

**ARTICLES INSPIRED BY
THE WORK OF JOHN M. PAYNE**

MOUNT LAUREL: HINDSIGHT IS 20-20

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The New Jersey Supreme Court is justifiably famous for its decisions in *Southern Burlington County NAACP v. Township of Mount Laurel*—commonly known as *Mount Laurel I* and *Mount Laurel II*.¹ Its valiant efforts to reform zoning practices in the state led to reconfiguration of both state and local land use regimes in New Jersey, and provided a model used by other jurisdictions confronting similar issues.² As a New Jersey-based land use professor, John Payne took on the lifelong task of chronicling, critiquing and writing about *Mount Laurel*.³ Under the circumstances it would be

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1. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975). The court revisited the dispute and issued an exhaustive evaluation of the issues in 1983. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983). Five other cases spawned by the initial result in *Mount Laurel I* were consolidated when the New Jersey Supreme Court heard the second round of the case in 1983.

2. Examples include New York, Pennsylvania and New Hampshire. See *National Land & Investment Co. v. Kohn*, 215 A.2d 597 (Pa. 1965); *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975); *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991). A summary of results around the nation may be found in 13 RICHARD R. POWELL & MICHAEL ALLAN WOLF, *POWELL ON REAL PROPERTY* §79D-07 (2010).

3. Unfortunately, John died much too young of brain cancer in 2009. His long period of service to both New Jersey and Rutgers led to his being named a Board of Governors Distinguished Service Professor in 2004. Some of his work relevant to this essay includes, John M. Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976); John M. Payne, *From the Courts: Starting Over—Mount Laurel II*, 12 REAL EST. L. J. 85 (1983); John M. Payne, *Housing Rights and Remedies: A "Legislative" History of Mount Laurel II*, 14 SETON HALL L. REV. 889 (1984); John M. Payne, *From the Courts: Mount Laurel Goes National*, 15 REAL ESTATE L. J. 62 (1986); John M. Payne, *Rethinking Fair Share:*

sacrilegious for a long-time property teacher like me to write for a festschrift honoring John's life without taking a new look at the case he spent so much time on. So I sat down and reread the *Mount Laurel* opinions, a host of related cases and legislative enactments, literature and other commentary and came to the "hindsight is 20-20" conclusion that the case was, in significant ways, wrongly decided. This essay tells you why.

I. JUST A BIT OF BACKGROUND

Summarizing the *Mount Laurel* dispute is impossible. The two main opinions are the size of a major book. Adding in all the related cases would fill a multi-volume set. Legislative responses were complicated and lengthy.⁴ The literature on the dispute is massive. Payne himself provided the best picture of the extraordinary scale of the litigation in a little piece describing the scene at the New Jersey Supreme Court in 1980 when it went over the issues for a second time—hearing arguments in six consolidated, multi-party cases.

The October argument was as much a landmark in the annals of American legal process as the subsequent decision itself. Because individual presentations by all the parties would have been hopelessly unwieldy (four pages were required to list the attorney appearances in the final opinion), the parties were required by the court to form themselves into interest groups (towns, developers, and poor people) and only one attorney was permitted speak, for the entire group, to any given portion of the twenty-four questions [under review]. A formal outline of the program, with designated speakers and time limitations, was presented to each visitor upon arrival, as at the opera. Under the ground rules . . . each speaker was bound to address the general question, rather than to advocate the facts or law of his or her clients' individual position.

The Judicial Enforcement of Affordable Housing Policies, 16 REAL ESTATE L. J. 20 (1987); John M. Payne, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?*, 6 YALE L. & POL'Y REV. 361 (1988); John M. Payne, *From the Courts: Beyond Mount Laurel*, 16 REAL ESTATE L. J. 349 (1988); John M. Payne, *From the Courts: Exclusionary Zoning and the "Chester Doctrine,"* 20 REAL ESTATE L. J. 366 (1992); John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665 (1996); John M. Payne, *Politics, Exclusionary Zoning and Robert Wilentz*, 49 RUTGERS L. REV. 689 (1997); John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685 (1998) (book review); John M. Payne, *General Welfare and Regional Planning: How the Law of Unintended Consequences and the Mount Laurel Doctrine Gave New Jersey a Modern State Plan*, 73 ST. JOHN'S L. REV. 1103 (1999); John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J. L. & POL'Y 555 (2000); John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365 (2001).

4. The Fair Share Housing Center website contains a brief and easy-to-read summary of the litigation aftermath. See *Mount Laurel Doctrine*, FAIR SHARE HOUSING CTR., <http://fairsharehousing.org/mount-laurel-doctrine/> (last visited Apr. 1, 2011).

The “argument” itself was as extraordinary as its setting. Because virtually all the lawyers involved were intimately familiar with the actual process of housing development, their arguments had the feel of testimony at a legislative hearing, rather than appellate advocacy. The members of the court in turn slipped readily into the role of legislators, peppering the speakers with well-informed questions to elicit facts (seldom law) about housing economics and the mechanics of land development. One of the twenty-four questions, for instance, asked that the parties discuss the applicability of the “trickle down” theory of housing supply, hardly a typical subject of courtroom debate.⁵

This highly orchestrated but open-ended hearing occupied eighteen and one-half hours, over a period of three and one-half days. The court later held one more day of arguments, in which attorneys who wished to do so could make traditional arguments on behalf of their clients. The court then took the case under advisement, issuing a book-length opinion three years later. Rather than attempt a detailed description of this massive case, I’ve elected to provide just enough background to create a picture of the original dispute and the historical context in which it arose.

It is common knowledge that much of urban America was a basket case when *Mount Laurel I* was argued in early 1974 and decided just over a year later. There were many causes. Deeply seated racial antagonism, the perceived benefits of single family suburban housing, and the gradual decline of center cities led many whites to leave their urban homes for new lives outside city cores.⁶ Construction of the interstate highway system beginning in the 1950s made commuting to city jobs easy, and literally smoothed the way for a nationwide middle class exodus to the suburbs. As people moved out of cities, jobs followed. Traditionally urban manufacturing jobs not only relocated to large factories in the suburbs, but also to sites overseas that promised lower wage costs. Racial tension grew as lingering, entrenched, white political structures held on to power in the cities, sometimes with unsavory tactics.⁷ By 1970, urban centers were left with fewer people, reduced employment opportunities, more poverty, lower tax bases, inferior educational systems, abandoned housing, empty office buildings, and financial nightmares. Countless

5. John M. Payne, *From the Courts: Starting Over—Mount Laurel II*, 12 REAL EST. L. J. 85, 87-88 (1983).

6. The scope and depth of racial discrimination operating in the real estate industry during the middle decades of the twentieth century cannot be underestimated. The classic history is KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985). Recent work has added to our depth of knowledge of the era. *E.g.*, DAVID M. P. FREUND, *COLORED PROPERTY: STATE POLICY & WHITE RACIAL POLITICS IN SUBURBAN AMERICA* (2007).

7. FREUND, *supra* note 6, at 4.

great metropolises—major, historically important places such as New York, Philadelphia, Baltimore, Washington, Cleveland, Pittsburgh, Detroit, Chicago and St. Louis, as well as a host of smaller cities and towns—fell on hard times, from which many still have not recovered. The urban disturbances of the late 1960s were the straw that broke the camel's back for many areas.⁸ Though middle- and upper-class whites, businesses, and investors had been leaving cities for quite some time, the shift accelerated after 1965.⁹

New Jersey, of course, was hardly immune from these cataclysmic demographic and economic shifts. Newark was especially hard hit. The once-vibrant city—the cultural and commercial center of New Jersey—deteriorated with remarkable rapidity. Reminders of its once-storied past still are capable of surprising my young contemporaries—a wonderful art museum,¹⁰ a once-grand library system,¹¹ great architecture,¹² a vibrant downtown business district, and, if you look carefully, beautiful residential areas. Its overall population fell thirteen percent between 1950 and 1970.¹³ Subgroup

8. The long term impacts of the riots on both people and urban environments were quite pronounced. See, e.g., William J. Collins & Robert A. Margo, *The Labor Market Effects of the 1960s Riots*, Harvard Inst. of Econ. Research Discussion Paper No. 2026 (2003), available at <http://post.economics.harvard.edu/hier/2003papers/2003list.html>; William J. Collins & Robert A. Margo, *The Economic Aftermath of the 1960s Riots in American Cities: Evidence From Property Values* Vanderbilt Working Paper No. 04-W10 (2004), available at <http://www.vanderbilt.edu/Econ/wparchive/workpaper/vu04-w10.pdf>.

9. FREUND, *supra* note 6, at 328-29.

10. See NEWARK MUSEUM, <http://www.newarkmuseum.org/> (last visited Apr. 1, 2011).

11. The grandeur of the main library building at 5 Washington Street suggests the wealth that helped build the city. A picture of the structure is available on the City of Newark's website. See *Newark Library*, CITY OF NEWARK, http://www.ci.newark.nj.us/residents/places_activities/place_3.php (last visited Apr. 1, 2011).

12. The city maintains a list of interesting and important buildings in its website. See *Historical Landmarks*, CITY OF NEWARK, http://www.ci.newark.nj.us/visitors/landmarks_points_of_oten.php (last visited Apr. 1, 2011).

13. Census data presents the following picture of migration into and out of Newark.

Year	Newark Population	White Population	% Population White	% Decline in White Population	Non-White Population
1950	438,776	363,149	82.8%		75,627
1960	405,220	265,889	65.6%	26.8%	139,331
1970	382,417	168,382	44.0%	36.7%	214,035
1980	329,248	101,417	30.8%	39.8%	227,831
1990	275,221	78,771	28.6%	22.3%	196,450
2000	273,546	72,490	26.5%	8.0%	201,056

The Star-Ledger maintains an excellent website on the city and the 1967 riot. See *Newark 1967 Riots Anniversary from the Star-Ledger*, NJ.COM, <http://www.nj.com/>

trends were much more dramatic. In only twenty years the city was transformed from a majority white to a majority black metropolis—the white population of Newark declined 54 percent, while the non-white population increased by 183 percent.¹⁴ The huge movements of people out of and into the city caused remarkable changes in commuting patterns and job locations, a major decline in the number of middle-class residents and resident property owners, and extensive disruptions in the structure of urban life. As middle-class whites left, they were not replaced by groups capable of buying up all property available for purchase, maintaining old businesses, and creating a comprehensive structure of social and economic life designed for the needs of the new residents. Social service organizations, non-profit support groups, religious institutions, and other establishments closed and were not always replaced. As George Sternlieb summarized the situation in his classic study, *The Tenement Landlord*, the decline in Newark's housing stock was due in significant part to the decline of resident ownership of leasehold property.¹⁵

The enormous range of challenges looming over cities across New Jersey was the subject of reports issued by two commissions in 1968—*The Kerner Commission Report*,¹⁶ released by the National Advisory Commission on Civil Disorders convened by President Johnson to study the barrage of riots that occurred between 1965 and 1967, and the *Report for Action*,¹⁷ the observations of the Governor's

newark1967/ (last visited Apr. 1, 2011). The website also contains an interesting set of demographic maps. See *Newark Demographics 1960-2000*, NJ.COM, <http://www.nj.com/newark1967/demographics/> (last visited Apr. 1, 2011).

14. See Census Table, *supra* note 15.

15. Sternlieb noted:

[T]here is no question of the significance of landlord residence, particularly single-parcel landlords, as insurance of property maintenance of slum tenements. Given the priority accorded by multiple-parcel owners to tenant problems as an inhibitor [to upkeep], . . . the lack of feeling on this score by resident landlords, coupled with their good record in maintenance, is most significant. It is the resident landlord, and only the resident landlord, who is in a position to properly screen and supervise his tenantry. No one-shot wave of maintenance and paint up-sweep up campaign can provide the day-to-day maintenance which is required in slum areas. Given the relatively small size of Newark tenement units, and others like them, this can only be accomplished by a resident landlord. The record of these landlords . . . is such as to inspire confidence in their future behavior on this score.

GEORGE STERNLIEB, *THE TENEMENT LANDLORD* 228 (1966) (emphasis omitted); see also GEORGE STERNLIEB & ROBERT W. BURCHELL, *RESIDENTIAL ABANDONMENT: THE TENEMENT LANDLORD REVISITED* (1973) (follow-up study to *THE TENEMENT LANDLORD*).

16. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter 1968 REPORT].

17. GOVERNOR'S SELECT COMMISSION ON CIVIL DISORDER: STATE OF NEW JERSEY,

Select Commission on Civil Disorder in the State of New Jersey. The Kerner Commission studied in depth the situations in Detroit and New Jersey—sites of two of the worst outbursts of urban disorder.¹⁸ Both the Kerner and New Jersey reports voiced concerns about strained relationships between largely white police departments and residents of black communities, poor housing conditions, demolitions and neighborhood disruptions caused by slum clearance and highway construction programs, unemployment, failing schools, inadequate health care, the commonly articulated view that courts treated black people and the poor unfairly, and the continuing impact of white racism. The Kerner Commission executive summary contained the now-famous warning: “This is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal.”¹⁹ There also was evidence that riots were most intense in areas where economic inequality and political unresponsiveness were moderate rather than severe problems,²⁰ and that those participating in the riots tended to be employed, lower-class residents—people who had begun to climb up the economic ladder but were frustrated by lack of continued progress in both the civil rights movement and the well-being of the black community.²¹

It was quite evident in the late 1960s that the urban centers of New Jersey and other states were in grave difficulty. There was a widespread sense, both locally and nationally, that corrective action was needed. Whether that sense arose from qualms about the likelihood of further riots or earnest desires to alleviate serious grievances made little difference. For a short time period, legislatures adopted significant reforms and some courts added their voices to the calls for change.²² Congress created the Office of Economic Opportunity (OEO) in 1964²³ as part of President Johnson’s War on Poverty and passed laws protecting civil rights in

REPORT FOR ACTION (1968).

18. In addition to Newark, the commission investigated events in northern New Jersey, Plainfield, and New Brunswick. 1968 REPORT, *supra* note 16, at 56-84.

19. *Id.* at 1.

20. See, e.g., Gregg Lee Carter, *The 1960s Black Riots Revisited: City Level Explanations of Their Severity*, 56 SOCIOLOGICAL INQUIRY 210 (1986).

21. See, e.g., John Herbers, *Study Says Negro Justifies Rioting as Social Protest; Report Compiled for Panel on Civil Disorders Finds Noncriminals Take Part*, N.Y. TIMES, July 28, 1968, at A1.

22. Perhaps the most important example was the deluge of cases that emerged after 1970 providing implied warranty defenses in landlord-tenant courts. The three most prominent of those cases were *Rosewood Corp. v. Fisher*, 263 N.E.2d 833 (Ill. 1970), *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), and *Marini v. Ireland*, 265 A.2d 526 (N.J. 1970).

23. Economic Opportunity Act of 1964, Pub. L. 88-452, 78 Stat. 508 (1964).

1964,²⁴ 1965,²⁵ and 1968.²⁶ Head Start and the National Legal Services program were two of many local, community-based projects funded by OEO. It was in this atmosphere that groups concerned about the advancing state of urban decay began to meet, talk and strategize about needed reforms in an array of areas—schools, police departments, courts used by the poor, taxation systems, and, of course, land use policy.

Discussions about land use focused on an interlinking set of problems involving race, poverty, taxation, and local control. Unfortunately—at least in hindsight—the discourse concentrated much more on making the suburbs more accessible to blacks and the poor, than on enticing middle-class citizens to the cities.²⁷ Given the forces at work, that focus was not surprising. The overlapping issues of race and poverty drove much of the policy debate among those working to ameliorate urban deterioration in the 1960s and 1970s. Racially segregated housing patterns were a fixture of American life throughout the twentieth century. Racial zoning statutes, invalidated by the Supreme Court in 1917,²⁸ were passed in a number of cities and towns early in the century. Restrictive covenants were commonplace until their invalidation in 1948,²⁹ but their legal demise did not end residential segregation. Red-lining, restrictive loan practices, segregated public housing, discrimination in the real estate brokerage business and an array of other practices continued to restrain racial integration well after World War II.³⁰ Even after 1968, when such practices became subject to judicial oversight as a result of the Supreme Court's reinvigoration of post-Civil War civil rights acts and Congress's adoption of fair housing legislation,³¹

24. Civil Rights Act, Pub. L. 88-352, 78 Stat. 241 (1964).

25. Voting Rights Act, Pub. L. 89-110, 79 Stat. 437 (1965).

26. Fair Housing Act, Pub. L. 90-284, 82 Stat. 81 (1968).

27. I am not claiming any personal prescience. My teaching and scholarly activities after joining the Rutgers faculty in 1968 tilted the same way. The clinical teaching work I did with Professors Frank Askin and Alfred Blumrosen in the Administrative Process Project was designed to increase the presence of minority residents in the suburbs. The reports issued on the project make this quite clear. See ALFRED BLUMROSEN, FRANK ASKIN & RICHARD CHUSED, ENFORCING EQUALITY IN HOUSING AND EMPLOYMENT THROUGH STATE CIVIL RIGHTS LAWS (1971); ALFRED BLUMROSEN, FRANK ASKIN & RICHARD CHUSED, ENFORCING FAIR HOUSING LAWS: APARTMENTS IN WHITE SUBURBIA (1970).

28. See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

29. See *Shelley v. Kraemer*, 334 U.S. 1, 22-23 (1948).

30. See JACKSON, *supra* note 6.

31. The Court in *Jones v. Mayer*, 392 U.S. 409 (1968), approved congressional power to adopt civil rights acts controlling private discriminatory actions under the Thirteenth Amendment. For the civil rights legislation, see Fair Housing Act, Pub. L. 90-284, 82 Stat. 81 (1968).

change was very slow in coming.³²

But once overtly race-based zoning schemes, covenants, and housing policies were invalidated, land use issues of necessity took on a different cast. Local zoning authorities exercised more restraint in their use of racial discourse in land use planning meetings. Suburban authorities hoping to maintain segregated neighborhoods were forced to use class-based distinctions as a proxy for race. Though everyone knew that race was playing a role in the formulation of suburban zoning rules in the 1960s and 1970s, the form of the regulations controlled only use patterns, structure types, and lot sizes, not the appearance of those working in buildings and living in dwellings. For those challenging zoning schemes that limited housing stocks to those affordable by middle- and upper-class families, the decline of overt racial classifications created new litigation challenges. Use of civil rights laws became more difficult. In the absence of “nasty” statements by public authorities, major obstacles arose to proving race-based claims.³³ As a result, a search began for new litigation strategies to deal with traditional suburban antipathy to integration. The goal, however, was still the same—to challenge the long history of antagonism by middle- and upper-class Americans and New Jerseyites to living in proximity with “other” citizens.³⁴

The circumstances giving rise to the *Mount Laurel* litigation itself clearly demonstrated the problem. After World War II, there were a large number of small, rural black communities all over the

32. Residential segregation has declined a bit in the United States since 1980, but is still significantly higher for blacks than for other groups. The United States Census Bureau published a detailed study on this issue in 2002, which was prepared by John Iceland and Daniel Weinberg, with assistance from Erika Steinmetz. See U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000 (2002), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf.

33. This concern became quite real two years after *Mount Laurel I* was decided, when the Supreme Court required a showing of intent to prevail in a constitutional discrimination claim under the Equal Protection Clause in *Washington v. Davis*, 426 U.S. 229 (1976), and declined to find a constitutional violation when Arlington Heights refused to grant a variance for the construction of low-cost housing in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). After remand, *Arlington Heights* was settled, in part because of difficulties in using race discrimination statutes to challenge a zoning decision. See *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 469 F. Supp. 836 (N.D. Ill. 1979). There are settings in which civil rights statutes may be successfully used, but the evidence of racial action has to be pretty significant. See, e.g., *Huntington Branch, NAACP v. The Town of Huntington*, 844 F.2d 926 (2d Cir. 1988). This case also may be read as a cautionary tale about the ways litigation delays and long-term opposition from local governments may frustrate the construction of subsidized housing.

34. See, e.g., Daniel Meyler, *Is Growth Share Working for New Jersey*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 219, 231-239 (2010).

eastern half of the nation. As cities and suburbs grew, many of these communities were surrounded and often replaced by tract developments. Mount Laurel ordered its longtime black community—once a stop on the Underground Railroad—vacated in the 1960s because of claims that the housing was substandard and unsatisfactory for human habitation. Those running the town had their eyes on the land for redevelopment. Rather than comply with the order to leave, Ethel Lawrence and other leaders in the community resisted, petitioned the Mount Laurel zoning authorities for permission to build a small apartment complex to serve those to be evicted from the local black neighborhood, and, when the petition was opposed, joined with the local chapter of the National Association for the Advancement of Colored People and minority residents of Camden to sue Mount Laurel for abusing its planning authority. Lawrence was a day-care worker and participant in the Burlington County Community Action Program—the local anti-poverty agency funded by the Office of Economic Opportunity. With the help of lawyers from the Camden Regional Legal Services Agency (another OEO funded program), lawyers donating their services, and other volunteers, Lawrence and her colleagues mounted what became one of the most important challenges in the history of American land use law.³⁵

Of necessity, the claims raised by Lawrence and her co-plaintiffs questioned the right of Mount Laurel to bar construction of housing suitable for occupancy by the poor and near-poor. As just noted, it would have been illegal for the town to base its refusal to allow construction of a subsidized housing project explicitly on racial grounds. Not surprisingly, the town insisted that racial animus did not motivate the structure of its land use plan.³⁶ Rather, Mount Laurel—to its credit in a perverse way—made the honest and straightforward claim that it had the right to economically discriminate in framing its land use regulations. The plaintiffs responded with a series of arguments that the actions of Mount Laurel were not in the public interest as required by both the state zoning enabling laws and the state constitution.³⁷ For these claims, it

35. FAIR SHARE HOUSING CTR., *supra* note 4. For a thorough history of the case, see DAVID L. KIRP, JOHN P. DWYER & LARRY A. ROSENTHAL, *OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA* 61-111 (1995).

36. *See* S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel I*), 336 A.2d 713, 717 (N.J. 1975).

37. The plaintiffs also made federal constitutional claims, but the New Jersey Supreme Court declined to reach those issues. *See id.* at 725. On the economic issues, that made sense. The United States Supreme Court already had declined to undertake close scrutiny of regulations based on economic status. *See* San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

made no difference whether the economically deprived persons excluded by Mount Laurel came from within its borders or from other communities such as nearby Camden.³⁸ The crucial issue was whether Mount Laurel could use economic class as a central criterion for land use regulation. On that score, the New Jersey Supreme Court decisions in *Mount Laurel I* and *Mount Laurel II* gave a decisive answer—NO. “We conclude,” Judge Hall wrote for the court in *Mount Laurel I*,

that every [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing . . . [I]t cannot foreclose the opportunity . . . for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.³⁹

II. THE PROBLEM

Quarreling with the core result of *Mount Laurel* is difficult. It is, after all, tawdry, unfair, and often illegal for communities to intentionally isolate themselves from contact with a variety of people from different classes, races, religions, or ethnicities. On the face of it, nothing seems dramatically wrong with the decisions. Indeed, the scope of the remedial orders made in *Mount Laurel II* to force compliance by suburban communities with fair share obligations and with duties to allow construction of least-cost housing was stunning in its boldness and breadth.⁴⁰ Few states have come close to scrutinizing their zoning practices with the depth and sophistication of New Jersey.⁴¹ But the original goal of the litigation—to force the

38. Perhaps the end of the *Mount Laurel* saga can be marked by the November 2000 opening of the Ethel Lawrence Homes, a small subsidized housing complex, in Mount Laurel. See *N.J. Hous. & Mortgage Finance Agency, A Dream Comes True*, HOME FRONT (N.J. Hous. & Mortgage Finance Agency, Trenton, NJ), Spring 2001, at 1, available at <http://www.state.nj.us/dca/hmfa/home/news/spring2001.pdf> (containing a photograph of the Ethel Lawrence Homes).

39. *Mount Laurel I*, 336 A.2d at 724.

40. The court told lower courts to establish tight deadlines for compliance with orders to revise zoning ordinances, to consider the appointment of masters where necessary, and to bar construction of certain types of housing, void zoning ordinances in their entirety, or award builder’s remedies in recalcitrant communities. In addition, the court ordered trial courts to maintain frequent contact with trial lawyers and exercise tight control over scheduling, use of expert witnesses and discovery in land use disputes. *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (Mount Laurel II)*, 456 A.2d 390, 455-59 (N.J. 1983).

41. Perhaps the best example of another jurisdiction with an interesting and often intelligently crafted zoning system is Oregon. The legislature adopted comprehensive statewide planning programs in the 1970s focusing in particular on preserving agricultural land and urban planning. Though now mired in controversy over adoption

suburbs to accept the dispersal of the poor and near-poor within their borders—had haunting shortcomings. Though *Mount Laurel* remedies have successfully forced the construction of thousands of units of housing outside the old central cities,⁴² and provided decent quarters for many people who otherwise would have been forced to live in substandard facilities, it and its sister cases around the country have done precious little to assist in the reconstruction of urban America. And the present legislatively imposed regulations in New Jersey—largely based on requiring construction of low-cost housing in proportion to the number of regular units built—continues long-extant incentives for suburban sprawl.⁴³ No “reverse” *Mount Laurel* doctrine has been created to control sprawl or reduce the amount of middle- and upper-class housing construction in the suburbs and increase it in the cities. If integration of economic classes is good for the suburbs,⁴⁴ it should be good for the cities too.

The *Mount Laurel* court’s ringing endorsement of access by low and moderate income citizens to “an appropriate variety and choice of housing”⁴⁵ led John Payne to make the claim in one of his last articles that the only logical support for the result was a state “constitutional right to shelter” for the poor and near-poor.⁴⁶ What

by referendum of measures requiring more frequent compensation of landowners negatively affected by regulations, Oregon is still a model state in many ways. For more on the state’s land use history, see David J. Boulanger, *The Battle Over Property Rights in Oregon: Measures 37 and 49 and the Need for Sustainable Land Use Planning*, 45 WILLAMETTE L. REV. 313 (2008).

42. The Fair Share Housing Center claims that 40,000 units have been built as a result of the cases. See FAIR SHARE HOUSING CTR., *supra* note 4. Though significant, it probably is only a small fraction of the actual need for such housing in New Jersey.

43. For an analysis of this issue and suggestions on how to alter the extant formula, see Meyler, *supra* note 34. Basing the formula on construction rates also tends to misallocate fair share housing obligations: jurisdictions already housing large numbers of poor people may end up with affordable housing obligations out of proportion to the actual need, while suburbs with low construction rates may have their obligations set too low. See *id.* at 240-47. Much of this misallocation can be remedied by shifting to a system requiring that a percentage of each housing development involving more than a few units be constructed as affordable housing. Montgomery County, MD, located just outside of Washington, DC, has done that for years—with notable success. See *id.* at 249-50.

44. The HOPE VI program subsidized by the federal government is part of a growing movement based on the idea that the less well-off fare better if they live in economically mixed neighborhoods. A description of the program may be found on the Department of Housing and Urban Development website, *About HOPE VI—Public and Indian Housing*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.hud.gov/offices/pih/programs/ph/hope6/about/index.cfm> (last visited Apr. 1, 2011).

45. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel I*), 336 A.2d 713, 724 (N.J. 1975).

46. John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J.L. & POL’Y 555, 564 (2000).

Payne did not do was consider the possibility that such a right has implications far beyond the affirmative obligation of cities and towns across New Jersey to make room for, and support, the construction of below-market-rate housing. The housing market has always been a creature that crosses both jurisdictional and economic boundary lines. To limit housing stocks to the middle- and upper-classes, as Mount Laurel and other suburban communities did, or to impose housing obligations on one set of government entities but not on others, had impacts elsewhere. Suburban communities competed for good tax ratables—inviting in uses that produced good revenues and imposed few (mostly educational) costs. This created a surplus of land for “good” housing on large lots and “clean” businesses. On the other hand, creating housing for the poor and near-poor outside of center cities deepened and intensified the emptying out of cities, created additional urban vacuums, reduced the number of potential employees in city centers, and accentuated the concentration of the deeply impoverished in areas left behind by middle- and upper-class migrants to the suburbs. Though *Mount Laurel* remedies helped those lucky enough to live in new, below market-rate suburban housing, full implementation of the right to shelter for the poor and near-poor—including integration by class—requires more than opening up the suburbs. While it is obvious to anyone living in a large metropolitan area that some suburbs have absorbed a significant number of poor and low-income people in recent decades, residential patterns still tend to be stratified by income.⁴⁷ Reducing the severity of that demographic pattern requires more than construction of low-cost housing outside the old central cities. It also requires reopening cities and newly impoverished suburbs to developments housing an array of people, in addition to establishing funding mechanisms to make routine construction of least-cost housing possible everywhere.

The sorts of remedies used in *Mount Laurel* have a very different impact in urban settings than they do in the suburbs. Indeed, a significant part of the original debates in the litigation was about the types of communities obligated to change their land use plans. In *Mount Laurel I*, remedies were imposed on “developing communities”—a phrase ambiguous enough to cause years of consternation and contention.⁴⁸ When *Mount Laurel II* was rendered eight years later, the court reconfigured its holding, concluding that “[e]very municipality’s land use regulations should provide a realistic

47. For more on the impact of social stratification see Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227 (2006); David Dante Troutt, *Ghettos Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000).

48. *Mount Laurel I*, 336 A.2d at 742-43.

opportunity for decent housing for at least some part of its resident poor who now occupy dilapidated housing,”⁴⁹ that the “obligation to provide a realistic opportunity for a fair share of the region’s present and prospective low and moderate income housing need will no longer be determined by whether or not a municipality is ‘developing,’” and that the regional fair share “obligation extends . . . to every municipality, any portion of which is designated by the State as a ‘growth area.’”⁵⁰ Despite this broad extension of the rule, its practical effect, even after significant modification of the doctrine by the state legislature, has been felt mostly outside of urban centers. Cities automatically meet their fair share obligations by housing a large percentage of the state’s poor residents. While cities, like the suburbs must and have accommodated the construction of below market rate housing, the *Mount Laurel* rules and the successor regulations mandated legislatively have done little to enhance other forms of urban development. Cities need not only new and remodeled below-market-rate housing, but also reconstruction of infrastructure, educational systems and an urban middle class.

The problems with *Mount Laurel* were made most obvious by the controversy over Regional Contribution Agreements. When the New Jersey legislature finally stepped into the land use debates by adopting the Fair Housing Act of 1985,⁵¹ administrative guidelines were established for fair share obligations and the Council on Affordable Housing was given the responsibility for issuing affordable housing quotas over regular time intervals.⁵² In addition, the act allowed communities to, in essence, purchase their way out of least-cost housing obligations by arranging regional contribution agreements calling for payment of fees to other, typically poorer jurisdictions—a process repealed when the Fair Housing Act was amended in 2008.⁵³ These regional contribution agreements made it feasible for many communities to skirt obligations to permit construction of affordable housing units by providing financial assistance for their construction elsewhere. It exemplified in a very concrete way the tendency of the *Mount Laurel* system to support

49. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel II*), 456 A.2d 390, 418 (N.J. 1983).

50. *Id.*

51. N.J. STAT. ANN. §§ 52:27D-301 to -329.19 (West 2010).

52. The Council, however, delayed issuing the third round of rules. The courts eventually ordered that rules be issued and invalidated some of them once they were released. *In re* Adoption of N.J.A.C. 5:94 and 5:95 by the N.J. Council on Affordable Hous., 914 A.2d 348 (N.J. Super. App. Div. 2007).

53. N.J. STAT. ANN. § 52:27D-329.6 (West 2010). The amendments also required that thirteen percent of all affordable housing built in the state be for very low income residents and imposed a two and one-half percent fee on developers for use in constructing below market rate housing. § 52:27D-329.1.

continued clumping of the poor in central cities.

III. A "REVERSE" MOUNT LAUREL DOCTRINE

There are two major roadblocks to the full development of the *Mount Laurel* doctrine. First, creating a right for the poor and near-poor to reside in economically integrated communities requires giving and enforcing the same right to those in other economic groups. At the moment, the housing choices available to virtually everyone—poor and non-poor—are constrained. The limitations, however, vary enormously across economic lines. Finding ways to reduce the differences in choice levels across class lines should be a central goal of any mature housing policy. Second, decent housing for poor people cannot be built without subsidies. In the absence of a cultural commitment to provide acceptable housing to all our citizens, the goals of *Mount Laurel* are a pipe dream. While there were remedial steps the New Jersey Supreme Court could have taken to reduce the impact of low government support on the *Mount Laurel* doctrine, the justices obviously were powerless to alter some aspects of the housing market.

Over twenty years ago, Gregory Alexander penned an intriguing article on constraints in the housing market.⁵⁴ Though he was writing about the operation of housing markets encumbered by servitudes, his thoughts are quite relevant to my reconsideration of the *Mount Laurel* doctrine. Application of traditional economic conceptions of a market to housing, especially developments regulated by servitudes, Alexander argued, was inappropriate for at least two sets of reasons. First, housing units come in packages. Important factors like location, taxes, floor plans, schools, and pricing—which almost everyone takes into account when buying a place to live—cannot be easily split apart. Purchasing a residence without accepting some sort of compromise is unusual. The packaging problem became more serious after World War II, as the number of condominiums, cooperatives, and subdivisions with homeowner association governing structures ballooned.⁵⁵ While

54. Gregory Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883 (1988).

55. According to the 2007 American Housing Survey for the United States, there were 8,445,000 condominium and 848,000 cooperative housing units in the nation. See *American Housing Survey for the United States: 2007, Table 1A-1: Introductory Characteristics – All Housing Units*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/housing/ahs/ahs07/ahs07.html> (last visited Apr. 1, 2011). That is a dramatic increase from the 4.8 million condo units that existed in 1990 and the 2.2 million a decade earlier. The most dramatic increase was in the Northeast, where the number of condominium units increased by 263.4 percent between 1980 and 1990. In New Jersey, the increase was an extraordinary 316.4 percent in only ten years. BUREAU OF THE CENSUS, STATISTICAL BRIEF: CONDOMINIUMS (1994), available at <http://www.census.gov>.

buyers may have preferences about location, layout, and other standard factors that they can largely satisfy if their economic status presents them with an array of options, typical servitude packages substantially reduce the range of options available to even wealthy purchasers. Housing choice, in short, is routinely constrained. Second, servitudes impose long-term obligations. Even if a home buyer fully understands and agrees with the terms and priorities of a servitude package at the moment of purchase, the rules of the game may change over time as new boards come and go, regulations are amended, occupants change, and the building complex is altered. The only way to rid oneself of unwanted shifts in policy is to sell and then be constrained anew by the limited sorts of housing packages available in the market. Given the millions of Americans now living in developments with homeowner associations, the impact of servitudes on the structure of the housing market has become very significant.

The sorts of market limitations described by Alexander do not operate the same across all economic classes. For the very rich, choices certainly are broader than for others. The well-to-do are likely to have the option of staying put or renting temporary housing while they look for a permanent place to live. They have the luxury of an array of choices of neighborhood, housing type, unit size, aesthetic ambiance, and cost. If they do not wish to live in a development run by a homeowner's association, that option probably is available. But if the well-to-do wish to live in a highly urbanized area, their choices may be much more limited than those available outside of center cities. Though some major cities like New York and Chicago have a large and growing stock of center city housing for the middle- and upper-classes, New Jersey cities largely lacked that amenity until quite recently.⁵⁶ It is a continuing and telling reminder of the impact

gov/apsd/www/statbrief/sb94_11.pdf.

56. Hoboken, just across the river from Manhattan and only one subway stop away, is the most important exception. It began to gentrify in the 1970s and is now a fairly wealthy community. Jersey City, a much larger city just to the southwest of Hoboken, and also within easy reach of Manhattan by subway, began the same process a bit later and now has significant areas of remodeled housing. New Brunswick, a smaller city benefitted by the presence of the main campus of Rutgers University and a train station on the main line to New York, has also seen a significant amount of housing rehabilitation and construction in recent years. The first new apartment units for higher income groups in Newark were recently opened in remodeled buildings near the main train station. Some once-troubled suburbs of Newark, most notably Montclair, have also become popular in recent years. But almost all of this gentrification has been due to standard economic forces, not land use planning decisions. And most of this change has done nothing to enhance economic integration in center cities. It has served to replace impoverished communities rather than establish newly vibrant, economically integrated neighborhoods—the ultimate goal of the *Mount Laurel* cases.

of income stratification in American life.

At the opposite end of the economic spectrum, choice may be virtually absent. The existence of waiting lists to get into public housing facilities and Section 8 housing voucher programs is a stark indication of the plight of the impoverished. Some of the waiting lists, especially for large public housing authorities, are enormous and largely composed of extremely low-income households. Data for 2003 and 2004 suggest that over one million families were on housing voucher waiting lists and over one and one-half million were in line for public housing units.⁵⁷ Many housing authorities have established priority systems to divvy up their available units, with people losing housing involuntarily because of fires or other emergencies, victims of domestic violence, working families, or the disabled at the top of the list. These house seekers are left to living with friends or relatives, scrounging for any available housing unit or living on the streets. While the *Mount Laurel* decisions contained much language evincing sympathy for the poor and near-poor, the remedies do little to provide the housing choices they need, regardless of where they wish to live.⁵⁸

Reducing the vast difference in choice levels across economic classes clearly is an unmet goal of the *Mount Laurel* courts. Given the breadth of the remedies imposed upon communities, requiring them to accept their fair share of least-cost housing, it is surprising that other steps were not taken. Several possibilities come to mind. First, developers of market-rate housing in any community should be required to offer a share of the units they build as below-market-rate residences. Second, those erecting commercial developments likely to require a range of employees should be required to either build, or pay a fee so others may build, a range of housing units for the workers. Finally, and most importantly, obligations to accept least-cost housing should be paired with limitations on zoning for more expensive dwellings and clean businesses. If the goal is to reduce income stratification, then continuing to allow towns to over-zone for

57. And this is only for agencies with more than 250 housing units. Smaller public housing authorities are not obligated to report waiting list data to the government. For more on this report, see NATIONAL LOW INCOME HOUSING COALITION, RESEARCH NOTE #04-03: A LOOK AT WAITING LISTS: WHAT CAN WE LEARN FROM THE HUD APPROVED ANNUAL PLAN? (2004), available at <http://www.nlihc.org/doc/04-03.pdf>.

58. Newark's public housing authority closed its waiting list to new applicants eight years ago. At one time the list contained more than 19,000 applicants. In 2010, the housing authority spent an influx of Section 8 funds to empty the list. That, however, only means that it will now be reopened for new applicants and is expected to grow again, at least for a time. And there is no guarantee that a voucher recipient will be able to find a fully satisfactory place to live. See David Giambusso, *Newark Unlocks a Door for Needy Residents, City Plans to Empty Long Section 8 Waiting List*, STAR-LEDGER, June 17, 2010, at 17.

typical suburban housing and prime commercial development is untenable. Some of those projects need to be pushed into other communities.

The *Mount Laurel II* court required communities to use inclusionary zoning techniques to include least-cost housing in their land use schemes. Among those mentioned were incentive zoning and mandatory set-asides.⁵⁹ The first grants developers greater square footage and density levels in return for the construction of least-cost housing units. The second simply requires construction of a certain percentage of least-cost units in every residential development. But neither was made mandatory. The exact nature of the affirmative steps to be taken by each community was left open for later discussion. The result has been that few communities have taken serious, meaningful steps to adopt genuinely inclusionary plans. That is unfortunate. Schemes with teeth work, as demonstrated by Montgomery County, Maryland—a recognized leader in the area—and dozens of other communities around the country. In Montgomery County, the moderately priced dwelling unit program requires that twelve and one-half percent to fifteen percent of all units in a development with twenty or more residences be made available to residents earning sixty-five percent or less of the median income in the county. In return, developers gain a twenty-two percent increase in normally available density levels. If units are sold at below-market rates rather than rented, they may be sold by their owners at market rates after ten years. But half of the “windfall” profits obtained at such sales must be paid to the county to assist in the construction of additional projects. Thousands of units, including a significant number run by public housing agencies and non-profit groups, have been built since the program’s inception in 1974. Developers in the area strongly opposed the program during deliberations over its creation. They now embrace it, and encouraged adoption of similar programs in neighboring jurisdictions.⁶⁰ The entire state of New Jersey should be operating under a similar plan.⁶¹ It would both substantially increase the number of below-market-rate housing

59. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel II*), 456 A.2d 390, 445-46 (N.J. 1983).

60. The first units mandated by the program became available in 1976. Over twelve thousand units were constructed by 2005. For a more complete history of the program, see *The History of the MPDU Program in Montgomery County*, MONTGOMERY COUNTY, MD, http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/history.asp (last visited Apr. 1, 2011). See also Jay Walljasper, *A Fair Share in Suburbia*, 268 THE NATION 15 (1999).

61. There is no reason to exclude urban areas from such a scheme. As gentrification spreads across the Northeast, housing available for the poor and near-poor will gradually be squeezed. That impact would be lessened with inclusionary schemes.

units constructed and establish a long-term system for financing housing for those needing deep assistance in order to afford a place to live.

The great wave of migration to the suburbs after World War II was facilitated and heavily subsidized by three important developments: (1) construction of the interstate highway system; (2) installation of sewer systems and water treatment facilities, stretching far from city centers;⁶² and (3) the movement of many businesses outside urban cores. The first two, heavily-subsidized by federal grants, made both residential and business development much more plausible and affordable. The heavy infusion of public funds into the construction of highways and sewers suggests that both commercial and residential housing developers should provide some recompense to the public for the tax funds used to support their projects. Most large commercial projects draw not only white-collar employees, but an array of service workers, clean-up crews, low-paid staff, and others who might like to live closer to work. A fee based on the cost of the project would go a long way toward helping to pay for their housing. Funds produced by such fees, together with those paid in from sales of houses built under inclusionary zoning schemes, would have a significant impact on the public's ability to construct publicly supported housing projects. While the New Jersey Supreme Court may not impose such fees itself, it may invalidate any land use scheme lacking such a program.⁶³ And the state legislature, of course, could require the use of such programs statewide.

Neither inclusionary zoning nor development fees require a proper balance in the sorts of land uses permitted under local zoning schemes. Though land must be made available for least cost housing under *Mount Laurel*, nothing prevents a community from continuing its prior efforts to attract projects that produce good tax revenues and require low levels of public expenditures. Indeed, if economic incentives operate at even a minimal level in the politics of the zoning "market," such behavior should be expected. But that does not mean the courts need to allow its continuance. In order for all communities in the state to operate properly, funding sources need to be spread fairly. Allowing the zoning market to operate unchecked exacerbates wide differences in property tax rates and monetary resources (including that for subsidized housing) among government

62. There is a large body of literature on suburban development after World War II. The classic book is JACKSON, *supra* note 6. For more recent commentary, see generally RICHARDSON DILWORTH, *THE URBAN ORIGINS OF SUBURBAN AUTONOMY* (2005) and the review of Dilworth, Nicole S. Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459 (2005).

63. The court has exercised similar powers. See *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976).

entities. Simply put, *Mount Laurel* will not work well if it is limited to rules requiring acceptance of a fair share of least-cost housing. All communities should be required both to accept least-cost housing *and to limit* the amount of land available for middle- and upper-class residential and commercial development.

It is perfectly clear that the *Mount Laurel I* and *II* courts were aware of this problem. The multi-layered case of *Robinson v. Cahill*,⁶⁴ which invalidated the then-extant system for funding public schools, was in dispute in the same period *Mount Laurel* was evolving. While not invalidating reliance on property taxes to pay for some local education expenses, the court did require state intervention to significantly reduce the disparity in funds available to serve children in various communities. The state was free to delegate to local jurisdictions both the operation and funding of schools, but the court was unprepared to allow such an atomized system to continue without efforts to equalize per pupil expenditures across the state.⁶⁵ The court could have crafted a similar result in *Mount Laurel* by requiring a greater level of statewide uniformity in zoning practices and requiring a significant reallocation of land use priorities at all economic levels of the housing supply chain.

The similarity of the issues in the zoning and school funding cases adds further power to the argument that the remedies imposed by *Mount Laurel* were too limited. Both involved highly localized systems for providing and regulating allocation of resources—land for housing in one case and taxes for education in the other. Since the 1920s, when states adopted zoning acts granting cities and towns the authority to zone and that devolution of power was approved by the United States Supreme Court in *Euclid v. Ambler*,⁶⁶ state governments largely stayed out of routine land use disputes. Similarly, operating public schools and raising property taxes for their support was long a function of local communities. Both land use and school-funding decisions made by one jurisdiction had significant effects on other locations. Land use patterns favoring the well-to-do

64. *Robinson v. Cahill (Robinson I)*, 303 A.2d 273 (N.J. 1973); *Robinson v. Cahill (Robinson II)*, 306 A.2d 605 (N.J. 1973); *Robinson v. Cahill (Robinson III)*, 335 A.2d 6 (N.J. 1975); *Robinson v. Cahill (Robinson IV)*, 351 A.2d 713 (N.J. 1975); *Robinson v. Cahill (Robinson V)*, 355 A.2d 129 (N.J. 1976). A related series of cases were decided later reaffirming the notion that some school districts provided inadequate education and requiring additional remedies. *Abbott v. Burke (Abbott I)*, 495 A.2d 376 (N.J. 1985); *Abbott v. Burke (Abbott II)*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke (Abbott III)*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke (Abbott IV)*, 693 A.2d 417 (N.J. 1997); *Abbott v. Burke (Abbott V)*, M-1293-09, 2011 WL 1990554 (N.J. May 24, 2011).

65. *Robinson I*, 303 A.2d at 273.

66. 272 U.S. 365 (1926). For a look at the history of *Euclid* and its nativist undertones, see Richard Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001).

and good business uses enhanced the quality of schools in suburban communities and reduced the ability of poorer communities to maintain high-quality educational programs. Land use and school-funding systems, even though run by different political operatives, were highly coherent in their overall goals. Both favored “high quality” residents with few children and white-collar businesses. These uses produced “nice” neighborhoods and business areas that demanded low-level government expenditures and produced significant tax receipts. If the obligation under the state constitution to pay for a “thorough and efficient” education must be shared across communities,⁶⁷ then a similar obligation to share both the benefits and burdens of various segments of the housing market should have been imposed.⁶⁸

It is not difficult to implement such a zoning duty. First, and most obviously, if a fair share system can be established for least-cost housing, it can also be set up for other land uses. That should be done, and zoning ordinances should be required to conform to the fair share usage plans. Second, “leap frog” development must be drastically curtailed. More than any other feature of contemporary land use practice, the ability of developers to purchase and build on cheaper land on the outskirts of suburbia significantly reduces the incentives to invest in more urbanized neighborhoods, increases sprawl, and limits the availability of housing for middle- and upper-class people in more densely populated urban areas. The overall goal should be to force infill development to occur before new areas are opened for urbanization.⁶⁹ Requiring adoption of statewide planning mechanisms to implement such planning techniques should have been a central feature of the *Mount Laurel* decisions.

Finally, the two large shortcomings in *Mount Laurel* noted here—the failure to impose limits on “surplus” zoning for prime development and the lack of strong inclusionary zoning remedies—are not without their downside in the present political environment. If such techniques work, development on the outskirts of urban areas will decline and infill development will increase. As the amount of land available for development or redevelopment in more densely populated areas declines, it will go up in price. There has to be some

67. See N.J. CONST. art. 8, § 4, cl. 1.

68. Interestingly, neither the *Robinson* nor *Mt. Laurel* lines of cases were decided as equal protection cases. See *supra* notes 1 and 64 and accompanying text. The former was resolved under the “thorough and efficient” education clause of the state constitution and the latter as a matter of the scope of the police power to enact legislation for the benefit of the public. *Id.*

69. Portland, Oregon is famous for its zoning plan that makes development on agricultural land on the city’s outskirts very difficult. Infill development has become commonplace. For more on Portland, see *generally* Boulanger, *supra* note 41.

triggering mechanism to reduce such pressure by opening agricultural land for development on the edges of urban areas. But the cost of inner city land inevitably will rise over time, placing pressure on housing prices for the middle class and making construction of subsidized housing more difficult. So we circle back to the issue raised at the beginning of this section of the essay—the need for mechanisms to fund least-cost housing. In the long run, we will not only need to control the resale prices of least-cost housing, recapture profits from those who purchased below market rate housing, and impose development fees on some projects, but we also will need ongoing, substantial commitments from both federal and state governments to help build housing for the poor and near-poor. That commitment has been sorely lacking in the last thirty years.⁷⁰ And without a revival of interest in such funding programs, everything written here and elsewhere about planning housing for all Americans will be for naught.⁷¹ I am sure John Payne would agree.

70. Budgets for the U.S. Department of Housing and Urban Development were cut dramatically during the Reagan years and have never fully recovered despite an increase in demand for subsidized housing. The American Enterprise Institute reports that Reagan was the only President to cut the HUD budget since 1963, slashing it over forty percent in his second term. See Veronique de Rugy, *President Reagan, Champion Budget Cutter*, AM. ENTER. INST. FOR PUB. POLICY RESEARCH (June 9, 2004), <http://www.aei.org/paper/20675>. As reported by the National Housing Institute, HUD took the largest hit among federal, non-defense departments during the Reagan years. See Peter Dreier, *Reagan's Legacy: Homelessness in America*, SHELTERFORCE ONLINE (Nat'l Hous. Inst.), May/June 2004, available at <http://www.nhi.org/online/issues/135/reagan.html>.

71. That is especially so in New Jersey where the present governor has voiced strong opposition to the *Mount Laurel* and school funding decisions and hostility to the judges who decided them. See, e.g., Kevin D. Walsh, *On the Front Lines of New Jersey's Mount Laurel Decision*, 20 POVERTY & RACE 9 (2011); Lisa Fleisher, *Gov. Christie Proposes Eliminating Affordable Housing Quotas, Fees*, STAR-LEDGER, May 13, 2010, available at http://www.nj.com/news/index.ssf/2010/05/gov_chris_christie_proposes_el.html.