Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity

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The housing dilemma has become increasingly acute in recent years. The escalation in housing prices is so well documented, it scarcely requires note.[1] The concern today is not merely that many may not achieve the "American Dream" of owning a single family detached home in the suburbs. The concern for many has become that rental units may not be available, and if available, may be unaffordable.[2]

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1. For example, the median sales price of new private single-family houses nationwide has increased from $23,400 in 1970 to $55,700 in 1978, an increase of 238%. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1979, at 792 (100th ed. 1979).

2. *See generally* DIVISION OF POLICY STUDIES, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, U.S. DEP'T OF HOUS. & URB. DEV., THE CONVERSION OF RENTAL HOUSING TO CONDOMINIUMS AND COOPERATIVES: A NATIONAL STUDY OF SCOPE, CAUSES AND IMPACTS I-II (June 1980) ("The rapid growth of conversion activity has coincided with an apparent decline in the profitability of building and operating multi-family rental housing. Reasons for this decline include higher operating and maintenance costs, higher land and construction costs for new apartments, changes in federal tax law, and increased government regulation—including rent control in a few areas. Many see these changes contributing to a long-term shortage of affordable rental housing. Some observers have asked whether they will lead eventually to the end of unsubsidized rental housing in this country."); CONG. REC. H 10096 (daily ed. Sept. 30, 1980). ("Unless the Congress acts soon, the crisis in rental housing will lead to far more drastic solutions that will be many times more costly. The Congress must act to increase the rental housing stock of this Nation. Not to do so is to condemn low and moderate income families to untenable housing conditions and to place inordinate housing cost burdens on all rental families.") (remarks of Congressman Ashley); CONG. REC. S 13953 (daily ed. Sept. 30, 1980) ("Lending by federally insured lending institutions for the conversion of rental housing to condominium and cooperative housing should be discouraged where there are adverse impacts on housing opportunities of the low and moderate

Restrictive municipal land use policies have contributed to this adverse situation. This is due, in part, to the use by municipalities of their regulatory powers to preserve the status quo: to preserve existing physical/structural character, environmental qualities, economic viability, or perhaps even to preserve the homogenous socio-economic character of a community. In order to preserve the status quo, municipalities may exclude those land uses which appear to detract from the perceived advantages of the community.[3] These exclusions frequently impact development of housing suitable for low or moderate income dwellers. Those individuals who directly or indirectly bear the burden of these restrictive municipal policies are often unable to successfully challenge the policies,[4] partially because municipal land use regulatory policies are traditionally accorded a strong presumption of validity by reviewing courts.[5]

This article will contrast the traditionally deferential approach of courts like the United States Supreme Court with several innovative state court approaches to restrictive land use regulations.[6]

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income and elderly and handicapped tenants involved.") (remarks of Senator Proxmire discussing § 603 of the Housing and Community Development Act of 1980).

3. *See* R. FISHMAN, HOUSING FOR ALL UNDER LAW 41 (1978) ("[F]rom the beginning, zoning in the United States was commonly used as a device to exclude undesirable persons or groups."); Bosselman, *Growth Management and Constitutional Rights: The States Search for a Growth Policy* (pt. II), 11 URB. L. ANN. 3 (1976)("[T]he dilemma [is that] [o]n the one hand, people want to move to new locations in order to improve their living environment and enjoy a better lifestyle. On the other hand, an improved living environment requires restrictions on the number of people who can live in an area, thus limiting the ability of some people to migrate and settle in various parts of the country.").

4. Plaintiffs are often unable to satisfy the "standing" requirement, particularly in federal courts. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975), in which the Court held that neither low and moderate income individuals nor developer plaintiffs had standing to challenge a town's exclusionary land use regulation. The Court found no concrete injury from existing regulation: the town had not denied permission to develop any specific low/moderate income housing project. The relief requested was prospective, speculative, and therefore lacking "ripeness to warrant judicial intervention." *Id.* at 516. State courts vary in the stringency of interpreting standing requirements, although there appears to be a trend toward a more liberal approach. R. FISHMAN, *supra* note 3, at 132 n.29.

5. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Ybarra v. Los Altos Hills, 370 F. Supp. 742 (N.D. Cal. 1973), *aff'd*, 503 F.2d 250 (9th Cir. 1974). *See generally* the comprehensive annotation in 1 R. ANDERSON, AMERICAN LAW OF ZONING 2d § 3.14 (Supp. 1980).

6. *See* Godschalk, *Growth Management Policy Considerations*, in URBAN LAND INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH V, 9, 10 (1980) ("Judicial interpretations of constitutional issues related to growth management can be thought of as a continuum that stretches from traditional positions derived from earlier decisions based heavily on protection of private property to newer positions that attempt to incorporate a broadened view of

The comparison is intended to delineate those analytical approaches which preclude judicial consideration of the actual purposes behind municipal restrictions, or which preclude judicial inquiry into whether the purposes asserted can actually be accomplished by the regulatory devices selected. This article will suggest that deferential judicial approaches may unnecessarily, perhaps unjustifiably, permit local governments to exclude low and moderate income residents.[7]

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the social and environmental impact of growth management."); Note, *Regulation of Land Use: From Magna Carta to a Just Formulation,* 23 U.C.L.A. L. REV. 904, 905, 918 (1976) (recent case law trend suggesting that land ownership no longer includes a right to develop). Supreme Court decisions are used in this article to illustrate a traditional deferential judicial approach to land use restrictions. Some commentators suggest a reason for the Supreme Court's deferential approach: federalism, *i.e.,* the notion that zoning issues are best confided to state and local governments with judicial review left to the state courts. *See* Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.,* 91 HARV. L. REV. 1373 (1978). Challenges to restrictive policies which are based on national concerns, such as interstate commerce, voting or free speech, are deemed by some best decided by federal courts. *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 YALE L.J. 385, 471 (1977). Other commentators assert that state courts should decide challenges under potentially broader state constitutional provisions where: (1) there is no need for national uniformity in the law; or (2) the Supreme Court has declared a "hands off" policy toward a certain class of disputes; or (3) the states attempt to innovatively respond to complex contemporary social and economic problems without adverse impact to the rest of the country. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873, 937-40 (1976). Notwithstanding whether the Supreme Court's deference to local legislative judgments is legitimate, the Court's deferential stance is sufficiently illustrative to provide a touchstone for a comparison between traditional and innovative judicial approaches. *But see* Callies, *The Supreme Court is Wrong About Zoning by Popular Vote,* 42 PLAN. 17 (1976).

7. For an excellent article reflecting an opposing view, *see* Rose, *Myths and Misconceptions of Exclusionary Zoning Litigation,* 8 REAL EST. L.J. 99 (1979). The author asserts that among the "myths and misconceptions" of exclusionary zoning litigation are:

> (1) *the myth of the moral imperative:* A fair evaluation of the benefits and costs of eliminating exclusionary zoning would put the plaintiff on the side of virtue and justice.
>
> (2) *the myth of the legal imperative:* The supreme law of the land, the United States Constitution, is violated by suburban exclusionary zoning.
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> (3) *the myth that exclusionary zoning is the "evil force":* If exclusionary zoning is eliminated, the social and economic inequities of our society will be eliminated also.

Id. at 102. The author asserts that the "elimination of exclusionary zoning will not provide housing for low and moderate income families." *Id.* at 123. Rather, elimination will result in windfall profits through increased land values to developers and real estate investors who in turn may not be compelled to construct low cost housing. *Id.* at 124.

I. Municipal Powers: Traditional Judicial Review

Municipalities are delegated authority by states in enabling acts to regulate land use for the "health, safety, morals, and general public welfare."[8] The means by which these "police power" purposes may be accomplished are generally within the broad discretion of municipalities.[9]

Traditional courts defer to local legislative judgment[10] for sev-

8. Many states have adopted enabling legislation based on the model of the Department of Commerce's 1922 Standard State Zoning Enabling Act and 1928 Standard State Planning Enabling Act. States also provide specific authority to municipalities in subdivision, planned unit development and annexation legislation. These Acts delegate the "state's sovereign authority" to regulate land use "to literally thousands of local governments throughout the nation," and often fail to provide a "mechanism for coordination among jurisdictions": "The fragmentation or balkanization of authority that has thereby resulted—with each community acting independently of its neighbors and attempting to solve its own parochial needs without regard to potential impacts of its decisions on surrounding areas—has proved to be a major obstacle to dealing with problems that are areawide in scope (such as housing, transportation, pollution, education)." R. FISHMAN, *supra* note 3, at 51-52. In response to this fragmentation, at least twenty-one states have enacted statewide planning statutes in order to coordinate development between jurisdictions. COUNCIL OF STATE GOVERNMENTS (COG), LAND: STATE ALTERNATIVES FOR PLANNING AND MANAGEMENT 10-11, Fig. 1 (1975). *See* F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971). For a recent compilation of state enabling acts and analysis of provisions specifically authorizing municipal fiscal impact analysis in land use regulations, see Burchell, *Fiscal Impact Analysis as a Tool for Land Use Regulation*, 7 REAL EST. L.J. 132, 135-48 (1978).

Such authority also may be delegated by a Home Rule provision in a state constitution. *See, e.g.*, CAL. CONST. art. XI, § 7.

9. Land use regulations "must find their justification in some aspect of the police power asserted for the public welfare," according to Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926). Police power ordinances are valid only if they are "really designed to accomplish a legitimate public purpose." Chicago B. & O. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906).

Whether contemporary zoning is in fact based upon the public welfare has been subject to debate. *See* Sayre, *Aesthetics and Property Values: Does Zoning Promote Public Welfare?*, 35 A.B.A.J. 471, 472 (1949). One view asserts that zoning is no longer based on the public welfare. Babcock & Feurer, *Land as a Commodity "Affected with a Public Interest,"* 52 WASH. L. REV. 289, 291 (1977). Rather, it is "a contest between competing *private* interests in real estate: the developer versus the protesting property owners or neighbors," which frequently results in "outrageous municipal practices that discourage or prevent development." *Id.* at 300.

10. The distinction between local government legislative as opposed to administrative or "quasi-judicial" actions is relevant to the degree of judicial scrutiny applied in a given case. Municipal recognition that traditional self-executing zoning is frequently inadequate to respond to the complex problems of increased urbanization has prompted local governments to move toward new regulatory devices intended to maintain greater current discretion over land use decisions. These "wait-and-see" devices include rezonings, variances, amendments, special exceptions or permits, floating zones, conditional rezonings and

eral reasons: the separation of powers, a perceived lack of judicial expertise in land use matters, and the desire to allow local governmental flexibility in meeting changing conditions with innovative responses.[11] Local land use regulations come to these courts armed with a formidable presumption of validity, and challengers often must bear the burden of proving that the statute is invalid. Challenges are based on theories that the regulation:

1. violates the equal protection clause;
2. violates the due process clause;
3. is outside the scope of the enabling legislation; or
4. is not a proper exercise of the police power.[12]

These challenges require the court to make three queries:

1. Is the *objective* sought a legitimate police power purpose within the purposes specified in the enabling legislation?
2. Are the *means* utilized reasonably related to the accomplishment of this legitimate purpose?
3. Is the *effect* of the means employed unduly oppressive upon the challenger, or do the means infringe a constitutionally protected interest of the challenger?[13]

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planned unit developments. These devices provide municipalities needed flexibility, but also afford them "an opportunity to abuse their discretion" by excluding on an *ad hoc* basis. R. FISHMAN, *supra* note 3, at 45-49. In response to this potential for abuse, innovative courts have held that certain rezonings are quasi-judicial, thus requiring greater procedural safeguards for participants. *See, e.g.,* Snyder v. City of Lakewood, 542 P.2d 371 (Colo. 1975); Town v. Land Use Comm'n, 524 P.2d 84 (Hawaii 1974); Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978); Lowe v. City of Missoula, 525 P.2d 551 (Mont. 1974); Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973); Board of Supervisors v. Snell Constr. Corp., 202 S.E.2d 889 (Va. 1974). *See generally* Kolis, *Zoning Amendments: Legislative v. Quasi-Judicial Hearings,* URB. LAND 24 (July/Aug. 1979).

Local government actions deemed legislative receive a narrow scope of judicial review. Local actions deemed quasi-judicial or administrative may receive stricter judicial scrutiny, although "[i]n practice, review is usually narrow, because courts apply both a presumption that findings were made and that they were supported by sufficient evidence." R. FISHMAN, *supra* note 3, at 145.

11. *See* Mandelker, *Differential Enforcement of Housing Codes—The Constitutional Dimension,* 55 U. DET. J. URB. L. 517, 534-35 n.77 (1978).

12. *See* Rose, *Exclusionary Zoning and Managed Growth: Some Unresolved Issues,* in URBAN LAND INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH V 169, 179 (1980).

13. Although the challenges may be based upon separate constitutional or statutory bases, the line drawn between judicial analyses is often unclear. This is due, in part, to plaintiffs generally challenging restrictive regulations on several separate points of alleged constitutional infringement or statutory violation. Thus, plaintiffs may allege violations of both due process and equal protection clauses in addition to challenging the police power

The means utilized by municipalities to restrict land use, to maintain the status quo, are infrequently subject to close scrutiny by the courts. Municipalities rarely employ land use regulatory devices which have not been validated previously by the courts in similar or related contexts.[14] The means generally become relevant only when regulations are enacted for improper purposes or when

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action as "ultra vires."

Due process challenges are based on the Fifth Amendment to the Federal Constitution: "[N]or shall private property be taken for public use, without just compensation," U.S. CONST. amend. V. The Fifth Amendment is applied to the states through the due process clause of the Fourteenth Amendment: "No state shall . . . deprive any person of life, liberty, or property," U.S. CONST. amend. XIV. Courts generally hold that municipal regulation does not constitute a "taking" in violation of the due process clauses unless substantially all economic use of the property is deprived by the regulation. In cases when a taking is found to have occurred, courts will merely require the regulation to be stricken as opposed to requiring monetary compensation. *See* Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981). General due process challenges allege that governmental action is unreasonable, arbitrary, capricious, without a rational basis, unrelated to any legitimate police power purpose, and that the means are not reasonably related to any legitimate purpose. *See* Godschalk, *supra* note 6, at 11. "this general due process concept . . . prohibits in a general way certain kinds of activities that are also proscribed in a more specific way through other constitutional provisions. For example, the regional general welfare challenge and the right to travel challenge seem to derive from the requirement of a legitimate objective. The equal protection challenge is highly related to the general due process requirement that the means be reasonably necessary to the accomplishment of the ends. The taking challenge is often raised where it is claimed that the means are unduly oppressive on the individual, in violation of general due process." *Id.*

Equal protection challenges are based on the Fourteenth Amendment. The stringency of judicial review depends upon the challenge asserted, that is, whether the classification affects economic or "fundamental" interests or a constitutionally suspect category. When the classification affects economic interests, courts generally employ a relaxed scrutiny similar to a general due process analysis and uphold classifications which arguably bear some relationship to the purpose asserted for regulation. Mandelker, *supra* note 11, at 557. Courts will apply a strict scrutiny standard of review when the classification affects fundamental interests or suspect categories such as race or religion. *Id.* at 558-59.

14. One regulatory tool has, however, come under attack recently in several state courts: this is a moratorium on building or related permits. Courts frequently strike such provisions unless the local government intends to utilize the device as a *temporary* regulatory measure. *See, e.g.*, City of Boca Raton v. Boca Villa Corp., 371 So.2d 154 (Fla. Dist. Ct. App. 1979), and its companion case, City of Boca Raton v. Arvida Corp., 371 So.2d 160 (Fla. Dist. Ct. App. 1979) (the court invalidated the city's charter which provided that "[n]o building permit shall be issued for the construction of a dwelling unit within the city which would permit the total number of dwelling units within the city to exceed 40,000," because the population cap did not bear a rational relationship to a valid municipal purpose); Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980) (upholding the constitutionality of a municipal ordinance which limited the availability of building permits to no more than one-tenth of the lots in a subdivision both in the year the lots are subdivided and in each of the subsequent ten years, since the restriction was temporary and comprehensive planning studies were underway).

they result in an improper effect.

The effect of municipal regulatory devices is generally a more revealing query. Yet, even the effects generally enjoy a presumption of validity.[15] The literature in this field is replete with discussions of regulatory devices which, although not facially exclusionary nor explicitly promulgated for exclusionary purposes, may nonetheless have an exclusionary effect. These exclusionary regulatory devices include:

1. large-lot zoning;
2. minimum house size, bedroom number, or frontage and lot width requirements;
3. overzoning for nonresidential uses;
4. prohibition of multi-family housing;
5. prohibition of mobile homes;
6. unnecessarily high subdivision requirements; and
7. administrative practices.[16]

Similarly, the purposes for which these restrictions are enacted are rarely subject to close scrutiny once those purposes appear to fall under the umbrella of the "general welfare."[17] As long

15. Regardless of municipal intent, the inevitable effect of land use devices is to exclude certain uses and therefore certain classes of people. Walsh, *Alternatives to Warth v. Seldin: The Potential Resident Challenger of an Exclusionary Zoning Scheme*, 11 URB. L. ANN. 223 (1976). The Supreme Court has stated: "In many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the Nation's population." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.15 (1977).

16. *See* R. FISHMAN, *supra* note 3, at 54-56. *See also* Williams & Norman, *Exclusionary Land Use Controls: The Case of Northeastern New Jersey*, 22 SYRACUSE L. REV. 475, 481-84 (1971) (minimum building size requirements directly influence housing costs; single family unit restrictions effectively preclude those for whom the most economically feasible housing is some form of multiple dwelling; the number of bedrooms is often restricted when multiple dwellings are permitted; prohibiting mobile homes may discourage the immigration of inner city residents who cannot afford more expensive housing; large lot requirements not only increase costs to homeowners but curtail the availability of land for multi-family dwellings).

17. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). "When . . . because the courts stand ready to credit as acceptable any goal the political branches regard as conducive to the general welfare—the class of acceptable (sub)goals is infinitely expandable at the discretion of the political branches, a requirement of a rational choice/goal relation for every choice is no demand at all." *Id.* at 1248.

Part of the judiciary's reluctance to scrutinize closely municipal purposes for restrictions is the difficulty of ascertaining such purposes, and also a reluctance to invalidate facially valid restrictions because of the illegitimate intent of one or a few legislators. *See generally* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252

as a municipality asserts some accepted police power purpose as the basis of a restriction which may have an exclusionary effect, the reviewing court will generally bow to the municipality's judgment. Municipalities are usually astute enough to assert justifications which are acceptable to the contemporary judiciary.[18] As the Seventh Circuit noted in *Metropolitan Housing Development Corp. v. Village of Arlington Heights:*[19]

> As overtly bigoted behavior has become more unfashionable, evidence of [discriminatory] intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that [the legislature] . . . intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.[20]

In recent years, the potential for municipalities to "act discreetly" has expanded dramatically. Increased concern for the environment, in addition to increasing fiscal strains on municipalities caused by rapid growth, have provided municipalities with a

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(1977): "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." *Id.* at 265. *See also* United States v. O'Brien, 391 U.S. 367 (1968): "Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decisionmaking in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is an entirely different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a wiser speech about it." *Id.* at 383-84.

18. *Cf.* Ely, *supra* note 17. "Laws like that involved in *Brown* [v. Board of Education, 347 U.S. 483 (1954)], which on their face distinguished on the basis of race, were readily taken care of, or at least the Court felt, in traditional equal protection terms without examining motivation. But it was not long before recalcitrant officials began to seek the same results by measures not explicitly racial. . . . Unless the promise of *Brown* was to go unfulfilled, it seemed inevitable that the doctrine of unconstitutional motivation would be wheeled back into the judicial arsenal when a flagrant enough situation arose." *Id.* at 1209.

19. 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978). The case was heard on remand from the United States Supreme Court. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

20. 558 F.2d at 1290.

wealth of new justifying purposes for restrictive regulations.[21] In the absence of definitive evidence to support or refute the success of local regulatory responses to alleviate complex environmental or fiscal problems, courts may be particularly willing to defer to the expertise and judgment of local governments in choosing appropriate responses.[22]

Unfortunately, this judicial stance may preclude scrutiny of the actual purposes behind potentially exclusionary municipal land use devices. As noted by one well-respected commentator:

> [One] reason for environmentalists' opposition to homebuilding is that the concept of the environment is a loose one easily stretched to include many values and purposes. In suburban America, preserving the environment usually means preserving the social status quo as well. If no open land is to be developed, then newcomers cannot move into a town except through the gradual turnover of older housing.[23]

As long as a municipality asserts a laudable public purpose for a land use restriction, such as environmental protection, the traditional court will presume that the restriction is constitutionally valid. The burden of proving an invalid purpose is on the challenger. Until an invalid purpose is asserted, the traditional court will generally not inquire whether the ordinance will, in fact, achieve its professed purpose or what other purposes may have prompted its enactment.[24]

Some state courts have begun to pierce the presumption of legitimacy with closer judicial scrutiny.[25] This has been accom-

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21. *See generally* Bosselman, *supra* note 3. "Recognizing the weakness of basing restrictive measures on arbitrary standards, advocates of growth management have long searched for more defensible standards for basing growth limitations. Particularly attractive to advocates of growth management is the concept of 'carrying capacity,' which has been widely used by ecologists in wildlife management . . . . Efforts to use carrying capacity methodology to determine standards for human population are in their infancy and it is far too soon to pass judgment on their success." *Id.* at 33-34.

22. *Cf.* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) ("[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.").

23. B. FRIEDAN, THE ENVIRONMENTAL PROTECTION HUSTLE 129 (1979).

24. *See* note 17 *supra*.

25. Most state courts prefer, however, to invalidate restrictive municipal regulations on statutory as opposed to constitutional grounds. Ellickson, *supra* note 6, at 474. *Cf.* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). "In the realm of constitutional law . . . this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has

plished by redefining the "general welfare" to include the welfare of the region, excluding from legitimate police power purposes the maintenance of a municipality's status quo, or by finding suspect those regulatory devices which effectively exclude low and moderate income residents.[26] When presented with regulations which have an exclusionary effect, these courts may accord the regulation a "relaxed" presumption of validity, or may reverse the traditional presumption entirely to accord the regulation a presumption of *in*validity. These approaches lighten the burden of proof for the challenger: the burden is shifted to the municipality to show that the regulation is a legitimate exercise of its police powers. Under this approach, the court may go so far as to inquire whether the regulatory device utilized is not just reasonable, but necessary, to accomplish some legitimate governmental goal. The court may also substitute its own judgment for that of the municipality when determining the true purpose behind a municipal ordinance.[27]

Traditional courts, like the United States Supreme Court, do not journey so far into the rubric of the asserted "public welfare" purpose for a restrictive local regulation.[28] These courts do inquire into the purposes asserted for a municipal regulation, but will defer to local judgments unless the restriction is clearly "arbitrary or

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preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police . . . ." *Id.* at 397.

26. *See, e.g.,* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied,* 423 U.S. 808 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975); Nickola v. Township of Grand Blanc, 394 Mich. 589, 232 N.W.2d 604 (1975); Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974); Appeal of Kit Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). *See also* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1973), *rev'd,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976); Golden v. Town Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291 (1971), *appeal dismissed,* 409 U.S. 1003 (1972). *See generally* R. FISHMAN, *supra* note 3. "[A] local jurisdiction, in exercising its zoning powers, is acting only as a delegate of the state . . . the 'general welfare' that must be served extends beyond the borders of the particular municipality." *Id.* at 57. Brower, *Courts Move Toward a Redefinition of General Welfare,* 31 LAND USE PLAN. & ZONING DIG. (1979).

27. *See generally* Godschalk, *supra* note 6; Hynes-Cherin & Cohen, *The Role of Courts in Land Use: An Overview,* in URBAN LAND INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH V, at 31 (1980).

28. *See* note 6 *supra.*

unreasonable" or unconstitutionally infringes upon a recognized constitutional right or "fundamental interest" of the challenger.[29] Since the Supreme Court does not deem access to housing a "fundamental interest"[30] and does not consider economic discrimination to be a violation of the equal protection clause,[31] successful challenges to exclusionary zoning will be few in deferential courts.

II. The Supreme Court

A. The Foundation

The Court stated in its first seminal zoning decision, *Village of Euclid v. Ambler Realty Co.*,[32] that zoning regulations are presumed constitutionally valid until it is shown that the "provisions are clearly arbitrary and unreasonable, having no substantial rela-

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29. *See generally* Rose, *supra* note 12. "[A]bsent a clear constitutional violation, such as blatant racial discrimination, federal [deferential] courts are reluctant to interfere too actively with municipal zoning since zoning is an exercise of the police power reserved to the states." *Id.* at 176.

30. Lindsey v. Normet, 405 U.S. 56 (1972) "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing and definition of landlord-tenant relationships are legislative, not judicial, functions." *Id.* at 74. *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) "Nor is there reason to subject the Village's action to more stringent review simply because it involves respondents' interest in securing housing." *Id.* at 259 n.5 (quoting Lindsey v. Normet, 405 U.S. 56, 73-74 (1972)). *See generally* San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 18-39 (1973).

31. "Case law reveals that wealth-based differentiations are struck only when they result in injury to rights considered fundamental by the Supreme Court. Wealth discrimination has been found unconstitutional in cases dealing with voting rights [Harper v. Board of Elections, 388 U.S. 663 (1966)] and criminal appeals [Ross v. Moffitt, 417 U.S. 600 (1974); Bodie v. Connecticut, 401 U.S. 371 (1971)] . . . .

"Two other decisions, James v. Valtierra [402 U.S. 137 (1971)] and San Antonio Independent School District v. Rodriguez [411 U.S. 1 (1972)] reveal the Supreme Court's reluctance to treat economic opportunities for lower income groups as fundamental or to give wealth-based discrimination the suspect label." Mandelker, *supra* note 11, at 571-72.

32. 272 U.S. 365 (1926). Plaintiff alleged that the municipality's adoption of a zoning ordinance which restricted his property to residential use was an unconstitutional taking under the due process clause and denied him equal protection under law. Plaintiff sought an injunction against the threatened application of the ordinance: he had neither sought nor been denied a building permit; he merely contended that he could not sell the land for industrial uses.

The Court did not strictly scrutinize the ordinance because plaintiff had not demonstrated a "present infringement or denial of a specific right." *Id.* at 395.

tion to the public health, safety, morals, or general welfare":[33]

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.[34]

The Court noted that comprehensive reports of "[c]ommissions and experts . . . which bear every evidence of painstaking consideration" illustrate that zoning ordinances which "segregat[e] . . . residential, business, and industrial buildings," promote the general welfare by:[35]

1. facilitating the provision of "fire apparatus suitable for the character and intensity of the development in each section";
2. increasing "the safety and security of home life";
3. preventing "street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections";
4. decreasing "noise and other conditions which produce or intensify nervous disorders"; and
5. preserving "a more favorable environment in which to rear children."[36]

The Court found that municipal separation of land uses was justified by and rationally related to the municipality's purpose of pro-

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33. *Id.*

34. *Id.* at 387.

35. *Id.* at 394.

36. *Id.* The Court took special note of the appropriateness of segregating apartment houses from detached single family homes in order to protect residents from the ill-effects of apartments. "[T]he development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes . . . [V]ery often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities, until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed." *Id.*

moting health and safety.[37]

The Court's 1954 decision in *Berman v. Parker*[38] provided a description of the scope of police power which is frequently quoted by traditionally deferential courts.[39] Appellants contended that Congress could not legitimately exercise its power of eminent domain over their department store "merely to develop a better balanced, more attractive community" as opposed to condemning property "for the purpose of ridding the area of slums."[40] The Court stated that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive":[41]

> We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition . . . . The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[42]

Congress' expressed legislative purpose in the act under consideration was "to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all [substandard housing and blighted areas] by employing all means necessary and appropriate for the purpose."[43] The Court deferred to Congress' judgment "that the Nation's Capital should be beautiful as well as sanitary" and held that such a purpose would not violate the due process clause under the Fifth Amendment.[44]

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37. *Id.* at 397.
38. 348 U.S. 26 (1954).
39. *Berman* is frequently cited by courts which uphold local zoning regulations enacted to promote aesthetic purposes. *See generally* Kolis, *Architectural Expression: Police Power and the First Amendment*, 16 URB. L. ANN. 273, 283 n.37 (1979).
40. 348 U.S. at 31.
41. *Id.* at 32.
42. *Id.* at 32-33.
43. *Id.* at 28.
44. *Id.* at 33.

B. Foundation Applied

In *Village of Belle Terre v. Boraas,*[45] the Court considered the constitutional legitimacy of a small municipality's ordinance which expressly prohibited lodging, boarding, fraternity or multiple dwelling housing. The only permitted residential structures under the ordinance were single family units, and the ordinance did not include in the definition of "family" groups of more than two unrelated individuals.[46]

Plaintiffs in *Belle Terre* contended that the ordinance unconstitutionally denied them equal protection of the law.[47] The Court cited its decision in *Euclid* in support of the presumed validity of legislative classifications which are not "wholly arbitrary,"[48] and which bear a rational relationship to a permissible state objective.[49] The Court "refused to limit the concept of public welfare that may be enhanced by zoning regulations."[50] The Court held that Belle Terre's ordinance was a legitimate exercise of its police powers to promote legitimate public purposes:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . . The

45. 416 U.S. 1 (1974).

46. *Id.* at 2.

47. *Id.* at 7. Plaintiffs challenged the ordinance "on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a State; that it bars people who are uncongenial to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction . . . trenches on the newcomers' rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society." *Id.*

48. *Id.* at 4.

49. *Id.* at 8. The Court found no improper purpose for the ordinance: "It is not aimed at transients. Cf. *Shapiro v. Thompson,* 394 U.S. 618. It involves no procedural disparity inflicted on some but not on others such as was presented by *Griffin v. Illinois,* 351 U.S. 12. It involves no 'fundamental' right guaranteed by the Constitution, such as voting, *Harper v. Virginia Board,* 383 U.S. 663; the right of association, *NAACP v. Alabama,* 357 U.S. 449; the right of access to the courts, *NAACP v. Button,* 371 U.S. 415; or any rights of privacy, cf. *Griswold v. Connecticut,* 381 U.S. 479; *Eisenstadt v. Baird,* 405 U.S. 438, 453-454. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be ' "reasonable, not arbitrary" ' . . . and bears 'a rational relationship to a [permissible] state objective.' " *Id.* at 7-8 (footnote omitted).

50. *Id.* at 5 (discussing Berman v. Parker, 348 U.S. 26 (1954)).

> police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[51]

Presented with an asserted infringement of First Amendment rights, the Court more closely scrutinized the purposes for which the restriction was enacted. In *Erznoznik v. City of Jacksonville*,[52] plaintiffs challenged the facial validity of the city's ordinance which prohibited movies with nudity in drive-in theaters when the screen was visible from a public street or place.[53] The city asserted three police power purposes for the ordinance:

1. to protect its citizens against unwilling exposure to materials that may be offensive;[54]
2. to protect children from offensive materials;[55] and
3. to prevent the distraction of passing motorists in order to decrease the likelihood of accidents.[56]

The Court scrutinized the asserted justifications and found them inadequate since the ordinance infringed upon expression protected by the First Amendment: "[W]e do not deprecate the legitimate interests asserted by the city . . . . We hold only that the present ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression."[57]

In *Young v. American Mini Theaters, Inc.*,[58] the Court was again presented with a case in which a police power restriction was alleged to infringe upon First Amendment interests.[59] The City of

51. 416 U.S. at 9.
52. 422 U.S. 205 (1975).
53. *Id.* at 206-07.
54. *Id.* at 208.
55. *Id.* at 212.
56. *Id.* at 214.
57. *Id.* at 217. The Court stated that the first justification cited by the City was insufficient to justify the restriction: "[T]he limited privacy interest of persons on the public street cannot justify this censorship of otherwise protected speech on the basis of content." *Id.* at 212. The second justification advanced was deemed overinclusive: "Clearly all nudity cannot be deemed obscene even as to minors." *Id.* at 213. The traffic justification advanced by the city was summarily dismissed as underinclusive and makeweight: "There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist." *Id.* at 214-15.
58. 427 U.S. 50 (1976).
59. *Id.* at 51. Plaintiff also claimed that the ordinance violated the due process clause of the Fourteenth Amendment because it was vague. The Court rejected this contention. *Id.*

Detroit enacted an "anti-skid row ordinance" which prohibited adult movie theaters from locating less than 1000 feet from another adult movie theater.[60] Plaintiff, owner of an adult motion picture theater, asserted that the ordinance violated his First Amendment rights as a prior restraint on protected speech.[61] The expressed purpose of the Detroit ordinance was to prevent the unwholesome effects of allowing such establishments to congregate in one area. The results of such congregation, "[i]n the opinion of urban planners and real estate experts who supported the ordinances," included the attraction of "an undesirable quantity and quality of transients," the diminution of property values, "an increase in crime, especially prostitution," and the encouragement of "residents and businesses to move elsewhere."[62] To the Court, these police power purposes were sufficient to support the restriction, even in light of its effect upon constitutional expression. Determinative for the Court was the fact that the ordinance did not totally suppress, but merely regulated, the location of such expression.[63] The only remaining question for the Court was whether the means employed to accomplish a legitimate municipal police power goal, that is, the preservation of "the character of [the city's] neighborhoods,"[64] was constitutionally acceptable. The Court deferred to the city's judgment:

60. *Id.* at 54.

61. The Supreme Court employs a strict scrutiny approach in noncommercial speech cases. Local regulatory infringements of First Amendment rights must be justified by a state interest "sufficiently compelling," Wooley v. Maynard, 439 U.S. 705, 716 (1977), furthered by the least intrusive means possible, Elrod v. Burns, 427 U.S. 347, 362-63 (1976), Buckley v. Valeo, 424 U.S. 1, 68 (1976), where the means bear a "substantial relation" to the compelling governmental interest, Buckley v. Valeo, 424 U.S. 1, 64 (1976). The state interest must be "unrelated to the suppression of expression," Procunier v. Martinez, 416 U.S. 396, 413 (1974), and may be so deemed if the restriction is a reasonable "time, place and manner" regulation, Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977).

Different types of expression are accorded different weights by the Court. *See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court in *Young* scrutinized the content of the expression restricted by Detroit's ordinance to conclude: "[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value . . . we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." 427 U.S. at 70-71.

62. *Id.* at 55.

63. *Id.* at 71. The Court stated: "[t]he city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support [the dispersal] restriction applicable to all theaters within the city limits." *Id.* at 62-63.

64. *Id.* at 71.

> It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . . [T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.[65]

In *Moore v. City of East Cleveland*,[66] the Court found the means employed under municipal police powers to be constitutionally unacceptable because they infringed upon a "fundamental" interest. East Cleveland enacted an ordinance limiting occupancy of single family units to "families." The ordinance defined "family" so as to prohibit appellant grandmother from having her two grandchildren, of different children, live with her. This living arrangement constituted a criminal offense under the ordinance.[67]

The City asserted that the ordinance was enacted to prevent overcrowding, minimize traffic and parking congestion, and avoid undue financial burdens on East Cleveland schools.[68] The Court stated that although "these are legitimate [police power] goals,"[69] the ordinance infringed upon the fundamental constitutional interests of marriage and family choices protected under the due process clause of the Fourteenth Amendment.[70] The Court distinguished *Belle Terre* because the ordinance in that case related only to *unrelated* individuals.[71]

> When a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate . . . . [W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.[72]

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65. *Id.*
66. 431 U.S. 494 (1977).
67. *Id.* at 496.
68. *Id.* at 499-500.
69. *Id.* at 500.
70. *Id.* at 499.
71. *Id.* at 498.
72. *Id.* at 499. The Court noted the problems encountered by the judiciary when entering the realm of "substantive due process": "There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights . . . . [H]istory counsels caution and restraint. But it does not counsel . . . cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family." *Id.* at 502 (emphasis in original).

The Court found that East Cleveland's ordinance had "but a tenuous relation to the alleviation of the conditions mentioned by the city."[73] The Court, therefore, held the ordinance unconstitutional under the due process clause of the Fourteenth Amendment.

The Court's analysis in *Moore* precluded it from directly addressing the question of whether or not East Cleveland's ordinance violated the equal protection clause in its disproportionately adverse impact on racial minorities.[74] This issue was squarely faced by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[75] In *Arlington Heights*, the city denied the Metropolitan Housing Development Corporation (MHDC) a rezoning permit from a single to multi-family classification which MHDC sought in order to construct 190 federally-subsidized units for low and moderate income tenants.[76] Federal funds were partially conditioned upon "an affirmative marketing plan designed to assure that [the] development [would be] racially integrated."[77] MHDC alleged that Arlington Heights' denial was racially discriminatory in violation of the Fourteenth Amendment.[78]

Opponents of the rezoning asserted two justifications for the

73. *Id.* at 500. The Court gave an example of the tenuous relationship: "[T]he ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation . . . ." *Id.*

74. *Id.* at 496 n.3. Justice Brennan, with whom Justice Marshall joined, concurred in the *Moore* opinion, adding the following: "I do not wish to be understood as implying that East Cleveland's enforcement of its ordinance is motivated by a racially discriminatory purpose: the record in this case would not support that implication. But the prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the 'extended family' pattern remains a vital tenet of our society. It suffices that in prohibiting this pattern of family living as a means of achieving its objectives, appellant city has chosen a device that deeply intrudes into family associational rights that historically have been central, and today remain central, to a large proportion of our population." *Id.* at 510.

75. 429 U.S. 252 (1977).

76. *Id.* at 254.

77. *Id.* at 257.

78. The rezoning proposal was considered at three public hearings during which both opponents and supporters of the rezoning "addressed what was referred to as the 'social issue'—the desirability or undesirability of introducing at this location . . . low- and moderate-income housing . . . that would probably be racially integrated." *Id.* at 257-58.

The court of appeals held that the rezoning denial had racially discriminatory effects and could be tolerated only if it served compelling governmental interests. The court of appeals found that "[n]either the buffer policy nor the desire to protect property values met this exacting standard." *Id.* at 260.

Village's refusal:

1. Rezoning threatened to cause a measurable drop in property value for neighboring sites.
2. The Village's apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for apartment zoning primarily to serve as a buffer between single-family development and commercial or manufacturing districts. The proposed project did not meet this requirement.[79]

The Supreme Court accepted these justifications as legitimate police power purposes and put forth a standard of review for cases involving charges of discriminatory intent. The Court noted that "the generous *Euclid* test, recently reaffirmed in *Belle Terre*" was inapplicable in this case.[80] The Court stated that judicial deference is not justified when there is proof that a discriminatory purpose has been *a* motivating factor in a local land use decision.[81] The Court explained that "racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[82] In order to determine whether a discriminatory purpose was a motivating factor, the Court must make a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[83] The Court emphasized that a plaintiff need not prove that a governmental action was undertaken *solely* for a discriminatory purpose since it can rarely be said that a legislative body is "motivated solely by a single concern, or even that a particular purpose [is] the 'dominant' or 'primary' one."[84] However, proof of a racially discriminatory purpose is the "required threshold showing."[85] Once a plaintiff proves that a governmental action is "motivated in part by a racially discriminatory purpose," the burden shifts to the government to establish "that the same decision would have resulted

79. *Id.* at 258.

80. *Id.* at 263.

81. *Id.* at 265-66.

82. *Id.* at 265. The Court provided a partial list of "circumstantial and direct evidence of intent" from which evidence of a discriminatory motivation purpose may be gleaned: (1) Disproportionate racial impact of official action, *id.* at 266; (2) Historical background of the decision, *id.* at 267; (3) Legislative or administrative history, especially where there are contemporary statements by members of the decisionmaking body, *id.* at 268.

83. *Id.* at 266.

84. *Id.* at 270-71 n.21.

85. *Id.*

even had the impermissible purpose not been considered."[86]

MHDC failed to establish this threshold showing of discriminatory purpose.[87] MHDC could only show proof of disproportionate impact.[88] The Court, therefore, held that no constitutional violation had been shown.[89]

The Court's two most recent land use decisions reaffirm its deferential approach. In both cases the Court considered the question of whether the local restriction was so onerous to plaintiffs as to require monetary compensation under the Fifth and Fourteenth Amendment due process clauses. In *Penn Central Transportation Co. v. New York City*,[90] the City enacted legislation intended to

86. *Id.*

87. *Id.*

88. *Id.* at 269. The historical background of the decision evoked no suspicion: the land had been zoned for single family homes since 1959; the buffer policy was in effect long before MHDC requested rezoning and had been applied "too consistently . . . to infer discriminatory purpose from its application in this case," *id.* at 270; the "rezoning request progressed according to the usual procedures," *id.* at 269; and "there [had] been reliance by some neighboring property owners on the maintenance of single family zoning in the vicinity," *id.* at 270. The legislative and administrative history of the decision also disclosed no discriminatory motive: public hearing minutes disclosed that the Plan Commission and Village Board members "focused almost exclusively on the zoning aspects of the MHDC petition," *id.* at 270, and although some individuals who spoke at the public hearing "might have been motivated by opposition to minority groups . . . that evidence 'does not warrant the conclusion that this motivated the defendants.'" *Id.* at 269.

The Court in *Arlington Heights* did not specifically address the legitimacy of the police power goals of the ordinance in question. The Court merely accepted the appropriateness of Arlington Heights' "buffer policy" and its desire to protect property values: "the zoning factors on which [the local legislature] relied are not novel criteria in the Village's zoning decisions." *Id.* at 270. The Court's strict scrutiny did not go to the merits of police purposes advanced by the Village. Rather, the Court's scrutiny went only to the merits of MHDC's allegations that discriminatory motives prompted the Village's refusal to rezone. Had MHDC been able to show one discriminatory factor, the burden of proof would have shifted to the Village. The Village would have then had to show that the same decision would have resulted even had the impermissible purpose not been considered. *Id.* at 270-71 n.21. At that point, the Court would have presumably scrutinized more closely the legitimacy of police power purposes asserted by the Village for its refusal to rezone. Hence, although the Court espoused the strict scrutiny standard in *Arlington Heights*, strict scrutiny was applied only to the "circumstantial and direct evidence of [the governmental body's discriminatory] intent." *Id.* at 266.

89. The Court remanded the case to the court of appeals to determine the statutory question: whether the rezoning decision violated the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1976). 429 U.S. at 271.

90. 438 U.S. 104 (1978). Plaintiff, owner of Penn Central Terminal, challenged the city's ordinance under which the station had been designated a historical landmark, since the designation precluded the owners from allowing VAP Properties to construct a multistory structure over the station.

preserve " 'the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government.' "[91] The legislation was intended "to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their characters."[92] The New York Preservation Law of 1965 was enacted pursuant to the New York State Enabling Act which declares that "it is the public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures or areas."[93] The New York City statute was intended to promote the general welfare by:

1. fostering "civic pride in the beautiful and noble accomplishments of the past";
2. protecting and enhancing "the city's attractions to tourists and visitors";
3. supporting and stimulating business and industry;
4. strengthening the economy of the city; and
5. promoting the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure, and welfare of the people of the city.[94]

The police power justifications for New York's statutory restrictions were not scrutinized by the Court since the owners of the property did "not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal":[95] "[T]his Court has recognized, in a number of settings, that states and cities may enact land-use restrictions or controls to enhance the quality of urban life by preserving the character and desirable aesthetic features of a city . . . ."[96]

91. *Id.* at 109.

92. *Id.*

93. N.Y. GEN. MUN. LAW § 96-a (McKinney 1977). *See also* Penn Cent. Transp. Co. v. New York City, 438 U.S. at 108-09 n.5.

94. *Id.* at 109.

95. *Id.* at 129. The Court held further: "[T]he application of New York City's Landmarks Law has not effected a 'taking' of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties [through transfer development rights]." *Id.* at 138.

96. *Id.* at 129.

The Court used similarly expansive language in *Agins v. City of Tiburon*[97] to describe the scope of legitimate police power goals. The city was required, under state law, to prepare a general plan for land use containing an open space element in order to "discourage the premature and unnecessary conversion of open-space land to urban uses" and to assure "the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources."[98] The question before the Court was "whether the mere enactment of the zoning ordinances constitutes a taking."[99] To address this issue, the Court first had to delineate the proper scope of the police power by determining whether the ordinance substantially advanced "legitimate state interests."

The Court scrutinized the city's expressed purposes for the ordinance:

> [i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise, and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl.[100]

The Court held that the ordinance in question substantially advanced legitimate state interests:

> The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes long have been recognized as legitimate . . . . [The ordinances serve] the city's interest in assuring careful and orderly development of residential property with provision for open space.[101]

C. Exclusionary Regulations in Traditional Courts

Traditional courts like the Supreme Court will overturn few

97. 447 U.S. 255 (1980).

98. *Id.* at 261 n.7.

99. *Id.* at 260. Plaintiffs challenged the ordinance as an unconstitutional taking without due process of law because the ordinance allowed only one to five units to be constructed on their parcel. *Id.* at 258. However, plaintiffs did not seek approval for development under the ordinance. *Id.*

100. *Id.* at 261 n.8.

101. *Id.* at 261.

municipal land use restrictions on constitutional grounds. The Court will defer to the local justifications for restrictive regulations as long as a municipality acts within the bounds of broadly defined police powers delegated by state enabling statutes, and where the challenger fails to:

1. assert the *unconstitutional infringement* of a constitutional right, such as freedom of expression, due process or equal protection; or
2. allege the *unconstitutional infringement* of a constitutionally protected "fundamental interest," such as marriage or the family.[102]

Under this approach, challengers to exclusionary practices will have little success in the Supreme Court or in courts which are similarly deferential to local land use decisions. The Court recognizes few constitutional rights or interests which will require a reversal of the burden of proof or a piercing of the presumption of validity.[103] The result is that close scrutiny of the purposes behind regulations which have an exclusionary effect is rarely available. Municipalities may "act discreetly" to systematically deprive housing opportunities, so long as the municipality's purpose behind the restriction is to suppress the "ill-effects of urbanization"[104] and to enhance "the quality of urban life."[105]

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102. The phrase "unconstitutional infringement" is meant to emphasize that a restriction may affect a constitutional right or fundamental interest, yet may not infringe to a magnitude which violates the Constitution. *See* notes 30-31 *supra*. Challenges based on the right to travel, *see* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd* 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); or the right to privacy, *see* Belle Terre v. Boraas, 416 U.S. 1 (1974), do not serve to reverse the presumption of validity of ordinances exclusionary in effect.

103. Agins v. City of Tiburon, 447 U.S. at 261.

104. Penn Cent. Transp. Co. v. New York City, 438 U.S. at 129.

105. *See* notes 25-27 and accompanying text *supra*. *See generally* Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980). Plaintiffs challenged the constitutionality of a zoning bylaw which limited the number of building permits issuable "to one tenth of the lots in a 'subdivision' in the year the lots are subdivided and a further one tenth of those lots in each of the subsequent nine years." *Id.* at 1349. The court noted that Chilmark is located on Martha's Vineyard, in "an isolated, substantially rural area" and stated that the "public interest" is different in rural and urban areas: "[I]n a rural . . . setting, where no showing has been made of regional demand for primary housing, the public interest in preserving the environment and protecting a way of life may outweigh whatever undesirable economic and social consequences inherent in partly 'closing the doors' to affluent outsiders primarily seeking vacation homes." *Id.* at 1352. In addition, the state legislature had specifically expressed concern for the preservation of the " 'natural, historical, ecological, scientific, or cultural values on Martha's Vineyard,' " and the town was therefore serving regional as op-

III. State Courts: Innovative Approaches

Although state court approaches vary widely between jurisdictions, there is a growing trend to more closely scrutinize police power purposes when the effect of land use regulation is exclusionary. State courts are beginning to demand that local governments justify restrictions with sufficient study and documentation. State courts are also often more willing to substitute judicial judgment for local legislative judgment on the necessity and effectiveness of regulation.[106]

This trend is in part the result of a redefinition of "general welfare": courts scrutinize a local regulation's impacts on not only the enacting municipality, but on the region as a whole. Municipalities in these jurisdictions are required to act for the benefit of a region, as opposed to acting merely for the benefit of local re-

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posed to merely local needs. *Id.* The court stated that although the statute would be presumed constitutionally valid, *id.*, "the municipality [must] bring forward some indication that the zoning provision has some reasonable prospect of a tangible benefit to the community." *Id.* at 1353. The town relied on studies of soil limitations for water supply and sewage disposal, *id.*, and thereby established a "prima facie showing of a rational reason for its action." *Id.* at 1354. The burden of proof then shifted to the plaintiffs to show that "the studies did not support these concerns." Plaintiffs failed to bring forth such evidence, and the court upheld the *temporary* growth restriction. *Id.* at 1355. The court noted: "We express no view on the application of the rate of development by-law in subsequent years, particularly after the first ten years from its effective date. We assume, in the absence of a contrary showing, that a period of ten years is reasonably necessary to complete all necessary studies and to implement recommendations and that the town will proceed with its studies in good faith. A very different case would be presented if it were determined that the town was not proceeding with the necessary studies which are said to be the basis for the enactment of the rate of development by-law." *Id.* at 1354 n.16.

106. The leading case in this field is Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied,* 423 U.S. 808 (1975). The New Jersey Supreme Court stated: "[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served." 67 N.J. at 177, 336 A.2d at 726. *Cf.* Save a Valuable Environment v. City of Bothell, 89 Wash. 2d 862, 576 P.2d 401 (1978). The court held the city's rezoning action to permit construction of a shopping center unconstitutional because rezoning would cause serious adverse environmental consequences: "[The City] may not act in disregard of the effects outside its boundaries. Where the potential exists that a zoning action will cause a serious environmental effect outside jurisdictional borders, the zoning body must serve the welfare of the entire affected community. If it does not do so, it acts in an arbitrary and capricious manner. The precise boundaries of the affected community cannot be determined until the potential environmental effects are understood." *Id.* at 867, 576 P.2d at 405.

sidents by maintaining the status quo.[107] This trend is also partially the result of judicial recognition that housing problems are becoming severe, particularly for low and moderate income individuals. These courts interpret the police power flexibly in order "to address new controversies in light of changing societal values and convictions."[108] When municipalities in these jurisdictions enact regulations that exacerbate housing shortages, courts may require a strong showing of public welfare purpose in order to allow the restriction to stand.[109] Three recent state supreme court decisions will serve to illustrate the judicial trend toward stricter scrutiny of local regulations which have the potential to exclude.

In *Robert E. Kurzius, Inc. v. Village of Upper Brookville*,[110] the New York Supreme Court scrutinized the Village's five-acre minimum lot zoning ordinance for constitutional validity. The Village argued that the primary purpose of the five-acre zoning was not to prevent the entry of newcomers, but merely to avoid future burdens, economic and otherwise, upon the administration of public services and facilities. The Village additionally asserted that the ordinance was enacted to preserve open space.[111]

Plaintiffs showed, by analyzing the ordinance's legislative history, that the Village intended to accomplish different goals in enacting the five-acre minimum. Plaintiffs submitted the testimony of the planning expert retained by the Village to show that the purpose of the five-acre minimum was in fact to allow the Village

107. Godschalk, *supra* note 6, at 10. *Cf.* Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980) in which the town enacted a youth lot exemption from lot size requirements "'[f]or the purpose of helping young people who have grown up in Chilmark and lived here for a substantial portion of their lives and who, because of the rising land prices, have been unable to obtain suitable land for their permanent homes at a reasonable price, and who desire to continue to live in Chilmark.'" *Id.* at 1348.

108. Clearly, there are potential problems with a narrow judicial focus on the expressed public welfare purposes of an ordinance, since motives are often difficult to fathom and the invalid motives of a handful of decisionmakers should not necessarily serve to invalidate an otherwise legitimate ordinance. *See* note 17 *supra.* Courts can, however, demand sufficient study and documentation to demonstrate the reasonableness of a particular police power purpose: for example, a municipality enacting an exclusionary restriction in order to prevent adverse impact on sewage capacity should be required to provide sufficient documentation to show that an adverse impact will, in fact, occur if the restriction is not enacted. *See* note 107 and accompanying text *supra;* note 141 and accompanying text *infra.*

109. *Id.*

110. 67 A.D.2d 70, 414 N.Y.S.2d 573 (1979).

111. *Id.* at 78, 414 N.Y.S.2d at 581.

to maintain its status quo.[112] The court held that this showing was sufficient to satisfy plaintiffs' burden of proving an invalid police power purpose.[113]

> The record demonstrates beyond peradventure of doubt that the leaders of the village, after consulting with some of the large landowners, decided to use their zoning power to preserve the village as a citadel of privilege. Thus their zoning power was not being used as a proper exercise of the police power to serve the [regional] general welfare but rather to stop the march of progress and to preserve special benefits for the privileged group of large landowners which consists mainly of present residents of the village.[114]

The court then scrutinized the police power justifications advanced by the municipality for the restriction. The court noted first that the restriction was not justified as an attempt to obviate future burdens on services and facilities since improper "exclusion of newcomers includes both selective admission as well as total exclusion."[115] Based on the record available, the court deemed the Village's second justification, to preserve open space, to be a "makeweight argument."[116]

Since the court found that the Village had not enacted the restriction for legitimate purposes, the court held the five-acre minimum "unconstitutional as an unreasonable and improper exercise of the police power."[117]

The New Jersey Supreme Court came to a similar conclusion when recently faced with a municipal restriction neutral on its face. In *Home Builders League of South Jersey, Inc. v. Township of Berlin*,[118] the Township adopted an ordinance which imposed minimum floor area requirements for residential dwellings. The ordinance did not tie the minima to occupancy or other factors such as frontage or lot size. In fact, different minima were applied in different areas of the township for the same type of unit.[119] The

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112. *Id.*
113. *Id.* at 78, 414 N.Y.S.2d at 580.
114. *Id.* at 81, 414 N.Y.S.2d at 580.
115. *Id.* at 82, 414 N.Y.S.2d at 581.
116. *Id.*
117. *Id.* at 83, 414 N.Y.S.2d at 581.
118. 81 N.J. 127, 405 A.2d 381 (1979).
119. *Id.* at 136, 405 A.2d at 386.

Township asserted that the state enabling legislation[120] authorized the municipality to regulate the size of buildings and percentage of lot which may be occupied by buildings, and to zone " 'with reasonable consideration [for] the character of each district and its peculiar suitability for particular uses.' "[121] The Township asserted that the purposes for the regulation were to "(1) promote public health and safety and (2) maintain the nature of residential neighborhoods and conserve property values."[122]

The court stated that the state enabling statute "might be read literally to include the power to impose minimum floor space" requirements under the authority to regulate structures.[123] However, when "a zoning provision, in addition to promoting legitimate zoning goals, also has effects contrary to the general welfare, closer scrutiny of the provision and its effects must be undertaken."[124] The court noted two "adverse consequences" of the floor area minima: increased housing costs and a potential exclusionary effect.[125] The court stated that municipalities enacting such restrictions "will be presumed to have acted for improper purposes."[126] The court set forth a two-tiered analysis for such cases. To rebut the presumption of invalidity, the municipality must establish a "valid basis" for the restriction. If a municipality succeeds in establishing a valid basis, the court must then determine "whether the provision furthers or is contrary to the general welfare [by] weigh[ing] and balanc[ing] . . . the exclusionary and salutary effects of the provision."[127]

The court then considered the bases advanced by the Township. The court stated that although promotion of health and

120. N.J. STAT. ANN. §§ 40:55D-1 to -65 (West Supp. 1980-1981).

121. 81 N.J. at 138, 405 A.2d at 387 (quoting N.J. STAT. ANN. § 40:55D-62(a) (West Supp. 1980-1981)).

122. 81 N.J. at 142, 405 A.2d at 387.

123. *Id.* at 138, 405 A.2d at 388.

124. *Id.* The court noted that in this case, the effect of the floor area requirements "bear a direct relationship to the cost of a house" and therefore had the "potential [for] exclusionary effects." If it could be shown that the "[t]ownship's sole purpose in setting up the minima" was to discriminate on economic grounds, the court noted that the minima would be stricken as unconstitutional. *Id.* at 141, 405 A.2d at 389. Such evidence was not advanced by plaintiffs.

125. *Id.* at 139-40, 405 A.2d at 389.

126. *Id.* at 142, 405 A.2d at 389.

127. *Id.* at 142, 405 A.2d at 389-90. Evidence was received from a doctor, a land planner, a housing consultant and a law professor. *Id.*

safety are legitimate police power purposes, "minimum floor area requirements are not *per se* related to public health, safety or morals."[128] This finding was supported by "substantial evidence" in the record from various experts.[129] Since the Township required different minima in different areas of the city for the same type of unit, the court found that the Township could not have been "considering health, safety, and morals when it enacted these provisions."[130]

The court found the second rationale advanced by the township, the preservation of the character of neighborhoods and conservation of property values, also to be legitimate police power purposes.[131] However, since the ordinance had an exclusionary effect, the municipality was required to show that "the size of a house [bore] a reasonable relationship to the character of the neighborhood including maintenance of land values."[132] The Township failed to establish this, and plaintiffs provided sufficient evidence to establish the contrary.[133]

The Township failed to show a connection between the minima and legitimate police power purposes. The court concluded that "the ordinance appears to be directed solely toward economic segregation."[134] Since the municipality did not provide adequate documentation to show the reasonable success of the restriction in accomplishing its stated objectives, the court substituted its own judgment to determine what the municipality intended to accomplish.

Similarly, the New Hampshire Supreme Court found a town's comprehensive "slow-growth" ordinance potentially exclusionary in *Beck v. Town of Raymond.*[135] Pursuant to the state zoning ena-

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128. *Id.* at 142, 405 A.2d at 389.
129. *Id.*
130. *Id.* at 143, 405 A.2d at 390-91.
131. *Id.* at 148 n.6, 405 A.2d at 392 n.6.
132. *Id.*
133. *Id.* at 148, 405 A.2d at 392.
134. *Id.*
135. 118 N.H. 793, 394 A.2d 847 (1978). Following *Beck,* the New Hampshire state legislature enacted N.H. REV. STAT. ANN. § 31:62-b (Supp. 1979) which specifically authorizes temporary growth restrictions: "In unusual circumstances requiring prompt attention and for the purpose of developing or altering a growth management process . . . or a master plan or capital improvement program, a city or town may adopt an ordinance imposing interim regulations upon development . . . ." *See* Conway v. Town of Stratham, 120 N.H. 257, 414 A.2d 539 (1980) (holding that the town's enactment of a slow growth ordinance

bling act,[136] the town enacted an ordinance which limited the availability of building permits to individual landowners in each building year (April 1 to March 31) to:

> Four permits per year for owners of fifty or more acres;
> Three permits per year for owners of twenty-five to fifty acres;
> Two permits per year for owners of ten to twenty acres; and
> One permit per year for owners of less than ten acres.[137]

The purpose for the ordinance advanced by the town was to restrain rapid growth in order " 'to prevent overcrowding [of] schools and the overburdening of [the town's] taxpayers.' "[138] The court recognized that the zoning enabling legislation provided the town with authority to regulate growth,[139] but noted that this authority was subject to limitation. The court stated that comprehensive growth controls "should be the product of careful study," accompanied by "[g]ood faith efforts to increase the capacity of municipal services,"[140] and "must not be imposed simply to exclude outsiders . . . especially outsiders of any disadvantaged social or economic group."[141] The Town of Raymond had not undertaken a

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does not improperly infringe upon the jurisdiction of the planning board).

136. N.H. REV. STAT. ANN. § 31:60-:89 (1970).

137. 118 N.H. at 795, 394 A.2d at 848. Four days after enacting the zoning amendment, the town passed a general ordinance "substantially identical to the zoning ordinance." *Id.* The court held that the general ordinance was not "a valid exercise of the police power delegated to the municipality" under general enabling legislation. *Id.* at 795, 394 A.2d at 849. The court held that an ordinance so comprehensive in nature and " 'not intended to be integrated into previous enactments as part of an over all, regulatory scheme,' " must be enacted pursuant to the state zoning enabling act. *Id.* at 799, 394 A.2d at 851 (quoting Village House, Inc. v. Louden, 114 N.H. 76, 79, 314 A.2d 635, 637 (1974)). Plaintiff claimed that he was protected under the " 'grandfather clause' " exemption of the zoning enabling act since the zoning ordinances were enacted subsequent to " 'active and substantial development . . . within twelve months of the recording of subdivision plans . . . .' " The court agreed. 118 N.H. at 797, 394 A.2d at 849.

138. *Id.* at 795, 394 A.2d at 849 (quoting the lower court's findings).

139. *Id.* at 798-99, 394 A.2d at 852. The court cited Patenaude v. Town of Meredith, 118 N.H. 616, 621, 392 A.2d 582, 585 (1978), for the rule that "[c]omprehensive planning with a solid scientific, statistical basis is the key element in land use regulation in New Hampshire."

140. 118 N.H. at 800-01, 394 A.2d at 852. The court offered a solution "to the problem of parochial growth restrictions": "[R]egional or state-wide land-use planning . . . could coordinate responses to the population escalation in New Hampshire, thereby eliminating the present disparities existing between towns, and insuring that each municipality bears its fair share of the burden of increased growth . . . .

"Communities may wish to examine the feasibility of seeking greater state participation in solving what is essentially a state problem." *Id.* at 801-02, 394 A.2d at 852-53.

141. *Id.* at 801, 394 A.2d at 852.

study to justify the restriction nor was the ordinance part of a comprehensive plan. The court upheld Raymond's "ordinance only as a *temporary* emergency measure to allow the town two years at most to develop a . . . comprehensive plan for phasing in growth."[142] In so holding, the court made its own assessment of the purpose for Raymond's restriction:

> Its apparent primary purpose is to prevent the entrance of newcomers in order to avoid burdens upon the public services and facilities. This alone is not a valid public purpose. Moreover, the great bulk of such expenses as sewer and water lines and streets are usually forced upon the developer and in turn upon the ultimate homeowners. Towns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge.[143]

IV. Conclusion

These state court decisions illustrate methods by which courts can pierce the "public welfare" purpose which has shielded municipalities in deferential courts. Traditionally, municipalities have been able to justify regulations which have an exclusionary effect merely by declaring that the purpose of the restriction is to promote "the quality of urban life" so long as the restriction did not infringe a constitutional right. Innovative courts will accept a municipality's assertion that the promotion of "the quality of urban life" is a legitimate governmental purpose but, when faced with exclusionary regulations, will further inquire whether illegitimate purposes prompted enactment or whether the means chosen will actually accomplish the purposes asserted. Traditional courts accept the notion that the inevitable effect of land use restrictions is to exclude certain uses. Innovative courts accept the same notion, but have invalidated those restrictions which appear to be aimed at excluding low and moderate income residents.

Traditional and innovative courts approach the issue from different directions. Traditional courts focus on the rights of the challenger and query whether the restriction violates some recognized constitutional right. Innovative courts focus on the scope of the municipality's police power, on the definition of the public welfare,

142. *Id.*
143. *Id.*

and query whether the restriction is justified in light of its exclusionary effects.

Clearly, the extent to which a court will intervene is not solely based upon the limits of presumptions in judicial interpretations. Other policy and political questions are also at stake.[144] Some commentators assert that these issues are more properly in the province of state legislatures. Commentators assert that state legislatures should provide guidance to local governments on how best to address common problems such as rapid growth so that exclusionary effects are not so severe.[145] State governments are beginning to respond with various techniques.[146] Nevertheless, as long as local governments continue to enact restrictive land use regulations to maintain "citadels of privilege," there is an important role for innovative courts to play in ensuring adequate access to housing opportunities for all. Judicial approaches which presume valid those regulations which unnecessarily raise the cost of housing and thereby exclude, or which by other means in effect exclude low and moderate income individuals, appear archaic in light of today's housing crisis.[147] Municipal restrictions which in effect exclude should be justified with sufficient study and documentation. Municipalities should be required to show that strong countervailing public welfare purposes can in fact be accomplished by restrictions employed, and that there are no alternative methods available which could accomplish the same strong purposes in a less exclusionary manner.[148]

The Supreme Court, in its first validation of zoning, recognized the possibility of future cases "where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[149] The day has come when municipalities which act discreetly to exclude

144. *See* note 6 *supra.*

145. Beck v. Town of Raymond, 118 N.H. at 801, 394 A.2d at 852.

146. *See* note 7 *supra. See also* Bosselman, *supra* note 3, at 3 (discussing state approaches in Florida, Hawaii and Minnesota); Heeter, *Almost Getting it Together in Vermont,* in ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 335 (D. Mandelker ed. 1976).

147. *See* Ellickson, *supra* note 6. "Legislatures seldom explicitly authorize municipalities to pursue . . . parochial land use policies . . . . Most enabling acts that bestow planning and taxing authority are vague and open-ended. Where this is so, the propriety of active judicial scrutiny to prevent discrimination against outsiders is unquestionable." *Id.* at 473.

148. *Id.*

149. Village of Euclid v. Ambler Realty Co., 272 U.S. at 390.

should no longer be allowed to hide behind the presumption of validity. Altered judicial approaches are appropriate in light of changing conditions.

> [W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[150]

150. *Id.* at 387.