The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues

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INTRODUCTION

The *Mount Laurel* doctrine, a legal principle set forth in a series of New Jersey Supreme Court ("Supreme Court" or "court") rulings, is among the most significant contributions ever made to the advancement of affordable housing.[1] In these rulings, the Supreme Court implicitly declared housing to be a fundamental right[2] and imposed an affirmative obligation on municipalities to provide a "realistic opportunity"[3] for a fair share of the state's need for affordable housing.[4] In effect, the court went beyond what any state or federal court had done prior to 1975 or has done

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[1] As with many landmark legal doctrines, the *Mount Laurel* doctrine emanates from a series of cases, the most prominent of which are S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*]; S. Burlington Cnty. NAACP v. Mount Laurel Twp., 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*]; and Hills Dev. Co. v. Bernards Twp. in Somerset Cnty., 510 A.2d 621 (N.J. 1986) [hereinafter *Mount Laurel III*] (collectively "*Mount Laurel*").

[2] *See generally* John M. Payne, *Reconstructing the Constitutional Theory of* Mount Laurel II, 3 WASH. U. J.L. & POL'Y 555 (2000) (*Mount Laurel II* court effectively declares a constitutional right to shelter under the New Jersey Constitution). But the *Mount Laurel* court could not point to any *specific* provision in the state constitution to support a finding that there is a constitutional right to affordable housing. *Id.* at 564–65. In notable contrast, however, in the same year, the same justices concluded a specific provision within the New Jersey Constitution supported a finding of a constitutionally protected right to a "thorough and efficient" education. *See* Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975).

[3] *Mount Laurel I,* 336 A.2d at 724–25. By use of the phrase "realistic opportunity," the court did not impose on municipalities an obligation to provide a fair share of housing, but to create the opportunity to do so. Payne's article emphasizes that the effect of these words is to make the doctrine less strict or harsh, and other scholars have written on the subject as well. The language is also supported by its repeated use in *Mount Laurel II. See, e.g.*, *Mount Laurel II,* 456 A.2d at 442 ("Once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the *Mount Laurel* doctrine requires it to do no more.").

[4] *Mount Laurel I*, 336 A.2d at 724–25. However, the Court makes it clear that it does not intend to prescribe remedies to effectuate its bold ruling, and that the mandate would not affirmatively require suburban municipalities to produce affordable housing. *See, e.g.*, *Mount Laurel II*, 456 A.2d at 442 ("Once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the Mount Laurel doctrine requires it to do no more.").

since. Nor has any state or federal court gone as far in recognizing poverty as a factor to be weighed in the constitutional inquiry.[5] Thus, the court's bold approach in these cases and the national importance of the issue resulted in the *Mount Laurel* doctrine receiving broad attention across the country;[6] undoubtedly, these are landmark cases.

In *Mount Laurel I*, the justices determined that Mount Laurel Township's zoning ordinance was invalid in that it unlawfully excluded low and moderate income families from the municipality.[7] The ruling was based on the justices' finding that the state's police power[8] (for example, the power to regulate land use through zoning ordinances) can only be exercised to promote public health, safety, morals, or the general welfare.[9] The justices also found that all police power enactments, whether at the state or local level, must conform to the basic state constitutional requirements of substantive due process and equal protection.[10] Accordingly, the *Mount Laurel I* court determined that because the state controls the use of all public land, neither the state nor Mount Laurel Township through delegated authority from the state, can enact land use laws that breach these principles.[11] Furthermore, the court determined that the provision of adequate housing for low and moderate income citizens is an "absolute essential in promotion of the general welfare required in all local land use regulation."[12]

Thereafter, having invalidated Mount Laurel Township's exclusionary zoning ordinance, the court went on to make the *Mount Laurel* doctrine applicable to all of the state's municipalities.[13] As the court later stated in *Mount Laurel II*:

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[5] Recognition of poverty as a relevant consideration in the inquiry regarding *Mount Laurel* compliance does not necessarily raise poverty to a protected class, but only to a relevant consideration in determining whether the realistic opportunity test has been met.

[6] *See The Mount Laurel Doctrine*, N.Y. TIMES, Jan. 28, 2013, http://www.nytimes.com/2013/01/29/opinion/the-mount-laurel-doctrine.html?_r=0 (The *Mount Laurel* ruling "greatly influenced fair-housing policy across the nation . . . .").

[7] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 731 (N.J. 1975).

[8] *See generally* Mount Laurel I, 336 A. 2d 713 (N.J. 1975). The police power as used herein does not refer to law enforcement, but to the fundamental power vested in states to govern, including making and enforcing laws. Controlled by state constitutions and other limitations, such as due process, this power must be exercised for the protection and preservation of public health, justice, morals, order, safety, and the general welfare of the state's inhabitants. Police power can be delegated to local units of government.

[9] *Mount Laurel I*, 336 A.2d at 725.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 727.

[13] *See, e.g.*, *id.* at 728 ("It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.").

> When the exercise of [the zoning power] by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare—in this case the housing needs—of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality.[14]

The boldness of the *Mount Laurel* doctrine quickly produced two notable reactions: (1) attempts to ascribe a myriad of interpretations to the Court's intentions[15] and (2) stiff resistance, including opposition from the elected branches of government.[16] The court's intention has been characterized, for example, as pro-affordable housing, pro-sound planning, pro-environmental protection, pro-smart growth,[17] pro-housing diversity, and pro-racial integration, among others.[18] However, a less-discussed purpose of the case is the court's intention to limit, or at least restrain, the power of local governments in the area of the regulation of private property, undoubtedly the most accurate among the theories advanced.[19] Furthermore, even less discussed are actions of the elected branches of government that contributed to the ability of local governments to avoid timely compliance with the *Mount Laurel* mandates.[20]

This article theorizes that the nearly universal, but erroneous, view of New Jersey as a home rule state contributes significantly to both a mischaracterization of the principal intention of the *Mount Laurel* court and the extent and effectiveness of political resistance to implementation of the *Mount Laurel* mandate. In light of the myriad of strategies and tactics employed by the executive and legislative branches to enable local

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[14] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 456 A.2d 390, 415 (N.J. 1983).

[15] David N. Kinsey, *Smart Growth, Housing Needs, and the Future of the* Mount Laurel *Doctrine*, *in* MOUNT LAUREL II AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING 45–46 (Timothy N. Castano & Dale Sattin eds., 2008); Brief for New Jersey State Conference of the NAACP and Latino Action Network as proposed Amici Curiae Supporting Plaintiffs at 17, *In re* Adoption of N.J.A.C. 5:96 and 5:97, 6 A.3d 445 (N.J. Super. Ct. App. Div. 2010), *cert. granted*, 15 A.3d 325 (N.J. 2011) (No. 67,126) [hereinafter NAACP Brief].

[16] *See infra* Part III.A–D.

[17] Kinsey, *supra* note 15, at 45–46.

[18] NAACP Brief, *supra* note 15, at 7.

[19] For a detailed analysis of why the fundamental purpose of *Mount Laurel* was to limit the power of local governments to make exclusionary zoning decisions. *See generally* Daniel Meyler, Note, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 219 (2010). *See also* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 725 (N.J. 1975) ("Land use regulation is encompassed within the state's police power. Our constitutions have expressly so provided since an amendment in 1927. That amendment, now Art. IV, sec. VI, par. 2 of the 1947 Constitution, authorized legislative delegation of the power to municipalities (other than counties), but reserved the legislative right to repeal or alter the delegation . . . .").

[20] *See infra* Part III.A–D.

governments to defer, minimize, or even avoid compliance, the paper questions whether the *Mount Laurel* court gave customary and presumptively appropriate deference to the elected branches of government to provide a mechanism for the doctrine's implementation.

The level of independent discretion available to local units of government in the exercise of police powers, delegated by the state through legislation, defines the level of home rule existing in the state. In New Jersey, for example, the constitutional power to zone is delegated to local units of government through legislation known as the Municipal Land Use Law.[21] Exclusionary zoning of the type invalidated by the *Mount Laurel* court is reflected in local governments' misapplication of the Municipal Land Use Law for purposes that advance a parochial interest of the particular municipality.[22] This article contends that the political branches of government, when called upon to provide a mechanism to implement the *Mount Laurel* mandates, extended a level of discretion to local governments that is not at all consistent with the reality of home rule in the state. Furthermore, this inappropriate enabling of a misapplication of the law was significantly emboldened by a broad-based misconception about the level of home rule actually existing in the state.[23]

Part I of this paper defines home rule and describes the range of home rule adopted among the fifty states. The section then goes on to explore principles supporting home rule generally and responses commonly offered by home rule opponents, including those in New Jersey who see adoption of a liberal home rule position as antithetical to the *Mount Laurel* mandates. Finally, this section of the paper explores the emergence and seeks to debunk the home rule myth in New Jersey.

Part II of this paper provides a more detailed overview of the *Mount Laurel* cases, as well as an insider's view of how the *Mount Laurel* story has evolved to date and why its bold promise remains largely unfulfilled. This section describes the shifting of enforcement of the *Mount Laurel* rulings from the judiciary to the elected branches of government, and goes on to address the question of whether and why the court, which had courageously remained engaged in the issue of a "thorough and efficient education," retreated so quickly and completely from an issue that the court itself described as "broad and far-reaching, extending much beyond these particular plaintiffs and the boundaries of this particular

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[21] Municipal Land Use Law, N.J. STAT. ANN. §§ 40:55D-1, 40:55D-2 (2008).

[22] The *Mount Laurel I* court emphasized the tax ratable chase, sound planning and environmental considerations among such parochial interests. *Mount Laurel I*, 336 A.2d at 730–31.

[23] However, this paper does not attempt to determine whether the actions by elected officials conferring an inappropriate level of discretion and power to local governments in the area of zoning is a deliberate ploy to gain political advantage, or a reflection of the officials' own misunderstanding of the level of home rule in the state.

municipality."[24]

Part III of the paper describes the ways that the elected branches have attempted to blunt the impact of the Mount Laurel rulings—enabled, in my view, by the home rule myth.

I. HOME RULE

A. Defining "Home Rule"

"Home rule" can best be defined as "the powers of a municipality to shape its charter and to exercise local self government, subject to constitutional [provisions] and [constitutionally permitted] statutory laws."[25] Broadly speaking, home rule describes the relationship between state and local government in terms of the extent to which government power vested in the state has been delegated to local governments.[26] This definition of home rule underscores the fact that municipalities are merely creatures of the state.

It would follow then that the extent and nature of home rule can reflect as many as fifty variations in the United States. These variations on state-local relationships fall somewhere between two extremes established through nineteenth century jurisprudence.[27] At one end is "Dillon's Rule," derived from an 1868 Iowa Supreme Court opinion authored by Justice John F. Dillon.[28] According to the Dillon opinion, "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control."[29]

The opposite extreme is the "Cooley Doctrine," derived from an 1871 Michigan Supreme Court opinion authored by Justice Thomas M. Cooley.[30] Cooley's opinion describes the right to local self-government as an absolute right which cannot be abridged by state authority.[31] Cooley posits that local governments existed before state governments and therefore are parallel to the state and should continue for all time.[32]

Variations among the fifty states have occurred over the years through

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[24] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 716 (N.J. 1975).

[25] DR. ERNEST REOCK & RAYMOND BODNAR, CNTY. & MUN. GOV'T STUDY COMM'N, FORMS OF MUNICIPAL GOVERNMENT IN NEW JERSEY 2 (1979).

[26] *See id.*

[27] *See id.*

[28] *Id.* at 3.

[29] City of Clinton v. Cedar Rapids & Mo. R.R. Co, 24 Iowa 445, 475 (1868).

[30] REOCK & BODNAR, *supra* note 25, at 3 (citing People ex rel. Le Roy v. Hurlbut, 9 Am. Rep. 103 (Mich. 1871)).

[31] People *ex rel.* Le Roy v. Hurlbut, 9 Am. Rep. 103, 108 (1871).

[32] *Id.* at 108–09.

home rule "movements." Results of these movements fall generally into one of the following classifications, each of which represents a blending of the Dillon and Cooley extremes[33]:

i. State Supremacy presumes full acceptance of Dillon's Rule, pursuant to which municipalities have only those powers expressly granted or mandated by the state together with those powers necessarily implied by the powers granted.[34]

ii. Modified State Supremacy, which has also been called "negative home rule," generally accepts the validity of Dillon's Rule, but places constitutionally protected limitations on the exercise of state supremacy–e.g., a requirement that courts provide "liberal" interpretations of local government powers.[35]

iii. Under a Legislative Grant of Home Rule, local powers are conferred by the legislature by statute.[36]

iv. Constitutional Home Rule is an approach similar to a legislative grant of home rule, except that the grant of power is conferred through language in the state constitution. Such language might either limit state legislative action relative to local governments, or provide explicitly for certain powers and functions to be exercised by local governments—or both. Two variations of this approach can be described: non-self-executing home rule and self-executing home rule. Under the former variation, legislative action is required which can either be optional or mandates; whereas under the latter variation, no

[33] The following categories are set forth and described in greater detail in REOCK & BODNAR, *supra* note 25, at 4–6.

[34] *Id.* at 4.

[35] *Id.*

[36] *Id.* It has been pointed out that two weaknesses inherent in this approach have curtailed its use: courts wed to "Dillon's Rule" are likely to strike down such statutes as an invalid delegation of state authority, and future legislatures are free to withdraw the delegated powers. *Id.*

legislative action is required.[37]

v. Local Home Rule as an Inherent Right presumes full acceptance of the "Cooley Doctrine" and is most often characterized by forbearance by the legislature when dealing with local government matters.[38]

These classifications remind us not only that there are numerous approaches to home rule but also that there is a large variety of purposes for which home rule might be granted.[39] However, this article will focus on the power to regulate the use of private property.

B. Support for and Opposition to Home Rule

The case for delegating some or all of the state's powers to local governments is compelling. As Alexis de Tocqueville said, "local assemblies of citizens constitute the strength of free nations . . . A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty."[40] What's more, it can reasonably be argued that "[t]he need for local democracy has . . . grown since de Tocqueville's time, as the federal and state governments have become larger and more complex[, while] access to them for ordinary citizens has become [even] more difficult."[41]

Many home rule advocates have referred to an opinion by the Supreme Court of Utah in which the justices observed:

> [T]he history of our political institutions is founded in large measure on the concept–at least in theory if not in practice–that the more local the unit of government is

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[37] *Id.* at 5–6. Additionally, the Model State Constitution provides suggested language for both a self-executing and a non-self-executing constitutional grant of home rule. *Id.* at 6 (citing NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION § 8.01(3) (1948)).

[38] REOCK & BODNAR, *supra* note 25, at 6.

[39] The relationship between state and local government can be described in terms of numerous areas of power and authority. These include, for example, the power to determine local government organization; the power to determine local government processes, such as elections, local legislation, financial administration, and personnel administration; the power to determine what local services will be performed and to perform those services; the power to regulate the use of private property; the power to regulate personal behavior; and the power to raise money through taxation and borrowing. *See id.* at 9–25. In New Jersey, the power to regulate private property has moved the furthest away from strict state supremacy. *See id.* at 19–21.

[40] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 45 (Henry Reeve trans., Arlington House 1966).

[41] Reply Brief for New Jersey Citizen Action (NJCA) et al. as Amici Curiae Supporting Defendant at 6 Fenichel v. City of Ocean City, 2009 WL 2392038 (No. A005933-06) (2008). This brief was prepared by legal staff of Appleseed Public Interest Law Center of New Jersey where the author served on the Board of Directors.

> that can deal with a political problem, the more effective and efficient the exercise of power is likely to be.[42]

Additionally, home rule advocates go on to say that "[l]ocal self-government enables the people to govern themselves at the level of government that is literally closest to home," and that "[l]ocal government provides citizens with opportunities for participation in public decision making that are simply unavailable in larger units of government."[43] Moreover, in support of an inherent right of home rule, it has been argued that localities, and their residents, should not endure hardship while waiting for the state to act, nor endure a uniform solution when uniformity is inappropriate.[44]

Indeed, "[b]y empowering communities at the grass-roots level, home rule allows the people to tailor public services and regulations to local needs and circumstances[,] and endorses the diversity of viewpoint[s] concerning what makes good public policy that has long been characteristic of American life."[45] As Gary Schwartz expressed it, "many regard the affording of diversity as one of the basic justifications for a system of multiple sub-metropolitan local governments."[46] Schwartz also said, "[i]n lawyer's language, home rule inverts the presumption or shifts the burden on the authority issue; in common language, home rule converts city authority from a question of why into a question of why not?"[47]

Local self–government also promotes policy innovation and experimentation. Similar to federalism's facilitation of state-level innovation, local autonomy permits local governments to serve as "laboratories of democracy" and "to try novel social and economic experiments without risk to the rest of the country."[48] As one Oregon court found, "municipalities tend to be the proving grounds–in terms of both need and public acceptance–for nondiscrimination policies that are later adopted at state and national levels."[49]

While de Tocqueville may have been right in asserting that the ever-increasing size of state government makes access increasingly more difficult for ordinary citizens, it is equally true that the proliferation of local governments renders many such governments too small and

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[42] State v. Hutchinson, 624 P.2d 1116, 1121 (Utah 1980).
[43] Reply Brief for New Jersey Citizen Action (NJCA) et al., *supra* note 41, at 6.
[44] *Id.* at 42.
[45] *Id.* at 6–7.
[46] Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. Rev. 671, 748 (1973).
[47] *Id.* at 678 (quotations omitted).
[48] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[49] Sims v. Besaw's Café, 997 P.2d 201, 213 n.3 (Or. Ct. App. 2000).

amateurish to be effective.[50] For instance, the Utah Supreme Court's position—that local governments will more effectively deal with community political problems[51]—can be challenged with a reference to the need for regional approaches to many such problems, and the small likelihood that local communities will shed provincialism in these regards.[52] Indeed, the element of the *Mount Laurel* court's rulings that continues to receive both academic and judicial debate is the mandate that the cost of leveling the playing field between the rich and the poor in pursuit of affordable housing must be shared by all of New Jersey's municipalities and residents on a regional basis.[53] The New Jersey County and Municipal Study Commission puts it this way:

> The proliferation of municipalities, brought on by a variety of forces over the history of New Jersey, may have a beneficial effect in keeping local government close to the individual citizen. On the other hand, it frequently makes the process of government more difficult. The flow of air and water, the pressure of development, and the needs of transportation do not stop at the boundaries of 567 municipalities which may have been established decades ago in another society. In many cases, the solution to one community's problems may lie within another municipality's boundaries.[54]

Local governments may indeed be the proving grounds for experimentation and new policies in addition to serving as laboratories of democracy. Unfortunately, the experimentation and policies they spawn often result in behavior designed to serve the local community while having a deleterious effect on the general welfare of the larger society.[55] It is this exact behavior and resultant outcomes that the *Mount Laurel* court planned to restrain, in part by rejecting zoning policies and practices

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[50] *See generally* ALAN J. KARCHER, NEW JERSEY'S MULTIPLE MUNICIPAL MADNESS (1998). Mr. Karcher's interest in exposing the myth of home rule in New Jersey derives from his conclusion that the myth has supported a proliferation of local governments in the state—566 existing as opposed to 200, which he believes would be a more appropriate number. *Id.* at 215. He describes the downsides of New Jersey's excessive number of municipalities as "inappropriate land use and redundant, expensive administration." *Id.* at 203.

[51] State v. Hutchinson, 624 P.2d 1116, 1121 (Utah 1980).

[52] *See* Charles B. Ferguson, Jr., *Hamlets: Expanding the Fair Share Doctrine Under Strict Home Rule Constitutions*, 49 EMORY L.J. 255, 258–59 (2000).

[53] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713,732 (N.J. 1975); S. Burlington Cnty. NAACP v. Mount Laurel Twp., 456 A.2d 390, 415 (N.J. 1983).

[54] ERNEST C. REOCK, JR. & RAYMOND D. BODNAR, N.J. CNTY & MUN. GOV'T STUDY COMM'N, THE CHANGING STRUCTURE OF NEW JERSEY MUNICIPAL GOVERNMENT 5 (1985).

[55] *See* Ferguson, *supra* note 52, at 256.

intended to "seek industrial retables [sic] to create a better economic balance for the community *vis-a-vis* educational and governmental costs engendered by residential development"[56] or intended to maintain the rural character of the municipality.[57] Though localities may wish to avoid hardship endured while waiting for the state to act or to avoid standardized solutions when uniformity is, in their view, inappropriate, the state's desire to remove undesirable multiplicity considered detrimental to the general public becomes paramount.[58]

A response to the scholar who suggests that home rule converts city authority from a question of "why?" to a question of "why not?" can best express the point. Why not? The New Jersey Supreme Court has ruled, as a matter of constitutional law, the process of good government and an equitable distribution of resources dictates that citizens' needs, especially a need as paramount as housing, be addressed on a regional basis.[59]

C. Emergence of the Home Rule Myth in the State of New Jersey

The status of home rule in New Jersey has been described in a number of colorful ways. It has, for example, been described as a "state of mind"[60] and "constructively a delusion,"[61] suggesting that there is a wide-spread misperception of where New Jersey is situated along the Dillon-Cooley spectrum. It has also been characterized as a "ploy" and as a "propaganda coup," suggesting that there are some who believe the misperception has been deliberately exploited for political gain.[62]

In truth, the home rule mindset in New Jersey gives rise to a belief that there is something close to an inherent right to home rule in the state, buttressed by a corollary state of mind among those who regard themselves as citizens of their communities first and of the state second.[63] This latter state of mind is shared by state legislators, many of whom are either present or past officials of local communities.[64]

In New Jersey, the legislature has delegated significant authority and

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[56] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 731 (N.J. 1975).

[57] *See id*. at 718–19.

[58] *See* REOCK & BODNAR, *supra* note 25, at 21.

[59] *See Mount Laurel Twp. I*, 336 A.2d at 727-28.

[60] REOCK & BODNAR, *supra* note 54, at 9.

[61] KARCHER, *supra* note 50, at 209. To quote Senator Farleigh Dickinson, "Home Rule is regarded as a political concept in other states, but in New Jersey it is a precept of theology." *Id.* at 75.

[62] *See id.* at 209. Furthermore, Karcher suggests that, "when anyone threatens the status quo," or the exercise of delegated powers by local units of government, "the magic words 'Home Rule' are invoked." *Id*. at 207. He also points out that the myth of home rule has been persistent in large part because "it has been the centerpiece of political debates and campaigns" and "metamorphosed from a campaign slogan in the 1870s to a magical mantra in the second half of the twentieth century." *Id*. at 208.

[63] REOCK & BODNAR, *supra* note 54, at 9.

[64] *Id*.

responsibility to local units of government; this authority includes the power to regulate private property, the power to raise money through taxation and borrowing, the power to determine local government organization, and the power to regulate public behavior.[65] On the other hand, the state continues to demonstrate that New Jersey remains on the Dillon end of the home rule spectrum by taking back the power to create new local government units; by insisting upon uniform rules in the administration of elections, municipal finance, and the enactment of local ordinances, "by mandating uniform procedures for local taxation and borrowing," and by preempting local regulation in many areas involving social welfare.[66] It is, in part, the dynamic nature of home rule in New Jersey which proves the point that it remains on the state supremacy end of the spectrum; whatever powers the state delegates to local units of government, the state can take back, restrict, or preempt.[67]

Therefore, in certain areas of state-local relationships, including the power to regulate private property, at best New Jersey may be said to have home rule in the form of modified state supremacy and legislative grant of home rule, both of which include very limited protection by the state constitution. Tracing constitutional history in the state of New Jersey is relatively easy since the state has adopted just three constitutions over the past three hundred years – in 1776, 1844, and 1947. By adding a reference to constitutional amendments adopted in 1875 and 1927, a full review of the state's constitutional treatment of the subject of state-local relationships can be achieved.

New Jersey's 1776 Constitution, contains two particular elements with implications for state-local relationships. First, Article 23 includes a caveat that would render the new constitution null and void "if Reconciliation between Great Britain and these Colonies should take place, and the latter be again taken under the Protection and Government of the Crown of Great Britain."[68] Second, the 1776 Constitution reflects a political philosophy of legislative supremacy that has been described as one of the most extreme examples of "legislative omnipotence."[69] On the other hand, the 1776 Constitution places a premium on popular participation in government that was generations ahead of other state constitutions or the U.S. Constitution with, for example, its support of "a statutory grant of voting rights to African Americans and women."[70] This

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[65] REOCK & BODNAR, *supra* note 25, at 9–25.
[66] REOCK & BODNAR, *supra* note 54, at 8–9.
[67] *Id.*
[68] ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 8 (2d ed. 2012)(quoting NEW JERSEY IN THE AMERICAN REVOLUTION 1763-83: A DOCUMENTARY HISTORY 216 (Larry R. Gerlach, ed. 1975) (referencing N.J. CONST. OF 1776, art. 23)).
[69] *Id.* (quotations omitted).
[70] *Id.* at 9.

combination of legislative omnipotence and expanded participation in government provided a foundation for the emergence of political parties and New Jersey's home rule debate.[71] Accordingly, it may be extrapolated that the emergence of political parties, campaigns, and debates would also give rise to more provincial political thinking and attempts to garner power and discretion in areas of interest to particular constituencies.

With its lack of a separate bill of rights, and an inadequate recognition of the principles of checks and balances and separation of powers, the short-lived 1776 Constitution was replaced by the Constitution of 1844.[72] This new constitution added a separate bill of rights, and the term of office of the legislative council (renamed the Senate) was extended from one to three years.[73] "The governor became an elected officer . . . with veto power and a three-year term" and the power to appoint judges. A mechanism for future constitutional amendments was also established.[74] These changes reflected a general dissatisfaction with the performance of the legislative branch [75] and provided additional impetus for a focus on local politics and local government units.[76]

One outcome of the dissatisfaction with the performance of the legislative branch was the early exercise of the newly created mechanism for constitutional amendments. The so-called general-law amendment of 1875 ended the legislature's practice of enacting laws applicable to individual municipalities.[77] The principle that laws be of general application was interpreted by local politicians as a constitutional prohibition imposed on the state legislature against intruding in local affairs and, therefore, was also wrongly interpreted as an endorsement of home rule.[78]

Later, a 1927 constitutional amendment authorized the state legislature to enact laws allowing municipalities to adopt zoning ordinances "regulating buildings and other structures according to their construction and use."[79] Emboldened and enabled by a U.S. Supreme Court ruling that municipal zoning did not violate the U.S. Constitution, the constitutional

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[71] *See* ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 3 (1990).

[72] *See id.* at 6.

[73] WILLIAMS, *supra* note 68, at 15–16.

[74] *Id.* at 16.

[75] *Id.*

[76] KARCHER, *supra* note 50, at 208.

[77] *See* WILLIAMS, *supra* note 71, at 10 ("The [1873 constitutional] commission followed Governor Parker's recommendation and proposed a long series of specific limits on private, local, and special laws, which were adopted after being approved by the legislature.") (referencing N.J. CONST. OF 1844, art IV, § VII, para. 11). The "general law amendment" was one of twenty eight constitutional changes proposed by the legislature and approved by the voters in 1875. *See id.*

[78] *See id.*, at 208.

[79] REOCK & BODNAR, *supra* note 25, at 20 (referencing N.J. CONST. OF 1844, art. IV, § VI, para. 5 (amended 1927)).

commission proposed the 1927 amendment authorizing localities to adopt zoning ordinances.[80] In the case of *Roselle v. Wright*, the New Jersey Supreme Court held that the zoning power derived from the police power that was always and only possessed by the state legislature,[81] a position reaffirmed by the *Mount Laurel* court in describing a basis for the state's power to regulate and control exercise of the zoning power by local units of government.[82]

Three more amendments to the state constitution adopted in 1947 added traction to the myth of home rule in New Jersey.[83] Pursuant to one amendment, the state legislature was authorized to provide for the exercise of eminent domain.[84] Under another amendment the legislature was authorized to provide for the clearance and redevelopment of blighted areas.[85] A third amendment urged state courts to provide for a liberal construction of the powers of counties and municipalities.[86] However, with respect to the first two of these amendments, they can at best extend home rule in New Jersey to the classification of non-self executing constitutional home rule. With respect to a liberal construction of local powers by the state's courts, courts have not permitted this "urging" to diminish the long-standing principle that New Jersey lies on the state supremacy end of the home rule spectrum. In the area of delegation of power to regulate private property, including the power to zone, cases involving the exercise of delegated power under the Municipal Land Use Law have consistently restrained the exercise of that power. This is consistent with the *Mount Laurel* mandate that any such exercise of governmental power must advance the general welfare as if the power were being exercised by the state itself.[87]

For instance, in a case involving a developer's challenge to a local zoning ordinance, the New Jersey Supreme Court in 2003 ruled that "[m]unicipalities do not possess the inherent right to zone," that "[z]oning is a police power that is vested in the legislative branch of [state] government" and that the legislative branch alone "is authorized to delegate to municipalities the power to adopt zoning ordinances."[88]

In a 2005 Appellate Division case, a landowner challenged a borough's ordinance requiring the landowner to pay the cost of a public advocate as

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[80] WILLIAMS, *supra* note 71, at 12 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

[81] Roselle v. Wright, 122 A.2d 506, 510 (N.J. 1956).

[82] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713,725 (N.J. 1975).

[83] REOCK & BODNAR, *supra* note 54, at 8 (referencing N.J. CONST. OF 1947, art. IV, § VI, para. 3).

[84] *Id.*

[85] *Id.* (referencing N.J. CONST. OF 1947, art. VIII, § IIII, para. 1).

[86] *Id.* at 26, 28 (referencing N.J. CONST. OF 1947, art. IV, § VII, para. 11).

[87] *See Mount Laurel I*, 336 A.2d at 725.

[88] Rumson Estates, Inc. v. Mayor & Council of Borough of Fair Haven, 828 A.2d 317, 323 (N.J. 2003).

part of a variance request.[89] The court ruled that "[t]he power to zone is an exercise of the police power" and that "[a] municipality possesses and can exercise zoning authority only to the extent the Legislature has delegated it."[90]

A year later, a developer challenged local zoning ordinance amendments that required applicants to give notice of the hearing on the application which exceeded the notice specified by state statute.[91] The Appellate Division of the Superior Court ruled that the scope of the municipality's authority is essentially a question of statutory construction and that the goal of statutory construction is to determine the intent of the legislature.[92]

Finally, in a 2008 case, a builders association challenged local code amendments which conditioned development approvals on a developer's setting aside land to be used for common open space or recreation areas and facilities, or, in lieu of the set-aside, payment of an assessment.[93] The Superior Court, Appellate Division relied on the established principle that "[a] municipality does not have the inherent right to zone."[94] In line with the *Mount Laurel* rulings, the court went on to say, "[a] local government's authority to plan and zone and, in so doing, to impose conditions on a developer, is a delegation of police power" and "[m]unicipalities . . . have only that power to zone that the Legislature has delegated to them."[95] Furthermore, in response to the 1947 constitutional amendment urging liberal construction and presumptive validity of local laws, the court said, "[n]otwithstanding the liberal construction afforded to municipal action, in the enactment of zoning laws a local government may only advance an authorized purpose in a manner permitted by the legislature."[96]

These court rulings establish state supremacy over local units of government in the exercise of the power to regulate private property and applies in all instances: where there is clear preemption over the subject matter by the state, where there has been a prior delegation of power which the state deems appropriate to withdraw, and where the state has previously been silent on the subject but now wishes to be heard. The home rule movement in New Jersey has only produced "a certain amount of deference given to traditional methods of municipal governance."[97]

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[89] Cerebral Palsy Ctr., Bergen Cnty., Inc. v. Mayor & Council of the Borough of Fair Lawn, 864 A.2d 1184, 1184 (N.J. Super. 2005).

[90] *Id*. at 1188.

[91] N. Y. SMSA Ltd. P'ship v. Twp. Council of Twp. of Edison, 889 A.2d 1129, 1129 (N.J. Super. 2006).

[92] *Id.* at 1132.

[93] N. J. Shore Builders Ass'n v. Twp. of Jackson, 949 A.2d 312, 312 (N.J. Super. 2008).

[94] *Id.* at 316.

[95] *Id*. (quotations omitted)(alteration in original).

[96] *Id.* at 317 (quotations omitted).

[97] KARCHER, *supra* note 50, at 207.

However, what if the legislature itself fails to advance a constitutional mandate—for example, one intended to limit, or restrain, the exercise of local power and discretion? In a 2007 case, the New Jersey Supreme Court provided an answer to this question. In *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, the court held that the local planning board exceeded its delegated authority under the Municipal Land Use Law when it designated an undeveloped parcel of land as in need of redevelopment merely because the board found that the land was stagnant and not fully productive.[98] The ruling establishes the principle that the judiciary can impose enforceable limits on the legislative power to authorize condemnation for the purpose of redevelopment. The *Gallenthin* case curbs overly liberal grants of power to local units of government and is reminiscent of the *Mount Laurel* court's intention to restrain the level of discretion accorded local governments in exercising the power to zone.[99]

If the *Gallenthin* decision had been in place in 1917, the state legislature might not have adopted legislation described by one scholar as the "high-water mark of hypocrisy."[100] The Home Rule Act of 1917, intended merely to consolidate thousands of statutes dealing with municipalities, provided, because of its mislabeling, one of the most effective bases for a claim that New Jersey is a home rule state.[101]

II. MOUNT LAUREL: AN OVERVIEW

A. The Story Behind the Lawsuit[102]

The case of *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township* began in a New Jersey trial court in 1971.[103] It was inspired by

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[98] Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447, 447 (N.J. 2007).

[99] *Gallenthin* follows the landmark Supreme Court decision in Kelo v. City of New London, 545 U.S. 469 (2005). In *Kelo*, the Court held as a matter of federal constitutional doctrine that appropriating property for transfer to a private entity in order to encourage economic development or enhance tax revenues constituted a permissible "public use" under the Takings Clause of the Fifth Amendment. For a thorough analysis of the *Gallenthin* case, *see generally* Ronald K. Chen, Gallenthin v. Kaur: *A Comparative Analysis of How the New Jersey and New York Courts Approach Judicial Review of the Exercise of Eminent Domain for Redevelopment*, 38 FORDHAM URB. L.J. 987 (2011). Professor Chen points out that the U.S. Supreme Court left room for states to place further restrictions on the exercise of the takings power and that the New Jersey Supreme Court determined that the state legislature authorized objectionable uses of eminent domain for the purposes of redevelopment by too liberally defining "Blight." *Id.* at 987–88.

[100] KARCHER, *supra* note 50, at 209.

[101] *Id.*

[102] The author has drawn largely from his own personal knowledge and experience in the development of the following account.

[103] *See* S. Burlington Cnty. NAACP v. Mount Laurel, 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972) *modified sub nom.* S. Burlington County NAACP v. Mount Laurel Twp., 336 A.2d 713 (N.J. 1975); Ethel A. Lawrence-Halley, *Biography of Ethel Robinson Lawrence*, THE RICHARD C. GOODWIN LECTURE IN HONOR OF ETHEL LAWRENCE (March 16, 1926–July 19, 1994), http://goodwinlecture.rutgers.edu/lawrence.htm (last visited Mar. 27, 2013).

Ethel Lawrence, an African American woman whose family had lived in rural Mount Laurel Township for over six generations. In 1955, Mrs. Lawrence and her husband Thomas Lawrence purchased a home in the Township where they raised nine children.[104] It was the Lawrences' dream that their children and grandchildren would also have the opportunity to live and raise families in Mount Laurel.[105] This, however, was not to be.[106]

Soon after Mr. and Mrs. Lawrence purchased their home, many rural areas in New Jersey, including Mount Laurel Township, began to take on the character of self-contained communities existing on the outskirts of cities.[107] This change was aided and abetted by zoning policies that sought to limit "undesirable" forms of development, "undesirable" residents, and the costs of both.[108] Restrictive zoning became the primary weapon.[109] Illustratively, there were bans on mobile homes and apartment complexes, a requirement that homes only be built on large lots, minimum building size requirements, and restrictions on the number of bedrooms to be included in a new home (intended to limit the number of school-age children moving into the municipality).[110] These and other restrictive devices had the effect of driving up housing costs and effectively excluding people of limited financial means from purchasing new homes or finding affordable rental units.[111] Ethel Lawrence's daughter was only able to remain in Mount Laurel Township by living in a converted chicken coop.[112]

Angered and frustrated by her community's changing character and the inability of her family, friends, and neighbors to move or even remain in Mount Laurel, Mrs. Lawrence organized the Springville Community Action Committee.[113] This multi-racial non-profit organization sought to develop low and moderate income housing in Mount Laurel Township.[114] To do so, it followed normal development procedures for a non-profit organization.[115] It secured seed money from the New Jersey Department of Community Affairs, commissioned a design plan for a thirty-six unit multi-family housing complex and submitted the development plan to the

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[104] Lawrence-Halley, *supra* note 103.

[105] *Id.*

[106] *Id*.

[107] *See generally* DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA 50–54 (1995).

[108] *See id.* at 47–50.

[109] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 729 (N.J. 1975).

[110] Lawrence-Halley, *supra* note 103.

[111] *Id.*

[112] *See A Dream Comes True*, HOME FRONT (N.J. Hous. & Mortgage Finance Agency, Trenton, NJ), Spring 2001 (on file with the author).

[113] *See generally* KIRP, *supra* note 107, at 45; Lawrence-Halley, *supra* note 103.

[114] Lawrence-Halley, *supra* note 103.

[115] *Id*.

municipal zoning board for approval.[116] The proposed project required zoning approval because it involved a zoning variance from the township's restrictive zoning ordinance to permit construction of the multi-family rental complex. The zoning board's denial led to the filing of a lawsuit in 1971.[117]

Both a state and a federal commission charged with determining the root causes of racial disorders that erupted during the summer of 1967 in many American cities, including a number of cities in New Jersey, made it clear that racism were central to Mount Laurel's, New Jersey's and the nation's most troubling inequities.[118]

The trial court bypassed the issue of inequality based on race, instead focusing on inequality based on economic status and ruling that Mount Laurel Township's system of land use regulation was invalid because it unlawfully excluded low and moderate income families from the municipality.[119] Thereafter, the case proceeded through the appeals process.[120]

To satisfy due process and equal protection rights in the context of the constitutional power to zone, a municipality must exercise that power for the general welfare, not just the welfare of that municipality and its residents.[121] To reach this definition of the constitutional obligation, the court had to overcome some stiff jurisprudential challenges. For example, to find a substantive due process right, the court had to identify a fundamental right.[122] Typically, this requires a finding that the right was in, or derived from, the state or constitution. Thus, in *Mount Laurel I*, the court found a right to housing embedded in the New Jersey Constitution.[123] Since that right, as compared to the right to a certain level of education,[124] was not explicitly guaranteed by the Constitution, the court had to take an

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[116] *See id.*

[117] *Id.*

[118] The National Advisory Commission on Civil Disorders was established by Lyndon B. Johnson on July 28, 1967, to investigate the causes of the 1967 race riots in the United States and to provide recommendations for the future. Chaired by Illinois governor Otto Kerner, the eleven member commission is often referred to as the "Kerner Commission." Similarly, the Governor's Select Commission on Civil Disorder was established by Governor Richard J. Hughes on August 8, 1967, to examine the causes, incidents, and remedies for the civil disorders that occurred in New Jersey in that year. Chaired by Robert D. Lilley of New Jersey Bell,that commission is often referred to as the "Lilley Commission."

[119] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465, 472 (N.J. Super. Ct. Ch. Div. 1972) *modified sub nom.* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713 (1975).

[120] *Mount Laurel I*, 336 A.2d at 713.

[121] *Id.* at 727–28.

[122] *See generally* Payne, *supra* note 2, at 556, 564–65.

[123] *S. Burlington Cnty. NAACP*, 290 A.2d at 472.

[124] *Id.* at 472–73. A "mandate that the legislature provide for a 'thorough and efficient system of free public schools'" is one among the 28 constitutional amendments adopted in 1875. WILLIAMS, *supra* note 68, at 10.

expansive view of fundamental rights. The court went even further, determining that to the extent poverty denies New Jersey citizens access to decent and affordable housing in the state's growth areas, it can be considered in determining the constitutionality of land use regulations negatively affecting this class of people.[125]

The meaning of general welfare was no longer left to the discretion of local governments but was instead expanded to cover the state as a whole.[126] The court ruled that every municipality must, by its land use regulations, make realistically possible an appropriate variety and choice of housing. It must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need.[127]

By the time *Mount Laurel I* reached the New Jersey Supreme Court, the judicial approach to the challenge of insuring equal access to the benefits of economic progress for all citizens had become complex and multifaceted.[128] The court needed, for example, to determine the particular segment of the population to which its mandates would apply and describe the particular societal problem it intended to address.[129] Other elements of the judicial approach included an attempt to understand and address causes of the severe deterioration of urban areas where the state's poorest residents were forced to live and a mandate that the cost of making an accommodation for that population to find housing in the suburbs be shared by all of New Jersey's municipalities and residents on a regional basis.[130] This mandate became the highlight and focus of the continuing *Mount Laurel* story.

That advocates for a variety of important social issues attempted to find support in the passionate and bold language of the *Mount Laurel* cases is unsurprising. This is so, in part, because the justices' interpretation of the issues before them, and the manner in which they ultimately crafted a remedy, was not forced on them by the local facts of the case but instead grew out of the fact that they saw urban revitalization as obsolete and suburban growth as the best hope for addressing low income housing needs of the time.[131] By connecting access to affordable housing to properly-

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[125] *See* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713, 731 (N.J. 1975).

[126] *See id.* at 727–28.

[127] *Id.* at 724.

[128] *See* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 290 A.2d 465, 472 (N.J. Super Ct. Law Div. 1972).

[129] *See id.* ("While it may be an argument that it would affect property values, and while it is proper to zone in certain instances against factories, it is improper to build a wall against the poor-income people.").

[130] *Mount Laurel I*, 336 A.2d at 724–25.

[131] *See generally* Alan Mallach, *Challenging the New Geography of Exclusion: The* Mount Laurel *Doctrine and the Changing Climate of Growth and Redevelopment in New Jersey*, *in* MOUNT LAUREL

planned suburban growth, and by distributing the obligation to provide such housing on a regional basis, the court opened the floodgates to interpreting their bold action as a statement regarding, among other things, smart growth, environmental protection, regional planning, racial integration, and regional equity.[132]

In addition, by focusing on inequality of opportunity to find affordable housing in the growing suburbs on economic status, as opposed to race, the court invited lengthy debate and discussion as to whether the omission of a race-based remedy was deliberate, an oversight, or perhaps a miscalculation of the character of the state's urban population at the time.[133]

B. The Rationale of Mount Laurel I

In 1975, the New Jersey Supreme Court was advancing its groundbreaking ruling restricting the local exercise of the zoning power, while acknowledging that the matter ultimately was best left to the legislative branch.[134] Justice Hall, who authored the opinion for the majority in *Mount Laurel I*, later pointed out that in recognizing the necessity for legislative action he was not suggesting that the judiciary merely encourage proper action by the legislature based on a moral imperative.[135] This, he said would appear to be "mere wishful thinking" by the court.[136] Justice Hall then goes on to say,

> The court does not live in a vacuum and it was fully realized that the decision would not immediately and in itself produce low and moderate income housing in the outlying municipalities but was only a first step. . . . The task is a huge and vital one and cannot be accomplished by the court alone.[137]

II AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING 21, 27, 29 (Timothy N. Castano & Dale Sattin eds., 2008).

[132] *See supra* notes 17–18 and accompanying text.

[133] In another article, it was argued that the New Jersey Supreme Court may have assumed low- and moderate-income black residents would be included in the benefits of the *Mount Laurel* rulings by virtue of the court's emphasis on the de-concentration of urban poverty. Robert C. Holmes, *A Black Perspective on* Mount Laurel II*: Toward a Black Fair Share*, 14 SETON HALL L. REV. 944, 945 (1984). That article suggested that the justices may have miscalculated the composition of New Jersey's urban communities ("urban aid municipalities") in 1975 by assuming, in error, that low and moderate-income populations of the state's urban aid municipalities were predominantly black. *Id.* at 949.

[134] *Mount Laurel I*, 336 A.2d at 724–25.

[135] Frederick W. Hall, N.J, State League of Muns. & N.J. Inst. of Mun. Attorneys, A Review of the Mount Laurel Decision 11–12 (Nov. 19, 1975).

[136] *Id.* at 11.

[137] *Id.* at 11–12.

Justice Hall's anticipatory transfer of the obligation to implement the court's broad and undefined mandate to the legislature was complemented by the court's decision to not prescribe specific remedies for inappropriate use of land use regulation at the local level.[138] This general observation may be tempered only slightly by the fact that the court did "encourage the state legislature to assist in countering local abuses of the zoning power by authorizing regional zoning."[139] In this regard, Justice Hall said, "I was trying to promote the desirability of regional zoning, which . . . is not forbidden by our constitution, but requires legislation."[140]

The idea of a regional approach to land use can be interpreted in two ways: first, as a mandate for a managed approach to growth and planning, taking into considerations the protection of environmentally sensitive areas and the revitalization of deteriorating cities,[141] and second, as a cost-sharing mechanism, taking into account the added burden low-and moderate-income housing imposes on a municipal tax base and on municipals services.[142]

As to the issue of race, Justice Hall declared: "[W]e accept the representation of the municipality's counsel at oral argument that the regulatory scheme was not adopted with any desire or intent to exclude prospective residents on the obviously illegal basis of race, origin or believed social incompatibility;"[143] in this regard, the court expressed a strong view about Mount Laurel's and other municipalities' motivation for adopting exclusionary zoning practice.[144] Instead, the court declared emphatically:

> There cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on Property [sic] . . . and that the policy was carried out without regard for non-fiscal considerations with respect to People [sic], either within or without its boundaries.[145]

The court referred to this basis for exclusionary zoning as "fiscal zoning."[146] Also, the *Mount Laurel I* court noted that some municipalities

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[138] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713,734 (N.J. 1975).

[139] Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 32 (1988).

[140] Frederick W. Hall, *An Orientation to Mount Laurel*, *in* AFTER MOUNT LAUREL: THE NEW SUBURBAN ZONING 3, 11 (Jerome G. Rose & Robert E. Rothman, eds., 1977).

[141] Kinsey, *supra* note 15, at 45 (Mount Laurel doctrine reflects "smart growth" policy).

[142] *See* Ferguson, *supra* note 52, at 262.

[143] *Mount Laurel I*, 336 A.2d at 717.

[144] *Id.*

[145] *Id.* at 723.

[146] *Id.* at 742.

used restrictive zoning devices to preserve a rural and ecologically pleasing living environment through environmental zoning.[147]

Elected branches of government were emboldened to remain aligned with local anti-*Mount Laurel* sentiments by encouraging municipalities to resist compliance with the new *Mount Laurel* law; this anti-*Mount Laurel* sentiment was supported by the lack of a court-designed prescription for implementation of its bold new mandate and a readily available opportunity to interpret the mandate as requiring considerations related to social issues as varied as sound planning, smart growth, housing diversity, racial integration, and environmental protection among others.[148]

A. Mount Laurel II

Municipal non-compliance with *Mount Laurel I* mandates resulted in the consolidation of six cases before the New Jersey Supreme Court in 1983.[149] Chief Justice Robert Wilentz began the majority opinion in that case with the following words:

> [W]e believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case. . . . To the best of our ability we shall not allow it continue. This Court is more firmly committed to the original *Mount Laurel* doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work.[150]

The mounting number of unresolved cases challenging municipal non-compliance with the *Mount Laurel* doctrine demonstrated to Chief Justice Wilentz the need to clarify the court's intention, "the need to put some steel into that doctrine."[151]

The principal element of "steel" provided by the *Mount Laurel II* court was a stern reaffirmation of the basic tenets of the *Mount Laurel* doctrine: that municipal land use regulations that conflict with general welfare are an unconstitutional abuse of the police power, that the provision of adequate housing for all citizens is essential to the general welfare, and that the cost of providing adequate housing for all must be shared on a regional basis.[152] The *Mount Laurel II* court also replaced the "developing municipality" standard for being subject to the *Mount Laurel* mandate with a "growth

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[147] *Id.* at 731.
[148] *See infra* Part III.A–D.
[149] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 456 A.2d 390, 391 (N.J. 1983).
[150] *Id.* at 410.
[151] *Id.*
[152] *Id.* at 413.

area" designation as determined by reference to the State Development Guide Plan or by facts and circumstances surrounding the particular case.[153]

Significantly, unlike the *Mount Laurel I* court, the *Mount Laurel II* court established a series of policy prescriptions and remedial measures. The *Mount Laurel II* court, for example, made it clear that to comply with the mandate, municipalities might be required to go beyond simply removing obstacles to inexpensive housing.[154] They might be required to take "affirmative steps to encourage the construction of low-and moderate-income housing, such as offering density bonuses to developers and requiring mandatory set-asides of a portion of the new units for lower-income households."[155]

The *Mount Laurel II* court retained some level of judicial oversight over *Mount Laurel* enforcement in two basic ways. The court encouraged litigation by endorsing the controversial "builders remedy" and ruled that future exclusionary zoning-related litigation would be handled by three specially assigned judges.[156] The builders remedy provided a presumptive right to a building permit to successful developer-plaintiffs whose proposed development could meet a three prong test: "(1) it provided lower-income housing; (2) it was consistent with sound planning criteria; and (3) the municipality had failed to meet its Mount Laurel obligations."[157] Meanwhile, the three designated judges had the daunting task of determining a methodology for calculating the specific numerical sum of each municipality's fair share obligation while remaining accountable to the court's directive that local facts and circumstances, including sound planning and environmental sensitivities, must be taken into account.[158]

Moreover, the *Mount Laurel II* court further refined the doctrine by limiting the protected class to households that could qualify for low- and moderate-income housing eligibility under a standard established by the United States Department of Housing and Urban Development ("HUD").[159]

D. Mount Laurel III

Even as the *Mount Laurel II* court earnestly sought to strengthen the

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[153] *Id.* at 424–25.

[154] Martha Lamar et al., *Mount Laurel at Work*: *Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1200 (1989).

[155] *Id.* at 1200–01.

[156] *Id.* at 1201.

[157] *Id.*

[158] *Id.* at 1201–02.

[159] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 456 A.2d 421, 421 n. 8. (N.J. 1983).

doctrine, it still preferred legislative over judicial action in the area of regulating the exercise of the zoning power.[160] There are a number of possible bases for this preference: a recognition of the inherent limitations of judicial intervention, an opinion regarding social remedies as being part of traditional executive or legislative models, a concern about being labeled an activist court, or a calculation of what was necessary to achieve the level of political consensus required to avoid civil disobedience that has blunted implementation of bold federal and state rulings in the past.[161] Still, the New Jersey Supreme Court in *Mount Laurel* was willing to step into the gray area surrounding the appropriate balance of power among the three branches of government in order to advance a social policy that the court deemed important enough to justify any risk associated with its bold action.

Moreover, while constitutional interpretation is surely not always political, the judicial branch of government is not completely insulated from prevailing political and social realities, some of its decisions undoubtedly are influenced by the justices' values and life experiences. In that sense, courts render decisions that are "political." At what point and to what extent the judiciary should retreat from this political encroachment can be debated on a case-by-case basis.

It seems that the political response to implementing *Mount Laurel's* mandates and goals goes far beyond normal and acceptable political compromise, representing instead a deliberate attempt to blunt the intent and promise of the ruling. This reality provides more than an adequate justification for the court to have remained more deeply engaged in *Mount Laurel*'s implementation.[162] As the court says:

> [W]hile we have always preferred legislative action to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is

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[160] *See id.* at 490.

[161] A case likely in the minds of the *Mount Laurel* court is Brown v. Bd. of Education, 347 U.S. 483 (1954). The court also likely considered familiar adages associated with social change: that rules are not self-executing and that a rule change is no good without a political base to support it.

[162] Commentators, like Professor Franzese, describe the *Mount Laurel* court's retreat as being "both appropriate and predictable." Franzese, *supra* note 139, at 49. Such commentators contend that 1) the court's attempt to implement the constitutional obligation was never intended to usurp the responsibilities of the political branches; and 2) creation of legislation purporting to implement the new law represented a presumptively meaningful response from the political branches that deserved deference from the court. *See generally id.* The first point is correct, but the second is not. The political response to implementing the mandates and goals of *Mount Laurel* is outside of the realm of a normal, and acceptable, attempt to create political consensus and represents instead a deliberate attempt to blunt the intent and promise of the ruling. This reality provides more than an adequate justification for the court to have remained more deeply engaged in *Mount Laurel*'s implementation.

> our duty. We may not build houses, but we do enforce the Constitution.[163]

It seems eminently reasonable to believe that the court intended to require that the elected branches of government act in a manner that would likely produce the constitutionally mandated results.

Far from creating political consensus, the court, with respect to its attempt to bring about social change, instead created a division within the state between "impassioned dissent as well as vigorous praise."[164] This dissention created an impetus for the executive and legislative branches to act. The first significant action was enactment of the Fair Housing Act adopted by the legislature and signed by the governor on July 3, 1985.[165] Among its provisions, the Fair Housing Act called for transfer of responsibility for *Mount Laurel* compliance from the judiciary to an administrative agency.[166] On February 20, 1986, the New Jersey Supreme Court, in *Mount Laurel III* upheld the constitutionality of the Fair Housing Act and ordered any pending *Mount Laurel* case to be transferred to the administrative agency if either party petitioned to do so.[167] Transition of enforcement of restraints on local abuses of the zoning power from the judiciary to the elected branches of government was complete.

Thus the level of progress toward full compliance with the *Mount Laurel* mandate and the level of fulfillment of its lofty goals that has occurred since 1986 leaves room for vigorous debate about whether the Supreme Court's retreat was timely or prudent. Language embedded in each of the *Mount Laurel* cases continues to provide those who would blunt the impact of the rulings with arguments that cloud the court's principal purpose and allow elected officials to provide an inappropriate level of local discretion in *Mount Laurel* compliance. These unintended outcomes of the court's early retreat are fueled by the pervasive misperception that New Jersey is a home rule state.

III. ATTEMPTS TO BLUNT THE IMPACT OF THE MOUNT LAUREL RULING

A. Early Resistance

To the extent the *Mount Laurel* court intended its ruling to open the suburbs to low-and moderate-income urban dwellers, it invited a rocky road to implementation. Part of the remedial difficulty undoubtedly

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[163] *Mount Laurel II*, 456 A.2d at 490.
[164] Franzese, *supra* note 139, at 35.
[165] N.J. STAT. ANN. §§ 52:27D–301–329 (West 2010).
[166] *Id.* at § 52:27D–305.
[167] *See generally* Hills Dev. Co. v. Bernards Twp. in Somerset Cnty., 510 A.2d 621 (N.J. 1986).

reflects the elected branches' desire to remain politically aligned with the majority view. Beyond that, ascribing a motive or purpose to the elected branches' lukewarm response to *Mount Laurel*'s implementation is a matter of conjecture. One might speculate, for example, that the state was reluctant to disrupt its semi-official policy of creating exclusive residential enclaves for corporate CEOs as part of a larger plan to attract the corporations and other facilities with which the CEOs are associated. Additionally, the elected branches may have intended to implement *Mount Laurel* just enough to minimize the likelihood that an activist court would remain directly involved in monitoring enforcement of its mandate.

Whatever might have been the basis for early resistance to full implementation of *Mount Laurel*, success in slowing the *Mount Laurel* implementation process was enabled by the pervasive misperception that power and discretion over regulation of private property could appropriately be placed with local units of government. Three initial actions by the elected branches to shift *Mount Laurel* implementation toward local discretion include: (1) a legislative proposal to amend the state constitution;[168] (2) an executive order from the governor rescinding executive orders by the previous governor directing the Division of State and Regional Planning to calculate and project New Jersey's present and prospective housing needs,[169] and (3) a gubernatorial decision to disband the Division of State and Regional Planning and relocate its function to the Office of the State Treasurer.[170]

The proposal to amend the state constitution in a manner that would remove the constitutional basis for the *Mount Laurel* mandate attracted bipartisan support and was embraced by the executive branch, but it was never adopted by the legislature or submitted to the state's voters.[171] Nonetheless, the specter of an action that would fully undermine the court's noble intent paved the way for new legislation, ostensibly intended to implement the doctrine, but it was regarded by *Mount Laurel* loyalists as a political compromise meant to delay implementation and minimize the law's impact on the State.

B. The Fair Housing Act[172]

Enactment of the Fair Housing Act (FHA) in 1975 was intended to

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[168] Joseph F. Sullivan, *Politics; Fair-Housing Amendment Faces Fight in the State Senate*, N.Y. TIMES, May 25, 1986, http://www.nytimes.com/1986/05/25/nyregion/politics-fair-housing-amendment-faces-fight-in-the-state-senate.html.

[169] Kinsey, *supra* note 15, at 46.

[170] *Id.* at 47.

[171] *Chronology*, OFFICE FOR PLANNING ADVOCACY, STATE OF NEW JERSEY DEPARTMENT OF STATE, http://nj.gov/state/planning/chronology.html (last visited Mar. 16, 2013).

[172] The following account is drawn largely from the author's own personal knowledge and involvement as a member of the task force organized to draft the Fair Housing Act.

codify the *Mount Laurel* mandate and to establish a new administrative agency charged with the duty of formulating fair-share guidelines for municipalities and certifying *Mount Laurel* compliance. State Senator Wynona Lipman[173] was the initial sponsor of the Fair Housing Act and, with a broad-based task force, its principal drafter.[174] In Senator Lipman's words, the bill would provide a "straightforward planning mechanism which municipalities could use as an alternative to judicial determinations of housing obligations."[175]

Governor Kean and Senator Lipman agreed that the provisions of the Fair Housing Act would be carried out by the Council on Affordable Housing (COAH), a new state administrative body, which would be responsible for establishing regulations under which municipalities would be required to demonstrate compliance with the court's rulings.[176]

Governor Kean conditionally vetoed Senator Lipman's version of the bill, recommending a number of changes that, if adopted by the legislature, would enable him to sign the revised bill into law.[177] However, as the revised bill gave enormous, and, in her view, inappropriate deference to local discretion and control, Senator Lipman withdrew her support and sponsorship of the legislation.[178] Those elements of the Governor's version of the Fair Housing Act most offensive to Senator Lipman include the following:

- The bill included a twelve-month moratorium on enforcement of *Mount Laurel*.[179]

- Application to COAH by the state's municipalities for certification of *Mount Laurel* compliance was voluntary.[180]

- Even after a municipality's fair share of regional need was determined, the municipality could make fair share adjustments based upon a wide variety

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[173] In 1971 Wynona Lipman (D-Essex) became the first African American woman to serve in the New Jersey Senate.

[174] Senator Wynona M. Lipman, *The "Fair" Housing Act?*, 9 SETON HALL LEGIS. J. 569, 569 (1986).

[175] *Id.*

[176] *Id.*

[177] *Id.* at 570.

[178] *Id.* at 570, 572.

[179] STATE OF N.J., STATEMENT TO SENATE COMMITTEE SUBSTITUTE FOR SENATE, NOS. 2046 AND 2334, at 1 (1985).

[180] VALERIE W. HAYNES, PRINCETON COMMUNITY HOUSING: A BRIEF HISTORY OF THE MOUNT LAUREL DOCTRINE AND THE PRINCETON REGIONAL MASTER PLAN HOUSING ELEMENT AND FAIR SHARE PLANS 1 (2012).

of considerations, including historic preservation, environmental, agricultural, open space, recreational, and infrastructure.[181]

- A downward adjustment in a municipality's fair share allocation was permitted if the municipality lacked adequate public facilities and it would be prohibitively expensive to provide them.[182]

- With no criteria to guide COAH, adjustments in a municipality fair share were permitted if the established pattern of development in a community would be drastically altered.[183]

- COAH was permitted to reduce or limit a municipality's fair share, even beyond the various downward adjustments, on the basis of any other criteria COAH might develop.[184]

Most troubling to Senator Lipman was the provision that allowed one municipality to enter into an agreement with another under which the "receiving" municipality, for a price, could assume 50% of the "sending" municipality's fair share housing allocation.[185] These agreements, known as Regional Contribution Agreements (RCAs), were to be regulated by COAH, including the price to be paid to a receiving community and were generally executed between a suburban sending municipality and an urban receiving municipality.[186]

Emboldened by broad discretionary power and a not so subtle message to provide significant deference to suburban communities, COAH adopted a negative approach to implementing *Mount Laurel* goals beyond the

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[181] Lipman, *supra* note 174, at 571. The Senator considered this criterion to be so vague as to be totally open-ended. *Id.*

[182] *Id*. The Senator believed this provision was out of line with existing legal precedents to the effect that the existence or non-existence of schools and other facilities cannot be used to deny a local development application.

[183] *Id.* With no criteria to guide COAH in this very subjective judgment, in the Senator's opinion, granting any such adjustment would contribute to the perpetuation of exclusionary zoning wherever a municipality's established pattern of development was based on exclusionary practices.

[184] The Senator believed this provision was a certain recipe for additional litigation. *Id*.

[185] CHICAGO ASSEMBLY, AFFORDABLE HOUSING AND PUBLIC POLICY: STRATEGIES FOR METROPOLITAN CHICAGO 345 (Lawrence B. Joseph ed., 1993).

[186] Rachel Fox, *The Selling Out of* Mount Laurel: *Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 FORDHAM URB. L.J. 535, 557–60 (1987).

efforts embedded in the Regional Contribution Policy.[187] A few examples among many include:

- COAH recognized and awarded credits to municipalities to offset their fair share obligations that were clearly counterproductive to the Court's intent. Credits were given, for example, for so-called alternative living arrangements that included group homes and other congregate living facilities. Under this policy, municipalities could count each bedroom of a group home as a separate unit, thereby greatly diluting the actual measure of prospective need for housing units.[188]

- COAH inappropriately gave credits for rental units, units built in a prior needs assessment cycles, and units that did not correspond to any assessment of housing need.[189]

- COAH set the sales price of units transferred pursuant to RCAs so low (initially $20,000 a unit) that the price only supported rehabilitation of substandard units and not the construction of new units. As a result, a suburban "sending" municipality would get credit for providing an affordable housing unit, reducing the statewide assessment of the need for such units, even though no additional affordable unit was actually added to the state's housing inventory.[190]

C. State Planning Act

In 1986, the legislature also adopted a State Planning Act,[191] which included the following legislative finding: "An adequate response to judicial mandates respecting housing for low- and moderate- income persons requires sound planning to prevent sprawl and to promote suitable

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[187] For an overview of key issues raised in the implementation of the Fair Housing Act, *see generally* CONNIE MYERS, THE ASSEMBLY TASK FORCE TO STUDY THE IMPACT OF THE FAIR HOUSING ACT AND STATE PLANNING ACT, FINDINGS AND RECOMMENDATIONS 13–22 (2001).

[188] *Id.* at 18.

[189] *Id.* at 17–18.

[190] An excellent discussion about COAH's tendency to "minimize and then dilute the *Mount Laurel* obligation" is contained in Kinsey, *supra* note 15, at 55–58.

[191] N.J. STAT. ANN. §§ 52:18A-196 *et seq*. (West 2010).

use of land."[192] In theory, there is a clear and positive relationship between the State Planning Act and implementation of the *Mount Laurel* doctrine.[193] However, as was the case with the Fair Housing Act, there is reason to question whether the State Planning Act was actually intended to advance the *Mount Laurel* doctrine or to provide an invitation to local governmental units to circumvent its spirit.

The State Planning Act called for the creation of a seventeen member State Planning Commission[194] and an Office of State Planning.[195] The Act also charged the Commission and the Office with the preparation and adoption of a comprehensive state development and redevelopment plan within thirty-six months of the law's adoption.[196]

In 1985, the executive branch, led by Governor Kean, sought to have greater control over the planning process that would ultimately determine whether municipalities were complying with *Mount Laurel's* constitutional obligations.[197] This was accomplished by replacing the existing planning process and development guide plan with an elaborate new planning apparatus.[198] An inevitable effect of such a major adjustment was to delay implementation of *Mount Laurel* principles.[199] It also reflected the mid-1980s shift in political alignment from urban and Democratic to suburban and Republican.[200]

During the six years between the legislature's adoption of the State Planning Act and the State Planning Commission's adoption of a final plan, the Commission administered a process referred to as "cross-acceptance."[201] This process was intended to be a bottom-up inclusionary undertaking designed to assure input from citizens as representatives of local levels of government.[202] Presumably, a development plan that sought political cross-acceptance from a local community perspective in mid-1980s New Jersey would take a long time to complete and would not likely zealously embrace the social policies embodied in the *Mount Laurel* rulings.

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[192] N.J. STAT. ANN. §§ 52:18A-196h (West 2010).

[193] *Id.* (finding that "[a]n adequate response to judicial mandates respecting housing for low-and moderate-income persons requires sound planning to prevent sprawl and to promote suitable use of land.").

[194] N.J. STAT. ANN. §§ 52:18A-197 (West 2010).

[195] N.J. STAT. ANN. §§ 52:18A-201 (West 2010).

[196] N.J. STAT. ANN §§ 52:18A-199 (West 2010).

[197] *Chronology, supra* note 171.

[198] *Id.*

[199] BARBARA SALMORE & STEPHEN SALMORE, NEW JERSEY POLITICS AND GOVERNMENT: THE SUBURBS COME OF AGE 366 (2008).

[200] *Id.* at 372–73.

[201] The author served on the inaugural State Planning Commission and therefore participated in developing the procedures and nomenclature. *See* NEW JERSEY STATE PLANNING COMMISSION, WHAT IS CROSS-ACCEPTANCE? 1 (2013), http://nj.gov/state/planning/docs/whatiscrossacceptance.pdf.

[202] *Id.* at 2.

D. Growth Share v. Fair Share Methodology

Under the provisions of the Fair Housing Act, COAH is charged with developing formulas and rationales every six years for the allocation of affordable housing obligations among the State's 566 municipalities.[203] In return for voluntary compliance, municipalities are entitled to a six year reprieve from lawsuits brought pursuant to the builder's remedy.[204] Fair-share allocations are based on complex and to some extent arbitrary formulas that take into account fiscal capacity, wealth, employment trends, and the availability of vacant land.[205] COAH issued first and second round allocation reports in 1987 and 1994 respectively.[206] Third round allocation numbers and a rationale for the same were due in 1999, but they were never issued.[207]

By 2003, with COAH four years behind on its responsibility for producing third round numbers, administration of the implementation of *Mount Laurel* began to unravel.[208] On one side, in spite of COAH's voluntary compliance procedures, builders continued to use the threat of lawsuits to pressure municipalities into unwanted zoning changes.[209] On the other side, municipalities, emboldened by the support and deference given to them by the elected branches of government, began to develop new strategies for avoiding compliance.[210] *Mount Laurel* opponents reached into the bold and expansive language of the rulings to develop a counter attack based on the specter of bad planning, environmental disaster, and sprawl.[211] The argument was advanced that the *Mount Laurel* court intended its mandate that suburbs be financially accessible to all New Jersey residents to be tempered by an equal concern for so-called "smart growth."[212] In one scholar's words "affordable housing became a convenient scapegoat for those concerned that sprawl was overtaking what was left of rural New Jersey."[213] In addition, deference to local discretion took a number of additional forms:

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[203] *Mount Laurel Doctrine*, FAIR SHARE HOUS. CTR, http://fairsharehousing.org/mount-laurel-doctrine/ (last visited Mar. 20, 2013).

[204] Alan Mallach, *The Betrayal of* Mount Laurel: *Will New Jersey Get Away with Gutting its Landmark Fair Housing Legislation?* SHELTERFORCE ONLINE (Mar./Apr. 2004), http://www.shelterforce.com/online/issues/134/mtlaurel.html.

[205] *Id.*

[206] *Mount Laurel Doctrine*, *supra* note 203.

[207] *Id.*

[208] Mallach, *supra* note 204.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] Kinsey, *supra* note 15, at 45.

[213] Mallach, *supra* note 204.

- The Fair Housing Act was amended to change the period of repose for voluntary compliance from six years to ten.[214]

- To cover the four year overdue period relative to third round rules, COAH issued interim certifications to municipalities with no requirement for additional affordable housing.[215]

- A new governor was elected who had previously been mayor of a municipality that had not provided a single unit of affordable housing while having been assigned a fair share obligation of 1,351 units.[216]

- The new governor appointed a person to head COAH who had been mayor of a municipality that produced no affordable housing units in spite of a COAH-assigned obligation of 1,851 units.[217]

Out of this, the growth share methodology emerged from a bitter struggle between affordable housing advocates on the one hand and opponents of the spread of affordable housing to the suburbs on the other.[218] The growth share methodology is an ironic product of this struggle, inasmuch as it was originated by the pro-affordable housing group, and then used effectively by opponents of affordable housing to reduce the demand for affordable housing production.[219]

As defined by affordable housing advocates, the growth share methodology was an uncomplicated way to fairly connect affordable housing production to employment opportunities created by development and economic growth.[220] To the extent the incidence of growth was left to local discretion, municipalities were able to control their fair share of the region's affordable housing needs.[221] Emboldened by political support from the elected branches of government, COAH, had once again found ways to place the ultimate control over affordable housing production in

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[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] Mallach, *supra* note 204.
[220] *Id.*
[221] *Id.*

the hands of those from whom the *Mount Laurel* court expressly intended to remove such control.[222]

COAH's creativity in transforming a reasonable alternative into a complex, and often arbitrary, fair-share methodology for affordable housing allocation can be evidenced by a few examples:[223]

- COAH's administration of a growth share methodology applies indefensibly low ratios of growth to units required. For example, only one affordable housing unit was required for every ten units built and only one affordable housing unit was required for every thirty jobs created.[224]

- In place of the 25% previously allowed, municipalities were allowed under COAH's new rules to build up to 50% of their total fair share as senior citizen housing.[225]

- Municipalities were given undeserved credits against future growth obligations for "overproducing" affordable housing units since 1987.[226]

- Creative methods were devised to increase the level of transferability of units from one municipality to another pursuant to regional contribution agreements.[227]

However, inappropriate deference to local discretion in the context of *Mount Laurel* implementation may have finally run its course. In 2007, the Appellate Division of the New Jersey Superior Court rejected COAH's methodology for determining a fair share allocation of affordable housing units among the state's municipalities.[228] The matter was remanded to COAH for adoption of revised rules in conformity with the opinion.[229]

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[222] *Id.*

[223] *See generally id.* (providing extensive summary of the new tactics to reduce local affordable housing obligations).

[224] *Id.*

[225] Mallach, *supra* note 204.

[226] *Id.*

[227] *Id.*

[228] *In re* the Adoption of N.J.A.C. 5:94 & 5.95, 914 A.2d 348, 379–80 (N.J. Super. Ct. App. Div. 2007).

[229] *Id.* at 402.

Upon return to the Appellate Division in 2010, COAH's third round rules and methodology were again rejected.[230]

The 2010 decision was appealed by the League of Municipalities and the New Jersey Supreme Court granted a petition for certification in March 2011.[231] The opinions rendered by the Appellate Division are buttressed by a number of amicus curiae briefs.[232] The Appellate Division rulings, together with the amicus briefs, lay a solid foundation for the New Jersey Supreme Court to make clearer its purpose of strictly limiting local government power with respect to the regulation of private property– particularly in the area of zoning.[233] The Appellate Division expressed its objection to the use of a growth share methodology in two ways, first ruling that "the growth share methodology can be valid only if COAH has data from which it can reasonably conclude that the allocation formula can result in satisfaction of the statewide need."[234] Second, the court ruled that "any growth share approach must place some check on municipal discretion."[235]

CONCLUSION

The "home rule myth" – the pervasive misperception that in New Jersey there is something akin to Judge Cooley's home rule right for local governments – creates a political environment that emboldens those who would seek to vest local governments with significantly more power and discretion in their relationship with the state than is lawfully permitted. After all, if home rule is already recognized as a tenet of New Jersey policy regarding local-state relationships, memorializing local power and discretion in select instances should be viewed as a mere formality. Among those emboldened by the myth are the elected branches of state government already inclined to garner or preserve local favor and support.[236] Home rule has been the centerpiece of political debates and campaigns over the past one hundred years, and in one commentator's words, has "metamorphosed from a campaign slogan in the 1870s into a

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[230] *In re* the Adoption of N.J.A.C. 5:96 & 5:97, 6 A.3d 445, 456 (N.J. Super. Ct. App. Div. 2010).

[231] *In re* the Adoption of N.J.A.C. 5:96 & 5:97, 15 A.3d 325 (N.J. Super. Ct. App. Div. 2011) (granting *cert.*).

[232] *See, e.g.*, Brief for American Civil Liberties Union of New Jersey as Amicus Curiae Supporting Respondents, *In re* the Adoption of N.J.A.C. 5:96 & 5:97, 15 A.3d 325 (2011) (granting *cert.*); Brief for New Jersey Future et al., as Amici Curiae Supporting Respondents, In re the Adoption of N.J.A.C. 5:96 & 5:97, 15 A.3d 325 (2011) (granting *cert.*); Brief of National Association of Colored People et al., as Amici Curiae Supporting Respondents, *In re* the Adoption of N.J.A.C. 5:96 & 5:97, 15 A.3d 325 (2011) (granting *cert.*).

[233] *See generally In re* the Adoption of N.J.A.C., 15 A.3d at 325.

[234] *In re* the Adoption of N.J.A.C., 6 A.3d at 455.

[235] *Id.*

[236] KARCHER, *supra* note 50, at 208.

magical mantra in the second half of the twentieth century."[237]

This creeping of the home rule myth into the culture and politics of the state gained traction from a convenient misinterpretation of the general law provision of the state constitution; this misinterpretation was that the provision forever precluded intrusion by the legislature into the internal operations of the State's municipalities.[238] This misinterpretation was further supported by the mislabeled Home Rule Act of 1917.

While *Mount Laurel* is but one context in which the home rule myth can be explored, it is also, thankfully, a context in which the myth can be effectively opposed. Under the mantle of the state constitution, the *Mount Laurel* court specifically intended to restrain the power and discretion of local governments in the exercise of the power to zone.[239] Moreover, the court also intended to restrain the elected branches' inclination to expand local power and discretion in this area of local-state relationships.[240] State supremacy, not home rule, is the law of the land.

Still, following the court's retreat in *Mount Laurel III* in 1986, there was an absence of judicial presence in the enforcement of the doctrine. Accordingly, the elected branches found numerous and creative ways to exploit the opportunity provided by the home rule myth to assist local governments in their efforts to avoid, or at least minimize, their housing obligations under the law. COAH has been the primary facilitator in this regard, originally created as part of watered-down legislation presumptively intended to implement the Court's bold housing mandate.

The courts are no longer in retreat. Affirming the original intent of the *Mount Laurel* courts in 1975 and 1983, the Appellate Division has rejected COAH's attempt to adopt a methodology for determining a municipality's fair share housing obligation.[241] That methodology deliberately places ultimate control over housing production in the discretion of local governments because "obligations [are] based on [local] projected rates of housing or job growth."[242] Thereafter, in a five-hour hearing on November 14, 2012, the New Jersey Supreme Court heard arguments for and against COAH's proposal.[243]

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[237] *Id.*

[238] *See id.*

[239] S. Burlington Cnty. NAACP v. Mount Laurel Twp., 456 A.2d 390, 415 (N.J. 1983).

[240] *Id.*

[241] *In re* the Adoption of N.J.A.C. 5:96 & 5:97, 15 A.3d 325, 456 (N.J. Super. Ct. App. Div. 2011).

[242] Michael Booth, *'Growth-Share Methodology' for Fair Housing Aired at High Court*, 210 N.J. L.J., 1, 1 (2012).

[243] Video Recording: Hearing for the appeal of *In re* Adoption of N.J.A.C. 5:96 & 5:97, 6 A.3d 445 (2010), *cert. granted* 15 A.3d 325 (2011) (Nov. 14, 2012), *available at* http://njlegallib.rutgers.edu/supct/args/A_90_91_92_93_94_10.php [hereinafter *Video Recording*].

While COAH was the focus of the recent *Mount Laurel* hearing, and represented by the Office of the Attorney General, the agency has in fact been dormant since the Governor took a unilateral

Consistent with the trend described in the foregoing pages, presenters in favor of the COAH proposal, including the New Jersey League of Municipalities, urged the court to place greater reliance on local discretion in the area of land use, to adopt a growth share methodology for determining a municipality's housing obligation, and to endorse COAH as the appropriate administrator for *Mount Laurel* implementation going forward. Edward Buzak, representative for the League of Municipalities, argued during the hearing that "[t]he beauty of growth share is that you get results" automatically, and "[i]f there is no growth, the need [for housing] is not created."[244] According to Buzak's rationale, "if a municipality chooses to project no future growth, a developer could invoke the 'builder's remedy'—seeking permission from a court to build housing that a town's zoning law prohibits."[245] Furthermore, as argued by COAH Deputy Attorney General Geraldine Callahan, "the Mount Laurel rulings did not mandate one single method for determining a municipality's fair share of affordable housing . . . the court's [sic] should defer to COAH to determine how to achieve a proper balance."[246]

One can only conclude from this review of the principal arguments advanced before the New Jersey Supreme Court in favor of COAH authority and growth share methodology that the presenters[247] were not asking for a favorable interpretation of the earlier *Mount Laurel* rulings, but instead for recognition of home rule as the prevailing policy in the relationship between state and local government in the area of land use. However, as argued by Kevin Walsh, representative of the Fair Share Housing Center, "growth share gives municipalities too much discretion.

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executive action to abolish it in 2011. In a separate hearing before the Supreme Court held on January 29, 2013, the Court heard arguments for and against upholding the Governor's unilateral action. While this matter mainly concerns application of the state's Reorganization Act, it has a corollary affect on the *Mount Laurel* case and on the theories advanced in this article. Megan DeMarco, *Gov. Christie Dissolves Council on Affordable Housing*, NJ.COM (Sept. 15, 2011, 8:07 PM), http://www.nj.com/news/index.ssf/2011/09/gov_christie_dissolves_council.html.

For example, during COAH's dormancy, the Governor transferred $142,000,000 earmarked for the construction of low-income housing from a trust fund under COAH's management to the general treasury to cover budget shortfalls. Were COAH to be reinstated, it is likely that the trust funds would be restored for their original purpose. It is also noteworthy that the Legislature declined to exercise its prerogative to override the Governor's unilateral action, perhaps having identified a politically safe way to again subvert or restrain full implementation of the Court's mandate. Thus, it would appear that even COAH, with its inclination to provide excessive deference to local discretion in the area of the power to zone, does not go far enough in these regards in the eyes of the elected branches. Mark J. Magyar, *Battle over Governor's Powers Underscores Importance of Upcoming Supreme Court Fight*, N.J. SPOTLIGHT (Jan. 29, 2013), http://www.njspotlight.com/stories/13/01/28/battle-over-governor-s-powers-underscores-importance-of-upcoming-supreme-court-fight/.

[244] *Video Recording*, *supra* note 243, at 9:05–9:08, 41:51–41:56.

[245] *See id.* at 12:55–13:30.

[246] Booth, *supra* note 242, at 2.

[247] Presenters included the above mentioned Buzak and Callahan. Video Recording, *supra* note 243 at 1:03–2:03.

The reason we have 60,000 homes is because we checked those tendencies" to adopt exclusionary zoning ordinances.[248] Furthermore, as Stephen Eisdorfer, representative of N.J. Builders Association, argued, "[p]rojected growth is just a set of targets controlled entirely by zoning," and, "[y]ou cannot choose to not grow in order to exclude the poor."[249]

Thus, presenters opposing COAH's proposal needed only to remind the court of the principal elements of its bold mandate: that municipal land use regulations which conflict with the general welfare abuse the police power and are unconstitutional, that the provision of adequate housing for all citizens of the state is essential to the general welfare, and that the cost of providing adequate housing for all must be shared on a regional basis.[250]

In light of the New Jersey Supreme Court's fundamentally clear and bold effort to preserve state supremacy in the area of the power to zone (even as against actions of the legislature), arguments in support of an expansion of home rule in this area of local-state relationships are hard to understand.[251] Even more inexplicable is a representation embedded in these arguments that local governments recognize their constitutional obligation, but can now be trusted to shed the provincialism that prompted the need for the *Mount Laurel* doctrine in the first place.[252] It is reliance on the pervasive misperception that New Jersey is a home rule state that provides a shelter for such otherwise baseless arguments. Thus, it is now up to the court to make its intentions absolutely clear: that rules governing the production of housing (that is accessible to *all* citizens of the state) throughout New Jersey will be established by the state, and not in accordance with local discretion, the myth of home rule notwithstanding.

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[248] *Video Recording*, *supra* note 243, at 1:38:40.

[249] *See id*. at 1:44:05–1:44:26, 1:47:30–1:47:41.

[250] *See generally id.*

[251] "Fundamentally" is added here to reinforce the point that the court left fragments of doubt in 1975, and again in 1983, on which those who would exploit the home rule myth might feed. For instance, the Court has said that the importance of environmental factors should always be considered, *Mount Laurel I*, 336 A.2d at 731, and that growth area designation would be determined by reference to the State Development Guide Plan "or by facts and circumstances of each particular case," *Mount Laurel II*, 456 A.2d at 451.

[252] At the hearing, counsel for COAH Deputy Attorney General Geraldine Callahan said "every municipality knows it has a constitutional obligation and that it cannot bury its head in the sand." *Video Recording, supra* note 243 at 2:36:44–2:36:52. She went on, however, to urge the court to endorse COAH's role in determining a municipality's fair share housing obligation, including adopting the growth share methodology based on local development decisions. *Id.*