

Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 47

January 1995

Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses

Georgette C. Poindexter
University of Pennsylvania

Follow this and additional works at: https://openscholarship.wustl.edu/law_urbanlaw



Part of the [Law Commons](#)

Recommended Citation

Georgette C. Poindexter, *Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses*, 47 WASH. U. J. URB. & CONTEMP. L. 03 (1995)

Available at: https://openscholarship.wustl.edu/law_urbanlaw/vol47/iss1/2

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Urban Law Annual ; Journal of Urban and Contemporary Law by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

TOWARDS A LEGAL FRAMEWORK FOR REGIONAL REDISTRIBUTION OF POVERTY-RELATED EXPENSES

GEORGETTE C. POINDEXTER*

America's cities bear an increasingly heavy burden of caring for the nation's poor. As they struggle to meet their citizens' budgetary demands, poverty-related expenditures take up a disproportionately large share of scarce funds. To compound the problem, cities receive ever-decreasing help from state and federal governments.

One reason for the increased burden on cities is the concentration of poverty in cities, brought about in part by suburban exclusionary zoning. Because suburbs do not accept their fair share of regional poverty they should contribute financially to the care of the region's poor, who are concentrated in cities.

The author proposes a model for equitable regional redistribution of poverty-related expenses. This model will overcome legal constraints while not bowing to political resistance. The proposed model would create a state agency to redistribute revenue across regions to pay for local poverty-related expenditures.

* Citibank Term Assistant Professor of Real Estate and Legal Studies Wharton School of Business, University of Pennsylvania. A.B., Bryn Mawr College, J.D., Harvard University Law School. I am grateful to my colleagues in the Real Estate and Legal Studies Departments for their helpful insights and suggestions, especially Susan Wachter, Michael Schill, Joseph Gyourko, and Kenneth Shropshire, and to Joel Green, and Eve Beebee, for research assistance. My thanks also to the Wharton Real Estate Center Research Sponsor Program for financial assistance.

I.	INTRODUCTION	6
II.	REGIONAL SHIFTS AND RESULTING DISPARITIES	7
	A. <i>Regional Population Shifts Between Cities and Suburbs</i>	7
	B. <i>Why the Shift?</i>	10
	C. <i>Role of Exclusionary Zoning</i>	12
III.	THE EFFECT OF THE CITY BEARING A DISPROPORTIONATE BURDEN OF REGIONAL POVERTY	15
	A. <i>Concentration of Poverty</i>	17
	B. <i>Budgetary Problems of Cities and the Impact of Poverty-Related Expenditures</i>	17
	1. Direct Costs	17
	2. Intergovernmental Transfers	18
	3. Unfunded Mandates	19
	4. Property Taxes	19
	5. Income Taxes	21
IV.	INTERDEPENDENCE BETWEEN CITIES AND THEIR SUBURBS	22
	A. <i>Regional Impact of Declining Cities</i>	22
	B. <i>Resistance to Regional Co-operation</i>	23
V.	A MODEL OF REGIONAL REDISTRIBUTION OF POVERTY-RELATED EXPENSES	24
	A. <i>Direct Tax</i>	25
	B. <i>Linkage Tax</i>	26
	C. <i>Annexation</i>	27
	D. <i>Creation of Regional Government</i>	28
	E. <i>Federal Government Intervention</i>	29
	F. <i>State Government Intervention</i>	29
	1. Zoning Power is Given to Municipalities by States	31
	2. Model of Regional Redistribution of Poverty-Related Expenses	32
	3. The Impact of Judicial Intervention	34
	4. Learning from <i>Mount Laurel</i>	35
	a. The Basis of the <i>Mount Laurel</i> Doctrine	35
	b. <i>Mount Laurel I</i>	36
	c. <i>Mount Laurel II</i>	38
	d. The Fair Housing Act	40
	e. <i>Mount Laurel III</i> and Beyond	42
	f. The <i>Mount Laurel</i> Doctrine Outside New Jersey	43

VI. BUILDING ON THE *MOUNT LAUREL* DOCTRINE..... 44

 A. *Constitutional Issues* 44

 B. *Formulating Fair Share* 45

 1. Defining Poverty-Related Expenses..... 45

 2. Calculating Fair Share 46

 C. *The Role of the Judiciary versus the Role of the Legislature* 47

 1. Planting the Seeds of Change 47

 2. Legislative Initiatives 49

 D. *Regional Contribution Agreements* 49

VII. CONCLUSION 50

*"Where dwelle ye, if it to tell be?
'In the suburbes of a toun' said he"
Chaucer, Canterbury Tales*

I. INTRODUCTION

Suburbs, the population ring surrounding a city, have evolved from the time of Chaucer. In seventeenth century England, the suburbs were the home of the poor and disenfranchised.¹ By the turn of the twentieth century, however, American suburbs had become an exclusive haven for the very wealthy.² Today, in 1995, the middle class dominates American suburbs.³

Detached, single-family homes in the suburbs, with well manicured lawns, are the hallmark of American middle class success. But down the road from the tranquil life of the suburbs lies the city, which houses not only the residents who chose to live there, but also those who are economically prevented from living in the suburbs: the poorer members of our society. As poverty becomes more concentrated in the urban core, cities struggle to provide evermore expensive services to those who are evermore less able to pay.

City budget directors and mayors face a circular dilemma. More revenue is desperately needed. Increasing taxes, however, ignites middle class flight, leaving the city with a sizably smaller tax base.⁴

A region's poorer residents are increasingly concentrated in cities.⁵ Thus, suburban residents do not pay for poverty-related

1. JOHN R. STILGOE, *BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939*, 1-2 (1988). Stilgoe's description of the historical meaning of the suburb mirrors the common image of the modern city: "Always suburban connoted inferiority, . . . [d]ependent, forlorn . . ." *Id.* at 1.

2. Peter Dreier, *American Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C.L. REV. 1351, 1376 (1993) ("Since World War II, the United States has witnessed one of the most dramatic population shifts in its history — the movement of Americans from cities to suburbs.").

3. See STILGOE, *supra* note 1, at 2 ("If opinion polls prove accurate, suburbs represent the good life, the life of the dream, the dream of happiness in a single-family house in an attractive community."). No geographic-political entity, either suburb or city, is an absolute economic monolith. Pockets of poverty exist in the suburbs. Indeed, some of the older inner ring suburbs of American cities have more in common with the central city than they do with their suburban brethren.

4. Dreier, *supra* note 2, at 1372 (noting that city leaders are caught in a "fiscal catch-22" — the poor residents cannot afford to pay higher taxes or fees, but imposing higher taxes on affluent residents or businesses will drive them out of the city, thus aggravating the fiscal crisis).

5. See *infra* notes 17-20, 58-62 and accompanying text.

expenses in the same proportion that taxpayers in the city do.⁶ Regional redistribution of poverty-related expenses can help ease cities' disproportionate burden of caring for the region's poor. The suburbs should either allow the poor into their communities or contribute to the expense of providing services to the impoverished.

This Article first outlines demographic and historical factors that create economic disparities between cities and their suburbs. Next, this Article discusses the effect of poverty on city budgets. Finally, this Article explores the relationship between cities and suburbs to highlight the importance of regional co-operation. Based on this examination, this Article proposes a legal framework for regional redistribution of poverty-related expenses, focusing on both the legal and political constraints of such a model.

II. REGIONAL SHIFTS AND RESULTING DISPARITIES

After World War II, population, political power, and economic dominance flowed from the cities to the suburbs.⁷ These regional shifts produced inequality in poverty-related expenditures. Although it is beyond the scope of this Article to chronicle in detail the sociological and demographic impetus for these changes, this Article will trace major shifts that continue to impact upon city-suburban interaction.

A. *Regional Population Shifts Between Cities and Suburbs*

Prior to World War II, cities dominated their surrounding suburbs in both economic and political clout.⁸ Whether through annexation or sheer growth, cities commanded the bulk of the population and, hence, taxing power in the region.⁹ Since World

6. See Dreier, *supra* note 2, at 1371 (noting that city residents require and pay for more poverty-related social services than their suburban counterparts); see also *infra* part III.B.3 (discussing the adverse impact of mandated social service programs on city finances).

7. See THOMAS B. EDSALL AND MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE RIGHTS AND TAXES ON AMERICAN POLITICS* 229 (1991) (concluding that "the nation is moving steadily toward a national politics that will be dominated by the suburban vote"); see also William Schneider, *The Suburban Century Begins*, ATLANTIC, July 1992, at 33-44 (arguing that changing demographics are moving American politics away from cities); Dreier, *supra* note 2 at, 1354 (citing Schneider, *supra* at 33-44) ("We have begun a 'suburban century' in American politics, Schneider wrote, in which candidates for national office, and for a majority of congressional seats, can ignore urban America without paying a political price.").

8. See *supra* note 7 and accompanying text.

9. *Id.*

War II, however, such factors as government sponsored mortgage programs,¹⁰ interstate highways,¹¹ and racial strife¹² have opened the flood gates and shifted the population from the cities to the suburbs.

Since World War II, regional population dominance has reversed, leaving cities with a decreasing share of regional population (see Chart 1). In 1950, 57 percent of people residing in major metropolitan areas lived in cities and 43 percent lived in the suburbs.¹³ By 1990, however, cities' share of metropolitan population plummeted to 37 percent and the suburban share increased to 63 percent.¹⁴

In addition to population movement to the suburbs, employment likewise shifted out of the central city.¹⁵ The suburbs frequently offer manufacturers cheaper land and labor.¹⁶

10. Brian O'Connel, *The Federal Role in the Suburban Boom*, in SUBURBIA RE-EXAMINED 189 (Barbara Kelly, ed. 1989). For example, the Federal Housing Authority (FHA) insures home loans to qualified borrowers, thus eliminating the lender's risk and providing lenders an incentive to make mortgage loans. In the post World War II period, however, FHA lending criteria resulted in a pronounced preference for lending for new construction rather than existing structures. Because the new construction was more likely to be in the suburbs than in the city, the program encouraged suburban growth. *Id.* See also KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF AMERICA 190-218 (1985) (noting that consumer choices were subsidized by federal government policies which both pushed people out the cities and pulled them into suburbs); Dreier, *supra* note 2, at 1377 (noting that federal housing policies offered government-insured mortgages to whites in suburbs, but not in cities).

11. O'Connel, *supra* note 10, at 187. The Interstate Highway system funded by the federal government provided a web of roads that facilitated travel between the city and the suburbs. *Id.* These highway systems cut commuting time for workers, allowing them to live in the suburbs and work in the city. *Id.* See also Dreier, *supra* note 2, at 1377 (noting that federal highway-building policies "opened up the hinterlands to speculation and development.").

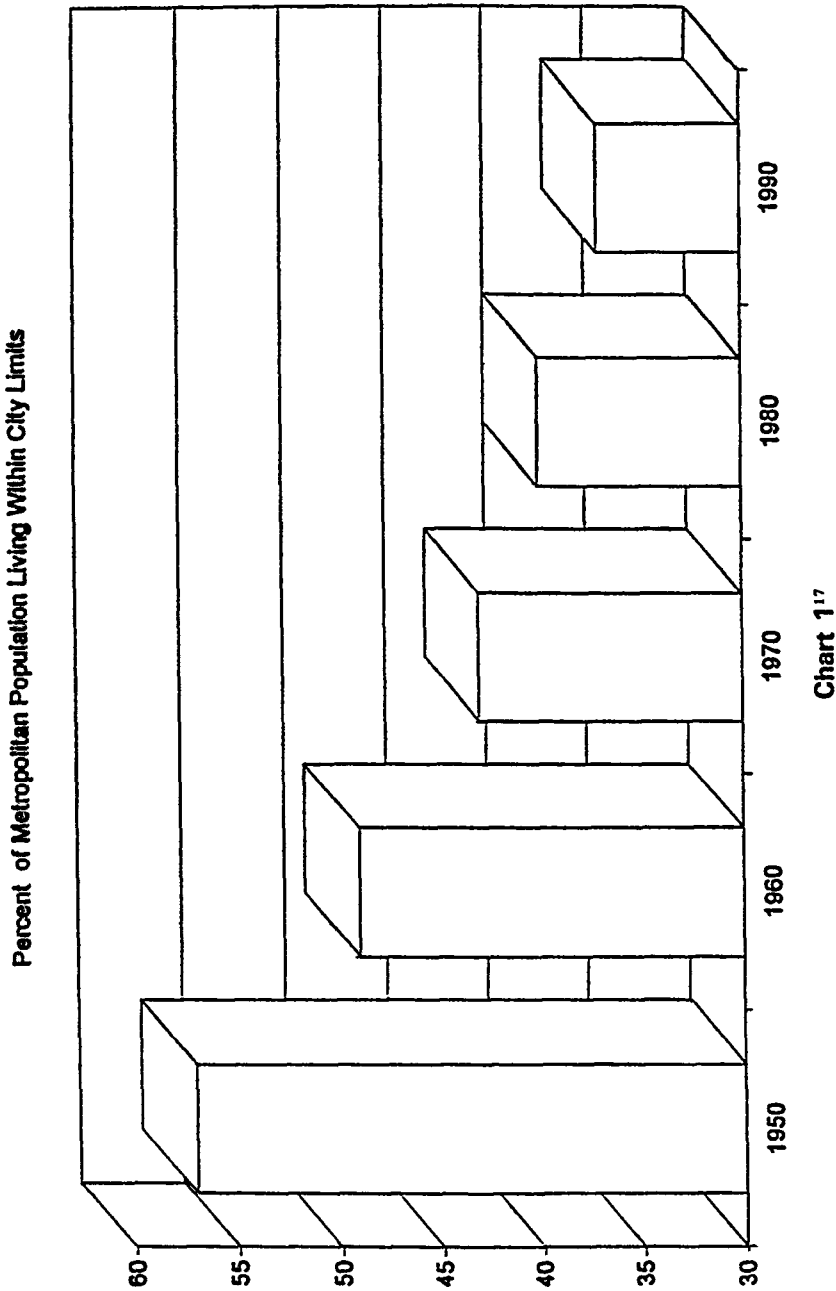
12. See CAROLYN ADAMS ET AL., PHILADELPHIA: NEIGHBORHOODS, DIVISION, AND CONFLICT IN A POSTINDUSTRIAL CITY 83 (1991) (describing the pattern of racial hostility that induced whites to abandon Philadelphia for the suburbs). See Dreier, *supra* note 2, at 1377 (noting that America's post World War II suburban migration "is often described as the 'white flight' or 'suburban exodus' of consumers anxious to leave troubled neighborhoods for greener pastures.").

13. Peter Mieszkowski & Edwin S. Mills, *The Causes of Metropolitan Suburbanization*, 7 J. ECON. PERSP. 135 (1993).

14. *Id.*

15. Anita A. Summers, *A New Urban Strategy for America's Large Cities*, Table 2 (prepared for Association for Public Policy and Management) (October 28, 1994).

16. For example, Sears, Roebuck and Co. moved its merchandise group headquarters and 5000 workers from central Chicago's Sears Tower to suburban Hoffman Estates, Illinois. See Ellen Christian & Flynn Robberts, *Sears'*



Suburban Experiment Set to Begin, Will the State Ever Recoup its \$66 Million, CHI. TRIB., Aug. 2, 1992, at 1. Along with improvements in efficiency, the company will benefit from \$66 million in state incentive programs. *Id.*

¹⁷ Chart 1 was compiled by the author from data contained in Mieszkowski & Mills, *supra* note 13.

As population shifted from the city to the suburbs, a disparity between the income levels of suburban and city residents developed. In 1960, the per capita income of city residents was 105 percent of that of suburbanites.¹⁸ By 1980, it had dropped to 90 percent.¹⁹ During the 1980s, city residents' per capita income continued to fall precipitously. By 1987, the per capita income of city residents was only 59 percent of that of their suburban neighbors.²⁰ In some cities, the disparity was even greater. For example, in 1990, the per capita income of Philadelphia city residents was 48 percent of their suburban neighbors.²¹

Analyzing the differences in median incomes of city and suburban residents confirms the disparity. In 1970, the annual median income of city residents nationwide was \$8,100, while the annual median income of suburban residents nationwide was \$9,650 — a difference of \$1,550.²² In 1981, the difference was \$3,500.²³ By 1991, a \$6,142 difference existed between the median incomes of city and suburban residents.²⁴ (See Chart 2) These statistics show that the city is no longer the regional wealth and population center it was before World War II.²⁵

B. *Why the Shift?*

What causes this shift? Why do more people, especially those with economic means, choose to live in the suburbs, rather than the city? Economist Charles Tiebout hypothesized that intra-regional movers are merely consumers looking for the community that best meets their demand for public goods.²⁶ Tiebout's

18. Larry C. Ledebur & William R. Barnes, *NATIONAL LEAGUE OF CITIES, Metropolitan Disparities and Economic Growth: City Distress and the Need for a Federal Local Growth Package 1* (1992).

19. *Id.*

20. *Id.*; Farrell et al., *The Economic Crisis of Urban America*, BUS. WK., May 18, 1992, at 38, 42.

21. Steve Boman, *Wide Approach to Cities' Woes, Suburbs Can't Wall Themselves Off Professor Says*, PHILA. INQUIRER, Sept. 13, 1992, at B17.

22. The author compiled the statistics for urban-suburban income disparities from U.S. DEPARTMENT OF COMMERCE, U.S. DEPARTMENT OF HOUSING AND URBAN DEV., *AMERICAN HOUSING SURVEY FOR THE U.S., 1970-1991*. Hereinafter citations will refer to the *AMERICAN HOUSING SURVEY* for the appropriate year.

23. *AMERICAN HOUSING SURVEY*, 1981.

24. *AMERICAN HOUSING SURVEY*, 1991.

25. See generally LARRY H. LONG & DONALD C. DAHMANN, *THE CITY-SUBURB INCOME GAP: IS IT BEING NARROWED BY A BACK-TO-THE-CITY MOVEMENT?* (1980) (concluding that a gentrification movement had not narrowed regional income gaps by the late 1970s).

26. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) [hereinafter Tiebout, *Pure Theory*].

Income Difference between City and Suburban Residents

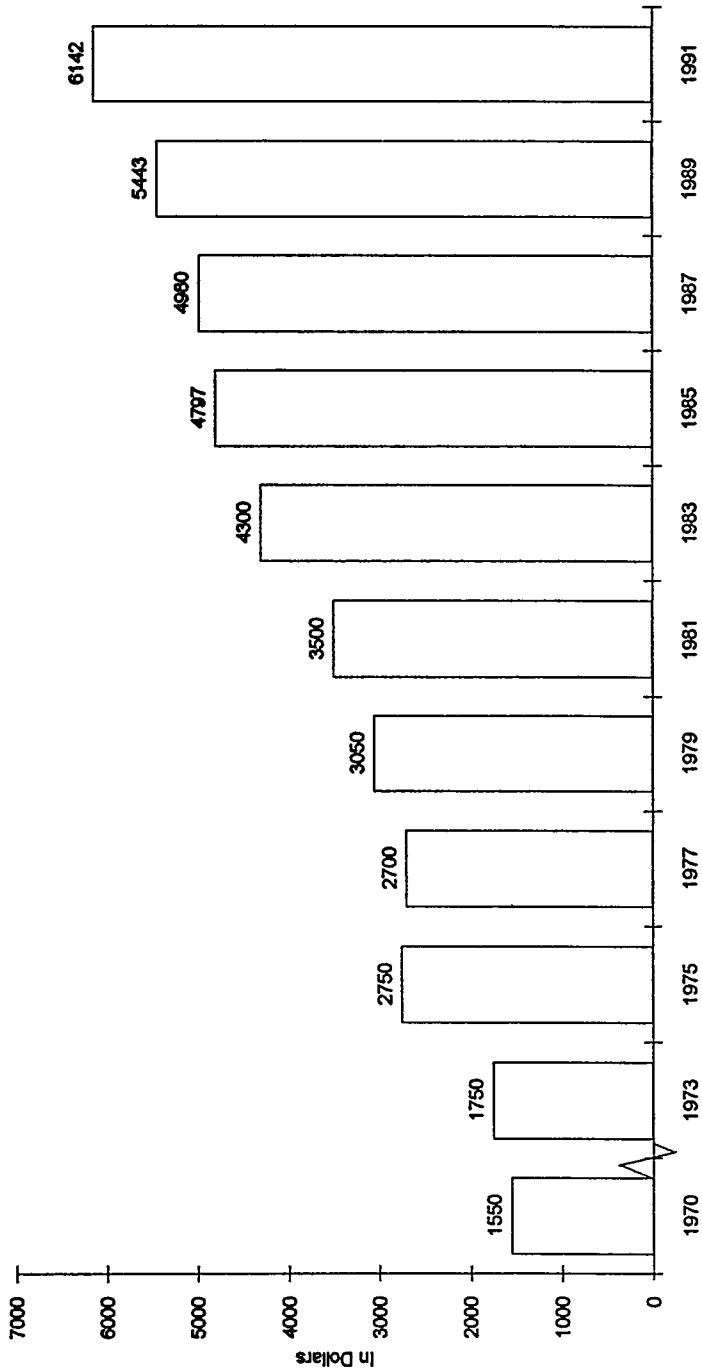


Chart 2²⁷

27. Compiled by the author from data contained in AMERICAN HOUSING SURVEY, 1970-1991.
Washington University Open Scholarship

theory holds that based on a community's revenue and expenditure patterns, consumers move to a community where the local government "best satisfies [their] set of preferences."²⁸ Under this theory, a consumer is better able to choose an appropriate community as the number and variety of communities increase.²⁹ The greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position.

Consumers search for the community where the levels of taxes and municipal expenditures mesh with their personal needs. Rather than express their choice through the ballot box, consumers "vote with their feet" and find that community which most closely matches their desired bundle of services.³⁰

Consumers compare the tax rate and expenditure patterns within the city against those of its surrounding suburbs. Based on this comparison, consumers choose the community with affordable taxes that spends its tax monies in the way the consumers desire.³¹ Because cities spend a high percentage of their budgets on poverty-related services,³² economically able consumers choose to live in the suburbs, where they do not pay for social services for which they have no use.³³

C. Role of Exclusionary Zoning

The theory of "community shopping" assumes that consumers can always attain the package of public services they desire.³⁴ Therefore, a municipality must either assure that the desired bundle of services will be provided in the future, or else the current clientele of residents will relocate. Municipalities use a variety of methods to keep out those consumers who might alter the package of services. One method of protecting this bundle of community attributes is exclusionary zoning.³⁵

28. *Id.*

29. *Id.*

30. This theory addresses only economic barriers and assumes away barriers to movement based on race or ethnicity. In reality, certain consumers cannot exercise their true choice of location. Racial and ethnic discrimination often impedes an efficient housing market.

31. Tiebout, *Pure Theory*, *supra* note 26, at 424.

32. *See infra* part III.

33. Dreier, *supra* note 2, at 137. *But see* Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity* 92 HARV. L. REV. 1662, 1675 (1979) (asserting that the wealthy demand more services than the poor, using their mobility to acquire the optimum bundle).

34. Inman & Rubinfeld, *supra* note 33, at 1748-49. Inman & Rubinfeld conclude that despite attempts to provide fiscal equality, wealthy families will locate wherever they can find the services they desire. *Id.*

35. Exclusionary zoning is using the local land use laws to prevent entrance of certain land uses into the community.

The United States Supreme Court first recognized local government's ability to regulate land use in *Village of Euclid v. Ambler Realty Company*.³⁶ In *Euclid*, the Court determined that zoning codes are a valid exercise of the police power when used for the public welfare.³⁷ The *Euclid* decision laid the legal groundwork and justification for local zoning codes in the United States, and empowered local governments (specifically in suburbs) to act in their own (even if selfish) best interests by erecting land use barriers to exclude undesirable uses and citizens.³⁸

For example, if a local government wants to keep out lower income housing, it can enact a zoning code that makes it difficult for low income residents to affording housing.³⁹ Local government can use a variety of formulas to achieve this goal. For example, local governments can enact zoning codes which require that each lot be of a minimum size; which mandate a maximum density; which limit structures to a certain number of floors; or which allow only a certain percentage of the lot to have impervious covering.

Exclusionary zoning is aided because local governments can comply with *Euclid* through a de minimis proof of public welfare promotion.⁴⁰ *Euclid* allows zoning codes that benefit local residents, even if they exclude and discriminate against outsiders. Such ordinances are unconstitutional only if shown to be "clearly arbitrary and unreasonable [and having] no substantial relation

36. 272 U.S. 365 (1926). In *Euclid*, a property owner sued the village, a suburb of Cleveland, Ohio, under the Fourteenth Amendment of the United States Constitution. *Id.* at 379-84. The property owner claimed that the village zoning ordinance limited the market value of the tract. *Id.* at 384.

37. *Id.* at 387 ("The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.").

38. *Id.* at 389. The Court rejected the argument that the village could not divert the city's natural development. The Court stated: "The village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions." *Id.*

39. Development of lower income housing depends on high density construction. For example, if an apartment rents for less money, absent some sort of subsidy, there must be more rental units produced on the property to justify development.

40. In *Euclid*, the Court recognized a broad range of permissible purposes for zoning ordinances. These ranged from improving access by fire engines to decreasing "noise and other conditions which produce or intensify nervous disorders." 272 U.S. at 394. The Court suggested that banning apartment houses might validly ensure children "the privilege of quiet and open spaces

to the public health, safety, morals, or general welfare."⁴¹

This zoning power is essential to the market efficiency described in the Tiebout theory.⁴² If consumers do in fact shop for the municipality that offers the optimal service "package," then municipalities must maintain that mix of services.⁴³ By using exclusionary zoning, suburbs can eliminate consumers who might shift resources to social and welfare services that the present residents do not want and for which they are unwilling to pay.

Municipalities use zoning to achieve goals beyond the *Euclid* Court's pastoral ideal. The *Euclid* Court blessed zoning as a method to protect citizens against the encroachment of industrialization.⁴⁴ But zoning permits legally created residential economic segregation. As one commentator noted, "land use law has completely outgrown its original roots in nuisance — the separation of inconsistent uses — and [has] become a form of public utility regulation."⁴⁵ Called the "dark side of municipal land use regulation,"⁴⁶ exclusionary zoning is the "use of the zoning power to advance the parochial interests of the municipality at the expense of the surrounding region, and to establish and perpetuate social and economic segregation."⁴⁷

Exclusionary zoning is rational for the individual suburban consumer and municipality, but creates economic inefficiency and disparity on the regional level. Rational economic behavior on the individual and municipal levels depends on creation of artificial (i.e., not market-derived) barriers such as exclusionary

41. 272 U.S. at 395.

42. See Stephen D. Galowitz, *Interstate Metro-Regional Responses to Exclusionary Zoning*, 27 REAL PROP. PROB. & TR. J. 49, 61 (1992). Galowitz concludes that without exclusionary zoning, communities cannot protect the special bundles of services they provide. *Id.* See also Bruce W. Hamilton, *Taxes and the Tiebout Hypothesis: Some Empirical Evidence*, in FISCAL ZONING AND LAND USE CONTROLS at 13 (Edwin S. Mills & Wallace E. Oates eds. 1975). The Tiebout argument for efficiency, however, is focused on the level of individual municipalities. The argument fails to take into account whether exclusionary zoning is efficient on regional level. See also Bruce W. Hamilton, *Capitalization of Interjurisdictional Differences in Local Tax Prices*, 66 AM ECON. REV. 743 (1976) (proposing a mathematic model indicating that interjurisdictional differences in tax rates and public sector benefits are capitalized into residential property values). See *infra* notes 43-47 and accompanying text.

43. See Galowitz, *supra* note 42, at 60-61.

44. *Euclid*, 272 U.S. at 388.

45. John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20, 33 (1987) [hereinafter Payne, *Rethinking Fair Share*].

46. *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 735 (N.J. 1975) (Pashman, J., concurring).

47. *Id.* See also *infra* notes 58-62 and accompanying text.

zoning. The spill-over effect of these barriers, however, results in the rest of the region bearing an economic burden that, but for the erection of artificial barriers, would be borne proportionately by all municipalities within the region.⁴⁸

Exclusionary zoning allows municipalities to take a "free ride" on the payment of poverty-related expenditures at the expense of other communities in the region.⁴⁹ Communities that cannot, or choose not to, exclude low income residents must pay not only for those who would choose to live there anyway, but also for those who, but for the exclusionary zoning, would choose to live in another community.⁵⁰

Exclusionary zoning ordinances are attractive to politicians because exclusionary zoning laws preserve the status quo.⁵¹ Those who *can vote* want to prevent those who may change the service package from entering their municipality. But those who may want admission into the community and may change the service package *cannot vote*. Thus, the costs of exclusionary zoning, borne by the city, fall primarily on those who lack the ability to vote for change in the suburbs. The benefits, conversely, inure only to those who have the power of the suburban vote.⁵²

III. THE EFFECT OF THE CITY BEARING A DISPROPORTIONATE BURDEN OF REGIONAL POVERTY

The social and economic disparities between cities and suburbs, enforced through exclusionary zoning, create a multiplicity

48. See Galowitz, *supra* note 42, at 68 (discussing the externalities associated with exclusionary zoning). Galowitz concludes that "the 'rational' community will enact exclusionary restrictions because they yield net benefits at the local level. By contrast, regional governing bodies would reject such restrictions because they ultimately yield net costs." *Id.* at 68-69.

49. Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMPLE L. Q. 665, 668 (1987) [hereinafter McDougall, *Regional Contribution Agreements*].

50. Galowitz, *supra* note 42, at 71 ("[L]andlords and homeowners naturally unite to further their common interest . . . and can influence local governments to enact zoning policies that effectively deny many individuals their choice of residence.").

Property rights advocates claim that exclusionary zoning is a right of private property owners. This theory, however, fails to take into consideration the negative externalities imposed upon nonexcluding communities by exclusionary zoning.

51. Cf. McDougall, *Regional Contribution Agreements*, *supra* note 49, at 672 (noting that critical legal theorists view the problems associated with region-wide development (as opposed to local, municipal development) as a result of the ends pursued by the political leadership of exclusionary municipalities).

52. See Galowitz, *supra* note 42, at 62 (discussing the political bias toward exclusion).
Washington University Open Scholarship

of municipal service packages. These bundles of services vary according to which side of the city line one resides. By erecting barriers to protect their desired service packages, suburbanites are cut off from the present worry of how services will be delivered to those in the city who are unable to pay. This "out of sight, out of mind" mentality leads, at best, to apathy and, at worst, to hostility toward the urban poor.⁵³ As author Neal Pierce pointed out, the "torn social fabric" separating cities and suburbs "is rooted in historic anti-urbanism, overlain in our time by ethnic and racial prejudices."⁵⁴

Middle-class flight leaves cities with a disproportionately economically disadvantaged population.⁵⁵ As population and income shift to the suburbs, cities must somehow still provide services to those who are least able to pay. Increasingly, cities are forced to raise taxes⁵⁶ (an act of political suicide, which gives further incentive to middle-class flight) or reallocate scarce income between budget items.⁵⁷

53. See NEAL PEIRCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD 17 (1993). See also Dreier, *supra* note 2, at 1360 (noting that many suburbanites “seek to quarantine themselves from the economic and social problems created by a troubled economy, widening income disparities, rising poverty, and the environmental and related problems” of the city).

54. Peirce, *supra* note 53, at 17.

Indeed, as James Rouse, Chairman of the Enterprise Foundation recognized: "It has been said that poverty is not the real problem in America, that it is affluence — rising affluence that brings with it detachment, separation, indifference to the poor." James Rouse, *Rational Visions Generate Energy to Transform the Lives of the Poor* 58 VITAL SPEECHES OF THE DAY, 344-47 (1992).

55. See *infra* part III.A.

56. For example, when the Mayor of Memphis faced population loss and escalating costs in 1993, he stated that he had to raise city taxes every year since he took office. Ronald Smothers, *City Seeks to Grow by Disappearing*, N.Y. TIMES, Oct. 18, 1993, at A10.

57. See Dreier, *supra* note 2, at 1372 (noting that city leaders are caught in a “fiscal catch-22” — poor residents cannot afford to pay higher taxes or fees, but imposing higher taxes on affluent residents or businesses might induce them to leave, thus aggravating the fiscal crisis.”); Susan S. Fainstein & Ann Markusen, *The Urban Policy Challenge: Integrating Across Social and Economic Development Policy*, 71 N.C. L. REV. 1463, 1463 (1993) (“The uprisings that raged through Los Angeles in April 1992 propelled the issue of urban policy on to the national agenda after a decade of neglect.”). For example, two days before the 1992 Los Angeles riots, the Los Angeles City Council voted to take \$48.3 million earmarked for its Community Redevelopment Agency’s low-income housing program to pay for added police and fire services. Although the ensuing riots were not a direct result of this decision, they were an outgrowth of the underlying problem of inadequate local resources in America’s urban centers. See Farrell et al., *supra* note 20, at 43 (describing urban budget problems); see also Dreier, *supra* note 2, at 1371 (“To avert fiscal collapse, many times have closed schools/hospitals, health centers, police

A. *Concentration of Poverty*

It is not simply the *existence* of poverty that creates increased financial burdens on cities, it is the *concentration* of the poverty within the city.⁵⁸ In 1960, approximately 40 million Americans lived in poverty.⁵⁹ Thirty percent lived in cities.⁶⁰ During the 1980s, however, poverty became increasingly concentrated in America's cities.⁶¹ By 1991, 42 percent of America's 36 million poor people lived in cities.⁶² Although the absolute number of people living in poverty throughout the U.S. *decreased*, cities' proportionate burden of caring for America's poor has dramatically *increased*.

B. *Budgetary Problems of Cities and the Impact of Poverty-Related Expenditures*

The concentration of poverty stings cities most when the cost of necessary public services exceeds available revenue.⁶³ The budgetary cost of poverty-related expenses is more than just the direct expenditures — it includes the impact of intergovernmental transfers, unfunded federal and state mandates, and property and income tax limitations.

1. Direct Costs

The municipal services provided to the poor are more expensive, per capita, than those demanded by the middle class.⁶⁴

stations, and fire stations. They have laid off essential employees and reduced basic services, such as maintaining parks, repairing roads, and enforcing housing and health codes.'').

58. Galowitz, *supra* note 42, at 74 ("A concentration of low income families, in poor quality urban housing, multiplies problems synergistically.'').

59. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 469 (113th ed. 1993).

60. Janet R. Pack, *Poverty and Urban Expenditures*, 7-8 (June 14, 1994) (unpublished manuscript on file with the author); Farrell et al., *supra* note 20, at 38.

61. Ledebur & Barnes, *supra* note 18, at 4. See also Dreier, *supra* note 2, at 1364 ("The poor are increasingly concentrated in America's cities.'').

62. See Farrell et al., *supra* note 20, at 38.

63. See Dreier, *supra* note 2, at 1371. Dreier notes:

Cities, trapped by rising, costs shrinking resources, and unexpandable borders, are now confronting fiscal calamity. Many cities face bankruptcy and are operating under severe austerity budgets. In the past few years, Bridgeport, Connecticut, East St. Louis, Illinois, and Chelsea, Massachusetts plunged into bankruptcy. A number of other cities, including Philadelphia and New York, teeter on the edge of insolvency.

Id.

64. The poor benefit more from expenditures on services like health care

Estimates of the direct and indirect costs of urban poverty range from \$230 billion⁶⁵ to \$750 billion⁶⁶ annually. The larger the city, the more it spends on poverty-related expenses.⁶⁷ Cities with populations between 500,000 and 1 million devote approximately 13 percent of their budget to poverty-related expenses.⁶⁸ Cities with populations greater than one million, however, dedicate more than twenty-two percent of their budgets to poverty-related expenditures.⁶⁹

2. Intergovernmental Transfers

City budget deficits result in part from the paradox that many to whom a large portion of the city's budget is allocated make no contribution to revenues.⁷⁰ In the past, cities could rely on the federal and state governments to close this budget gap.⁷¹ The amount of federal aid to cities today, however, is approximately only 33 percent of what it was in 1970.⁷² Expressed as a percentage of city budgets, federal aid is nearly 64 percent below its 1980 level.⁷³ Additionally, the size of the city affects the amount of intergovernmental transfers received.⁷⁴ The

than street repairs. See Inman & Rebinfeld, *supra* note 33, at 1675. Providing health care is more expensive than providing trash and sanitation services. Similarly, the bureaucracy of a child welfare system is more expensive than providing parks and recreation. *Id.*

65. Farrell et al., *supra* note 20, at 40; Pack, *supra* note 60, table 2.

66. Rouse, *supra* note 54, at 345.

67. Pack, *supra* note 60, at 7-8.

68. *Id.*

69. *Id.* at Table 3a. Seven cities are included in this group and the figures are dominated by those for New York city. The remaining six cities are quite heterogeneous in that three are joint city-county governments and three have separate county governments with major expenditure responsibilities. *Id.*

70. See Dreier, *supra* note 2, at 1371-72 ("[T]he cost of providing public services has increased. Beginning in the 1980s, three phenomena — homelessness, crack cocaine, and AIDS — placed additional burdens on city services. These trends were exacerbated by both federal and state governments' dramatic cuts in fiscal assistance to local governments.").

71. *Id.* Dreier notes that during the Reagan and Bush administrations, the federal government slashed federal aid to cities, "reversing five decades of steady growth in federal urban assistance." *Id.* at 1383-84. See generally *id.* at 1383-87 (describing specific cuts in assistance).

72. Boman, *supra* note 21, at B17.

73. Farrell et al., *supra* note 20, at 40. But see Martin M. Wooster, *Alms After the Storm*, REASON, Oct. 1992, at 52. Wooster points out that blaming middle-class flight on decreased federal spending is misleading and misses the main culprit of city budget woes: bureaucratic bondage of poverty. Calling the social service bureaucracy "poverty pimps," Wooster pinpoints the problem as the lack of choice across economic lines. *Id.* at 53.

74. Pack, *supra* note 60, at 7-8.

nation's largest cities have the lowest ratio of intergovernmental transfer payments to per capita poverty expenditures.⁷⁵

3. Unfunded Mandates

In addition to decreased federal and state aid, cities must contend with the escalating costs of federally and state mandated programs that are paid for by the city.⁷⁶ For example, the Commonwealth of Pennsylvania requires that each county maintain certain levels of child welfare agency programs.⁷⁷ The state, however, has not fulfilled its obligation to fund these programs.⁷⁸ Consequently, the City of Philadelphia must pay for the unfunded mandate by transferring funds from other city departments, including its police, fire, and streets departments.⁷⁹

4. Property Taxes

The revenue generator of local governments — real property taxes — exacerbates the problem.⁸⁰ Low property values tie the hands of the city and severely limit city budgets even when property tax rates are relatively high.⁸¹ It stands to reason that, given the same tax rate, the lower the value of the real estate taxed, the less revenue generated. Conversely, if the value of the real estate appreciates, the tax revenue generated will likewise increase, even without an increase of the tax rate. Against this backdrop, it is pertinent to note that the rate of appreciation between city and suburban owner-occupied housing is uneven.

Through the 1970s and early 1980s, city and suburban homes appreciated at approximately the same pace.⁸² In the mid-1980s, however, suburban home values grew at a much faster rate than

75. *Id.*

76. Edward Rendell, *Rendell Outlines His Plan for a "New Urban Agenda,"* PHILA. INQUIRER, Apr. 15, 1994, at A23 (Edward Rendell is the mayor of the city of Philadelphia).

77. Thomas Turcol, *Rendell Offers Plan to Extend Child-Welfare Funds,* PHILA. INQUIRER, Mar. 13, 1992, at B3.

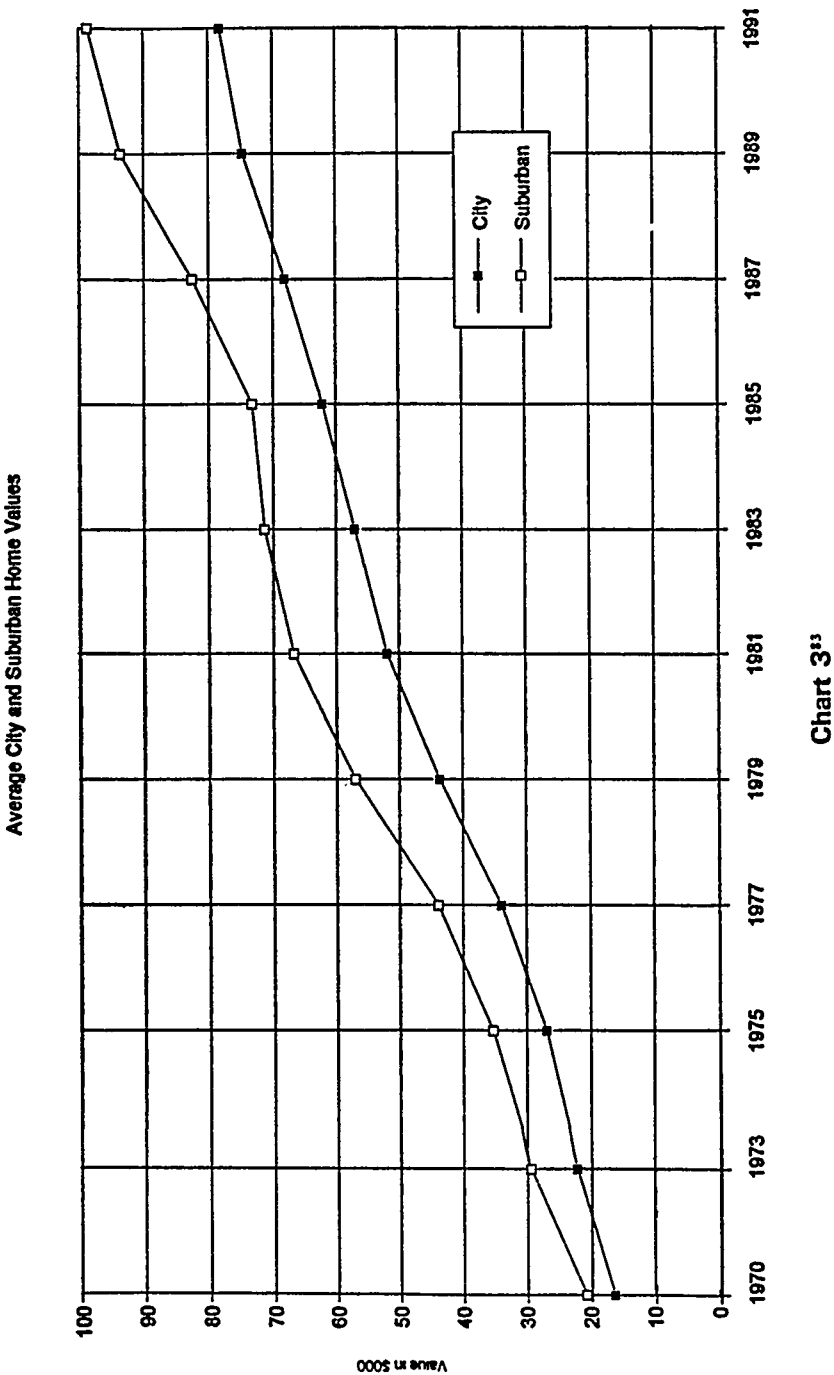
78. *Id.*

79. *Id.* Another example is the federal government's requirement that the city comply with the Americans with Disabilities Act by putting in curb cuts and ramps which could cost Philadelphia taxpayers \$140 million. Rendell, *supra* note 76, at A23. This is more than three times the entire amount Philadelphia budgeted for street resurfacing and reconstruction in fiscal 1994. *Id.*

80. For example, the City of Richmond, Virginia derived more than 30% of its income from this source in fiscal year 92-93. FINANCIAL STATEMENT OF THE CITY OF RICHMOND FOR FISCAL YEAR 1992-93, at 18.

81. Galowitz, *supra* note 42, at 74.

82. AMERICAN HOUSING SURVEY, 1970-1983.



83. Compiled by the author from data contained in AMERICAN HOUSING SURVEY, 1970-1991.
https://openscholarship.wustl.edu/law_urbanlaw/vol47/iss1/2

city home values.⁸⁴ In 1970, there was a \$4,400 difference between the mean value of a home in the suburbs and a similar home in the city (see Chart 3).⁸⁵ As recently as 1985, this difference was \$11,233.⁸⁶ In 1987, however, the rate of appreciation of suburban homes soared into the double digits, to 12.5 percent,⁸⁷ and remained high in 1989, at 13.5 percent.⁸⁸ This rate of appreciation out-paced the appreciation rate in the city market (9.5 percent in 1987⁸⁹ and 9.75 percent in 1989),⁹⁰ catapulting the difference in median home value to \$20,575 in 1991.⁹¹

5. Income Taxes

A city that relies on income tax as a revenue generator is likewise disadvantaged as compared to its suburban counterparts. Income is taxed according to residence.⁹² Even a city with a strong employment base will be constrained if the majority of the work force leaves the city at day's end for their homes in the suburbs. For example, the City of Baltimore is the "economic and employment engine" behind that region's economy.⁹³ But even a robust economy in Baltimore does not translate into increased prosperity for the city, because the highly paid workers tend to live in the suburbs and income is taxed according to residence.⁹⁴ Ironically, the addition of "imported" income tax revenues permit the suburbs to offer even lower property taxes.⁹⁵

As a result of the concentration of poverty in cities and budgetary problems, cities, which house the majority of a met-

84. AMERICAN HOUSING SURVEY, 1983-1987.

85. AMERICAN HOUSING SURVEY, 1970.

86. AMERICAN HOUSING SURVEY, 1985.

87. AMERICAN HOUSING SURVEY, 1987.

88. AMERICAN HOUSING SURVEY, 1989.

89. AMERICAN HOUSING SURVEY, 1987.

90. AMERICAN HOUSING SURVEY, 1989.

91. AMERICAN HOUSING SURVEY, 1991.

92. An income tax is a tax imposed by a government on income from whatever source wherever it is earned, based upon the taxpayer's residence. This is different than a wage tax, which is imposed on income earned within the taxing entity. See *infra* part IV.B (discussing wage taxes). See, e.g., Mark K. Joseph, *Baltimore Makes the Suburbs Richer*, BALTIMORE SUN, Oct. 13, 1991, at 3M (describing how Baltimore, despite being the centerpiece of the region's economy, faces fiscal problems due to revenue inadequacies).

93. Joseph, *supra* note 92, at 3M.

94. The alternative is to impose a city wage tax that will allow the city to tap income earned in the city by non-residents. If there is not tax parity between the suburbs and the city, however, the imposition of the wage tax will tend to drive jobs outside the city. For example, the disproportionately high city wage tax in Philadelphia has been blamed for fueling the movement of jobs to the suburbs. Robert P. Inman, *Can Philadelphia Escape its Fiscal Crisis with Another Tax Increase?* BUS. REV., Sept.-Oct. 1992, at 11-12 (published by Federal Reserve Bank of Philadelphia).

95. Joseph, *supra* note 92, at 3M.

ropolitan region's poor,⁹⁶ must pay for poverty-related services without help from the suburbs. While cities perform the "service" of keeping low income housing, crime, free health services and other social services out of the suburbs, they receive nothing in return from the suburbs.

IV. INTERDEPENDENCE BETWEEN CITIES AND THEIR SUBURBS

Suburbs erect barriers to the poor to avoid the immediate cost of poverty-related services. Exclusionary zoning policies do not, however, protect suburbs from poverty-related problems. The poverty-related problems that cripple the central city also tend to weaken the entire region.

A. Regional Impact of Declining Cities

A parochial view of city versus suburbs is naive. Cities and suburbs have common stakes in shared economies. The fate of a municipality depends not on how well it competes with others in its region but on how well its *region* competes with other regions in the United States and internationally.⁹⁷

Economic disparity between a city and its suburbs erodes the vitality of the regional economy. Studies indicate an inverse relationship between the level of city-suburb economic disparity and metropolitan economic performance.⁹⁸ Metropolitan regions with the widest city-suburb economic disparities achieve the lowest rates of economic growth and prosperity.⁹⁹ Consequently, policies of exclusionary zoning, while facially appealing to suburbs because they erect barriers to poverty, are actually detrimental to suburban growth and economic health.¹⁰⁰ Exclusionary

96. See *supra* part III.A.

97. See David R. Boldt, *City and Suburb Cooperation Works for Benefit of Both*, PHILADELPHIA INQUIRER, Dec. 19, 1993, at C5 (describing the "potential for enrichment that exists if suburbs and city seek to prosper together"); see also Dixie O'Connor, *Hanging Together: Municipalities Discover Regional Cooperation Is Key to Success*, SO. CITY, Apr. 1993, at 1, 8-9 (noting that when BMW was searching for the site for its new North American manufacturing plant, the 13 counties combined and created the Carolinas Partnership, which presented a comprehensive regional marketing and site plan).

98. See generally Ledebur & Barnes, *supra* note 18, at 5-6.

99. Cf. Dreier, *supra* note 2, at 1359; Richard Voith, *City and Suburban Growth: Substitutes or Compliments?* BUS. REV., Sept.-Oct. 1992, at 21, 27 (published by Federal Reserve Bank of Philadelphia) (describing the positive correlation between declining cities and slowly growing suburbs).

100. City problems have no respect for political boundaries. For example, crime, and the multiplier effect of crime, does not stop at the city line. See Michael A. Stegman, *National Urban Policy Revisited*, 71 N.C. L. REV. 1737, 1748 ("Rising crime rates are not exclusive to our largest cities."). Thus, when

zoning results in a financially weakened city and decreased regional economic vitality. Thus, despite the best efforts of suburbanites, cities and suburbs are interdependent and share common fates.

B. Resistance to Regional Co-Operation

Although regional co-operation is the key to the economic success of interdependent regions, suburban and city political leaders alike, with a few notable exceptions,¹⁰¹ resist regional co-operation.¹⁰² Suburban residents' and lawmakers' resistance reflects a fear that the suburbs will lose their unique "local revenue-expenditure patterns" as the city and suburbs merge into a interconnected region.¹⁰³ In essence, regional co-operation would erase the benefits of the economic cost-benefit analysis that led homeowners to choose houses in the suburbs. Co-operation negates the goal of exclusionary zoning, which is to free suburbanites from the economic cost of problems by zoning those problems out of their neighborhood.¹⁰⁴

On a more practical level, suburban residents view regional co-operation as a way for the city to get tax dollars through its back door, and they fear losing control over how their tax dollars are spent.¹⁰⁵ Building on a basic distrust of government

the city of West Palm Beach enacted a surcharge on water sold to suburban Palm Beach to finance police protection in West Palm Beach, the mayor of West Palm Beach commented: "Our crime worries them. I keep hearing from them [that] if we fall apart because of our crime, it would hurt them dramatically." Joel Engelhardt and Tim O'Melia, *Water Surcharge on Palm Beach Could Pay for West Palm Officers*, PALM BEACH POST, Mar. 12, 1994, at 1A. See also *supra* note 53 and accompanying text (describing the inappropriateness of suburbanites' "out of sight, out of mind" mentality).

101. See *infra* notes 131, 164 and accompanying text (discussing supporters of regionalism). See also Rob Gurwitt, *The Painful Truth About Cities and Suburbs: They Need Each Other*, GOVERNING, Feb. 1992, at 56, 58 (quoting John Amberger, executive director of the Southeast Michigan Council of Governments) ("[As a region] you pay one way or another" for the social problems of a declining central city.").

In addition, at least one study indicates that suburban homeowners may believe that a long-term economic decline in the central city will similarly reduce the market value of their suburban property. Dreier, *supra* note 2, at 1358-59 (citing Arthur S. Goldberg, *Americans and Their Cities: Solicitude and Support*, in *IN THE NATIONAL INTEREST: THE 1990 URBAN SUMMIT* (Ronald Berkman et al. eds., 1992)).

102. See Engelhardt and O'Melia, *supra* note 100, at 1A (noting that in response to the proposed West Palm Beach water surcharge, the Town Council President of Palm Beach stated, "if they have budget problems, they shouldn't be sticking their hands in our pockets to solve them").

103. Tiebout, *Pure Theory*, *supra* note 26, at 423.

104. See *supra* part II.C.

105. *Id.* *supra* note 97, at C5.

in general and city government in particular, "suburbanites resent it when politicians take their money and use it to solve other people's problems, especially when they don't believe that government can actually solve these problems."¹⁰⁶

Recognition of regional interdependence, likewise, gets a lukewarm reception from some city political leaders.¹⁰⁷ These leaders, often members of racial minority groups, fear that co-operation will dilute their political power.¹⁰⁸ They fear co-operation because it may lead to shared decision making authority between city and suburban governments with vastly different constituencies.¹⁰⁹

How, then, can suburban officials, city leaders, and residents be persuaded that regional co-operation for the payment of poverty-related expenses is mutually beneficial? "The trick, of course, is to find a way of arguing that the benefits of cooperation will outweigh the costs."¹¹⁰

V. A MODEL OF REGIONAL REDISTRIBUTION OF POVERTY-RELATED EXPENSES

The answer lies in a solution that uses *regional* tax dollars to pay for *regional* poverty-related expenses. The reality of the situation, however, is that the tax money is, by and large, in the suburbs and the poverty expenses are, by and large, in the city.¹¹¹ To counteract fiscal inequality and to match regional revenue with regional expenditures, a model must link the suburban tax base with the city budget.¹¹² The constraints on this model are both constitutional¹¹³ and political.¹¹⁴ If the correct legal mechanism is developed to redistribute the impact of poverty-related expenses across a region, however, the political barriers can be overcome.

Several possible methods exist to regionally redistribute poverty-related expenses. Municipalities might use direct taxes, linkage taxes, annexation, or a regional government to spread the burden of poverty. Alternatively, municipalities can look to

106. Wooster, *supra* note 73, at 53.

107. See Gurwitt, *supra* note 101, at 60.

108. See *id.*

109. See *id.*

110. See *id.* at 59.

111. See *supra* notes 22-25, 62 and accompanying text.

112. Even Tiebout acknowledges that pure localism is inefficient and regionalism is necessary when external economies and diseconomies are of sufficient importance. Specifically, Tiebout notes that "[n]ot all aspects of law enforcement are adequately handled at the local level. The function of the sheriff, state police, and the FBI — as contrasted with the local police — may be cited as resulting from a need for integration." Tiebout, *Pure Theory*, *supra* note 26, at 423.

113. See *infra* part V.A.

either the state or federal government to effect regional redistribution. Most of these models, however, present serious practical or political problems. On comparison, only a model built on state intervention can successfully redistribute poverty-related expenses.

A. Direct Tax

The first option for regional redistribution is direct taxation of suburban residents by the city. According to an economic model developed by Charles Tiebout, taxation of benefits solves the spillover problems caused by exclusionary zoning.¹¹⁵ To tax suburban residents, however, cities must establish a taxing nexus sufficient to pass constitutional muster. The "simple, but controlling, question is whether the [city] has given anything for which it can ask return."¹¹⁶ If nothing is given in return, any taxation of an individual violates the Due Process Clause of the United States Constitution, which requires that the government shall not deprive any person of "life, liberty, or property, without due process of law. . . ."¹¹⁷

Thus, in order for such a direct tax to pass constitutional muster, a direct nexus between the tax and the benefit must exist. One might argue that the proposed tax is justified because suburbanites receive the benefit of less homelessness and less crime because crime and homelessness are problems concentrated in the city.¹¹⁸ However, no court has yet found such a benefit.

115. Charles M. Tiebout, *An Economic Theory of Fiscal Decentralization*, in PUBLIC FINANCES: NEEDS, SOURCES AND UTILIZATION 79, 94 (National Bureau of Economic Research ed., 1961). For example, if town A sprays all of its trees to get rid of pests and the spray extends beyond Town A's borders then all the surrounding towns that benefitted from A's spraying must pay a benefits tax. *Id.* at 94-95.

Thus, extending this theory to the problem at hand: If the city has a disproportionate share of the region's poor and pays for all the services associated with the poor, then the surrounding towns that benefit from the city providing services to the poor, must pay a benefits tax.

116. See *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940) (requiring a state to provide protection, opportunities, and benefits before it may tax an activity); see also *Barclays Bank, PLC v. Franchise Tax Board*, 114 S. Ct. 2268, 2276 (1994) (stating that a state can exact a return if it affords taxpayer protection opportunities and benefits); *Allied Signal Inc. v. Director*, 112 S. Ct. 2251, 2258 (1992) (holding that the power to tax is based on protection, opportunities, and benefits conferred).

117. U.S. CONST. amend. V.

118. See DAVID T. HERBERT, *THE GEOGRAPHY OF URBAN CRIME* 102 (1982) (identifying large cities and densely populated areas as main problem areas of crime); Drew P. Gannon, *An Analysis of Pennsylvania's Legislative Programs for Financially Distressed Municipalities and the Reaction of Municipal Labor Unions*, 98 DICK. L. REV. 281, 289 (1994) ("Social problems such as crime, drugs, homelessness, and AIDS [are especially concentrated in large cities].").

Although some politicians have suggested a formal method of regional taxation to recognize the city's role in providing health care and social services, no legislature has yet adopted such a plan.¹¹⁹

B. Linkage Tax

An alternative to a direct tax would be to assess a linkage tax (or user fee) on those suburban residents who have direct dealings with the city. For example, a city might tax those who work in the city, attend cultural events in the city, or use airports located in the city.¹²⁰ A city wage tax on non-resident workers is the clearest example of a linkage tax.

However, linkage taxes only work if the resulting price, including tax, of city products is less than comparable goods suburbanites can purchase outside of the city.¹²¹ Thus, as long as the suburban worker makes more money in the city, despite the wage tax, he will continue to commute to the city for employment. However, if there is no parity in the tax rates between the suburbs and the city, employers in the city will have to pay higher wages to offset the increased tax burden. The result is that city employers will be at an economic disadvantage. Due to increasing employment opportunities, workers now have a choice as to employment location.¹²² Thus, the imposition of a wage tax on nonresidents will accelerate employment shifts to the suburbs.¹²³ In other words, the imposition

See generally U.S. CONF. OF MAYORS, A STATUS RPT. ON HUNGER & HOMELESSNESS IN AMERICA'S CITIES: 1991, 59-60 (1991); *Homeless Problem Worsening*, S.F. CHRON., Dec. 17, 1991, at A2.

119. See George Judson, *New Haven's Task: Tying City to Region to Promote Growth*, N.Y. TIMES, June 1, 1993, at A1 (describing a plan to share tax revenues from development regionally).

120. See Larry Rohter, *Meal Tax to Aid Miami's Homeless*, N.Y. TIMES, Aug. 3, 1993, at A10 (noting that Dade County, Florida approved a 1% tax on restaurant meals in Miami restaurants in order to underwrite medical treatment and job training programs for the homeless and to build low cost housing and temporary shelters).

121. See H. Craig Lewis, *The Suburbs Have Grown Up and the City Needs to Adjust*, PHILA. INQUIRER, Jan. 3, 1992, at A9. As a result of its recent fiscal crisis, Philadelphia obtained state authorization to impose an additional 1% sales tax on goods bought within the city. The result was an across-the-board increase in the cost of goods bought in the city which placed city businesses at a comparative economic disadvantage with their suburban competitors. As H. Craig Lewis, a state legislator from suburban Bucks County, noted, "[t]he fiscal crisis is a unique opportunity to promote revenue-generating mechanisms that work for the whole region. A local sales tax could be part of that but only if it is in place in surrounding counties too." *Id.*

122. See *supra* notes 16-17 and accompanying text.

123. See *supra* note 94 at 147/iss1/2.

of a user tax will not solve the problem, as long as suburbanites have the opportunity to purchase goods, without the tax, outside the city.¹²⁴

C. Annexation

Instead of taxing suburban residents, cities might attempt to use the process of annexation to bring the suburbs under the city's taxing umbrella. Cities that have annexed suburbs, such as Austin, Charlotte, Jacksonville, and Indianapolis, have much lower poverty and crime rates than those cities unable to annex suburbs.¹²⁵ To annex a suburb, however, requires an affirmative vote of both city and suburban residents.¹²⁶ Few municipalities can achieve such a vote. Even those cities previously successful with annexation, find it difficult to annex today.¹²⁷ For example, from 1940 to 1980, Memphis captured 54 percent of its metropolitan area's population growth by annexing suburbs.¹²⁸ By 1980, however, annexation became a difficult and very litigious process, and virtually stopped.¹²⁹

Annexation is almost impossible in today's political climate. Suburban residents are increasingly reluctant to trust the political

124. Linkage taxes or user fees succeed when there is a clearly defined and regionally unique function that the city is performing for the benefit of the suburbs. Charles Andes, *The Suburbs Ought to Chip In*, PHILA. INQUIRER, Sept. 15, 1992, at C1 (noting that in Denver and St. Louis, cultural institutions tend to be concentrated in the city, and in those metropolitan areas, suburban residents support regional cultural institutions with a regional tax for the arts). See also Engelhardt and O'Melia, *supra* note 100, at 1A (pointing out that cities which sell their water to the suburbs provide such a unique service that the suburbs have little choice but to accept increased taxes as when the City of West Palm Beach proposed a surcharge on water it provides to neighboring Palm Beach).

125. See Dreier, *supra* note 2, at 1378; Boldt, *supra* note 97, at C7.

One commentator notes that the great flaw of urban policy in the 1950s and 1960s was that it dealt with cities as cities and not as centers of metropolitan areas. Judson, *supra* note 119, at B1. According to Judson, the goal of urban policy should be to reconnect older cities to their suburbs so that they can compete with newer cities that grew up annexing their suburbs. *Id.*

126. See, e.g., ILL. ANN. STAT. ch. 60 para. 1/15-15(e) (Smith-Hurd 1992 & Supp. 1994) ("If a majority of those voting on the proposition do not vote in favor of it, the territory shall remain with the adjacent township [that is coterminous with the city].").

127. Dreier, *supra* note 2, at 1360 ("Only a few cities are in a position to annex outlying areas. Efforts to forge metropolitan-wide government, . . . have met with strong resistance, particularly by suburbanites.").

128. Smothers, *supra* note 56, at A10.

system from which they have fled.¹³⁰ Moreover, urban minority leaders resist annexation¹³¹ for fear that annexation of predominately white suburbs will dilute and threaten their new-found political powers.¹³²

D. Creation of Regional Government

At first glance, creation of a broad regional government is an attractive alternative to taxation or annexation. Most notably, it surmounts the constitutional problem inherent in taxation because voters would create a regional government at the ballot box. The regional government solution, however presents the same political drawbacks found in annexation.¹³³ Many groups, especially suburbanites, have resisted efforts to create regional governments.¹³⁴ Thus, once more, "the political reality of established government structures, as well as suburban whites jealously guarding their racially and economically homogeneous enclaves, and urban blacks benefitting from a rising tide of political power,"¹³⁵ will dash any hopes of creating a broad based regional government.

Metropolitan based government and tax assessment programs have been politically successful when the entity directly benefits both city and suburban residents. Examples include special service districts and mass transit systems.¹³⁶ Thus, even if, in an

130. See Judson, *supra* note 119, at A1 (noting that in New Haven, Connecticut, "reconnecting the city with its suburbs is a delicate task. Decades of suspicion have built up, racial divisions are deep, and many people who no longer live, work or shop in New Haven now fear the inner city.').

131. An exception is Memphis Mayor W. W. Herenton, an African-American, who proposed that Memphis should merge with the suburbs of surrounding Shelby County. The consolidation idea grew from the need to prop up the city tax base. Memphis business leaders immediately backed the suggestion, maintaining that a merger would lessen the city's tax burden. Smothers, *supra* note 56, at A10.

132. See Judson, *supra* note 119, at B1.

133. See *supra* part IV.B (discussing political and social resistance to efforts to regionalize).

134. Dreier, *supra* note 2, at 1360.

135. Smothers, *supra* note 56, at A10.

136. See, e.g., CAL. PUB. UTIL. CODE §§ 28500-29757 (1973 & Supp. 1994) (creating the San Francisco Bay Area Rapid Transit District); CAL. PUB. UTIL. CODE § 29690 (1973) (providing for the levy and collection of taxes by the special service district); 74 PA. CONS. STAT. ANN. §§ 1501-1543 (1993) (creating the Southeastern Pennsylvania Transportation Authority which serves the Philadelphia region).

In *Anema v. Transit Construction Authority*, 788 P.2d 1261 (Colo. Sup. Ct. 1990), the Colorado Court of Appeals discussed the constitutional necessity of a clearly enunciated benefit. The court upheld a tax on suburban residents for a transit system because "[t]he assessment constituted a valid special fee imposed on those individuals and entities reasonably likely to benefit from a

effort to persuade suburban residents to accept a regional government, one were to conclusively prove that suburban residents benefit from the city bearing the problems of poverty, such a benefit is most likely too small to withstand political resistance.

E. Federal Government Intervention

Some commentators propose that the federal government should intervene and redistribute revenues between cities and their suburbs.¹³⁷ Redistribution at the federal level, however, does not take into consideration the differing economic and political needs that face each individual metropolitan region. A redistribution formula that works for the Philadelphia Region (where the city and county are coterminus and the suburban counties ring the city), may not work for the Miami Region (where the metropolitan area bleeds imperceptibly into the West Palm Beach Metropolitan Area). Furthermore, even proponents of federal intervention concede that creating a national redistribution model is bureaucratically daunting.¹³⁸ The resulting, necessarily complex, agency would only further bloat the federal government.¹³⁹

F. State Government Intervention

The method of revenue redistribution with the surest legal footing, and the most plausible political support, exists at the state government level.¹⁴⁰ Policy analysts traditionally emphasize

rapid transit system." *Id.* at 1267.

Research shows that regional agencies increasingly focus on the areas of transportation and environmental protection. Regional councils, however, tend not to respond to human services needs. Robert Gage, *Regional Council Program Priorities for the 1990s: Two Emerging Program Clusters*, 11 *POL'Y STUD. REV.* 57, 72 (1992).

137. Ledebur & Barnes, *supra* note 18, at 11-12; Galowitz, *supra* note 42, at 82.

Edward Rendell, Mayor of Philadelphia, calls for a "New Urban Agenda" for the federal government which would "tip the playing field" in favor of cities and permit cities to compete economically with the suburbs. He proposes to create federal incentives for regional cooperation, including: mandatory purchasing requirements for the federal government from city vendors; placement of federal facilities in distressed urban areas; federal funding mandates; reviving tax incentives to spur city development; lifting restrictions on community-based housing development; and redevelopment of urban "brown fields" (hazardous waste sites). Rendell, *supra* note 76, at A23.

138. Galowitz, *supra* note 42, at 101-02.

139. *Id.*

140. Some commentators feel that because the spill-over effects of local exclusionary zoning are regional rather than statewide in scope, the redistri-

the ability of a higher-level government, whose boundaries encompass both the spillover's source and the geographic area the spillover affects, to internalize interjurisdictional cost spillovers.¹⁴¹ State regulation "transcends local prejudice and parochialism" and insulates local officials from their constituents who favor exclusionary zoning.¹⁴²

Using the power of the state government eliminates many of the hurdles associated with revenue redistribution.¹⁴³ First, unlike a direct tax, redistribution by the state does not violate the due process clause because the state government represents all of the groups affected by the redistribution.¹⁴⁴ Second, handling the problem on a state level avoids some of the bureaucratic problems associated with federal intervention.¹⁴⁵ Most importantly, though, by using state government, the power of the state courts can be brought to bear on legislators who may resist regionalism out of self-interest.¹⁴⁶ The result of state mandated regionalism would be that citizens of certain municipalities would pay a tax to a higher level of government, for the privilege of excluding the poor by engaging in exclusionary zoning.¹⁴⁷

bution should occur on the metro-regional level, rather than the state level. See Galowitz, *supra* note 42, at 108-40 (discussing interstate reaction "to metro-regional exclusionary zoning at the sub-federal level."). While this argument addresses the legal problems inherent in redistribution programs, it ignores the political reality of intraregional resistance.

141. Robert Ellickson, *Public Property Rights: A Government's Rights and Duties When Its Landowners Come Into Conflict With Outsiders*, 52 S. CAL. L. REV. 1627, 1628, 1657 (1979).

142. Galowitz, *supra* note 42, at 91, 96-97.

143. Metropolitan areas that cross state borders face a jurisdictional problem. The most notable examples are New York (New York, New Jersey, and Connecticut), Chicago (Illinois, Wisconsin, and Indiana) and Philadelphia (Pennsylvania, New Jersey, and Delaware). Of the 75 most populous metropolitan areas, 14 cross state boundaries. These 14 account for 33% of the population of the 75 areas (with New York alone accounting for 11%). U.S. BUREAU OF THE CENSUS, STATE AND METROPOLITAN AREA DATA BOOK 1991, Table 3 (1991).

Thus, in these multistate metropolitan regions, there must also be interstate compacts that support state sponsored efforts of regional distribution. This support can take the form of comity of legal decisions reached in neighboring courts and participation in multistate arbitration of fair share agreements. There is adequate legal precedent for such interstate compacts. See, e.g., 36 PA. CONS. STAT. ANN. § 3503 (1961 & Supp. 1994) and N.J. STAT. ANN. § 32:3-2 (West 1990) (creating the Pennsylvania and New Jersey Port Authority).

144. See *supra* part V.A (describing direct taxes).

145. See *supra* part V.E (describing federal intervention).

146. See *supra* part IV.B (explaining why politicians resist regionalism).

147. McDougall, *Regional Contribution Agreements*, *supra* note 49, at 693.

For an insightful and interesting discussion of casting this compensation as a liability rule rather than a property rule and of internalizing externalities https://openscholarship.wustl.edu/law_urbanlaw/vol47/iss1/2

1. Zoning Power is Given to Municipalities by States

Land use regulation is traditionally a local government activity, not a state government activity.¹⁴⁸ Both the law and land use planning theory, however, recognize a significant state role in zoning.

From the legal perspective, states create local municipalities through incorporation. States have constitutional authority over municipalities.¹⁴⁹ Accordingly, municipal police power flows from the authority of the state legislature.¹⁵⁰ States may also freely modify this municipal power for the good of all of the state's citizens.¹⁵¹

Most state constitutions require that municipalities exercise the police power for the general welfare of the people.¹⁵² In

through "pigovian taxes," see *id.* at 692-93. A pigovian tax is a tax paid to engage in exclusionary zoning. *Id.*

148. See generally Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

149. Furthermore, the validity of a municipality's attempt to act outside of the scope of power specifically granted to it by the state is limited by Dillon's Rule. Dillon's Rule states that local governments have only those powers specifically granted by constitution or statute or necessarily arising by implication from the power expressly granted by the state. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448 (5th ed. 1911). See, e.g., *In re* Petition of Ball Mountain Dam Hydroelectric Project, 576 A.2d 124, 126 (Vt. 1990) ("We have consistently adhered to the so-called Dillon's rule . . ."); *White v. Union County*, 377 S.E.2d 93, 95 (N.C. Ct. App. 1989) (Dillon's Rule is well settled in North Carolina); *Hylton Ent., Inc. v. Board of Supervisors*, 258 S.E.2d 577, 581 (Va. 1979) ("Adherence to [Dillon's Rule] has not been merely perfunctory, but has been conclusively evidenced by the affirmative action of the General Assembly . . ."); *O'Fallon Development Co., Inc. v. City of O'Fallon*, 356 N.E.2d 1293, 1298 (Ill. Ct. App. 1976) ("Dillon's Rule . . . continues to apply to nonhome rule units of local government.").

150. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 726 (1975) ("The zoning power is a police power and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state."); McDougall, *Regional Contribution Agreements*, *supra* note 49, at 670, n.42.

151. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (holding that municipal zoning codes are a valid exercise of the police power, but "where the general public interest would so far outweigh the interest of the municipality the municipality [is] not allowed to stand in the way.").

152. See *supra* notes 36-38 and accompanying text (discussing the constitutionality of zoning ordinances). See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390, 415, 417 (N.J. 1983) [*Mount Laurel II*] (interpreting NJ CONST. Art. I, §1 (1947)); *Meitner v. Township of Cheltenham*, 460 A.2d 1235, 1238 (Pa. Cmmw. Ct. 1983) (interpreting PA CONST. Art. I, §1 (1873)). *Lees v. Bay Area Air Pollution Control Dist.*, 238 Cal. App. 2d 850 (Cal. Ct. App. 1965) (interpreting CA

particular, police power laws must be for the general welfare of the citizens of the entire state, not solely for the general welfare of the citizens of that particular municipality.¹⁵³

From the planning perspective, planners recognize that the state has a legitimate role in land use regulation in four situations: 1) when "problems spill across jurisdictional boundaries;"¹⁵⁴ 2) when "local interests diverge from the interests of a broader public;"¹⁵⁵ 3) when "problems arise on lands not subject to effective local control;"¹⁵⁶ or 4) "when problems arise in implementing state policies of carrying out state investments."¹⁵⁷ The concentration of urban poverty caused by suburban exclusionary zoning clearly meets three of these criteria. Suburban exclusionary zoning creates spill-overs, represents suburban interest that diverge from regional interests, and cannot be adequately combatted due to jurisdictional problems. Land use planning policy, therefore, suggests that the state has a right to intervene.

2. Model for Regional Redistribution of Poverty-Related Expenses

Before each state develops a regional redistribution model, it must first determine the regional per capita poverty-related expenditure benchmark.¹⁵⁸ To calculate the benchmark, the state first is divided into urban-center regions.¹⁵⁹ Second, each municipality within each region submits its total spending for poverty-related services to the state agency. Third, the per capita poverty spending rate is calculated for each region.¹⁶⁰ This figure represents the per capita "fair share" of poverty spending each municipality should bear. Finally, each municipality's per capita

CONST. Art. 1, §14 (1879) and noting that the police power protects the order, safety, health, morals, and general welfare of society); *State Bd. of Barber Examiners v. Cloud*, 44 N.E.2d 972, 980 (Ind. 1942) (interpreting IND. CONST. Art. 1, §1 (1875)); *Illinois ex rel. Mosier v. City of Springfield*, 19 N.E.2d 598 (Ill. 1939) (interpreting ILL. CONST. Art. 4, §22 (1870)); *Bosworth v. City of Lexington*, 125 S.W.2d 995, 1000 (Ky. Ct. App. 1939) (interpreting KY CONST. §1); *Mo CONST. Art. 1, §2* (1875).

153. *Mount Laurel I*, 336 A.2d at 726; *Mount Laurel II*, 456 A.2d at 415.

154. Galowitz, *supra* note 42, at 84.

155. *Id.*

156. *Id.*

157. *Id.*

158. In the case of multistate metropolitan areas, the model would be implemented by each state in the region. Each state would determine which poverty related expenses are to be included.

159. Thus, rural areas would not participate in this redistribution.

160. To calculate per capita spending, divide the dollar amount spent by the region on poverty related services by the total regional population.

poverty-spending rate is calculated. If a municipality's per capita poverty-spending rate is *below* the regional per capita poverty-spending benchmark, it will be deemed to be *receiving the benefit* of exclusionary zoning. If, however, a municipality's per capita poverty-spending rate exceeds the regional benchmark, it will be deemed to be *bearing the burden* of exclusionary zoning.

If a municipality's per capita poverty-spending rate is below the regional benchmark, that municipality will pay an amount equal to the deficiency to a state agency. The state agency will then proportionately redistribute this money to those municipalities whose poverty-spending rate exceeds the regional benchmark.

For example, assume a city with a population of 100 is surrounded by one suburb with 100 people (see Chart 4). Each municipality has a budget of \$1,000. Because cities spend proportionately more of their budget on poverty-related services,¹⁶¹ assume that the city spends \$200 on poverty-related services and the suburb spends \$20. This means that the city spends \$2 per capita on poverty-related services and the suburb spends \$0.20. Added together, this region of 200 people spends a total of \$220 on poverty-related services. Therefore, the regional poverty-spending per capita is \$1.10. This is the regional benchmark. Because the suburb's per capita poverty expenditures are below the regional benchmark, the suburb would pay the difference between its per capita poverty-spending rate and the regional benchmark. Thus, the suburb would pay the state agency \$0.90 per capita, or a total of \$90. The city would receive this money to the extent that its per capita poverty spending exceeds \$1.10. In this case, the city's per capita poverty spending exceeds the regional benchmark by \$0.90 per capita, or a total of \$90. Thus, after redistribution, each municipality would spend \$1.10 per capita on poverty-related services.

	City	Suburb	Region
Population	100	100	200
Total Budget	\$1,000	\$1,000	\$2,000
Poverty-Related Expenditures	\$200	\$20	\$220
Per Capita Poverty-Related Expenditures	\$2	\$0.20	\$1.10

Chart 4

Under this model, communities still retain the power or "play or pay." They have a choice: they can allow poor people into their jurisdiction by allowing low income housing to be built, thus increasing their per capita poverty-spending, or they can pay the state to redistribute revenue to areas carrying more than their fair share of the poverty-related expenditure burden. This regional expenditure sharing is not regionalized service delivery, or a call for metropolitan government. Rather, it offers a plan for cities and suburbs to work together for the benefit of all the citizens of the region, while maintaining separate political divisions.

3. The Impact of Judicial Intervention

Suburban residents would likely resist state redistribution legislation with the same fervor associated with direct taxation and annexation.¹⁶² Regardless, the state courts have the power to judicially fabricate such a model while waiting for legislative action. Professor McDougall noted, "[T]he judiciary [is] often the most responsive of the three branches to public pressure to intervene. . . . In the absence of administrative and regulatory bodies established and equipped to handle exclusionary zoning problems, courts [find] themselves thrust into roles requiring administrative, legislative and judicial techniques in equal measure."¹⁶³

Judicial activism is crucial for the implementation of a policy to regionally share poverty-related expenditures. State politicians from suburban districts, while possibly personally favoring regional redistribution,¹⁶⁴ are at the mercy of their electorates, who will oppose any redistribution efforts which have them on the tax-paying end.¹⁶⁵ Courts must intervene to keep politicians insulated from retaliatory acts of their constituencies.

This is not to maintain that the courts should handle redistribution on a permanent basis. They should not, however, stand silent while politicians protect their political careers.¹⁶⁶ In the absence of meaningful advancement of regional redistribution by the legislature or executive branch, the court's involvement

162. See *supra* parts V.A., .C.

163. Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 650-51 (1987) [hereinafter McDougall, *From Litigation to Legislation*].

164. See Lewis, *supra* note 121, at A9 (advocating a more regional outlook).

165. See *supra* notes 101-04 and accompanying text (discussing suburban resentment of redistribution).

166. See McDougall, *From Litigation to Legislation*, *supra* note 163, at 624-25 (noting that politicians avoid addressing the problem of exclusionary zoning for fear of negative reactions from municipal officials and voters).

in propelling redistribution efforts is crucial. Without constitutional pressure maintained by the courts, the general regional welfare will not be served.¹⁶⁷ Courts must follow the lead of the New Jersey Supreme Court and demonstrate that without legislation the courts will solve the problem, leaving only the question of how for the legislators.¹⁶⁸

4. Learning From *Mount Laurel*

a. *The Basis of the Mount Laurel Doctrine*

The legal formulation for the proposed fair share imposition model is well developed in New Jersey's *Mount Laurel* decisions.¹⁶⁹ In these decisions, the Supreme Court of New Jersey used the state constitution's general welfare clause to establish a system for regional distribution of housing costs.¹⁷⁰ The *Mount Laurel* Doctrine has proved complicated to implement, but it is based on a simple principle: Each municipality must provide for both its own housing needs and its "fair share" of the region's housing demands.¹⁷¹

The *Mount Laurel* Doctrine was limited to the provision of low and moderate income housing.¹⁷² The same theory and legal configurations, however, also apply to wider regional prob-

167. See Payne, *Rethinking Fair Share*, *supra* note 45, at 42-43 (noting that without judicial pressure in the *Mount Laurel* decisions, the New Jersey legislature would not have enacted the Fair Housing Act).

168. See Peter Buchsbaum, *Mount Laurel II, A Ten-Year Retrospective*, *Str. & Loc. L. News*, Winter 1994, at 7, 17 (noting that without judicial pressure in *Mount Laurel*, the New Jersey legislature would not have enacted the Fair Housing Act).

John M. Payne, *From the Courts: Mount Laurel Goes National*, 15 *REAL EST. L.J.* 62, 70 (1986) [hereinafter Payne, *Mount Laurel Goes National*] (stating that *Mount Laurel* demonstrates to "legislatures that without legislation, the courts will solve the problems [thus] leaving to the legislature only the choice of *how* it will be solved. . . . [The result] cannot be achieved without judicial resolve to stay the course.").

169. *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986) (*Mount Laurel III*); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (*Mount Laurel I*).

170. See *Mount Laurel II*, 456 A.2d at 415 ("[T]hose regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.").

171. Payne, *Rethinking Fair Share*, *supra* note 45, at 21.

172. See *Mount Laurel I*, 336 A.2d at 731-32.

lems.¹⁷³ The *Mount Laurel* Doctrine attacks exclusionary zoning practices that shift the burden of low and moderate income housing out of certain communities.¹⁷⁴ The same attack may be made in situations where exclusionary zoning causes regional disparity in the incidence of poverty and poverty-related expenditures. Investigating the evolution of the most celebrated regionalism doctrine, therefore, proves instructive when developing a model for regional cooperation in poverty-related expense redistribution.¹⁷⁵

b. *Mount Laurel I*

*Southern Burlington County NAACP v. Township of Mount Laurel*¹⁷⁶ (*Mount Laurel I*) began the long line of legal battles through which the New Jersey Supreme Court recognized the necessity of regional (as opposed to purely local) planning. The New Jersey Supreme Court addressed whether a developing municipality could use land use regulations to "make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it," thus excluding them from living in the municipality because they could not afford existing housing.¹⁷⁷

Justice Pashman, in an impassioned concurrence in *Mount Laurel I*, noted that municipalities use their zoning power to "take advantage of regional development without having to bear the burdens of such development"¹⁷⁸ and to "maintain them-

173. The *Mount Laurel* decisions have met with limited success outside of New Jersey. See *infra* notes 229-39 and accompanying text. However, this reluctance of other states to wholeheartedly embrace the *Mount Laurel* decisions should not overshadow the decisions' enormous contribution to the efforts of regional planning. Instead of seeing the limited application outside of New Jersey as a defeat we should view it as instructive. Other states' reluctance to jump into the fray midstream may now be abated as the doctrine has been played out in full in New Jersey and the pitfalls discovered and repaired.

174. *Mount Laurel II*, 456 A.2d at 415.

175. This Article does not engage in an exhaustive examination of the *Mount Laurel* Doctrine. For a thorough discussion of the doctrine see McDougall, *Regional Contribution Agreements*, *supra* note 49.

176. 336 A.2d 713 (N.J. 1974).

177. *Id.* at 724. The Township of Mount Laurel, a Philadelphia suburb, enacted zoning ordinances that permitted only detached, single-family homes in residential areas. *Id.* at 719. The ordinance "realistically allow[ed] only homes within the financial reach of persons of at least middle income." *Id.* In the face of a housing shortage, the NAACP sued the township on behalf of various groups of minorities including people who lived in "central city substandard housing in the region." *Id.* at 717.

178. *Id.* at 736.

selves as enclaves of affluence or of social homogeneity.”¹⁷⁹ The court unanimously held that municipalities could not use their zoning power to exclude low and moderate income persons.¹⁸⁰

In *Mount Laurel I*, the New Jersey Supreme Court determined that exclusionary zoning violated the general welfare clause of the New Jersey State Constitution.¹⁸¹ The court noted that “general welfare” reached beyond the welfare of the citizens of any given municipality to the welfare of all state residents.¹⁸² The *Mount Laurel I* court recognized, however, that the power to raise local revenue is determined on an individual municipal basis, rather than a regionally determined one.¹⁸³ While some of a region’s municipalities might be better suited to bear more of the region’s low and moderate income housing, the state’s tax structure required each municipality to bear its “fair share” of the region’s housing needs.¹⁸⁴ Absent an agreement between all of the region’s municipalities, the court concluded that only proportional allocation of the housing burden could achieve the desired result.¹⁸⁵

Mount Laurel I was a monumental decision. It recognized that the zoning codes of individual municipalities could — and should — be scrutinized, not only for their effect on the citizens of that particular municipality, but also for their effect on persons living outside the municipality’s political and geographic boundaries. Compliance with *Mount Laurel I*, however, was slow and spotty.¹⁸⁶ The New Jersey Supreme Court lacked the legislative ability to enforce its decision. The *Mount Laurel I* decision dealt only with principles, not implementation, leaving open the question of remedies.¹⁸⁷ In fact, many felt that the

179. *Id.*

180. *Id.* at 731.

181. 336 A.2d at 730. The New Jersey zoning enabling act in effect at that time contained a general welfare clause. *See*, N.J. STAT. ANN. §§40:55-30 to 55-51 (1968), amended by N.J. STAT. ANN. §40:55D (1986); N.J. STAT. ANN. §40:55-32 (1968), amended by N.J. STAT. ANN. §40:55D-2.a (West 1991).

182. 336 A.2d at 726 (“When regulation does have a substantial external impact, the welfare of the state’s citizens beyond the border of the particular municipality cannot be disregarded and must be recognized and served.”).

183. *Id.* at 732.

184. *Id.* at 732-33.

185. *Id.*

186. John R. Nolon, *A Comparative Analysis of New Jersey’s Mount Laurel Cases with the Berenson Cases in New York*, 4 PACE ENVTL. L. REV. 3, 16 (1986) (emphasizing that the *Mount Laurel II* decision resulted from New Jersey judiciary’s great frustration with the lack of local compliance with the *Mount Laurel I* decision).

187. *See* Buchsbaum, *supra* note 168, at 7 (“Most important[ly], *Mount Laurel I* left open the question of remedy.”).

Mount Laurel I decision could be ignored as ineffective.¹⁸⁸

c. *Mount Laurel II*

The New Jersey Supreme Court revisited the issue of exclusionary zoning in *Southern Burlington County NAACP v. Township of Mount Laurel*¹⁸⁹ (*Mount Laurel II*). In *Mount Laurel II*, the New Jersey Supreme Court explicitly held that zoning ordinances must further the general welfare of all the citizens including those outside the municipality, if they live within the region that contributes to the municipality's housing demand.¹⁹⁰ Accordingly, a zoning ordinance that fails to "provide the requisite opportunity for a fair share of the region's need for low and moderate income housing," contravenes the general welfare, and thus, violates the state constitution.¹⁹¹

The *Mount Laurel II* court recognized that suburban exclusionary zoning practices are a major cause of urban deterioration.¹⁹² These exclusionary practices increase the relative concentration of poor in the cities and thereby hasten the flight of business and the middle class to the suburbs.¹⁹³ Providing lower income housing in the suburbs may help to relieve cities of the "overwhelming fiscal and social burden" that exclusionary zoning practices cause.¹⁹⁴

188. See Payne, *Rethinking Fair Share*, *supra* note 45, at 22 (contending that while *Mount Laurel I* was ineffective, *Mount Laurel II* "worked and stirred up a firestorm.").

189. 456 A.2d 390 (N.J. 1983). *Mount Laurel II* consolidated six cases in which the parties sought clarification of the *Mount Laurel I* doctrine. *Id.* at 410-11. In one of the cases, the NAACP challenged a trial court's decision that the Township of Mount Laurel had complied with *Mount Laurel I*. The trial court had found the Township in compliance with *Mount Laurel I* because it had made "a bona fide attempt . . . to provide a realistic opportunity for the construction of its fair share of the regional lower income housing need." *Id.* at 411.

190. *Id.* at 415. The New Jersey Supreme Court stated:

When the exercise of [exclusionary 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 . . . of those residing outside of the municipality, but within the region that contributes to the housing demand within the municipality.

Id.

191. *Id.*

192. *Id.* at 415-16, n.5.

193. *Id.* Furthermore, the court noted that while cities bear much of the burden of exclusionary zoning, deteriorating cities threaten the whole state. In addition to imposing costs on all the state's taxpayers, "[t]he continuing disintegration of our cities encourages business and industry to leave New Jersey altogether" *Id.*

The *Mount Laurel II* court found that in order to comply with *Mount Laurel I*, a municipality must provide a realistic opportunity for the construction of its regional fair share of low and moderate income housing.¹⁹⁵ The court recommended that government should use affirmative devices to make such realistic construction opportunities. These devices include lower-income density bonuses, mandatory set asides, and cooperation in achieving federal subsidies.¹⁹⁶

To apply its rule, the court defined "region" as "the general area which constitutes the housing market area of which the subject municipality is a part and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning."¹⁹⁷ Importantly the *Mount Laurel II* decision abandoned the previous limitation of the *Mount Laurel Doctrine* to "developing" communities (i.e., communities that were building new housing).¹⁹⁸ Instead, in *Mount Laurel II*, the court imposed fair share quotas on *each* community in the state, with special emphasis on so-called growth areas.¹⁹⁹ Additionally, the court concluded that a community could not calculate its regional fair share based on its own projected population. Rather, the court required communities to use the projected population of the region.²⁰⁰

A major problem of *Mount Laurel II*, however, was lack of a concrete methodology to determine a municipality's "fair share." The court declined to enunciate specific numbers to determine "regional need," calling instead for expert witness determination.²⁰¹ The court's indecision triggered a debate that continued for many years. Subsequent battles over implementing *Mount Laurel II* revealed a serious problem: one method for calculating regional housing need generated implausible numbers while the other generated numbers too high to be politically acceptable.²⁰²

195. *Id.* at 419.

196. *Id.* at 419, 448.

197. *Id.* at 440 (quoting *Oakland v. Madison*, 371 A.2d 1192 (N.J. Super. Ct. Law. Div. 1974)).

198. *Id.* at 430.

199. 456 A.2d at 430-31. The court noted, however, that zoning decisions must reflect regional considerations and that every municipality should not be "a microcosm of the entire state in its housing pattern" *Id.*

200. *Id.* at 441.

201. See *id.* at 440 ("We will not attempt here to provide any further guidance for the determination of regional need, but leave to the experts, including the experts appointed by trial court pursuant to our opinion.").

202. Payne, *Rethinking Fair Share*, *supra* note 45, at 24-26. Payne describes the two approaches as one for calculating "prospective need" and one for calculating "financial need." *Id.* at 25. Because of the complex and speculative

Finally, the *Mount Laurel II* court struggled with institutional barriers to developing an effective legal remedy. The absence of legislative assistance forced the court to sit as a super-legislature and enact judicial guidelines, in lieu of administrative regulations.²⁰³ *Mount Laurel II* produced a hailstorm of criticism from municipalities that faced judicially enacted mandatory zoning regulations.²⁰⁴ The Governor of New Jersey called the judiciary's guidelines "communistic."²⁰⁵

d. *The Fair Housing Act*

Since 1975, the court had been calling for action from the legislature.²⁰⁶ In 1985, ten years after *Mount Laurel I* and two years after *Mount Laurel II*, the New Jersey legislature finally took up the mantle of regionally determined need for low and moderate income housing by enacting the Fair Housing Act.²⁰⁷ The Fair Housing Act created an administrative agency known as the Council on Affordable Housing (COAH).²⁰⁸ By creating this state-wide agency, the legislature acknowledged a legitimate state interest in the effects of zoning — an area that had historically been solely within the purview of local authorities.²⁰⁹ By creating COAH the legislature solved the legitimacy problem of judicially enacted legislation.²¹⁰

Under New Jersey's Fair Housing Act, COAH has the power to: 1) define housing regions in the state and assess regional low and moderate income housing need, 2) promulgate criteria and guidelines to enable municipalities within the region to determine fair share of regional housing need, and 3) decide (upon application from a municipality) whether proposed ordi-

approach of "prospective need," Payne opined, its results made the process "inherently implausible." *Id.* The "financial need" approach, based on the number of households paying 25% to 30% of their income fair housing, generated numbers "that would have been politically devastating." *Id.*

203. *Mount Laurel II*, 456 A.2d at 458-59.

204. Payne, *Rethinking Fair Share*, *supra* note 45, at 22 (noting that the New Jersey Supreme Court "strayed so far into political territory that they could prevail only by obeying political rules, which, by definition, courts cannot obey.").

205. *Id.* at 22; Buchsbaum, *supra* note 165, at 8 ("Conservative suburban legislators sharply criticized what they termed to be 'judicial imperialism that threatened to destroy the fabric of their communities.'"). One local mayor said he would go to jail before he would obey a *Mount Laurel* judgement. Payne, *Rethinking Fair Share*, *supra* note 45, at 22.

206. See *Mount Laurel II*, 456 A.2d at 417.

207. N.J. STAT. ANN. §52:27D-301 to -329 (West 1986 & Supp. 1994).

208. N.J. STAT. ANN. §52:27D-305 (West 1986).

209. See *supra* part V.F.1 (describing traditional zoning practices).

210. See Payne, *Rethinking Fair Share*, *supra* note 45, at 29.

nances and related measures will satisfy their *Mount Laurel* obligation.²¹¹

Not only does the Fair Housing Act provide a statutory method for each municipality to determine and provide for its fair share of regional need for low and moderate income housing,²¹² it also implements a mechanism through which a municipality can "buy out" its obligation.²¹³ Municipalities can share *Mount Laurel* obligations by entering into what is known as a Regional Contribution Agreement (RCA). By paying the cost of building lower income housing, one municipality can transfer to another, if the other agrees, up to fifty percent of its obligation.²¹⁴ This provision allows suburban municipalities to transfer a portion of their obligation to urban areas within the same region.

This unique and innovative form of urban-suburban revenue sharing arose as a result of the pressure of fulfilling *Mount Laurel* fair share requirements.²¹⁵ Although RCAs have critics,²¹⁶ RCAs address the political reality that some communities would rather "pay" by exporting revenue than "play" by accepting low and moderate income housing into their community.²¹⁷ RCAs and their successful implementation provide an ideal model for formulating a method of regional redistribution of poverty-related expenses.²¹⁸

211. N.J. STAT. ANN. § 52:27D-307 (West Supp. 1994)

212. N.J. STAT. ANN. §§ 52:27D-307 to -311 (West 1986 & Supp. 1994).

213. N.J. STAT. ANN. §§ 52:27D-312 (1986 & Supp. 1994).

214. *Id.* The statute provides that "[a] municipality may propose the transfer of up to 50% of its fair share to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter." *Id.*

215. Buchsbaum, *supra* note 168, at 17.

216. See McDougall, *Regional Contribution Agreements*, *supra* note 49, at 682-83 (questioning whether low income housing will be more efficiently developed under RCAs). Professor McDougall notes that due to the cities' precarious financial position they may be more inclined to accept an economically disadvantageous RCA. When the money provided by the RCA is insufficient to house the additional low income burden then cities are worse off than before the agreement. *Id.*

217. At least one commentator believes that the most effective way to provide for the poor "is for both the city and the suburbs to agree to accept their fair share of indigent people." Galowitz, *supra* note 42, at 80. This, however, is politically unrealistic. Solutions to regional disparity such as this, while legally sound, ignore political reality that would bar their implementation.

It is important to note, however, that a municipality cannot transfer *all* of its fair share obligation through RCAs. By limiting transfer to 50%, the legislature required that "the provision of housing in urban areas must be balanced with the need to provide housing throughout the State for the free mobility of citizens." N.J. STAT. ANN. § 52:27D-302g (West 1986).

218. Douglas P. Opasko, executive director of COAH, states that RCAs

e. Mount Laurel III and Beyond

The New Jersey Supreme Court validated the Fair Housing Act and COAH in *Hills Development Co. v. Bernards Township*,²¹⁹ (*Mount Laurel III*). In *Mount Laurel III*, the court reaffirmed its commitment to upholding the constitutional requirement of regional (as opposed to purely local) planning.²²⁰ It drew on similarities between the Fair Housing Act and other state acts such as The Coastal Area Facility Review Act,²²¹ The Pinelands Protection Act,²²² and The Hackensack Meadowlands Reclamation and Development Act²²³ in its regional approach to the question of appropriate land use.²²⁴ Signaling that regional planning was the way of the future, the court stated, "[The Act's] statewide scope is an extensive departure from the unplanned and uncoordinated municipal growth of the past."²²⁵ In response to charges of sabotage from critics of the Fair Housing Act, the court stated that as long as COAH pursued *Mount Laurel* obligations with determination and skill, the administrative agency was preferable to court enacted remedies.²²⁶

After *Mount Laurel III*, the New Jersey courts continue to reaffirm the validity of RCAs. For example, in *AQN Associates, Inc. v. Township of Florence*²²⁷ the Superior Court held that RCAs are "bondable" municipal expenditures.²²⁸ Most recently, in *In re Township of Warren*,²²⁹ the Supreme Court held that a municipality cannot limit its housing to its own residents, even if half of its "fair share" is in another municipality as a result of entering into a RCA.²³⁰ The court found that allowing a

are a sorely needed source of housing money for cities. In 1990, RCAs represented 13% of low-moderate housing units approved for certification by COAH for municipalities seeking to comply with their *Mount Laurel* obligations. Housing plans approved by the state in 1990 called for \$43 million to be spent in older urban areas. Alan Sipress, *Despite Ruling, Affordable Homes Still Scarce in N.J.* PHILA. INQUIRER, Nov. 25, 1990, at A1.

219. 510 A.2d 621 (N.J. 1986).

220. *Id.* at 643 ("[I]t is the goal of *Mount Laurel II* [to provide] a realistic opportunity for lower income housing by the combined actions of the various governments in the state of New Jersey, leading to a satisfaction of the statewide need.").

221. N.J. STAT. ANN. §§13:19-1 to -21 (West 1991).

222. N.J. STAT. ANN. §§13:18A-1 to -49 (West 1991).

223. N.J. STAT. ANN. §§13:17-1 to -86 (West 1991).

224. 510 A.2d at 632.

225. *Id.*

226. *Id.*

227. 591 A.2d 995 (N.J. Super. Ct. App. Div. 1991).

228. *Id.* at 999.

229. 622 A.2d 1257 (N.J. 1993).

230. *Id.* at 1274.

municipality to exclude the region's poor "collides with the basic goals of the Fair Housing Act."²³¹

Cases after *Mount Laurel II* show an interesting shift in focus. In *Mount Laurel I*, the court introduced the concept of regionalism to limit the power of developing municipalities to erect barriers to the poor and the middle class. In *Mount Laurel II*, the court went one step further and recognized the constitutional duty of all communities, developing or not, to accept a regional fair share of low and moderate-income housing. In *Mount Laurel III* and later cases, the court ceded power to the legislature to implement a state wide planning agenda. The issue has changed from "why regionalism?" — to "how regionalism?"

f. The Mount Laurel Doctrine Outside of New Jersey

No other state has had the courage (some might say temerity)²³² to go as far as the New Jersey courts or legislature on this issue. While courts or legislatures in New Hampshire,²³³ Connecticut,²³⁴ New York,²³⁵ Pennsylvania,²³⁶ California,²³⁷ Mas-

231. *Id.* at 1277. While a local preference might be allowed in some narrow circumstances, the court stated that such a tool could not be allowed to defeat the purpose of the Fair Housing Act. *Id.*

232. McDougall, *Regional Contribution Agreements*, *supra* note 49, at 679.

233. See *Britton v. Town of Chester*, 595 A.2d 492, 496 (N.H. 1991) (holding zoning ordinance unconstitutional, but declining to adopt the *Mount Laurel* formula); *Stoney Brook Development Corp. v. Town of Fremont*, 474 A.2d 561 (N.H. 1984) (striking down growth control ordinance); *Knee v. Town of Atkinson* (alternatively captioned *Soares v. Town of Atkinson*), No. E-36-80 (N.H. Master Oct. 26, 1984). *Beck v. Town of Raymond*, 394 A.2d 847, 852 (N.H. 1978) (upholding town ordinance only as a "temporary emergency measure."). See also Payne, *Mount Laurel Goes National*, *supra* note 168, at 63 (discussing *Knee* holding).

234. *Rinaldi v. Zoning & Planning Comm.*, No. CV 87-03314925, 1990 WL 269380 (Conn. Super. Ct. June 29, 1990) (upholding denial of zoning change by Zoning & Planning Commission).

235. See *Asian Americans v. Koch*, 527 N.E.2d 265 (N.Y. 1988) (upholding city incentive zoning ordinance); *Berenson v. Town of New Castle*, 341 N.E.2d 236, 243 (N.Y. 1975) ("[I]t is quite anomalous that a court should be required to perform the tasks of a regional planner."). But see *Suffolk Housing Serv. v. Town of Brookhaven*, 511 N.E.2d 67, 71 (N.Y. 1987) ("[W]e decline to take the legislative action urged by plaintiffs.").

236. *West v. Township Supervisors*, 513 A.2d 1114 (Pa. Commw. 1986) (voiding ordinance prohibiting mobile home parks); *Fernley v. Board of Supervisors*, 502 A.2d 585, 587 (Pa. 1985) (holding "fair share" analysis inapplicable to basic types of housing); *Kit-Mar Builders, Inc. v. Township of Concord*, 268 A.2d 765 (Pa. 1970) (rejecting attempt to justify exclusionary zoning with claims of sewerage problems); *National Land and Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965) (holding a four acre minimum lot requirement

sachusetts,²³⁸ and Oregon²³⁹ have addressed the issue of exclusionary zoning and need for regionally focused answers to the provision of low and moderate income housing, all have stopped short of implementing a widescale plan like the one in New Jersey.²⁴⁰ Some commentators were surprised at other states' hesitancy to follow New Jersey.²⁴¹ The power of politics, however, cannot be stressed too forcefully. If citizens, legislators, and judges realize the increasing importance of regional interdependence to promote regional growth, however, the political impediments would diminish. In fact, in New Jersey, the same "revolutionary" *Mount Laurel* Doctrine that was called communistic is now accepted as the norm.²⁴²

VI. BUILDING ON THE MOUNT LAUREL DOCTRINE

In several areas, the *Mount Laurel* Doctrine can serve as a paradigm for fostering regional sharing of the burdens of poverty-related expenditures.²⁴³ These areas include: delineating the constitutional underpinning for regional (as opposed to purely local) zoning; formulating regional fair share; using the judiciary to overcome political resistance of legislators; and testing forms of legislation (most notably RCAs) that would effectuate regional sharing of expenditures.

A. Constitutional Issues

The heart of the *Mount Laurel* Doctrine is the idea that the general welfare clause in the state constitution encompasses the

unconstitutional); *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105 (Pa. 1977) (reversing denial of variance to apartment building).

237. See CAL. GOV'T CODE §§65580-65589.8 (West 1983 & Supp. 1994) (establishing a framework "[t]o assure that counties and cities recognize their responsibilities in contributing to the attainment of the state housing goal"); *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976) (upholding zoning ordinance, despite its possible unconstitutional vagueness).

238. MASS. GEN. L. ANN. ch. 40B §§20-23 (West 1994) (applying to low and moderate income housing—commonly referred to as the "Anti-Snob Zoning Law").

239. OR. REV. STAT. §§197.005-197.850 (1994).

240. For a detailed discussion of activity in other states see McDougall, *Litigation to Legislation*, *supra* note 163 at 631-35, 642-50.

241. See, e.g., Payne, *Mount Laurel Goes National*, *supra* note 168, at 62.

242. Buchsbaum, *supra* note 168, at 17.

243. The *Mount Laurel* Doctrine is not an end, but a beginning. In the face of extreme political pressure, a legal framework was developed painstakingly to establish a constitutional method for regional sharing of the burden of low income housing. The next step is to apply the lessons of *Mount Laurel* to local spending for wider social problems, such as health care and crime, which are linked to poverty.

general welfare of all the citizens of the state — not just the citizens of each local municipality.²⁴⁴ This “general welfare” constitutional argument has been affirmed in New Jersey and followed by courts in other states.²⁴⁵

Through devices such as exclusionary zoning, suburbs have improperly insulated themselves from the poor and the burdens of poverty-related expenditures.²⁴⁶ Exclusionary zoning imposes an unfair burden on the rest of citizens of the state who reside outside of the excluding municipality. By imposing a disproportionate share of poverty-related expenditures on other citizens of the region municipalities with exclusionary zoning violates the general welfare clauses of state constitutions.²⁴⁷

B. *Formulating Fair Share*

To effectuate regional redistribution, states must develop a formula to determine the fair share of poverty-related expenses that each community in the region should carry. Calculation of this fair share is not simply a mathematical function. As shown by the *Mount Laurel* experience, it is also an intensely political process.

1. Defining Poverty-Related Expenses

Each state will determine the poverty-related expenses to be included in the redistribution. The definition of poverty-related expenses will necessarily vary according to region. A poverty-related expense in one region may not exist in another. For example, in the colder regions of the United States, cities pay for mandatory shelter of the homeless in freezing weather. Additionally, health care is an expense that will vary from region to region, depending on whether there are public health care facilities in a city.²⁴⁸

244. See *supra* notes 181-86 and accompanying text.

245. See *supra* parts V.B.4.e.-f.

246. See *supra* notes 47-50 accompanying text (describing how exclusionary zoning allows municipalities to ride free with respect to poverty-related expenses).

247. Exclusionary zoning violates the constitutional rights to substantive due process and equal protection of the laws of those excluded. In all three *Mount Laurel* cases, the court recognized that the police power inherent in exclusionary zoning brings into constitutional question whether the guarantees of substantive due process and equal protection of the laws are violated. *Mount Laurel I*, 336 A.2d at 174-75; *Mount Laurel II*, 456 A.2d at 208-09; *Mount Laurel III*, 510 A.2d at 642. Therefore, regional redistribution of poverty-related expenses may be constitutionally mandated.

248. For a discussion of the problems associated with the placement of public health clinics in poor neighborhoods, see, Malcolm Gladwell, *Doctors Without Bills: Reason, Malpractice, and the Poor*, at 40.

In addition to direct costs, poverty-related expenses should include indirect costs,²⁴⁹ such as police protection.²⁵⁰ The cost of police and corrections in America's cities is \$50 billion annually.²⁵¹ Studies show that poor people are at a higher risk of experiencing violent crime, than those in other socio-economic levels.²⁵² When calculating poverty-related expenses, therefore, states should consider secondary expenses such as police protection.

2. Calculating Fair Share

Once a state determines the components of poverty-related expenses, the next step is to calculate each community in the region's fair share of these expenses. In *Mount Laurel II*, the New Jersey Supreme Court outlined the three basic components of the fair share formula: 1) delineating regions; 2) measuring present and prospective regional need; and 3) establishing a ratio for distributing that need among receiving communities.²⁵³ This formulaic approach, however, complicated application. By disputing calculations, suburban municipalities attempted to evade their fair share.²⁵⁴

249. A natural question at this point is whether the cost of public education should be a component of poverty-related expenses. The answer should be no — at least initially. While the deleterious effects of poverty on education have been recognized by the courts, statewide redistribution of educational expenses is already well underway in many jurisdictions. See *Abbott v. Burke*, 575 A.2d 359, 374-75 (N.J. 1990). See, e.g., *Sheff v. O'Neill*, 609 A.2d 1072 (Conn. 1992) (allowing judicial determination of whether the Constitution demands a minimum level of education). But see *Reform Educ. Fin. Inequities Today v. Cuomo*, 578 N.Y.S.2d 969 (N.Y. Sup. Ct. 1991), modified, 606 N.Y.S.2d 44 (N.Y. 1993) (holding that New York's system of school funding did not violate the education article of state constitution). It would be a mistake to derail these efforts by including them in a different redistribution effort.

Furthermore, the constitutional basis for a challenge to disparate funding of education is wholly different than a challenge for equalizing poverty expenditures. Unlike most poverty-related expenses, education is specifically addressed in most state constitutions thus creating a constitutional mandate that must be followed.

250. There is a proven relationship between poverty and increased crime. See generally Mark M. Lanier & David L. Carter, *Applying Computer Simulation to Forecast Homicide Rates*, 21 J. CRIM. JUST. 467 (1993).

251. See Farrell et al., *supra* note 20, at 40.

252. See Dreier, *supra* note 2, at 1367-68 ("[T]he likelihood that a person will be the victim of a crime varies dramatically depending on where he or she lives..").

253. 456 A.2d at 436; see also Payne, *Rethinking Fair Share*, *supra* note 45, at 23-27 (describing each of the three components).

254. See Payne, *Rethinking Fair Share*, *supra* note 45, at 32 (asserting that the fair share formula does not work because it makes municipal obligations

Enactment of the Fair Housing Act and the creation of COAH solved the methodology dilemma.²⁵⁵ COAH determines the total need for lower income housing, the regional portion of that need, and the standards for allocating each municipality's fair share without a cumbersome formulaic method.²⁵⁶ COAH divides the state into six regions consisting of up to four counties each, to determine the region's and state's present and prospective need for low and moderate income housing.²⁵⁷ COAH replaces the inconsistencies of case-by-case determinations with one overarching state plan.

Other states can learn from New Jersey. To efficiently redistribute poverty-related expenses, statewide plans are necessary. Numberless remedies are ineffective. States must strictly calculate fair share based upon a predetermined formula, rather than an ad hoc numbering.

C. *Role of the Judiciary Versus the Role of the Legislature*

The highest obstacle to regional redistribution is political resistance by those who will pay higher taxes.²⁵⁸ Many local politicians will oppose legislatively enacted redistribution.²⁵⁹ The *Mount Laurel* cases, however, present an illuminating example of how the judicial system can be used as a catalyst for legislative action.²⁶⁰

1. Planting the Seeds of Change

With its *Mount Laurel* decisions, the New Jersey Supreme Court did not wait for legislative action. Critics of what was considered judicial activism noted that this "intrusion of the judiciary into the process of implementation of the housing and

easy to evade and turns off sympathizers). Cf. Payne, *Mount Laurel Goes National*, *supra* note 168, at 66. Payne criticizes a New Hampshire court's adoption of only generalized guidelines. *Id.* "Numberless remedies give so little guidance as to what is required that even municipalities willing to comply but under political pressure to restrain growth may opt for trivial solutions [T]he court should assure that some reasonably specific statement of the limit of the obligations is devised." *Id.*

255. See *supra* part V.F.4.d (describing the Fair Housing Act).

256. See *Mount Laurel III*, 510 A.2d at 632, 637-42.

257. N.J. STAT. ANN. §52:27D-307 (West 1986 & Supp. 1994) (describing duties of the COAH); McDougall, *From Litigation to Legislation*, *supra* note 163, at 636-37 (stating that the COAH has established six regions).

258. See *supra* notes 101-06 and accompanying text (arguing that suburbanites resist regionalism because they want to retain control over local expenditures and revenue).

259. *Id.*

260. See *supra* parts V.F.4.c.-d (describing the influence of *Mount Laurel* in enacting the Fair Housing Act).

land use policy is harmful because the judicial procedure is entirely inappropriate for the administration of land use regulations."²⁶¹ The New Jersey Supreme Court responded to critics, noting that its activism was necessary to prod the legislature into action:²⁶²

We have been criticized for activism in this most sensitive and controversial area. We understand that no one wants his or her neighborhood determined by judges. Our reasons for 'activism,' if that is what it was, are fully set forth in *Mount Laurel II*. We note only that for the many years from the day of *Mount Laurel I* to the day of *Mount Laurel II*, there was no activism and there was no legislation, no ordinances and no lower income housing.²⁶³

The judiciary is a useful tool to promote legislation. The courts can be used to start the debate on regional redistribution of poverty-related expenses. When the legislature realizes, as in New Jersey, that the issue will be resolved with or without them, the natural parochial tendency to favor the status quo vanishes. But in the meantime, the role of the judiciary will expand or contract to meet the exigencies of the situation. In several *Mount Laurel* decisions, the New Jersey Supreme Court enunciated this fluid posture:

The judicial role, however, which could decrease as a result of legislative and executive action, necessarily will expand to the extent that we remain virtually alone in this field. In the absence of adequate legislative and executive help, we must give meaning to the constitutional doctrine in the cases before us through our own devices, even if they are relatively less suitable.²⁶⁴

Reliance on the *Mount Laurel* form of judicial activism is not a call for judicially created legislation. Rather, it is a signal to the legislature that their inaction is not the deathknell of regional redistribution. The *Mount Laurel* Doctrine is "less a prescription for judicial management of the exclusionary zoning problem, than it is a challenge to the political side of government to deal with it."²⁶⁵

261. Jerome G. Rose, *New Jersey Enacts a Fair Housing Law*, 14 REAL EST. L.J. 195, 211-12 (1986).

262. See *supra* note 205 and accompanying text.

263. *Mount Laurel III*, 510 A.2d 132 at 154.

264. *Id.* at 634 (quoting *Mount Laurel II*, 456 A.2d at 417-18).

265. *Reynolds, Mount Laurel Goes National*, *supra* note 168, at 69.

2. Legislative Initiatives

Legislative action is the surest foundation upon which to build regional redistribution. New Jersey's Fair Housing Act has been called a textbook illustration of the proper function of a legislature. It created an administrative structure to handle resource allocation questions that the courts previously handled by default.²⁶⁶

The New Jersey Supreme Court immediately recognized the legitimacy of the Fair Housing Act as the natural extension of the doctrine promulgated in *Mount Laurel I* and *Mount Laurel II*, and ceded its power to the legislature to implement a state-wide planning agenda.²⁶⁷ This passing of the legislative baton is an important lesson for further redistribution efforts. For while the judiciary may have to take the initial steps for formulating the policy of redistribution, judicial activism is not the goal, but rather a means to the end of sound, legislatively established social policy. The evolution of events in New Jersey highlights the importance of positive government to remedy fiscal imbalance.²⁶⁸

D. Regional Contribution Agreements

Regional redistribution of poverty-related expenses can also follow the methodology contained in the New Jersey Fair Housing Act, allowing for the creation of Regional Contribution Agreements.²⁶⁹ RCAs have been criticized on two fronts: 1) they do not provide for payment for infrastructure or other development costs;²⁷⁰ and 2) cities may be so desperate for cash, that they will accept a less advantageous deal than they would if bargaining power between cities and suburbs was equal.²⁷¹ In the case of regional redistribution of poverty-related expenses, however, neither criticism is applicable.

266. *Id.* at 69-70.

267. *Mount Laurel III*, 510 A.2d at 648.

268. Professor McDougall states: "New Jersey's administrative scheme demonstrates the importance and viability of 'positive government.' The costs of industrial development generated under a 'laissez-faire' regime remain long after society has enjoyed the benefits. Positive government thus becomes a necessity, not only to make repairs but to set a course which embodies people's needs." McDougall, *From Litigation to Legislation*, *supra* note 163, at 651.

269. N.J. STAT. ANN. §52:27D-312 (West 1986).

270. See McDougall, *Regional Contribution Agreements*, *supra* note 49, at 683 (suggesting that cities may accept poor residents without demanding enough money, thus worsening the housing situation).

271. See *id.* at 682-83, 689 (pointing to the "pattern of metropolitan settlement and the history of suburbanization" that "puts the suburbs in a position to make regional decisions and the cities to make desperate ones").

Unlike payment solely for housing, which the New Jersey RCAs address, poverty-related expenses would not have an infrastructure expense component. If an expense is linked to poverty, then that expense is included. If the state agency determines that an expense is not linked to poverty, it is not included.

More importantly, in response to the concern over the superior bargaining advantage of the suburbs, in this model the level of regional redistribution of poverty-related expenses would not be discretionary. A city could not be forced into a less advantageous deal, because the state determines the amount and location of the funds to be redistributed.

The use of state administered regional contribution agreements also responds to suburban concern over the city's ability to manage its finances. While some have come to the defense of city government in response to charges of fiscal mismanagement,²⁷² others have noted the suburban recalcitrance to pour more money into an inefficient political system.²⁷³ State oversight of the money will assure suburban residents that the redistribution efforts will not be fiscally mismanaged by the city.

VII. CONCLUSION

The expense of poverty is not a city problem, *a priori*. It is a city problem because the poor of a given metropolitan region are not allowed to live outside the city. Payment for poverty-related expenses is a *regional* problem that demands a *regional* solution.

Regional redistribution of poverty related expenses through a state agency is a win-win proposition. It maintains the suburban desire for political and economic separation from the city while acknowledging that such a separation has a cost. This cost is the redistribution that flows back to the city because it bears a disproportionate burden of poverty-related expenses.

272. See Dreier, *America's Urban Crisis*, *supra* note 2, at 1372 (citing HELEN F. LADD & JOHN YINGER AMERICA'S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY 292 (1991)).

273. See *supra* notes 99-104 and accompanying text.