent to which the legislature exercise its prerogative to limit such powers.[38] In one important law enacted in that session,[39] the legislature expressed a desire to broaden the scope of home rule powers by providing:[40]

> The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution.

This expansive attitude was also conspicuous in the 1971 legislative session, in which a broad county home rule bill was passed,[41] as was a bill repealing al-

---

extent that the legislature retains unlimited or virtually unlimited authority to supersede an exercise of municipal initiative conferred by the constitution, there is only a semantic difference between constitutional and legislative home rule, at least when the latter is defined in broad terms." Sandalow, *supra* note 23, at 699 n.12.

36. This is an additional limitation on municipalities and should be contrasted with the grant of power to charter counties, which provides: "Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law *approved by vote of the electors*." FLA. CONST. art. XIII, §1(g) (emphasis added).

37. Sparkman, *supra* note 16, at 292. The state of affairs was aptly outlined by the counsel to the Florida League of Municipalities. "[I]t appear[s] that if municipalities wished to exercise any power for municipal purposes where there was already a law on the books relating to the subject, it could only be exercised in the restricted manner provided, and since there was so much existing law, both general and special, relating to municipal powers, there would be little that municipalities could accomplish under the constitutional grant of home rule powers." *Id.* at 294.

38. *See* FLA. STAT. §§125.60-.64 (1973) (general law procedures for adoption of county charters); FLA. STAT. §§125.66-.68 (1973) (procedures for the enactment of county ordinances); Fla. Laws 1969, ch. 69-33, §1 (repealed 1973) (home rule powers for municipalities); Fla. Laws 1969, ch. 69-242, §1 (repealed 1973) (general law delegating the authority to promulgate charter amendments to the municipal governing body).

39. Fla. Laws 1969, ch. 69-33, §1 (repealed 1973). This statute was primarily a restatement of FLA. CONST. art. VIII, §2(b), except that in the statute the limitation of home rule powers by state legislative action was altered to read "except when prohibited by special or general law."

40. Fla. Laws 1969, ch. 69-33, §1 (repealed 1973). This provision was also not contained in FLA. CONST. art. VIII, §2(b). See note 39 *supra*.

The statute was interpreted as follows by the counsel to the Florida League of Municipalities:

"The purpose of the statute was to delineate and clarify the constitutional municipal authority which the legislature did *not* desire to restrict, but which under the constitution it had the power to restrict. . . .

"Unless a general law, a charter provision or a speical act contains language that clearly and definitely states that a certain municipal power *shall not* be exercised, then a municipality may validly exercise any such power for municipal purposes."

Sparkman, *supra* note 16, at 296.

41. Fla. Laws 1971, ch. 71-14. This bill was significant in two respects. It was "the first

most all of the existing population acts[42] and discouraging their future use.[43]

Neither the constitutional provision nor the legislature's strong policy statements and actions have received subsequent judicial recognition. In *City of Miami Beach v. Fleetwood Hotel, Inc.*[44] the leading case construing post-1968 municipal home rule powers, the Florida supreme court invalidated a municipal rent control ordinance.[45] In so holding the court noted the new constitutional provision on municipal home rule, but stated that it did not alter the rule that the paramount law of a municipality is its charter, which gives it all the powers it possesses.[46] The court then resurrected Dillon's Rule, relying on a 1925 case[47] that required specific delegation of powers and resolved doubts against the city.[48] The court also asserted that: (1) the ordinance conflicted with the Florida statute dealing with landlord-tenant relationships;[49] and (2) rent control is a matter of statewide, not municipal concern.[50]

---

act of home rule implementing legislation to address itself to the elimination of preexisting detailed authorizing legislation, passed under earlier philosophies, that could be restrictive under the constitutional limitations on home rule." Sparkman, *supra* note 16, at 298. Second, the statute draws no distinction between charter and noncharter counties, indicating a legislative intent to provide he fullest possible extent of home rule powers for all counties. The law has been described as "in fact and intent, a legislative charter for a non-charter county." *Id.*

42. Population acts are a form of general laws of local application that use population as the basis of classification. General laws of local application were described by the Florida supreme court as "relating to subdivisions of the state or to subjects or to persons or things as a class based upon proper distinctions and differences that inhere in or are peculiar or appropriate to the class." State *ex rel.* Buford v. Daniel, 87 Fla. 270, 287, 99 So. 804, 809 (1924).

43. Fla. Laws 1971, ch. 71-29. The population act had been one of the most commonly used methods of legislative control over local affairs and the effect of their repeal was to broaden home rule powers.

44. 261 So. 2d 801 (Fla. 1972).

45. *Id.* The case was decided on five grounds, three of which are discussed in the text accompanying notes 46-50 *infra*. In addition, the court invalidated the ordinance because (1) there was no emergency in fact and (2) the ordinance was too vague to be constitutional as a delegation of powers.

46. 261 So. 2d at 803.

47. Liberis v. Harper, 89 Fla. 477, 104 So. 853 (1925).

48. 261 So. 2d at 803. This course of action has been criticized as "directly contrary to both the spirit of the constitution and the trend in other jurisdictions." Comment, *supra* note 23, at 601.

49. Fla. Stat. §§83.01 *et seq.* (1971). This concern, though not expressly so labeled, is the preemption doctrine, which invalidates municipal legislation "not upon a determination that the municipality has no interest or insufficient interest to regulate the matter, but upon the ground that the legislature has determined that the state has a greater interest or that it is a more appropriate forum than the city council for resolving the problems dealt with by the regulation." Sandalow, *supra* note 23, at 665-66. *See generally* Glander & Dewey, *Municipal Taxation: A Study of the Pre-emption Doctrine,* 9 OHIO ST. L.J. 72 (1948).

50. 261 So. 2d at 804. Numerous cases have invalidated municipal ordinances on the ground that the subject matter was not one of local or municipal concern, and therefore was beyond the scope of the powers granted to municipalities. *See, e.g.,* Kansas City v. J.I. Case Threshing Mach. Co., 337 Mo. 913, 87 S.W.2d 195 (1935); Niehaus v. State *ex rel.* Bd. of Educ., 111 Ohio St. 47, 144 N.E. 433 (1924); City of Madison v. Tolzmann, 7 Wis. 2d

The *Fleetwood Hotel* court's reliance on case law repugnant to the 1968 constitution and statutory policy[51] appears to have provoked legislative response in the form of a comprehensive Municipal Home Rule Powers Act.[52] This Act, expressly intended "to remove any limitations judicially imposed . . . on the exercise of home rule powers"[53] expands the constitutional grant by giving municipalities authority to "exercise any power for *municipal purposes,* except when *expressly prohibited* by law."[54] Thus, the capacity for judicial policymaking in the area of determining the propriety of municipal action[55] is severely restricted,[56] if not nullified. The extremely broad definition of "municipal purposes,"[57] plus the recognition that municipalities "have the power to enact any legislation concerning any subject matter upon which the state legislature may act"[58] appears to preclude judicial invalidation on the grounds that the subject of the legislation is of state-wide concern. In addition, preemption by legislation or constitutional provision as a basis for invalidation is narrowed considerably by the requirement that such conflicting authority must *expressly prohibit* a municipality from exercising a given power.[59]

A recent opinion of the attorney general stated that the effect of the Municipal Home Rule Powers Act would be to allow municipalities to pass rent control ordinances and that the *Fleetwood* decision would no longer be controlling.[60] The opinion stated:[61]

570, 97 N.W.2d 513 (1959). Though both have been used as the sole ground for invalidating ordinances, a distinction should be made between invalidation because the subject matter is not one of local or municipal concern and a subject being preempted by state law. For examples of the latter, see Firestone v. City of Cambridge, 113 Ohio St. 57, 148 N.E. 470 (1925); City of Cincinnati v. American Tel. & Tel. Co., 112 Ohio St. 493, 147 N.E. 806 (1925).

51. See text accompanying notes 37-48 *supra.*

52. FLA. STAT. §§166.011 *et seq.* (1973).

53. FLA. STAT. §166.021(1) (1973). *Compare* this, *with* "excepted as otherwise provided by law" in article VIII, §2(b), *and* "except when prohibited by general or special law" language of Fla. Laws 1969, ch. 69-33, §1.

54. FLA. STAT. §166.021(4) (1973).

55. Efforts have been made nationally to extinguish or at least to narrow considerably the role of the judiciary. The National Municipal League's Model State Constitution would authorize a municipality "to exercise *any* legislative power or perform *any* function." *See* NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 97 (6th ed. 1963). *But see* Sandalow, *supra* note 23, at 685-721.

56. *See* OPS. ATT'Y GEN. FLA. 073-267 (1973).

57. FLA. STAT. §§166.021(2) (1973) states: "Municipal purpose means *any activity or power* which may be exercised by the state or its political subdivisions." (Emphasis added.)

58. FLA. STAT. §§166.021(3)(a)-(d) (1973).

59. FLA. STAT. §§166.021(1)-(4) (1973). By listing the four subject matters upon which municipalities may not act, the legislature makes it difficult for courts to find other matter impliedly precluded by vague constitutional language. The subject matter excepted is: "(a) The subjects of annexation, merger and exercise of extra-territorial power, which require general or special law pursuant to article VIII, section 2(c) of the state constitution; (b) Any matter expressly prohibited by the constitution; (c) Any subject expressly preempted to state or county government by the constitution or by general law; and (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of §§1(g), 3, and 6(e), article VIII, of the state constitution." *Id.*

60. OP. ATT'Y GEN. FLA. 073-267 (1973).

61. *Id.* at 7.

> [T]he Municipal Home Rule Powers Act, grants to municipalities all power . . . exercisable by the state with the exception of areas expressly forbidden by the Constitution, general law, county charter, or certain special laws.

Therefore, it would seem that the Florida supreme court's "overkill" in the *Fleetwood* decision has resulted in an undesirable situation. As one commentator analyzing a grant of power similar to the Florida Municipal Home Rule Powers Act[62] noted:[63]

> [R]eliance is placed exclusively upon the legislature to curb possible abuses of municipal power. A court could not limit municipal power without limiting the power of the legislature even though the considerations relevant to a determination of whether the limitations should be imposed may be quite different in the two situations. [I]t tend[s] to force the courts to the adjudication of major constitutional questions — limitations on legislative power — rather than permitting decision of minor constitutional questions — limitations on municipal power — which minimize the extent of judicial circumscription of legislatve power.

Thus, applying the present resolution of the long dispute in Florida over "home rule power" to present attempts by local governments to control population growth, one can conclude with at least some degree of confidence that such attempts are no longer vulnerable to attack on the theory that they constitute the exercise of powers in excess of those possessed by local governmental units. While this may be pleasing to those who support local growth control actions, consideration should be given to the possibility that state control is more appropriate and effective.

Treatment of Home Rule in Other States

Although the Florida situation is somewhat unique, constitutional home rule municipalities in other jurisdictions will encounter similar problems depending on the wording of specific constitutional grants. In jurisdictions such as Georgia, where the constitution vests the state legislature with discretion to determine the quantity of home rule to be delegated,[64] a municipality's power to enact a growth control ordinance depends entirely upon legislative grace.[65]

---

62. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. VIII, §8.02 (6th ed. 1963). This model provision would authorize a municipality to "exercise any legislative power or perform any function." *Id. See also* ALAS. CONST. art. X, §11.

63. Sandalow, *supra* note 23, at 690-91. "Conversely, [such provisions] tend to deny the judiciary power to curb abuse of municipal authority. A court sensitive to the limitations on its own competence that is postulated by the separation of powers would rarely, if ever, hold that a particular power, however inappropriate for exercise at the local level, exceeded municipal initiative. To do so would require . . . the court . . . to go even further and determine that the power not only was not delegable but that [it] would exceed the authority of the legislature as well." *Id.* at 691.

64. GA. CONST. art. XV, §1.

65. *See* note 27 *supra*.

At the other extreme are constitutional home rule provisions that plainly evidence an intention to limit legislative power to interfere in local governmental affairs.[66] Other provisions, which although appearing to retain legislative supremacy over all municipal affairs,[67] have been interpreted as creating an area within which cities can govern themselves entirely free from state control.[68] In both of these cases, ascertaining the scope of this local autonomy, which the United States Supreme Court termed an *"imperium in imperio,"*[69] necessitates a determination of whether a given function is of statewide or local concern.[70]

Although several tests have been devised,[71] the determination in most instances is exceedingly difficult. The Nebraska supreme court has confessed: "It is not easy in all cases to distinguish between municipal powers and state powers, and when they come within the classification of police powers, they are as impossible of accurate definition as the police power itself."[72] The confusion has not been lessened by the use of identical terminology, that is, municipal affairs, to deal with two fundamentally different problems – the extent of municipal initiative and limitation on legislative power. One commentator states that an examination of the cases reveals that different results may be had depending on how the question is raised.[73] He suggests that courts with some frequency hold:[74]

> [A] matter to be of "local concern" for the purposes of sustaining the exercise of municipal power in the absence of conflicting state legislation and yet of "statewide concern" when confronted with the question whether state legislation on the same subject prevails over inconsistent local law.

Several recently adopted constitutional home rule provisions[75] follow the National League of Cities model home rule provisions,[76] which reject the

---

66. *E.g.*, COLO. CONST. art. XX, §6. CAL. CONST. art. XI, §6 permits legal governmental bodies to: [M]ake and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to and controlled by general laws."

67. *E.g.*, OHIO CONST. art. X, §3; OKLA. CONST. art. XVIII, §3(a). *See generally* E. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 349-53 (1970).

68. Lackey v. State, 29 Okla. 255, 116 P. 913 (1911); Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S.W. 943 (1897). *See also* Merrill, *Constitutional Home Rule for Cities – Oklahoma Version*, 5 OKLA. L. REV. 139, 149-50 (1952); Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385, 387-88.

69. St. Louis v. Western Union Tel. Co., 149 U.S. 465, 468 (1893).

70. Vanlandingham, *supra* note 28, at 291.

71. *See* 1 C. ANTIEAU, MUNICIPAL CORPORATIONS LAW §3.36 (1968).

72. Consumers Coal Co. v. City of Lincoln, 108 Neb. 51, 189 N.W. 643, 646 (1922).

73. F. MICHELMAN & T. SANDALOW, *supra* note 67, at 351.

74. *Id.* at 351-52.

75. *E.g.*, MO. CONST. art. VI, §19; N.D. CONST. §130; S.D. CONST. art. IX, §2.

76. AMERICAN MUNICIPAL ASSOCIATION (National League of Cities), MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE §6 (1953).

imperium in imperio approach[77] by enabling cities to exercise all power and functions not denied by the state legislature. Missouri, for example, has adopted a provision with the specific intention of eliminating the "judicially-created areas of local autonomy where municipal enactments are deemed superior to state statutes."[78] In these states the validity of growth control ordinances no longer depends upon the court's classification of the ordinance as a matter of local concern, but rather depends upon the court's determination of whether a conflict existed between a state statute and the local enactment.[79] A sizeable body of case law, based on the doctrines of preemption and implied preemption, is available to aid courts in this determination.[80]

THE FEDERAL CONSTITUTION: PERMISSIBLE REGULATION

Growth control measures, like all ordinances that regulate the use of land, must find their justification in some aspect of the police power.[81] Ascertaining the constitutional scope of such police power[82] involves a two-step analysis.[83] First, an initial determination of whether the purpose of the regulation comes within acceptable objectives of the police power, that is, the protection of health, safety and morals, or the general welfare is required.[84] The courts next must examine whether the specific exercise of regulatory power is "reasonable,"[85] which is customarily considered under four rubrics: arbitrariness, confiscation, discrimination, or taking.[86] This traditional analysis has its organic base in the due process and equal protection clauses of the fourteenth amendment[87] and the taking clause of the fifth amendment.[88]

Despite this analytical framework, manageable guidelines have never been

---

77. *See* Vanlandingham, *supra* note 28, at 308.

78. Comment, *State-Local Conflicts Under the New Missouri Home Rule Amendment,* 37 MO. L. REV. 677, 681 (1972).

79. *Id. But see* Vanlandingham, *supra* note 28, at 310-11.

80. *See generally* Feller, *Conflict Between State and Local Enactments — The Doctrine of Implied Preemption,* 2 URBAN LAW. 398 (1970); Montgomery, *State Pre-emption and Local Legislation,* 4 SANTA CLARA LAW. 188 (1963).

81. *Cf.* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1925); *accord,* State *ex rel.* Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931).

82. The term "police power" has no exact definition. Berman v. Parker, 348 U.S. 26, 32 (1954); Hunter v. Green, 142 Fla. 104, 108, 194 So. 379, 380 (1940). The Florida supreme court has said that the police power has its origin, purpose, and scope in the general welfare of the state or as it is sometimes expressed the public health, public morals, and public safety. Marcy v. Mayo, 103 Fla. 552, 569-70, 139 So. 121, 128 (1931). It has also been said that the police power is the least limitable of all governmental powers. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

83. Heyman & Gihool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions,* 73 YALE L.J. 1119, 1122 (1964).

84. *Id. See also* Perry Trading Co. v. City of Tallahassee, 128 Fla. 424, 174 So. 854 (1937).

85. Heyman & Gihool, *supra* note 83, at 1122.

86. *Id.* at 1124.

87. U.S. CONST amend. XIV, §1.

88. *Id.* amend. V.

developed against which an ordinance regulating use of land may be measured. In determining the constitutionality of a specific regulatory exercise, courts often avoid the difficult analytical task of articulating a substantive decision by relying upon procedural rules.[89] In rejecting constitutional attacks, courts usually indulge in two judicial presumptions. The first is that legislative determinations of debatable questions are predicated upon rational grounds.[90] The second is that the exercise of the police power is valid, the burden of overcoming this presumption being imposed upon whoever attacks it.[91] Without relying on these presumptions, other decisions invalidating land use controls have stated no foundation for their holdings,[92] simply phrasing them in general conclusory descriptions of the regulation as arbitrary, unreasonable, or confiscatory.[93] Despite the lack of judicial articulation an attempt must be made to identify the policies that might influence a court ruling on the constitutionality of a growth limiting ordinance.

Since the Florida supreme court has recognized that the police power is in a constant state of evolution[94] and because suits might be initiated in federal court, the following examination will include cases from other jurisdictions and will deal not only with the Boca Raton type population cap,[95] but also with such other approaches to limiting population growth as low density zoning and timed-sequence development.

Substantive Due Process

The range of purposes of land use regulation that comes within the acceptable objectives of the police power has expanded considerably as courts have replaced nuisance analysis[96] with reliance on the general welfare provision of the police power doctrine.[97] While the traditional purposes of Euclidean zoning have received general acceptance,[98] this has not resulted in complete judicial abdication of responsibility for reviewing the objectives sought to be accomplished by land use regulations. Perhaps the most conspicuous example

---

89. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 13 (1971).

90. *See* 272 U.S. 365 (1926).

91. *Cf.* Snively Groves, Inc. v. Mayo, 135 Fla. 300, 184 So. 839 (1938).

92. *See* Girsh's Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

93. *See, e.g.*, State Highway Dep't v. Branch, 222 Ga. 770, 152 S.E.2d 373 (1966).

94. McInerney v. Ervin, 46 So. 2d 458, 463 (1950).

95. See text accompanying notes 7-9 *supra*.

96. Early statutes barring noxious uses in residential areas were upheld as valid legislative efforts to proscribe nuisance-like uses. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding ordinance outlawing operation of preexisting brickyard within recently expanded city limits as a proper exercise of police power). Even the landmark zoning decision of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), upheld comprehensive regulation to avoid nuisance-like impacts generated by particular uses in particular areas, for example, commercial establishments in single family dwelling areas. *Id.* at 387-88. *See* Heyman & Gihool, *supra* note 83, at 1123.

97. Heyman & Gihool, *supra* note 83, at 1123.

98. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

of this permissible objectives test is the prevalence of the view that zoning cannot be used to promote solely aesthetic objectives.[99]

More relevant to this analysis, however, is a series of decisions by the Supreme Court of Pennsylvania. Although not squarely confronted with an ordinance limiting growth, the court considered actions by various municipalities attempting to discourage population influxes through the use of zoning. The Pennsylvania supreme court in *National Land & Investment Co. v. Easttown Township Board of Adjustment*[100] invalidated a four-acre minimum lot requirement in a residential district. After examining and rejecting the township's alleged public purposes,[101] the court looked beyond the precise issue of the case and stated that a "zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid."[102] This position was clarified in *Kit-Mar Builder's, Inc. v. Township of Concord,*[103] where the court said:[104]

> The implications of our decision in *National Land* is that communities 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.

While in *National Land* lip service was paid to the presumption that legislative determinations upon debatable questions are predicted upon rational grounds,[105] the court in *Kit-Mar Builders* appeared to have reversed the presumption.[106] Looking beyond the stated purposes of the ordinance to the actual effect of the implementation of the ordinance, the court declared "that a scheme of zoning that has no exclusionary purpose *or result* is not acceptable . . . ."[107] In addition, the court appears to have changed the traditional burden of proof from the challenger of the ordinance to the municipality by stating that "[a]bsent some extraordinary justification, a zoning ordinance

---

99. *See, e.g.,* Berman v. Parker, 348 U.S. 26 (1954); Desert Outdoor Advertising v. County of San Bernardino, 255 Cal. App. 2d 465, 63 Cal. Rptr. 543 (1967); United Advertising Corp. v. Borough of Metuchin, 35 N.J. 193, 172 A.2d 429 (1961), *on remand,* 76 N.J. Super. 301, 184 A.2d 441 (1962). *But see* State v. Diamond Motors, 492 P.2d 825 (Hawaii 1967); State v. Buckley, 16 Ohio St. 2d 128, 243 N.E.2d 66 (1968).

100. 419 Pa. 504, 215 A.2d 597 (1966).

101. Among alleged public purposes was the necessity to insure proper sewage disposal and to protect township water from pollution. *Id.* at 525-26, 215 A.2d at 608. Additional justifications were the inadequacy of township roads and the burden that would be imposed upon that road system and the preservation of the character of the area. *Id.* at 526-29, 215 A.2d at 609-12.

102. 419 Pa. at 532, 215 A.2d at 612.

103. 439 Pa. 466, 268 A.2d 765 (1970).

104. *Id.* at 474, 268 A.2d at 768-69.

105. 419 Pa. at 521-22, 215 A.2d at 607.

106. 439 Pa. at 495-96, 268 A.2d at 779 (Pomeroy, J., dissenting).

107. *Id.* at 470, 268 A.2d at 766 (emphasis added).

with minimum lot sizes such as those in this case [2 and 3 acres] is completely unreasonable."[108] These decisions appear to respond to a policy issue posed by a legal commentator in an analysis of exclusionary zoning[109] concerning "the quantum of acknowledged social injustice involved in a formal governmental unit excluding or segregating people on the basis of their means."[110] The Pennsylvania supreme court appears to have answered that question in *National Land* by declaring that a township cannot "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live."[111]

This line of Pennsylvania cases was followed by a New Jersey court,[112] which invalidated a zoning ordinance requiring minimum lot size and floor space and providing for a limited number of multifamily units.[113] The court stated that housing needs are encompassed within the general welfare and a "Municipality must not ignore . . . its fair proportion of the obligation to meet the housing needs of its own population and of the region."[114]

The First Circuit Court of Appeals in *Steel Hill Development, Inc. v. Town of Sanbornton*[115] recently upheld a rezoning ordinance increasing minimum lot size from 35,000 square feet to 3 and 6 acres.[116] The case at first reading appears to oppose the line of Pennsylvania cases as it recognized:[117]

> [A]s within the general welfare, concerns relating to the construction and integration of hundreds of new homes which would have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of this small town, pose substantial financial burdens on the town for police, sewer and road service . . . .

As the court pointed out, however, the factual situation in *Steel Hill* is readily distinguishable from the Pennsylvania cases. Whereas those cases involved an

---

108. *Id.* at 471, 268 A.2d at 767.

109. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969); *see* Kit-Mar Builders, Inc. v. Township of Concord, 439 Pa. 466, 470 n.2, 268 A.2d 765, 766 n.2 (1970).

110. Sager, *supra* note 109, at 791.

111. 419 Pa. at 532, 215 A.2d at 612.

112. Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971). *See also* Molino v. Mayor & Council of the Borough of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (Law Div. 1971). *But cf.* J.D. Constr. Corp. v. Zoning Bd. of Adjustment, 119 N.J. Super. 140, 290 A.2d 452 (Law Div. 1972).

113. 117 N.J. Super. at 22, 283 A.2d at 359. The ordinance in question zoned approximately 55% of the land area of the township either R40, minimum lot size 1 acre and minimum floor space 1500 square feet, or R80, minimum lot size 2 acres and minimum floor space 1600 square feet. Additionally the multifamily zones were so restricted that no more than 500 to 700 additional units could be built. Three or more bedroom units were not permitted and two bedroom units were limited to 20% of the total units in any apartment development. *Id.* at 16, 283 A.2d at 556.

114. *Id.* at 20, 283 A.2d at 358.

115. 469 F.2d 956 (1st Cir. 1972).

116. *Id.* at 963.

117. *Id.* at 961.

unnatural limiting of suburban expansion into towns in the path of population growth, the Sanbornton ordinance responded to a proposed development that sought to create a demand for second homes rather than to satisfy an already existing demand for suburban expansion.[118] The court further showed its reluctance in upholding the ordinance by referring to the ordinance as a stop-gap measure and indicating that if the pressures of expansion were more real a different result would have been reached.[119]

The *Steel Hill* court seemed to indicate that the growth restriction ordinance would be effective only until an adequate study of future needs could be made and a plan developed to deal with these needs.[120] Such a plan providing for phased growth was upheld by the New York Court of Appeals in *Golden v. Town of Ramapo*.[121] The Ramapo plan used a residential development timing technique[122] for the alleged purpose of eliminating premature subdivision, urban sprawl, and development without adequate municipal facilities and services.[123] The majority recognized the exclusionary possibilities, stating that it would not countenance exclusion under any guise.[124] It believed, however, that the plan at issue, far from being exclusionary, was aimed at providing a "balanced cohesive community dedicated to the efficient utilization of land."[125] Although the factual settings in this case and the Pennsylvania cases are somewhat analogous,[126] the New York court placed great importance on the fact that the Ramapo plan, unlike the Pennsylvania minimum lot requirements, did not impose permanent restrictions upon land use.[127] The court

---

118. *Id.* at 960.

119. *Id.* at 962.

120. *Id.*

121. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed,* 409 U.S. 1003 (1972).

122. The plan did not rezone or reclassify any land into different residential or use districts but provided that any person engaged in residential development must obtain a special permit. "The standards for the issuance of special permits are framed in terms of the availability to the proposed subdivision plat of five essential facilities or services, specifically: (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) state, county, or town roads — major, secondary, or collector; and (5) firehouses. No special permit shall issue unless the proposed residential development has accumulated 15 development points, to be computed on a sliding scale of values assigned to the specified improvements under the statute." Additionally, a developer, by agreeing to provide those improvements that would bring the proposed plat within the number of development points could advance the date of subdivision approval. Also, applications to the "Development Easement Acquisition Commission" for a reduction of the assessed valuation were authorized. *Id.* at 368-69, 285 N.E.2d at 295-96, 334 N.Y.S.2d at 143-44.

123. *Id.* at 367, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

124. *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

125. *Id.*

126. The town of Ramapo, with the opening of the Tappan Zee Bridge became an easy 25-mile commute from the heart of New York City. Bosselman, *Can the Town of Ramapo Pass a Law To Bind the Rights of the Whole World?,* 1 FLA. S.U.L. REV. 234, 238 (1973).

127. 30 N.Y.2d at 378-79, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

further distinguished between an attempt to freeze population at present levels and a plan designed to maximize growth through efficient use of land.[128]

While these distinctions are valid, the majority opinion nevertheless refused to look beyond the purposes of the ordinance to its actual effect. It has been suggested by one commentator that the effect of a Ramapo plan will be to exclude all but upper income groups by restricting the amount of land available for housing and increasing its costs.[129] This same comentator has pointed out that the Ramapo plan will force development further and further into rural areas and, though preventing urban sprawl within the borders of the planned town, will contribute to the far more serious problem of megalopolitan sprawl.[130]

Thus, although there is precedent in several jurisdictions supporting the position that population growth control is a permissible objective of land use regulation under the police power, when it comes to judging the various ways in which local government may seek to accomplish their objectives, it is significant to note the strong emphasis in *Ramapo,* the leading case, on the fact that the Ramapo plan did not contemplate permanent restrictions on land development. A slowing down of growth rather than a population freeze or cap was intended. In other words, those courts that have approved the Ramapo or Ramapo-type plan have stressed the distinction between timing the pace of growth and preventing or severely limiting growth.

The "Taking Issue"

Closely related to the doctrine of substantive due process is the "taking" issue, which permits opponents of growth control measures to challenge the constitutionality of population growth control ordinances as applied to a particular piece of property.[131] Under the United States Constitution, private property is afforded protection under both the due process clause[132] and the fifth amendment taking clause,[133] as incorporated into the fourteenth amendment.[134] Comparable protection is afforded by the Florida constitution[135] and the constitutions of other states.[136] None of these constitutional provisions establishing and guaranteeing property rights, however, give much guidance by way of defining "ownership" or establishing the quality of the "ownership" right. As a result, the conflict between the rights of property owners and the

128. *Id.* at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

129. Bosselman, *supra* note 126, at 248. "This prediction appears to have been fulfilled as the average price of a house in Ramapo is $43,000, $3,000-$5,000 higher than those in surrounding towns. Housing for people in the $10,000-$20,000 income bracket has been practically eliminated." St. Petersburg (Fla.) Times, Nov. 18, 1973, §6, at 1, col. 1.

130. Bosselman, *supra* note 126, at 248.

131. *See generally* Nectow v. City of Cambridge, 277 U.S. 183 (1928).

132. U.S. CONST. amend. XIV, §1.

133. U.S. CONST. amend. V.

134. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

135. FLA. CONST. art. I, §2.

136. *E.g.,* IND. CONST. art. I, §21; IOWA CONST. art. I, §18; MICH. CONST. art. 10, §2.

interests and needs of society has been conceptualized in our legal system almost exclusively in terms of the supposed dichotomy between a taking of property, which is impermissible unless compensation is paid, and a "mere" regulation of property for which compensation is not due even if the regulation causes the landowner to suffer economic loss.[137]

Because American legislators and judges, like constitutional draftsmen, have largely ignored the conceptual bases of the ownership right from a quality of ownership standpoint, distinguishing between a "taking" and a "regulation" of property has become one of the more mystical rites performed by American jurists. Early cases facing this task found a compensable taking only when governmental action resulted in a physical invasion of the property in question.[138] This test functioned quite well during a period of rudimentary exercise of the police power.[139] Dissatisfaction with this test grew, however, as the scope of the police power increased[140] culminating in Justice Holmes' landmark opinion in *Pennsylvania Coal Co. v. Mahon*.[141] According to Professor Sax:[142]

> Holmes saw no difference between traditional taking and traditional exercise of the police power, but only a continuum in which property interests were asked to yield more or less to the pressures of public demand.

To Holmes, the difference between regulation and taking was a difference of degree, not kind, and therefore the resolution of each controversy depends upon the particular facts involved.[143]

While many theories have been proposed,[144] no definitive theory has

---

137. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Ambler Realty Co. v. Village of Euclid, 297 F. 307 (1924), *rev'd*, 272 U.S. 365 (1926). *See generally* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).

138. Mugler v. Kansas, 123 U.S. 623 (1887); Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).

139. *See* Sax, *Taking and the Police Power*, 74 YALE L.J. 36, 39 (1964).

140. The physical invasion test failed to "recognize that regulation may become so substantial or severe that the owner is precluded from making any reasonable use of his property. Conceptually, the standard assumes that the objectives gained by actual appropriation cannot be achieved by regulation. . . . [H]owever, appropriation and regulation may be merely alternative techniques for achieving the same goals." Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Taking of Property by Multi-Governmental Action*, 25 U. FLA. L. REV. 635, 640 (1973).

141. 260 U.S. 393 (1922).

142. Sax, *supra* note 139, at 51.

143. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 137, at 137.

144. Professor Dunham's theory uses as its basis the purpose of the governmental interference with land use. Compensation hinges on whether the regulation is for the prevention of harm, in which case no compensation need be paid, or whether it is for benefit extraction, in which case compensation is required. Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 560, 663-69 (1958). Professor Sax's theory divides the state's interest into entrepreneurial and mediatory roles. Compensation is required when the government enhances its resource position in an enterprise capacity at the expense of privately

evolved to separate permissible regulation from prohibited taking. Although an extensive analysis of the developments in this area is beyond the scope of this article,[145] an examination of several recent cases should provide some insight into possible judicial trends in the area as they relate to municipal growth control measures. The *Ramapo*[146] court recognized as a taking ordinances permanently restricting the use of property to such an extent that it may not be used for any reasonable purpose.[147] The court, however, impliedly classified the Ramapo plan as temporary, allowing property to be put to use within a reasonable time,[148] despite the fact that the plan restricts development for up to 18 years in certain areas.[149] Further, the court stressed that the restrictions were not absolute. The owners of the property had the option to accelerate the date of development by installing at their own expense necessary public services,[150] and certain uses were still permitted within residential districts.[151] The court also discussed the prospect of appreciated values and interim reductions in assessed value as further mitigating factors.[152] The *Ramapo* decision gave no intimation of whether the same result would have been reached in the absence of these mitigating factors. Judging from the court's reliance upon these factors, however, it is apparent that they played an important role in the decision.

The First Circuit Court of Appeals in *Steel Hill*[153] summarily dismissed the taking issue, finding that "though the value of the tract has been decreased considerably, it is not worthless or useless so as to constitute a taking."[154] This case is tempered, however, by the temporary nature of the decision in upholding the rezoning and upzoning.[155]

Although not directly related to population growth restriction, the Wis-

---

owned property. Sax, *supra* note 139, at 61-64. Professor Michaelman proposes a fairness test in which compensation would be based on whether it is "fair to effectuate this social measure without granting this claim to compensation for the private loss inflicted thereby." Michaelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1172 (1967). Another thoretical approach is the balancing test, under which no compensation need be paid if the social gains resulting from the governmental regulation outweigh the encroachment on private property rights. *See generally* Kratovil & Harrison, *Eminent Domain — Policy and Concept,* 42 CALIF. L. REV. 596 (1954). A theory known as the diminution in value test, often attributed to Justice Holmes, utilizes the magnitude of the property owner's loss as the controlling factor. Harris, *supra* note 140, at 652. A recent analysis of Florida decisions in this area concluded that the standard the courts apply in judging whether the government action amounts to a taking of property is unclear. Harris, *supra* note 140, at 651.

145. For a more in-depth analysis, see authorities cited note 144 *supra.*
146. *See* text accompanying notes 121-130 *supra.*
147. 30 N.Y.2d at 390, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.
148. *Id.* at 380-81, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.
149. *Id.*
150. 30 N.Y.2d at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.
151. *Id.*
152. 30 N.Y.2d at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 156.
153. *See* text accompanying notes 115-119 *supra.*
154. 469 F.2d at 963.
155. See text accompanying note 119 *supra.*

consin supreme court's decision in *Just v. Marinette County*[156] represents an unusually pro-governmental resolution of the issue of regulation of private property to further the public welfare without paying compensation. The case arose as a challenge to a Shoreline Zoning Ordinance that placed the plaintiff's land in a conservancy district.[157] The court stated the issue as "a conflict between the public interest in stopping the despoilation of natural resources . . . and an owner's asserted right to use his property as he wishes."[158] The compensation determination was formulated in terms of whether the restrictions were placed on the property to create a public benefit or to prevent a public harm.[159] After finding a public right in the preservation of natural resources,[160] the court declared that it is not an unreasonable exercise of the police power "to prevent harm to public rights by limiting the use of private property to its natural uses."[161]

Any assessment of the potential result of the application of "taking issue" principles to municipal growth control measures must begin with the recognition that the taking issue is at the center of the entire legal controversy concerning environmental law and land use planning and control law. The publication in recent months of *The Taking Issue* serves to highlight the importance of the issue and the controversy it elicits. The authors advocate abandoning the Holmes "matter of degree" test and adopting the theory that ordinarily there is no compensable taking unless there is a physical taking of land.[162] Other authors have recently advocated greater recognition of public rights to privately owned land through use of new or resurrected theories such as public trust,[163] common lands,[164] and no guaranteed development right.[165] The value of all these theories is questionable because they tend to ignore and camouflage the basic problem: the American legal system has never clearly

156. 56 Wis. 2d 7, 201 N.W.2d at 761 (1972).
157. *Id.* at 13-14, 201 N.W.2d at 766.
158. *Id.* at 14-15, 201 N.W.2d at 767.
159. *Id.* at 16, 201 N.W.2d at 767.
160. *Id.* at 16, 201 N.W.2d at 768.
161. *Id.* at 17, 201 N.W.2d at 768.
162. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 137, at 238-55. The authors suggest in the alternative that (1) no "taking" should be found as long as the public purposes served by the regulations were important and (2) that statutory standards be drafted to determine when compensation is required. *Id.* at 256-83. The "taking issue" controversy was recently brought to the attention of Florida lawyers in the form of a debate at the March 9, 1974, Second Annual Young Lawyers Convention. The participants were Mr. Bosselman and Professors Finnell and Lefcoe. See Landowners Rights v. Land Use Regulation (March 9, 1974).
163. *See* Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention,* 68 MICH. L. REV. 473 (1970).
164. Juergensmeyer & Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem,* 14 NATURAL RESOURCES J. (1974).
165. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); Little, *New Attitudes About Legal Protection for the Remains of Florida's Natural Environment,* 23 U. FLA. L. REV. 459 (1971). *See* Hillsborough County Environmental Protection Comm'n v. Franderson Properties, 283 So. 2d 65 (2d D.C.A. Fla. 1973).

come to grips with the problem of formulating a theory of ownership. Most "taking" cases constitute either an acceptance of or an exception to the nineteenth century liberal theory of ownership best expressed by the tort principle that a landowner may do as he wishes with his property so long as he does not interfere with the exercise of that same right by other landowners. Most industrialized nations long ago shifted from the liberal theory to the social function concept of ownership whereby the sacrosanct, God-given character of private property rights is abandoned in favor of a recognition that the quality of ownership is definable only in terms of the needs of a specific society at a given period of time.[166] Only when such a philosophical change is consciously made will the taking issue be capable of resolution on a consistent and predictable basis.[167]

Equal Protection

Growth-limiting ordinances may also be attacked as violative of the equal protection clause,[168] through the contention that they discriminate on the basis of race or wealth. The Supreme Court has recognized classification on either of these bases as highly suspect and therefore subject to exacting judicial scrutiny.[169] While the stronger method of attack would be to show a racial motive or purpose on the part of the governmental unit,[170] this might prove difficult with a growth restriction ordinance because of its esssentially indiscriminate exclusionary effect.

---

166. The theory was first proposed by Leon Duguit. One of the few comprehensive discussions of Duguit's theory and its present day application is contained in the mimeograph but unpublished lectures of Professor M. E. Kadam of the University of Geneva prepared for Faculté Internationale pour l'Enseignement Du Droit Compare and entitled *La Notion et les Limites de la Proprieté Privée en Droit Comparé.*

Perhaps the clearest expression of the social function theory in this hemisphere is the provision in the 1940 Cuban Constitution: "The Cuban Nation recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social inteersts, are established by law." CUBA CONST. art. 87 (1940).

167. For a more detailed discussion of this point, see Juergensmeyer, *The American Legal System and Environmental Pollution,* 23 U. FLA. L. REV. 439, 447-48 (1971). The United States Supreme Court has indicated a general acceptance of the social function theory. United States v. Willow River Power Co., 324 U.S. 499 (1945); Wickard v. Filburn, 317 U.S. 111 (1942); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

168. U.S. CONST. amend. XIV, §1.

169. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969). Two quite distinguishable tests exist for application of the equal protection clause. The rationality test essentially determines whether the classification drawn by the legislation bears a conceivably reasonable relation to a permissible state objective sought to be achieved by the statute. McGowan v. Maryland, 366 U.S. 420, 426 (1961). The "rationality" test is typically employed to attack a form of economic regulation. More v. Doud, 354 U.S. 457, 463 (1957). Where the classification touches on a fundamental right, the stricter standard of whether it promotes a compelling state interest is applied. Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

170. *See, e.g.,* Dailey v. Lawton, 425 F.2d 1037 (10th 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); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972).

A seemingly more useful approach would be to claim de facto discrimination against low-income individuals.[171] It could be argued that as a result of growth restrictive regulations such as large minimum lot size and restrictions on the number of multidwelling units, housing costs are prohibitive for low-income families.[172] This approach was recognized by way of dictum in *Southern Alameda Spanish Speaking Organization v. Union City*[173] where a referendum nullified a zoning variance that would have allowed the construction of low-income housing.[174] Speaking to the assertion that the effect of the referendum was to deny decent housing and an integrated environment to low-income residents, the Ninth Circuit Court of Appeals said:[175]

> If apart from voter motive the result of this zoning by referendum is discriminatory in this fashion, in our view a substantial constitutional question is presented. Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits.

A similar issue was raised in *Ramapo*,[176] but the New York Court of Appeals was satisfied by the town's argument that it had proposed to build biracial low-income family housing,[177] and that it had defended such proposals against the attacks of its own citizens.[178] A recent article found that this housing has been completed and consists of approximately 200 units, of which about fifty are occupied by low-income families, ten to twenty per cent of whom are black.[179] According to a recent interview with a local official no further low-income housing is contemplated.[180]

As the same commentator has noted "the wolf of exclusionary zoning hides under the environmental sheepskin worn by the stop-growth movement."[181] Thus, it would appear that a growth restriction plan that failed to provide adequately for low-income families would be ripe for attack. A problem exists in the federal courts, however, because the few governmental discriminations based on wealth that have been struck down by the Supreme Court have involved payment of a fee as a statutory precondition to the enjoyment of what

---

171. *See* Schwartz, *Exclusionary Zoning—Suggested Constitutional Attacks*, 4 CLEARINGHOUSE REV. 345, 361 (1970). *See generally* Sager, *supra* note 109; Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 STAN. L. REV. 774 (1971).

172. Schwartz, *supra* note 171, at 361.

173. 424 F.2d 291 (9th Cir. 1970). *But cf.* James v. Valtierra, 402 U.S. 137 (1971).

174. 424 F.2d at 292.

175. *Id.* at 295.

176. *See* text accompanying notes 124-125 *supra*.

177. 30 N.Y.2d at 368 n.2, 285 N.E.2d at 292 n.2, 334 N.Y.S.2d at 143 n.2.

178. *See* Fletcher v. Romney, 323 F. Supp. 189 (S.D.N.Y. 1971); Larrelly v. Town of Ramapo, 317 N.Y.S.2d 837 (App. Div. 1970).

179. Bosselman, *supra* note 126, at 249.

180. *Id.*

181. *Id.*

the Court has described as a fundamental personal right.[182] A further complication arises where the growth restrictive ordinance is the result of a referendum. The prevailing judicial attitude appears to be that a referendum is founded on neutral principles and should be exempt from federal court restraints.[183] The leading case in the area is *James v. Valtierra*,[184] in which the Supreme Court reversed a three-judge panel's holding[185] that article 34 of the California constitution, which required voter approval of proposed low-rent housing projects, violated equal protection.[186] The court refused to impose the compelling state interest criteria because it found that article 34 made no distinction based on race,[187] and declined to extend the compelling state interest test to classifications based on wealth.[188] The court placed great stress on the referendum as a procedure for democratic decisionmaking, saying: "[R]eferendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[189] Although *Valtierra* could be read as unequivocally supporting referenda, it could also be interperted as a refusal to extend further the compelling state interest standard of the equal protection clause.[190]

Right To Travel

As there appears to be a strong inclination toward limiting the scope of modern equal protection,[191] the constitutional right to travel has been suggested as an alternate means of challenging restrictive land use regulations.[192] The Supreme Court has recognized that the freedom to migrate to and settle in any state is constitutionally protected.[193] At various times this right to travel has been attributed to the privileges and immunities clauses of both articles IV[194] and the fourteenth amendment,[195] the due process clause of the fifth

---

182. Note, *The Right To Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U .CHI. L. REV. 612, 619 (1972).

183. Ranjel v. City of Lansing, 417 F.2d 321, 324 (9th Cir. 1970); Spaulding v. Blair, 403 F.2d 862, 865 (4th Cir. 1968); *cf.* Reitman v. Mulkey, 387 U.S. 369 (1969).

184. 402 U.S. 137 (1971).

185. Valtierra v. Housing Authority, 313 F. Supp. 1 (N.D. Cal. 1970), *rev'd*, 402 U.S. 137 (1971).

186. 402 U.S. at 143.

187. *Id.* at 141.

188. *Id.* at 144-45 (Marshall, J., dissenting).

189. *Id.* at 143.

190. Comment, *The Right To Travel and Its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635, 666 (1971-1972). A possible way to avoid the apparant federal limitation would be to bring the action under the Florida equal protection clause. FLA. CONST. art. I, §2.

191. Sager, *supra* note 109, at 779-80. *Cf.* James v. Valtierra, 402 U.S. 137 (1971).

192. See Note, *supra* note 182, at 623.

193. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 358 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

194. Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869).

195. Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); *id.* at 182 (Jackson, J., concurring).

amendment,[196] and the commerce clause.[197] The Supreme Court in *Shapiro v. Thompson,*[198] however, refused to ascribe the source of the right to travel,[199] instead quoting[200] Justice Stewart's statement in *United States v. Guest:*[201]

> The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

To invalidate local land use regulations as violative of the right to travel, it would be necessary to show that such regulations impose a penalty on that right.[202] The Supreme Court in *Shapiro,* in invalidating a one-year residency requirement for eligibility for welfare payments,[203] considered two elements of the penalty concept.[204] The first construed was the state's intention to deter people from moving into the state and burdening welfare rolls.[205] The second element viewed was the seriousness of the benefit denied, in this case welfare payments used to secure the necessities of life.[206] Because of the *Shapiro* Court's failure to clarify the degree of penalty necessary to invoke the compelling state interest test, there existed a lack of uniformity in decisions based on *Shapiro.*[207] Some courts required the presence of both elements[208] while others required neither.[209] Subsequently, the Court in *Memorial Hospital v. Maricopa County,*[210] recognizing the lack of clarity in the *Shapiro* penalty analysis,[211] discussed the amount of impact required to give rise to the compelling state interest test.[212] The Court repeated its earlier statement[213] that it is not necessary to show that anyone was actually deterred from traveling, and stated:[214]

---

196. Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Kent v. Dulles, 357 U.S. 116, 125 (1958) (cases involved the freedom of Americans to travel outside the country).

197. Edwards v. California, 314 U.S. 160, 173 (1941); Passenger Cases, 48 U.S. (7 How.) 283 (1849).

198. 394 U.S. 618 (1969).

199. *Id.* at 630.

200. *Id.*

201. 383 U.S. 745 (1966).

202. See Dunn v. Blumstein, 405 U.S. 330, 340 (1972). *See also* Note, *Constitutional Law —Equal Protection—Penalty on the Right To Travel—Durational Residency Requirements,* 1973 WIS. L. REV. 914, 919-23.

203. 394 U.S. at 627.

204. *See* Memorial Hosp. v. Maricopa Co., 94 S. Ct. 1076, 1081 (1974). *See also* Note, *supra* note 202, at 920.

205. 394 U.S. at 629.

206. *Id.*

207. *See* Note, *supra* note 202, at 921.

208. *See, e.g.,* Lontham v. McKeithan, 336 F. Supp. 153 (E.D. La. 1971); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971).

209. Cole v. Housing Authority, 453 F.2d 807 (1st Cir. 1970); Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970).

210. 94 S. Ct. 1076 (1974).

211. *Id.* at 1081.

212. *Id.*

213. Dunn v. Blumstein, 405 U.S. 330 (1972).

214. 94 S. Ct. at 1082.

> *Shapiro* and *Dunn* stand for the proposition that a classification which operates to *penalize* those persons . . . who have exercised their constitutional right of inter-state migration must be justified by a compelling state interest.

The Court, however, shed little light on the ultimate parameters of the *Shapiro* penalty analysis, finding only that medical care is as much a basic necessity of life to an indigent as welfare assistance.[215]

Construction Industry Association of Sonoma Co. v. City of Petaluma[216] represents the only case to date that has invalidated a local growth control enactment as violative of the constitutional right to travel.[217] The Petaluma scenario is a familiar pattern in which a rural town[218] experiences large population influxes as a result of urban sprawl. Petaluma, however, unlike many of its similarly situated sister cities, reacted by implementing a growth control policy. The "Petaluma Plan" was basically an aggregation of resolutions, ordinances and plans that attempted to limit the number of dwelling units constructed in the city to 500 per year.[219] The principal ordinance implementing

---

215. *Id.*

216. 375 F. Supp. 574 (N.D. Cal. 1974).

217. *Id.* at 581. The plan was also attacked as violative of the equal protection, due process, and commerce clauses. The court found it unnecessary to consider these issues after basing its decision on the right to travel. *Id.* at 586.

218. The City of Petaluma, although within modern commuting distance of San Francisco, had for the preceding hundred years been a rural market town. In 1950 the population was about 10,000, which had grown to 25,000 by 1970. The city then in two years added 5,000 new inhabitants. Hart, *The* Petaluma *Case,* 9 CRY CALIFORNIA 2, 6, 8 (1974).

219. The city council adopted an official development policy in June 1971, entitled "Official Statement of Development Policy for the City of Petaluma." Also included in the plan were the following ordinances:

(a) Petaluma Environmental Design Plan, March 27, 1962, PETALUMA RESOLUTION No. 6008 N.C.S. This plan would have allowed only 2,500 new dwelling units to be constructed in the city over the next five years. It provided that a "greenbelt" — a landscape strip park "approximately 200 feet in width" — would define the boundary for urban expansion during "the next decade or two." Residential development outside the greenbelt was forbidden and this was to be effectuated by the city refusing annexation and utility extension to the non-urban area and by soliciting the cooperation of Sonoma County in preventing development outside the greenbelt.

(b) Petaluma Residential Development System, August 21, 1972, PETALUMA RESOLUTION No. 6113 N.C.S. This system implemented the above policy and established a residential development evaluation board to administer the annual 500-unit allocation.

(c) Petaluma Housing Element, September 5, 1972, PETALUMA RESOLUTION No. 6126 N.C.S. This portion of the plan was intended to provide the city with data to "identify and quantify" the city's housing problems and to make recommendations and plans for alleviating them. It contained the following findings: (a) the city's growth rate is twice that of Sonoma County; (b) insufficient rental and low-income housing exists in the city; (c) vacancy rates are below normal averages for both new houses and apartments, indicating a tightening housing market; (d) the city should establish "a rate of housing construction adequate to provide a decent home for all residents regardless of age, sex, income, or ethnic background with maximum choice of rental or ownership, type, price, and location"; (e) the city should eliminate deficient housing and "stimulate private rehabilitation"; (f) the city should establish an annual percentage of 8 to 12 per cent of the annual housing allocation to be de-

the plan was the Residential Development Evaluation System, which allocated the available building permits on what was essentially a competitive basis.[220]

The federal district court framed the issue as a question whether a municipality capable of supporting natural population expansion may limit growth simply because it does not prefer to grow at the rate that would be dictated by prevailing market demand.[221] Then, applying the penalty analysis as clarified by *Memorial Hospital*,[222] the court concluded as a matter of law:[223]

> [T]here is no meaningful distinction between a law which penalizes the exercise of a right and one which denies it all together,[and that] it is clear that the growth limitation under attack may be defended only insofar as it furthers a compelling state interest.

The *Petaluma* court, noting the scarcity of case law, adopted the reasoning of a series of Pennsylvania cases[224] as best expressing the underlying rationale of those federal cases recognizing the right to travel as fundamental.[225] The Pennsylvania cases, while they did not consider the constitutional right to travel, invalidated restrictive municipal zoning ordinances as violative of substantive due process.[226] The public purposes alleged in support of the Pennsylvania ordinances[227] were similar to the compelling state interest urged by the City of Petaluma,[228] and the reasoning of the Pennsylvania supreme court in

---

voted to "low to moderate income housing" on both sides of the freeway separating east and west Petaluma.

See Granklin, Memorandum 74-2, at 3-6 (The Potomac Institute, Metropolitan Housing Program, Feb. 28, 1974). *See also* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 514 (N.D. Cal. 1974).

220. The allocation process required that anyone hoping to build more than four units in the coming building season must file plans with the residential development evaluation board by September. This board then would eliminate any proposals that fail to comply with the city's general plan and its environmental design plan. The remaining proposals were rated by an elaborate two-part point system. A plan could be assigned up to 30 points for access to existing and adequate services: streets, schools, drainage channels, fire protection, and sewer mains. Another 80 points could be awarded for excellence of design, the inclusion of low-cost housing and needed facilities, and for providing open space and trail links. Developments that failed to receive a minimum number of points—25 out of 30 in the first group, 50 out of 80 in the second—were eliminated. Following a public hearing, the recommendations of the evaluation board were to be presented to the city council for final disposition. *See* Hart, *supra* note 218, at 9.

221. 375 F. Supp. at 581.

222. *See id.* at 582.

223. 375 F. Supp. at 581.

224. 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 398 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1966); Bilbar Constr. v. Board of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958).

225. 375 F. Supp. at 584-86.

226. *See* text accompanying notes 100-111 *supra.*

227. See note 101 *supra.*

228. The city of Petaluma urged three compelling interests in support of the plan: (1) lack of adequate sewage treatment facilities, (2) inadequacy of the city's water supply, and (3) desire to protect the city's "small town character." 375 F. Supp. at 581-830.

dismissing the alleged public purposes was quoted extensively with approval by the *Petaluma* court.[229] Singificantly, in dismissing the purported compelling state interests, the federal judge stated that it is not sufficient that the government activity furthers a very substantial interest if other reasonable ways to achieve those goals exist with a lesser burden on constitutionally protected activity.[230] In analyzing the compelling state interests, that is, lack of sewage capacity, inadequate water supply, et cetera, and the available alternatives, the court stated:[231]

> The sole issue in this case is whether or not people currently excluded from Petaluma have the right to immigrate into the area. If so, relief will be granted and their rights will be enforced; after which the matter of dealing with the natural burdens that the exercise of those rights places upon the municipality falls entirely within the discretion of city officials or the city electorate. Neither Petaluma city officials, nor the local electorate may use their power to disapporve bonds at the polls as a weapon to define or destroy fundamental constitutional rights.

Exactly how a municipality can be expected to respond to a never ending increase in demand for city services is left unanswered. Surely such a position is not to be carried to its logical extremes.

Although the *Petaluma* court stressed that its decision was not intended to interfere with local government's use of "traditional" zoning powers,[232] this result does not necessarily follow from a close reading of the case. The court quoted with approval from the plaintiff's brief:[233]

> [T]his case [holds] . . . that local police power may [not] be used to shift the burden of providing housing to other cities in a metropolitan region.

This would seem to indicate that a city's zoning must be responsive to demographic and market trends.

The above reasoning also appears to answer the question of the effect of the *Petaluma* decision on the Ramapo plan[234] and variations thereon. It appears to preclude a city, such as Ramapo, in the path of metropolitan sprawl, from using such zoning methods as large minimum lot sizes and exclusion of multifamily units to avoid its share of the population spilling forth from the center city.[235] The court, again quoting plaintiff's brief, stated:[236]

---

229. *Id.* at 586.

230. 375 F. Supp. at 583. The court, in discussing the alternatives, addressed itself to the sewage problem and suggested as a solution both real and practical, increasing the capacity of the existing sewage treatment plants. *Id.* at 583.

231. *Id.*

232. *Id.* at 587.

233. *Id.*

234. *See* text accompanying notes 121-130 *supra.*

235. An examination of the effect of the Ramapo plan indicates that it has excluded people who have a right to immigrate into the area and has shifted the burden of providing housing to other cities in the metropolitan region. New building starts on single

> The prospective resident turned away at Petaluma does not disappear into the hinterland, but presents himself in some other suburb of the same metroplex, perhaps in some town with as many problems or more than Petaluma . . . . By this means, Petaluma legislates its problems into problems for Napa, Vallejo or Walnut Creek. *May Petalume pass a law to bind the whole world?*

Thus, an absolute population cap such as has been attempted in Boca Raton clearly appears violative of the right-to-travel principle applied by the Petaluma court.

One question left partially unanswered by the Petaluma decision is: What would have been the effect on the Petaluma decision if the Petaluma Plan had been enacted by a referendum[237] as was the Boca Raton population cap?[238] The *Valtierra* decision with its strong language in support of referenda[239] could be read as insulating the ordinance from attack. However, if the *Valtierra* decision is interpreted as a refusal to extend the compelling governmental interest standard rather than treating referenda as sacrosanct, then the right-to-travel doctrine would appear equally applicable to growth restrictive plans enacted by referendum. The *Petaluma* dictum concerning the inability of the local electorate to use its power to disapprove bonds at the polls as a weapon to define or destroy fundamental constitutional rights[240] would also support this proposition.

CONCLUSION

For those who wish to maneuver through it, the labyrinth of population dispersal control, as evidenced by recent municipal growth control measures, is as yet without a thread to follow. Only in recent months have the legal issues solidified. The most recent case in the area, *Petaluma*,[241] is still in the appellate process. Consequently, to offer even tentative substantive conclusions at this point would be foolhardy. Nonetheless, conclusions regarding various conceptual aspects of the problem and proposed resolutions of several conflicts seem in order.

---

family homes in Ramapo, which had reached a record of 835 in 1966, fell to 189 in 1969 when the timed sequential development plan was put into effect, and since 1969 the number of starts has not risen above 245. By contrast, in neighboring Clarkstown, which encompasses a little over half of the land area of Ramapo, 1,139 new homes were started in 1972. Additionally Ramapo prohibits multifamily units and it is estimated that construction of 2,000 units of commercial housing has been blocked in the last seven years. See St. Petersburg (Fla.) Times, Nov. 18, 1973, §G at 1, col. 1.

236. 375 F. Supp. at 587 (emphasis added).

237. The voters of Petaluma in June 1973, in an *advisory referendum* voted their approval of the plan by a margin of more than 4-1. *See* Hart, *supra* note 218, at 9.

238. *See* Boca Raton, Fla., Resolution No. 109-72, Nov. 8, 1972.

239. See text accompanying note 189 *supra*.

240. 375 F. Supp. at 583. *See also* text accompanying note 231 *supra*.

241. See text accompanying notes 216-233 *supra*.

First, the level at which governmental growth control is currently occurring is unrealistic and taints the entire controversy. To allow growth decisions at the small town level not only enhances the possibility that such measures will be used for discriminatory purposes, but also unjustifiably limits the course of action open to municipal, state, and federal authorities in making more wide-ranging plans for alleviating or solving the population dispersal dilemma. In most situations, not until states or metropolitan authorities, or both, tackle the problem throughout their jurisdictions will restrictive measures be sufficiently integrated with over-all economic, social, and general resource allocation policies to assure their compatibility with societal as opposed to local interests.

Second, it seems clear that no matter how needed or justifiable growth control measures are, they conflict with various constitutionally guaranteed rights and freedoms – equal protection, protection of private property, and the right to travel. As is always the case in such situations, careful balancing of interests must occur to ensure that the benefits attained from such measures outweigh the value of the rights and freedoms foregone to accomplish them.

Finally, new or at least different conceptual approaches to defining property rights and to reaching land use control decisions must be adopted. As discussed previously,[242] when it comes to defining ownership qualitatively, the courts have spent too much time on novel ideas and extraneous issues[243] and too little time in effectuating the social function theory of property rights. With all due respect to those who have spent their time trying to avoid rather than solve the problem of establishing the boundaries of the ownership right, it must be recognized that planners have been slow in developing even partly objective tools for analyzing the way in which a given tract of land should be used. Even under competently conceived and administered master plans, land use decisions have ordinarily been projected onto an imaginary plane of "market demand" as separated from the land itself as the estates in land concept. Only quite recently has an approach that offers some degree of objectivity to the land use decision process been developed: the carrying capacity theory.[244]

The key focus of the carrying capacity approach is to concentrate on the land itself – that is: What is its highest and best use, not from a market demand viewpoint but from the standpoint of natural considerations – soil, water, geological characteristics, topographical features, and the role it plays in its natural state in the area's support systems?[245] An undeveloped area of Florida

242. See text accompanying notes 162-165 *supra*.

243. *See* notes 163-165 *supra*.

244. Perhaps the nexus of the theory lies in the concept that until the relatively recent development of energy support techniques, the population of an area was limited by the capacity of the natural system to support that area's inhabitants. See generally H. ODUM, ENVIRONMENT, POWER AND SOCIETY (1971), DEP'T OF ARCHITECTURE, UNIV. OF FLA., INTERFACE – 4, REPORT 4 URBAN DESIGN STUDIO (1974).

245. A modeling technique is used that involves the diagrammatic representation of all the components and interactions of a given natural support system. Once diagrammed, the model's behavior can be expressed in mathematical terms and "duplicated" on an analog

now subject to intense development pressure has been analyzed in this manner.[246] The result has been the formulation of some objectively justifiable estimates of the numbers of inhibitants the land can support without destruction of the natural support systems of the area. The use for which each tract is best designed in order to make its maximum contribution to the area is also ascertainable through this approach.

Computers, even if fed proper data obtained from this approach, obviously cannot decide land use cases. The data obtained, however, should be extremely helpful to decisionmakers in assuring that population figures as well as land use allocation decisions will be made in a more objective and land oriented manner. If fundamental rights and ownership rights must be redefined to accomplish population growth control, then at least the latter must relate to natural considerations inherent in ownership, rather than to a mere shuffling of power between the private and public sectors of our society.

computer. The model may then be tested by inserting historical data, and checking to see that the model generates data known to exist at present. In this way, the accuracy of the model's ability to "predict" future trends may be validated. The value of working with such a model is that by interjecting hypothetical changes in the system, the consequent effects on the carrying capacity and future stability of the system can be reviewed and studied. Also, by using such modeling techniques, a particular area can be studied to ascertain whether the population growth has already exceeded the area's natural growth limits. *See generally* DEP'T OF ARCHITECTURE, UNIV. OF FLA., *supra* note 244.

246. STATE CARRYING CAPACITY COMMITTEE, UNIV. OF FLA., CARRYING CAPACITY PROJECT FOR FLORIDA AND ITS MAJOR REGIONS INVOLVING NATURAL SYSTEMS INVENTORY AND COMPREHENSIVE PLANNING (1974).