Judicial Deference and the Perpetuation of Exclusionary Zoning: A Case Study, Theoretical Overview, and Proposal for Change

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Judicial Deference and the Perpetuation of Exclusionary Zoning: A Case Study, Theoretical Overview, and Proposal for Change

Thus you have the wonderful vagaries of the law review Note and Comment; not so much old wine in new bottles as stale wine in new bottles—an endless rehashing of yesterday's rehashing, a cosmic worm of footnotes that feeds on its own tail like Ourobouros.*

INTRODUCTION

The United States is in the midst of a low-income housing crisis.1 An analogous shortage also existed in the Town of Brookhaven during the time period relevant to the major case discussed in this comment, Suffolk Housing Services v. Town of Brookhaven.2 Despite this reality, New York courts are still upholding the exclusion of low-income housing through municipal implementation of zoning ordinances. Exclusion is accomplished by the use of a plan which creates severe economic impediments to the construction of low-income housing. In Suffolk Housing, the Court of Appeals refused to find any municipal obligation to foster low-income housing or, at least, to remove the legally sanctioned impediments that make the construction of low-income housing by private developers economically infeasible.

This comment contends that judicial deference to legislative deci-

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* Boyle, Dumping: (Colon) on Law Reviews, CLS, May 1987, at 18.
1. See generally Dolbeare, The Low-income Housing Crisis, in A RADICAL PERSPECTIVE ON THE HOUSING CRISIS 29-75 (C. Hartman ed.). Dolbeare bases her thesis on the deficit of dwelling units available at the federally recognized figure of 30% of income for individuals living near or below the poverty line.
sion-making in the area of zoning often leads to unjust results. Governmental bodies hide behind the curtain of rationality review to perpetuate the exclusion of low-income housing. This comment argues that judicial deference to legislative decision-making in the zoning context is often undesirable because the presumption of constitutionality was designed to protect against a particular historical evil—the specter of an unelected judiciary preventing legislatures from deviating from a priori notions of laissez-faire capitalism. When the presumption of constitutionality is viewed in its proper historical perspective, the minimum level of rationality ordinarily required to justify social and economic legislation often becomes suspect, especially when the legislation works to distort the machinations of existing markets to the disadvantage of already disempowered groups. This comment argues for the establishment of a middle-ground between complete deference and judicial legislation.

The routine immunization of legislation from any meaningful level of judicial scrutiny is acutely felt by low-income individuals. When laws are contrary to their interests, the poor are urged to seek redress through the political process. In the context of our present political system, these appeals are often unheard or unheeded. The thesis of this comment is that the unique economic, political, and theoretical position of the poor in our society warrants heightened judicial scrutiny of legislation which has the effect of altering economic markets, such as housing, to the unnecessary detriment of the poor. While this comment acknowledges that the issue of whether a municipality has any affirmative obligation to promote low-income housing is important, this issue is beyond the scope of this piece.

To demonstrate how the presumption of constitutionality works in practice, this comment sets forth the facts and holding of a particular case, *Suffolk Housing Services v. Town of Brookhaven*. Section II argues that the town's discretionary implementation of its zoning amendment process makes the construction of low-income housing unnecessarily expensive, risky to the developer, and unlikely. In its holding, the New York Court of Appeals stated that the town's assertion that general economic circumstances causing the lack of low-income housing constituted a sufficient rebuttal of the appellant's claims, given the strong presumption of constitutionality which attaches to legislation such as zoning ordinances. As applied by the court, the presumption acts as an umbrella

3. *Id.*
4. See *infra* notes 103-109 and accompanying text.
which protects the ordinance from the unwanted "hard rain" of meaningful judicial scrutiny.

Section II proposes that, if the goal of judicial review is to assure the existence of "public values" in legislation, there is little reason to legitimate the exclusion of low-income housing in an area already experiencing an acute shortage of such housing. Here, this comment notes recent criticisms of the presumption which question the validity of the premise that all political actors have equal access to the political process. This criticism suggests that, since the poor are systematically unable to maintain an effective political voice, heightened judicial scrutiny would not be as undemocratic as is commonly thought.

Section IV is devoted to demonstrating the unique historical-theoretical posture of the poor in American political society and re-examining the civic republican notion that property is necessary for meaningful political participation. This comment argues that the task of modern theorists is to recover this heritage and realize that wealth is an important enough political consideration to be taken into account in the context of judicial review. As presently constructed, the doctrine of formal equality prevents substantive access at the political level and heightened scrutiny on the judicial level.

Section V argues that, after a realistic assessment of the above, heightened judicial scrutiny should be applied to laws which unfairly deny the poor access to the housing market. This comment proposes that when laws of this type are challenged, the courts should apply a preponderance of evidence standard, modeled after the "substantially related to an important government interest" test of Craig v. Boren. This standard promotes the twin goals of preventing the exclusion of low-income housing and maintaining flexibility in local land use policy. Laws which have only a marginal impact on low-income housing would not be invalidated.

This piece is not a casenote in that it is not exclusively concerned with the doctrine enunciated in a particular case. Instead, it is an attempt to illustrate some of the drawbacks of applying the rationality standard to certain zoning laws. This comment does not claim to be exhaustive or definitive; it simply tries to explore the problem and suggest an alternate approach. This comment's point is narrow. The issue of whether government has any substantive constitutional obligation to foster the development of low-income housing is not directly addressed. Instead, this comment argues that legislation which distorts the housing market to the

economic disadvantage of low-income individuals as a group should be closely scrutinized to ensure that it promotes a public purpose. In other words, the legislation must be examined to ensure that it does not act to exclude low-income housing from a particular jurisdiction.

II. CASESTUDY: SUFFOLK HOUSING SERVICES v. TOWN OF BROOKHAVEN

A. Background

Before addressing the case itself, a little background is in order. As recently as 1985, an article entitled, "Stage is Set in N.Y. for Attack on Exclusionary Zoning," appeared in the New York Law Journal. The author noted:

In spite of New York's more traditional approach to the question of the impact of zoning ordinances on housing opportunities, the Mt. Laurel decisions are stimulating increased pressure on New York's courts to react in a less deferential manner to the traditional presumptive authority of a municipality to formulate its own land use policies. While Appellate courts in New York have declined to require that municipalities provide opportunities for housing of low-income individuals, the stage has been set in New York for an attack on zoning laws and restrictions which do not provide for the accommodation of housing for...low-income individuals or which displace such people in favor of the more wealthy.8

In the same year, for the first time, a New York court held that New Jersey's Mt. Laurel doctrine,9 which requires municipalities to affirmatively foster the development of low-income housing, was also the law of New York.10 The above, along with the Court of Appeals's decision to hear Suffolk Housing Services embodied the hope of the progressive zoning community that New York's approach to exclusionary zoning and low-income housing was about to change.

B. The Facts and Claim

In Suffolk Housing Services v. Town of Brookhaven,11 resident low-income persons, taxpayers and public interest organizations sought judicial rezoning of the entire town by the New York Court of Appeals. The

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8. Rice, supra note 7 at 34.
9. See infra notes 58-68 and accompanying text.
case arose in 1975 when appellants first brought suit against the town. Appellants claimed that the town was inhibiting the construction of low-income housing in violation of, *inter alia*, Town Law sections 261 and 263, which require that towns use their zoning power to promote the general welfare, and the Federal Fair Housing Act. The case was tried in 1980, and in 1982, Judge Gerard ruled upholding the validity of the ordinance. In 1985, the Appellate Division affirmed the decision of the trial court.

The town of Brookhaven is the largest township in New York State. It occupies more than 340 square miles and as of 1979 had an estimated population of 354,000. By 1973, 58% of the town's available land had been developed. The trial court concluded that the town was experiencing a severe shortage of low-income housing. The town required an additional 7242 units, of which 74% would normally consist of rental units. A large portion of the housing occupied by low-income persons was deemed by the trial court to be in a deteriorated condition.

The town's multi-family housing policy consists of pre-mapping all available land for single family dwellings. In order to gain permission

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12. N.Y. TOWN LAW §§ 261, 263 (McKinney 1989). Section 261 enables towns governments to regulate land use and lists allowable purposes for land use regulation:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to make provisions for, so far as conditions permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefore; to facilitate the adequate provision of transportation, water, sewage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its particular suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the community.


13. 42 U.S.C. § 3601. The Court of Appeals did not address the fair housing claim although it was raised by the appellants.


15. Suffolk Housing Serv. v. Town of Brookhaven, 109 A.D.2d. 323, 491 N.Y.S. 396 (2d Dep't 1985) *


17. Record at 1103-04, 1536-37.

18. *Id.* at 27.

19. *Id.* at 490.

20. *Id.* at 1249.

21. *Id.* at 1088. The Town's zoning policy is still in effect as of the publication date. Permission may also be granted to cluster multi-family housing at densities no higher than what would be allowed in the existing single-family zone. N.Y. TOWN LAW at § 281.
to build multi-family housing at densities higher than those allowed under the single family classifications, a developer must acquire a site of at least 50 acres\(^\text{22}\) and apply for a zoning amendment to one of two multi-family classifications (MF-1 and MF-2).\(^\text{23}\) The zoning amendment process is purely discretionary;\(^\text{24}\) it is quite unlike a special permit which allows an otherwise prohibited use if statutorily defined criteria are met.\(^\text{25}\) The process is admittedly slow, risky to the developer, and usually unsuccessful. Prior to a decision by the zoning board, the planned development must be submitted to public hearings which inevitably subject the developer to "vehement public opposition."\(^\text{26}\)

From 1971-77, only 12.8% of all applications for MF-1 or MF-2 rezonings were approved.\(^\text{27}\) From 1972-1980, only six multi-family developments were approved.\(^\text{28}\) When rezonings were granted, developers were often required to agree to the imposition of covenants which restricted 80% of the units to one-bedroom or efficiency and 20% to two-bedrooms.\(^\text{29}\) In cases where no covenant was written into the rezoning, developers often informally agreed to similar conditions.\(^\text{30}\) The town's discretionary rezoning process resulted in almost exclusive development of single-family homes marketed as condominiums. In some instances, the town also required covenants prohibiting rental units or oral agreements to the same effect.\(^\text{31}\)

The trial court also established that the ubiquitous single-family

\(^{22}\) Suffolk Housing Serv. v. Town of Brookhaven, 109 A.D.2d 323, 333, 491 N.Y.S.2d 396, 404 (2d Dep't 1985).

\(^{23}\) Defendant's Ex. F.

\(^{24}\) Record at 783; CODE OF THE TOWN OF BROOKHAVEN §§ 85, 105-133.

\(^{25}\) A special exception or permit is:

\begin{itemize}
  \item a use permitted by the ordinance in a district in which it is not necessarily incompatible, but where it might cause harm if not watched. Exceptions are authorized under conditions which will insure their compatibility with the surrounding uses. Typically, a land use which is the subject of a special exception demands a large amount of land, may be public or semi-public in character and might be obnoxious or offensive. Not all of these characteristics will apply to every executed use, however. Hospitals in residential districts are one example, because of potential traffic and other problems which may affect a residential neighborhood. A filling station in a light commercial district is another example because of its potentially noxious effects.
\end{itemize}


\(^{27}\) Record at 1180, Suffolk Housing, 70 N.Y.2d 122.

\(^{28}\) Record at 1179-80.

\(^{29}\) Id. at 714-15.

\(^{30}\) Id. at 730.

\(^{31}\) Id. at 1819-30, 2420-21; Defendant's Ex. F; Plaintiff's Ex. Nos. 75, 81.
home was too expensive for the town’s low-income population.  

From 1975-1980, Brookhaven failed to build a single subsidized family unit.  

There is no public housing authority. However, the town has shown little reluctance to allowing the development of subsidized rental units for the elderly.  

C. New York’s Exclusionary Zoning Case Law

Before the New York Court of Appeals, appellants conceded that the town’s zoning ordinance was invulnerable to facial attack because it theoretically allowed for multi-family housing as required under Berenson v. Town of New Castle. In Berenson, the Court of Appeals held that the town of New Castle’s zoning ordinance, which prohibited multi-family housing, violated the general welfare clause of the New York’s zoning enabling clause. The court established a two-part test for determining the validity of a zoning ordinance. First, “a primary goal of a zoning ordinance must be to provide for a balanced, cohesive community which will make efficient use of the town’s available land.” A total ban on apartments is unacceptable under the first prong of the test. However, though “it may be impermissible in an undeveloped community to prevent entirely the construction of multiple family units anywhere in the locality[,] it is perfectly acceptable to limit construction of such buildings where such units already exist.” The second part of the test requires the community to consider regional housing needs in addition to local needs. No obligation to allow additional multi-family dwellings will be found if other communities in the region are meeting that particular need.

In Blitz v. Town of New Castle, the Second Department of the Appellate Division attempted to clarify some of the issues left open in Berenson. In addressing the issue of whether municipalities have any

32. Record at 1476-77; Plaintiff’s Ex. No. 66.
33. Record at 1222.
34. Id. at 640, 671, 916-18; Plaintiff’s Ex. No. 6 p.99.
35. 38 N.Y.2d. 102, 341 N.E.2d. 236, 378 N.Y.S. 672 (1975).
38. Id. at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 680 (citations omitted).
39. Id.
40. Id. at 111, 341 N.E.2d at 242, 378 N.Y.S.2d at 681. In the context of the Berenson case, the court noted: “[I]f New Castle’s neighbors supply enough multiple dwelling units or land to build such units to satisfy New Castle’s need, as well as their own, there would be no obligation on New Castle’s part to supply more, assuming there is no overriding regional need.” Id.
41. 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dep’t 1983).
affirmative obligation to provide for a complete array of housing, the
court stated, "New York courts have consistently rejected any ‘fair
share’ doctrine which would impose specific unit goals or quotas of hous-
ing on a municipality." 42 Instead of looking at numerical goals, the court
decided that an examination of "relevant data which may indicate
whether New Castle's provision for housing is at all commensurate with
some general notion of its expected contribution to regional housing
needs" was appropriate. 43 The county legislature's adoption of a blue rib-
on panel's recommendation of the area's regional housing need was held
to be valid. 44

In addressing plaintiff's contention that part two of the Berenson
test would only be satisfied by accounting for housing that would, or
probably would, be built, the court answered:

[Z]oning ordinances will go no farther than determining what may or may
not be built; market forces will decide what will actually be built. . . . [O]ur
concern is to determine whether, on its face, the amended ordinance will
allow the construction of sufficient housing to meet the town's share of the
region's housing needs, particularly for multifamily housing, assuming that
such construction be both physically and economically feasible. 45

In North Shore Unitarian Universalist Society v. Village of Upper
Brookville, 46 the Second Department further refined the regional needs
prong of the Berenson test. There, plaintiffs challenged a local ordinance
prohibiting the construction of multi-unit senior citizen housing. In as-
suming regional need for this type of housing, the court noted a Nassau-
Suffolk Comprehensive Development Plan which concluded that the re-
gional supply of such housing was adequate. 47 The court also pointed to
the fact that preserving the town's open space helped to satisfy regional
needs for undisturbed land and for water preservation. 48

However, in the same year, Asian Americans for Equality v. Koch
was decided. 49 The caserevolved around the City of New York's creation
of a special development district in Chinatown, where developers could
build at higher that otherwise allowed densities in exchange for the con-
struction of certain public amenities, such as swimming pools, "subsi-

42. Id. at 98, 463 N.Y.S.2d at 836.
43. Id. (emphasis in original).
44. Id. at 98, 463 N.Y.S.2d at 835.
45. Id. at 99, 463 N.Y.S.2d at 836 (emphasis in original).
47. Id. at 127, 493 N.Y.S.2d at 567.
48. Id.
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dized units for low- and moderate-income families and the rehabilitation of existing structures." In this particular case, the developer was able to build an 87 unit condominium priced at $170,000-500,000 per unit. In exchange for permission to build at a higher density, the developer agreed to include a public swimming pool in the design of the building and to contribute $500,000 towards the construction and rehabilitation of low-income housing within the affected district.

Plaintiffs contended that granting the permit failed to implement a “well balanced plan” as required under Berenson and the Equal Protection Clause of the New York State Constitution because it failed to “provide a realistic opportunity for the construction of low-income housing.” In other words, the granting of the permit was characterized as a part of a larger gentrification plan designed to exclude low-income individuals from the Chinatown district. In rejecting the defendant’s motion to dismiss, the court stated that the plaintiffs had asserted a valid claim because it interpreted New York law to require an affirmative obligation to foster low-income housing. Justice Saxe noted, “in light of the needs of the Chinatown community, a well balanced plan may be held to consist of a plan which facilitates the construction of quality low-income housing.” The issue of whether the zoning amendment accomplished this purpose was left for resolution at trial.

D. Appellant’s Claim in Suffolk Housing

In Suffolk Housing, because the Town of Brookhaven made some allowances for multi-family housing, the appellants were forced to challenge the implementation of the ordinance. The court construed the case as consisting of a single issue: whether the plaintiffs had carried their burden of proof in establishing that the Town had intentionally caused the alleged lack of low-income housing, given the strong presumption of constitutionality which attaches to zoning ordinances.

50. Id. at 73, 492 N.Y.S.2d at 841-42.
51. Id. at 74, 492 N.Y.S.2d at 842.
52. Id.
55. Id. at 79-80, 492 N.Y.S.2d at 846.
56. Id. at 88, 492 N.Y.S.2d at 851.
57. Id. Note, however, that Judge Saxe’s decision was overturned. 128 A.D.2d 99, 514 N.Y.S.2d 939 (1st Dep't 1987), aff'd 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988).
1. Mt. Laurel in New York? Appellants, while confining their case to the implementation of the ordinance, contended that Berenson imposed substantive obligations on the Town of Brookhaven. Posing South Burlington NAACP v. Township of Mt. Laurel58 (Mt. Laurel I) as a model, appellants insisted that Berenson required municipalities to affirmatively promote the development of low-income housing. While couching their case in established legalities, appellants urged the New York Court of Appeals to adopt the substantive due process and equal protection analysis of the New Jersey Supreme Court.

In Mt. Laurel I, plaintiffs, resident and non-resident low-income persons, taxpayers and the NAACP, sought to overturn the township's zoning ordinance. The ordinance, despite an abundance of undeveloped land, prohibited the development of any multi-family housing. The court held that exclusion of this type violated the New Jersey Constitution even without a showing of discriminatory intent.59 In a marked departure from any previous case, Judge Hall, writing for the majority, stated that developing municipalities must meet "their fair share of the present and prospective regional needs" for low-income housing.60 The court found the "fair share" obligation in the substantive due process and equal protection clauses of the New Jersey constitution.61

As a result of the township's intransigence in complying with Mt. Laurel I, plaintiffs were forced to bring suit in South Burlington NAACP v. Township of Mt. Laurel (Mt. Laurel II).62 In the years 1975-1983, the township set aside only one-quarter of one per cent of its undeveloped land for multi-family housing. Not suprisingly, not one unit was constructed.63 As a result of the township's actions, the Mt. Laurel II court stated: "Papered with studies, rationalized by hired experts, the ordinance is true to nothing but Mt. Laurel's determination to exclude the poor."64

To force compliance with its Mt. Laurel I mandate, the New Jersey Supreme Court required that municipalities affirmatively promote low-income housing through remedial measures. First, a developer who succeeds in her Mt. Laurel suit is afforded the so-called "builder's remedy." Simply stated, the builder's remedy allows the builder to actually con-
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To construct the project, in addition to having the ordinance at issue declared invalid.\(^6\) Other remedial measures might include density bonuses which allow construction at higher densities than are normally allowed if the developer agrees to include a specified number of low-income units. Under certain conditions, developers can be legally required to build low-income units in otherwise market-priced developments.\(^6\) To ensure compliance with the dictates of Mt. Laurel I, three special judgeships were established.\(^6\)

E. The Holding

Referring to the affirmed findings of fact of the lower courts, Chief Justice Wachtler, writing for the majority in Suffolk Housing Services v. Town of Brookhaven, alluded to the approval of "numerous developer applications" for the construction of multi-family housing.\(^6\) The Appellate Division found that during the relevant time, 36 multi-family projects were approved by the Town Board.\(^6\) The Court of Appeals concurred with the lower court's determination that these 36 approvals constituted a sufficient rebuttal of the appellant's contention that the town unfairly inhibited the construction of low-income housing, given the strong presumption of constitutionality accorded to legislation of this kind. The lack of developers willing to undertake such projects due to

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\(^6\) Id. at 279-81, 456 A.2d at 452-53. The builder's remedy has been defined as "a form of redress by which a builder-plaintiff in exclusionary zoning litigation is compensated for damages suffered as a result of the invalid ordinance by permitting him to proceed with his proposed development subject to certain conditions." Rose, New Additions to the Lexicon of Exclusionary Zoning Litigation, 14 Seton Hall L. Rev. 851, 870 (1984).

\(^6\) 92 N.J. at 261-74, 456 A.2d at 442-50.

\(^6\) Id. at 216, 456 A.2d, at 419. However, in 1986, the New Jersey Supreme Court upheld the New Jersey Fair Housing Act. N.J. Stat. Ann. § 52:27D-301 (West 1988); Hills Development Co. v. Township of Bernards, 103 N.J. 1, 510 A.2d 621 (1986). Briefly stated, the Fair Housing Act withdrew oversight of Mt. Laurel compliance from the 3-judge panel empowered under Mt. Laurel II, and turned the task over to an administrative agency. The agency was given "the power to define housing regions within the state and the regional need for low and moderate income housing, along with the power to promulgate criteria and guidelines to enable municipalities within each region to determine their fair share of regional needs." The agency is also empowered to determine if municipal actions satisfy its Mt. Laurel obligations. Id. at 48-49, 510 A.2d at 646-47; N.J. Stat. Ann. § 57:27D-316 (West 1988). The act also places a moratorium on the builder's remedy. N.J. Stat. Ann. § 52:27D-328 (West 1988).

The court's approval of the act has been criticized as a "bailout" because it returns the process to the very municipalities that were being sued for failure to live up to their obligations. See Lipman, The Fair Housing Act, 9 S.H. Legis. J. 569 (1986).

\(^6\) Suffolk, 70 N.Y.2d at 130, 511 N.E.2d at 69, 517 N.Y.S.2d at 926.

factors such as rising construction costs and economic stagnation, claimed the court, "contributed significantly to the inadequate development [of low-income housing]."\textsuperscript{70}

The failure to grant relief was further justified by the court's characterization of the appellant's proposed rezoning of the 49,100 acres of vacant land in the town of Brookhaven as "radical."\textsuperscript{71} Citing \textit{Kurzius, Inc. v. Village of Upper Brookville},\textsuperscript{72} the court stated, "[z]oning is an essentially legislative task, it is therefore anomalous that courts should be required to perform the tasks of a regional planner."\textsuperscript{73} The Appellant's failure to point to the denial of a request to develop a particular project, claimed Justice Wachter, created an unattractive claim for judicial intervention.\textsuperscript{74} In the same vein, the court insisted that the institutional claimants' lack of personal housing needs plus the inability of these groups to locate individual plaintiffs "underscores the abstract character of the case."\textsuperscript{75} In sum, the court denied that anyone would be without housing as a result of its decision.

F. The Standing Issue

The court's references to the nature of appellant's claim and demand of relief present an interesting paradox. On appeal, the town contended that the Court of Appeals should reject the lower court's liberal views on standing and dismiss the complaint.\textsuperscript{76} Though not directly addressing the issue, the court implicitly granted standing to the plaintiffs. However, the court's ambivalence to the appellant's standing is clear from its characterization of the claim as "abstract."\textsuperscript{77} The effect this tacit grant of standing will have on future cases is not entirely clear. In \textit{Asian Americans for Equality v. Koch}, the Court of Appeals cited \textit{Suffolk Housing Services} for the proposition that "plaintiffs [who] alleged either that they live in sub-standard housing [in the district affected by the zoning amendment] or that they were compelled to leave because of their inability to find suitable housing... [and who] are persons of low income and none own prop-

\textsuperscript{70} Suffolk, 70 N.Y.2d at 130, 511 N.E.2d at 70, 517 N.Y.S.2d at 926.
\textsuperscript{71} Id.
\textsuperscript{73} Id. at 347, 414 N.E.2d at 682, 434 N.Y.S.2d at 182.
\textsuperscript{74} Suffolk, 70 N.Y.2d at 131, 511 N.E.2d at 71, 517 N.Y.S.2d at 927.
\textsuperscript{75} Id.
\textsuperscript{76} Suffolk, 70 N.Y.2d, at 124 (points of counsel).
\textsuperscript{77} The New York State Constitution, unlike its federal counterpart, has no "case or controversy" requirement.
property in Chinatown” had standing in the case. The court acknowledged that this holding was contrary to federal standing law as exemplified by Warth v. Seldin and proceeded to dispose of the claim on the merits.

1. Rejection of Warth v. Seldin: Zoning on the Merits. In Warth, plaintiffs sought to set aside the Town of Penfield’s zoning ordinance which restricted almost all available residential land to single family housing. In refusing to grant standing to the plaintiffs, the Supreme Court held in Warth that there must be “specific, concrete facts demonstrating” harm to the plaintiff and that “he would personally benefit from the court’s intervention.” The importance of “an initial focus on . . . a particular project” was noted in a footnote. In assessing the plaintiff’s situation, the Court emphasized the need for a “causal relationship” between their injuries and the zoning ordinance, and concluded that no “substantial probability” of such a relationship existed. Standing claims by Rochester taxpayers and public interest organizations were dismissed because they were characterized by the Court as attempting to assert the constitutional rights of third parties.

Ironically, although the Supreme Court and the Court of Appeals disagreed on the stage at which the claim should be denied, they adopted strikingly similar rationales in denying the request for standing and refusing to declare that the town’s zoning was illegally implemented. Both courts focused on the abstract nature of the respective claims in resolving the cases.

2. Does Standing Really Matter? The implications of the grant of standing remain unclear due to the unqualified rejection of the claim on the merits. Perhaps the decision to grant standing is a result of the court’s strong desire to reject the core contention that Berenson required any affirmative obligation to foster low-income housing. Conscious or not of criticisms of Warth which stress that the holding forces the plaintiffs to try the case on the merits at the standing stage, the Court of Appeals has adopted a more expansive view on the subject notwithstanding the
lack of a "case and controversy" requirement under the New York State Constitution. 84 Plaintiffs are given the luxury of having their claim rejected in the flame of the fire (on the merits) instead of in the heat of the frying pan (the standing stage). Barring an unambiguous excusory intent on the part of a municipality or a per se exclusion of multi-family housing, plaintiffs have little chance prevailing. However, if the Court of Appeals does employ a different interpretation of Berenson in the future, similar plaintiffs will be permitted to gain standing to sue under Suffolk Housing Services.

G. A Critical Analysis of the Holding

"Implicit in our ruling is a recognition that a municipality may not exercise its zoning power to effectuate socio-economic or racial discrimination." 85 Yet according to the affirmed finding of the Appellate Division, "the record is replete with evidence that town officials, with popular support, made every effort to exclude low-to-moderate income housing." 86 While the holding and Berenson indicate that a municipality is under no duty to act affirmatively to promote the development of low-income housing, 87 the lower court's findings betray something more than the laissez-faire attitude required by Berenson and Kurzius. 88 If the town had presented equal opposition to housing proposed to serve minority groups only, a court would have been hard pressed to find anything but discrimination. Opposition to low-income housing is merely a form of discrimination against the poor. 89

84. U.S. CONST. art. III, § 2. A more liberal view of standing appears to be developing in New York. In Sun-Brite Car Wash, Inc. v. Board of Zoning Appeals, the court stated, "[standing] principles, which are in the end matters of public policy, should not be heavy-handed; in zoning litigation in particular, it is desirable that land use disputes be be resolved on their merits rather than by preclusive, restrictive standing rules." 69 N.Y.2d 406, 508 N.E.2d 130, 515 N.Y.S.2d 418, 421 (1987). See also Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (allowing standing for low-income plaintiffs, none of whom owned property in the area affected by the zoning regulation).

85. Suffolk, 70 N.Y.2d at 129, 511 N.E.2d at 69, 517 N.Y.S.2d at 926.

86. Suffolk, 109 A.D.2d. at 337-38, 491 N.Y.S.2d at 406.

87. Suffolk, 70 N.Y.2d at 130, 511 N.E.2d at 70-71, 517 N.Y.S.2d at 926.

88. Suffolk, 109 A.D.2d at 332, 491 N.Y.S.2d at 403.

89. By grouping together the words 'socio-economic' and 'racial,' the court highlights the social-science evidence which indicates that the two terms are closely related. Discrimination against the poor is often tantamount to discrimination against racial minorities. For a recent discussion of class as the basis for Afro-American economic instability, see Wilson, American Social Policy and the Ghetto Underclass, DISSENT, Winter 1988, at 57.
1. **Zoning as Market Interference.** In the town of Brookhaven, developers willing and able to construct low-cost housing must resort to a highly discretionary rezoning process and its concomitant public hearings.90 These hearings, according to the Court of Appeals, inevitably subject the developer to "vehement public opposition."91 These procedures and the town's affirmed opposition to low-income housing create an unequivocal impression of the socio-economic discrimination the court so resolutely opposes. In defense of its actions, the respondent argued that pre-mapping all available land exclusively for single-family homes was customary practice throughout Long Island.92 In fact, 99% of the land in the New York metropolitan area is so zoned.93 Beyond the desire to socially exclude, the reason for the lack of land pre-mapped for multi-family housing is a fear of being a loser in a zero-sum-game.

According to this model, no municipality can afford to have a less restrictive zoning policy than any other municipality. A municipality that fails to restrict multi-family/low-income housing will suddenly become flooded with housing of this type. The municipalities are afraid that a glut of new housing occupied by the poor would strain local government and school budgets to the breaking point.94 The import of this model is that only strong inter-jurisdictional planning can serve the interests of low-income housing.95 Without a strong state policy mandating shared responsibility for low-income housing, regional planning as required by Berenson remains an illusory ideal. Local governments have no incentive to act alone; to do so is considered suicidal.

The failure to pre-map any land in a large, heterogeneous township like Brookhaven is particularly burdensome considering the difficulties a developer must face to gain permission to construct multi-family dwellings. In Kurzius, Inc. v. Village of Upper Brookville,96 the Court of Ap-

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90. See supra note 26.
93. President's Commission on Urban Housing, A Decent Home 140 (1968).
94. R. Babcock & F. Bosseman, Exclusionary Zoning 9 (1973). Covenants restricting the number of bedrooms are designed to implement the same purpose. Id.
95. The conundrum of the zero-sum-game can be illustrated through the child labor controversy of the early 20th century. The statute at issue in The Child Labor Case, 247 U.S. 251 (1918) was an attempt to nationalize the problem. Without a federal law controlling child labor, even states not favoring child labor as a moral or social issue were forced to allow it or face cutthroat competition from the states which permitted this economical form of labor. All jurisdictions are compelled to take the least restrictive approach lest they lose their economic base.
peals upheld the Village’s zoning ordinance which only allowed for single family homes on five acre plots. The Village of Upper Brookville was described by the New York Court of Appeals as “a coherent area characterized by estate type development and generally bounded by properties developed on a large lot basis.” In justifying the ordinance, the court noted that a variety of housing types were available nearby. While the five acre zoning was upheld, Kurzius makes clear that large lot zoning, when enacted for an exclusionary purpose, is illegal. The court stated, “[o]nce an exclusionary effect coupled with a failure to balance local desires with housing needs has been proved then the burden of otherwise justifying the ordinance shifts to the [municipality].” This specialized fact situation should not justify Brookhaven’s failure to pre-map some land for multi-family development. The historical justification for zoning is supposed to be: a place for everything, everything in its place. The town of Brookhaven and the Court of Appeals have perpetuated the validity of another maxim: the suburbs are no place for the poor. Berenson’s requirement that a zoning ordinance need only allow for the theoretical possibility of multi-family housing fails to adequately account for the welfare of Brookhaven’s low-income population. Instead, it overemphasizes the maintenance of property values and the tax burden on the current resident population.

2. Low-income Housing: Public or Private. When the doctrinal smoke has blown over, the difference between the court’s and the appellant’s conceptions of the police power comprises a principal issue of the case. The appellants contended that, “the use of governmental powers in a manner offensive to the general welfare—is the same in New York as in New Jersey.” (referring to the Mt. Laurel decisions) In its decision, the Court of Appeals did not even mention Mt. Laurel. The differing views of the sister states make for a stark contrast. In New York, the construction of low-income housing is viewed as a primarily economic issue—the result of private, market oriented transactions. In New Jersey, on the other hand, low-income housing is portrayed as a deeply political issue requiring collective action and responsibility.

97. Id.
98. Id. at 345, 414 N.E.2d at 683-84, 434 N.Y.S.2d at 183.
100. Contrary to the way the court portrays value, its essential source is the community itself.
3. **Government as an Actor in the Housing Market.** The New York position of allowing the market to determine what type and quantity of housing will be built in the absence of governmental subsidies is ironic on several counts.¹⁰² First, the Appellate Division found that the Town's failure to pre-map any land for multi-family housing was "at least a contributing factor" in the lack of low-cost housing.¹⁰³ The lack of zoning for multi-family housing inflates the cost of development by maintaining prices at an artificially high level. This is the inherent difficulty in most zoning regulations.¹⁰⁴ As one commentator put it:

In California, the prices of homes have doubled, tripled, and even quadrupled within the last six years. Rents have increased at a similar pace, and in early 1980 the vacancy rate was placed at less than one percent. Inflation may have contributed to this phenomenon but cannot fully account for it. The main cause is a shrinking supply of housing relative to demand. Because there are no real shortages of labor, material, or land, had market forces been allowed to operate without restraint, the supply of housing would have kept up with demand. Instead, supply and demand notions were shelved for political decisions to "manage and control growth" — euphemisms for regulations that artificially and deliberately limited the construction of housing. Given a growing demand for housing of all types, a policy decision to limit the supply must inevitably drive prices upward. It was predictable that price increases for homes and rentals would be correspondingly great. The most effective way of limiting the supply of housing is to give to government a general power to control the use of land. . . . The process is called zoning. Its stated purpose is regulation that would separate incompatible land uses and protect against present and anticipated environmental harms. But whatever its stated purpose, zoning functions too censoriously by imposing and legitimizing prior restraints on the use of land. As a result, genuine monopoly effects are created — less production of housing and prices influenced upward. . . . Through zoning laws, government has, in fact, become the sponsor of exclusion and discrimination and the instrument through which supply is curtailed and price increased.¹⁰⁵

Moreover, resorting to the special permit procedure or rezoning process forces developers (and eventually consumers) to absorb finance charges accumulated on monies borrowed while awaiting the results of

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¹⁰³. Id.

¹⁰⁴. Delogu, *Local Land Use Planning: An Idea Whose Time Has Passed*, 36 Me. L. Rev. 261, 263 (1984). In Mt. Laurel II, the New Jersey Supreme Court recognized this reality. As a result of zoning and other land use regulations, the price of a single-family home in New Jersey was increased from $33,843 to $57,618. *Mt. Laurel II*, 92 N.J. 158, 259 n.25, 456 A.2d 390, 441-42 n. 25.

the lengthy and often unsuccessful process. Other up-front costs to developers can include lawyer's fees, the cost of preparing petitions and applications, neighborhood publicity, public relations campaigns, and preliminary architectural renderings. The 50 acre minimum site requirement has the additional effect of permitting only large, hence expensive to finance, developments. These regulations and the effects which they have on prices suggest that the very private-public distinction which New York courts implicitly rely on is not as easily defined as might first appear. Whether one prefers a market-oriented philosophy or a state interventionist model of land use planning, it is undeniable that by zoning only for single family housing, the town of Brookhaven has interfered with the machinations of the 'pure market.' The town partially creates the housing market by regulating what type of housing is allowable and under what conditions it can be built.

4. Insulating Exclusionary Zoning Through Judicial Deference. Though the court concluded that general economic circumstances contributed significantly to the lack of low-income housing, closer analysis reveals the fallacy of this reasoning. Before proceeding, however, a summary of the court's rationale is in order. First, all legislative acts are presumed to be constitutional. Secondly, even though the facts indicate that the town practiced a successful policy of inhibiting the construction of low-income housing, in light of the presumption of constitutionality, the town needed only to provide a rational, permissible reason for the deficiency. Thirdly, the Court of Appeals found that the "economy" pro-


It has been postulated that land use controls frequently have the effect of excluding from suburban communities anyone whose income is lower than that of the current residents by maintaining housing rents at an artificially high level. Large lot low density zoning contributes to a higher price per lot. Minimum floor requirements result in the construction of homes that are larger and more expensive than necessary to maintain minimum health standards. Requirements that a subdivision developer provide basic improvements such as streets, sidewalks, and sewers, and even dedicate land for schools and parks or pay a fee in lieu of doing so, increase the cost of housing and place the burden of financing community amenities on new residents.

Id. (citations omitted).

Like all sources of regulation, zoning is commutarian in nature; it allows the government/majority to limit or control how the owner or potential owner will use her property. See also Delogu, supra note 104 at 262-63.

107. Interview with John Crabbe, Project Director of Delta Development of Western New York, Inc., in Buffalo, N.Y. (March 27, 1989). See also King supra note 107 at 606.

108. Suffolk Housing, 109 A.D.2d at 333, 491 N.Y.S.2d at 396.
provided a rational, if not compelling, reason. Thus the town carried its burden of proof and prevailed.

The result of the court’s method is to completely insulate claims of this type from meaningful judicial scrutiny. Since the economy will always be a major factor in the housing market, courts can always point to it as a “rational, if not compelling, reason” for the lack of housing. Besides maintaining this impenetrable legal barrier, by proceeding in this fashion, the court fails to account for the interdependence of government and the market. In the Court of Appeal’s view, two separate spheres of human activity exist. The first sphere consists of government which stands outside the market.

The second sphere is some sort of pure market which is not related in any way to government. As discussed earlier, government plays an important role in defining the parameters of the housing market through zoning regulations. It also defines the market by creating some types of property rights and not recognizing others, by enforcing some types of transactions, and by choosing which kinds of interests are alienable. Government can and does make adjustments in its regulatory patterns when the market responds adversely or acts in a socially undesirable fashion. If the Court of Appeals is sincere in its commitment to prohibiting socioeconomic discrimination, the town of Brookhaven’s role in manufacturing the lack of low-income housing is too important to be legally ignored. Zoning regulations which directly increase the cost of doing business produce the lack of developers willing to undertake low-income projects.

The foregoing directly implicates the presumption of constitutionality as the key procedural element preventing the court from scrutinizing the town’s exclusionary implementation of its zoning ordinance. The town is free to carry out its policy of excluding low-income housing as long as the economy can be cited as a contributing factor. In the opinion, appellants are reminded that zoning is a purely legislative task. The court’s message is: seek redress through the legislative and/or electoral processes.

III. THE PRESUMPTION OF CONSTITUTIONALITY AND POOR PEOPLE

The remainder of this comment is devoted to a critical overview of the presumption of constitutionality. As has been argued, it acts as a legal umbrella under which no rain can fall. Generally, the presumption is taken for granted as necessary for the preservation of a democratic society defined by the separation of the legislative and judicial branches of government. This comment argues that the presumption is based on
several false assumptions, including the idea that the legislative process is necessarily more "democratic" than judicial intervention. Understanding the relationship between formal equality and poor people's ability to attain effective access to the political process is also important in understanding the overbroad insulating effects of the presumption of constitutionality.

A. The Origin and Historical Meaning of Rationality Review

As this comment has argued, the town's zoning policy plays an important role in the formulation of the housing market. The failure to set aside land for multi-family housing raises the cost of development through the accrual of finance charges and excessive minimum site requirements. The public hearings form another obstacle designed to delay and deter potential development. These factors were explicitly recognized by the Appellate Division *Suffolk Housing*. The court noted that the town's policies "were, at least, a contributing factor to the lack of low-cost housing." However, under rationality review, legal recognition of this form of socio-economic discrimination is not possible. The presumption of constitutionality cuts short any meaningful review of zoning ordinances which discriminate against the poor. Only instances of racial, gender, and reverse discrimination will subject legislation to anything more than a cursory level of scrutiny.

The presumption of constitutionality has come to be considered an embodiment of modern rationality. As differing social theories began to compete in America, the legal community began to see decisions such as *Lochner v. New York* as wrongly decided for two primary reasons. First, the specter of the judiciary imposing its normative theory of economics was considered undemocratic and socially counterproductive. The inability of legislatures to rectify the unequal bargaining power of labor and capital came to be recognized as an impediment to a stable economy. Secondly, in light of the attack of the legal realist movement,

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112. Modern rationality, as described by Max Weber, would deny the existence or possibility of a collective good. Individuals are only capable of understanding their own interests. M. WEBER, SCIENCE AS A VOCATION 152-53 (1923).

113. *Lochner v. New York*, 198 U.S. 45 (1905) (The Court struck down a statute designed to limit bakers to working an 8 hour day. The liberty of the workers to freely contract for more than the maximum was held to be violated by the statute.)
the judiciary's formalist notions of contract and duress appeared overly rigid, and failed to adequately reflect social reality.

The doctrine of judicial deference to legislative decision-making was devised as a means to protect progressive social legislation from being invalidated by the Lochner-era Supreme Court. A leading case enunciating this doctrine was Nebbia v. New York. In Nebbia, the Supreme court was faced with deciding the constitutionality of a minimum retail price for milk set by a New York State agency. In upholding the statute, the Court stated, "the guaranty of due process . . . demands only that the law selected shall not be unreasonable, arbitrary or capricious, and that the means selected have a real and substantial relationship to the object to be sustained." Justice Roberts concluded that setting a floor for milk prices was a satisfactory means of ensuring an adequate supply of milk by preventing the destruction of the dairy industry through ruthless competition.

By 1955, the degree of judicial scrutiny for economic and social legislation reached its present level in Williamson v. Lee Optical. The Supreme Court justified the statute's differential treatment of opticians and ophthalmologists by imputing a hypothetically rational means and end to the statute. The Court surmised that the Oklahoma Legislature might have concluded that prohibiting opticians from preparing new lenses from old glasses without a prescription, despite convincing evidence that the procedure was perfectly safe, promoted the general welfare. A rational justification for the law was said to be the encouragement of more frequent eye examinations, which only ophthalmologists were qualified to perform. Legislation of this type need only be rationally related to achieving a public goal. The Court concluded, "the day is gone when this Court uses the Due Process Clause [to] strike down state laws [and regulations] because they may be unwise, improvident or out of harmony with a particular school of thought." In Suffolk Housing Services, the Court of Appeals followed this general notion in its stated refusal to act

115. Id. at 525.
116. Id. at 530. See also Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); United States v. Carolene Prod. Co. 304 U.S. 144 (1938).
118. Id. at 484.
119. Id. at 488.
as a "regional planner" since zoning is "essentially a legislative task."\textsuperscript{120}

B. Public Values and the Presumption of Constitutionality

While the presumption of constitutionality was designed to prevent a particular separation of powers conflict, the role of the judiciary is not constitutionally limited to assuring the existence of a minimum level of rationality. The rationality standard, as applied in the equal protection and due process clauses, is designed to prohibit what has been called a "naked preference."\textsuperscript{121} A naked preference is "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised raw political power."\textsuperscript{122} The prohibition against naked preferences endows the constitution with a substantive mandate to prevent government from being the exclusive tool of one faction or another.\textsuperscript{123} The framers of the constitution included these prohibitions\textsuperscript{124} in order to ensure that the political process would produce public values,\textsuperscript{125} rather than simply emulate economic markets.\textsuperscript{126}

This "public values" vision of the constitution unified by the prohibitions against naked preferences is analytically distinct from the dominant pluralist view of the theory and practice of judicial review.\textsuperscript{127} The dominant view contains several major assumptions. First, the polit-
ical process is normally able to assure access to all groups. Secondly, if political access is systematically inhibited, as in race\textsuperscript{128} and gender\textsuperscript{129} discrimination, courts are free to restore balance to the process through judicial intervention. The third major assumption of the dominant or process-oriented conception is that judicial review is inherently less democratic than the political process.\textsuperscript{130} The pluralist vision of politics is to emulate economic markets by promoting the preferences of the majority at the expense of the present minority within constitutional limits.

C. The Insufficiency of Process-Oriented Theory

Recent scholarship has begun to undermine many of the empirical and theoretical assumptions which support the judicial deference to legislative decision-making exemplified in \textit{Suffolk Housing Services}. Richard Parker,\textsuperscript{131} in criticizing the dominant "process orientation" of Jesse Choper\textsuperscript{132} and John Ely,\textsuperscript{133} summarized the basic tenets of their theory:

(1) In operation, our process of representative democracy normally works well enough.

(a) Government decisionmakers, being responsible to the people at periodic elections, are generally responsive to the interests of the majority.

(b) Majorities are not stable through time or across issues. They are shifting coalitions formed in a process of basically fair and open competition among "minority" interests.

(c) Because majorities are shifting, government decisionmakers cannot afford to completely ignore minority interests for fear that those interests might be necessary to form a majority later. Thus, generally, they will take all interests into fair account with respect to particular decisions.

(d) Individuals and groups generally can be counted on to recognize their own interests through exercise of their voice and vote.

(2) This process, though, is subject to occasional, systemic malfunctions.

(a) Acting in their own self-interest, those "in" power may try to restrict the voice and vote of some of those who are "out" of power, thereby distorting the process of fair interest competition.

(b) In cases of majority prejudice against certain minorities, the process of formation of shifting majority coalitions may be distorted. So, government

\begin{itemize}
\item[128.] See, e.g., cases cited \textit{supra} note 109.
\item[129.] See, e.g., cases cited \textit{supra} note 110.
\item[131.] Parker, \textit{The Past of Constitutional Theory—and Its Future}, 42 OHIO ST. L. J. 223 (1980).
\item[132.] See \textit{CHOPER supra} note 127.
\item[133.] See \textit{ELY supra} note 127.
\end{itemize}
decisionmakers may disregard the interests of such minorities.\textsuperscript{134}

Choper and Ely maintain that the failures of the political process are trivial in comparison to the radically undemocratic nature of an unelected judiciary substituting its judgments for those of the legislature. Parker responds to this concern by asserting that the process theorist's preoccupation with the anomaly of judicial review prevents them from divining the true nature of the political process.\textsuperscript{135} He also insists that their stated standards for judging the political process are too low.\textsuperscript{136} Once invidious discrimination against a particular group is eliminated, the process theorists assume that the group will be able to compete in the "Madisonian" fray of interest group competition.

Parker notes social science findings that indicate that some groups are simply unable to effectively voice their positions and assert themselves in the political process.\textsuperscript{137} Furthermore, he adds that, "the bulk of the citizens play no very significant part... in the political process."\textsuperscript{138} Parker's main point is that, after an objective look at the political process, it no longer appears fundamentally more democratic than judicial review. Thus, Ely and Choper's aversion to the anomaly of judicial review is no longer justifiable.

This review of Parker's argument highlights the questionable foundation for some of the key premises of the presumption of constitutionality as applied in \textit{Suffolk Housing Services}. The line of Supreme Court cases from \textit{Nebbia} to \textit{Lee Optical} is typically described as a doctrinal and theoretic advancement.\textsuperscript{139} Advocates of this approach, reacting to the stain of the \textit{Lochner}-era judiciary single-mindedly promoting its own social agenda, see judicial deference to legislative decision-making as the only viable alternative. Judicial intervention is considered a precious form of capital to be held in reserve for the protection of fundamental individual rights and racial discrimination. However, as Parker notes, "'process orientation' homogenizes a huge portion of our constitutional rights and grants us a general right to a neutral reason when the government fails to serve our interests."\textsuperscript{140} Examples of this homogenization are

\begin{itemize}
\item \textsuperscript{134} Parker, \textit{supra} note 131, at 240 (emphasis in original). \textit{See also} Unger, \textit{The Critical Legal Studies Movement}, 96 \textit{Harv. L. Rev.} 561, 602-16 (1983).
\item \textsuperscript{135} Parker, \textit{supra} note 131 at 236.
\item \textsuperscript{136} \textit{Id.} at 240.
\item \textsuperscript{137} \textit{Id.} at 242.
\item \textsuperscript{138} \textit{Id.} at 242-44.
\item \textsuperscript{139} P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 287-311 (2d. ed. 1983).
\item \textsuperscript{140} Parker, \textit{supra} note 131 at 251.
\end{itemize}
to be found in the differential treatment of opticians and ophthalmologists in *Lee Optical* 141 and the acceptance of general economic circumstances as a rational reason for the lack of low-income housing in *Suffolk Housing Services*. The presumption of constitutionality creates a standard which cannot possibly help to ensure that economic and social legislation will be designed to promote public purposes. For groups not protected by the heightened scrutiny of modern equal protection law, or for cases of disproportional racial impact, the professed neutral reason often appears perplexing or seems to be the result of raw political power or callousness. Under this regime, most Americans are treated as equally empowered, cream-colored, ahistorical beings.142

IV. THE HISTORICAL RELATIONSHIP BETWEEN PROPERTY AND POLITICAL PARTICIPATION

A. Civic Republicanism: Property as the Basis for Political Autonomy

Once the premises supporting the presumption of constitutionality have been critically examined, its theoretical grounding becomes open to question. The poor suffer many of the same systemic political disabilities which presently justify the application of heightened scrutiny in the area of racial discrimination. Yet when laws like the zoning ordinance in *Suffolk Housing Services* act to the acknowledged disadvantage of the poor, rationality review is applied. This section is devoted to the proposition that the unique historical status of the poor warrants increased judicial scrutiny of laws which unduly inhibit access to the housing market.

In the years between the Declaration of Independence and the ratification of the Constitution, all of the original states enacted tax-paying or property qualifications for the franchise.143 These qualifications were premised on the idea that the possession of property invested the individual with an ability to exercise the independent judgment necessary to the

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141. 348 U.S. 483 (1955). The results in *Lee Optical* and *Carolene Products* can also be attributed to the exercise of raw political power on behalf of the ophthalmology and dairy industries respectively. These cases are normally cited to represent the good new days of modern rationality review and economic due process.

142. Professor Freeman argues that modern equal protection law is a manifestation of what he calls the "perpetrator perspective". "The perpetrator perspective sees racial discrimination not as conditions, but as actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victim than it is on the overall life situation of the victim class." From the victim's perspective, "racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass." Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1978).

process of self-governance. Conservatives and Whigs alike believed that "propertylessness" made a man dependent on his social superiors. Any such man would vote in the interest of his patron rather than the 'public good'. As Gordon Wood related it:

If all men were independent and free of temptation, said James Iredell in an expression of traditional eighteenth-century Whig opinion, then everyone could have "an independent vote for a representative." But because they are not, "there must be some restriction as to the right of voting: otherwise the lowest and most ignorant of mankind must associate in this important business with those it is presumed from their property and other circumstances, are free from influence and have some knowledge of the great consequence of their trust." Even the most radical English Whigs, like James Burgh and Joseph Priestly, feared the "people in low circumstances" who were especially susceptible "to bribery, or under the power of their superiors". Others expressed more mundane reasons for their fears.144

Strange as this sentiment may sound to the reader, the quotation contains a strong concern for a rough equality between members of the polity.145 It acknowledges that great disparities in wealth will inhibit the political process in its pursuit of "public values." With the notion of formal equality embedded in the modern mind, equality is associated with "voice and vote." This is the result of a historical process which occurred in the 19th century.146 The initial attempt to reconcile the Revolutionary War credo of egalitarianism and the older notion of property-as-autonomy found form in Jefferson's ideal of the yeoman farmer and southern

144. Id. Blackstone, commenting on suffrage requirements, stated:

The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to his liberty, and his life. But, since that can hardly be expected in persons of indigent fortune, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *171 (1765).


146. See generally Steinfeld, Suffrage in the Early American Republic, 41 STAN. L. REV. 335 (1989) (asserting that in the mid-19th century line between the political franchise and disenfranchisement was drawn at the ability to alienate ones labor).
agrarianism. In this way, anyone desiring the independence which land conferred could come to possess it. This represented the simple solution—made possible by an abundant supply of unsettled land (or more accurately, land occupied only by Native Americans). Unfortunately for Jefferson and the yeoman farmer, America was to be a commercial, manufacturing nation.

B. The Idea of Formal Political Equality: Labor as Property

The civic republican notion that property/independence was a prerequisite for political participation was confronted with a major theoretical problem in the early 19th century in the form of artisans' and laborers' demands for universal white male suffrage. While in the end the suffragists were successful, their opponents were quick to point out the contradiction inherent in their position. "There is nothing in the condition of our country to prevent [workers] from being absolutely dependent on their employers, here as everywhere else. The whole body of every manufacturing establishment, therefore dead votes, counted on by head, by their employer." Although the northern factory worker could be considered as dependent on his employer as the slave was to his master, the laborer could no longer complain that his material condition prevented full-scale political participation.

This contradiction forced the development of a new theory of labor, property and the individual. Drawing on Locke's Second Treatise, a man's labor was conceptualized as his property or capital. Employment shifted from a mixed public-private relationship dominated by the statute of laborers and master and servant law, to a purely private contractual relationship. Dependence came to be defined as the inability to alienate one's own labor. Men now "owned" their labor in the same way that the yeoman owned the farm, and the factory owner owned the factory. "Property ownership . . . was being propelled into the realm of the 'private'. It might confer independence and it might give power, but it was only a matter of private relations between individuals in civil society."

The privatization of labor assisted in harmonizing this theoretical contradiction.

149. Minutes of the Massachusetts Constitutional Convention of 1823, at 251-52 (1853).
150. Steinfeld, supra note 146 at 367.
Just as the founders of the United States perceived the critical relationship between wealth and political participation, modern theorists too must make this connection. While the concerns of 18th century theorists were dependence and autonomy, today's issues are the unequal distribution of political power and its abuses. The privatization of labor and the present emphasis on formal equality mask the fundamental reality of social relations. Those individuals and groups who lack property are simply unable to advance their views in the age of mass media politics. Thus the poor can be faulted for their lack of political acumen while being reminded of their equality. The legacy of civic republicanism serves to remind us of how socio-economic relations were an important consideration in early political theory and perhaps should be again.

C. The Pluralist Understanding of Equality

While Jefferson and others were conceptualizing a political life centered around the individual freeholders, James Madison, in writing the Federalist Papers, developed a political theory which emphasized groups or "fractions," as he called them. Madison's concern with protecting the political process from the tyranny of a present majority is a lineal ancestor of Ely and Choper's process-oriented theory.\textsuperscript{151} Group theories of politics tend to more accurately portray the world which we inhabit. Political parties, PACs and interest groups dominate today's political scene.\textsuperscript{152} The individual is almost powerless outside of this framework. While the "Madisonian" conception of democracy provides a superior analytic tool, it fails to take into account the substantive lessons of civic republicanism—that political actors require some sort of rough equality of material circumstance in order to participate in defining the public good.\textsuperscript{153}

An important failure of modern pluralism is its inability to recognize that many groups unprotected by heightened scrutiny are systematically disadvantaged in the political process. The low-income population of Brookhaven, as well as those individuals who do not currently live there but would like to, are such a group. They cannot promote their political needs as well as middle-class homeowners. The failure to pre-

\textsuperscript{151} The Federalist Nos. 10, 51 (J. Madison).
\textsuperscript{153} M. Weber, supra note 112 at 152-53.
map any land for multi-family housing and its attendant disincentive to development can be considered a naked preference—an exercise of the raw political power by the upper and middle classes against the low-income minority.

As R.A. Dahl, the former prophet of pluralist theory, said recently:

Ownership and control contribute to the creation of great differences among citizens in wealth, income, status, skills, information, control over information and propaganda, access to political leaders, and, on the average, predictable life chances, not only for mature adults but also for the unborn, infants, and children. After all due qualifications have been made, differences like these help in turn to generate significant inequalities among citizens in their capacities and opportunities for participating as political equals in governing the state.154

The influence of PACs and wholesale influence-peddling "corrodes the fundamental compromise of capitalist political democracy, according to which the unequal influence of the economic realm is supposed to operate in a sphere separate from the equal influence of the polity."155 Wealthy business interests "invest" in the part of the political spectrum which will further their pecuniary interests.

D. The Modern Era: Wealth and Political Power

Though the purpose of this article is not to explore the relationship between campaign finance and democracy, the unequal distribution, largely along the epiphenomenona of class and race, of functional access to the political process should be noted.156 Dahl, in his earlier work, assumed that political participation was a function of interest. Those who have an interest in, or "feel strongly" about, a particular issue will participate more fully, thereby ensuring that their interests are heard. Those who fail to assert themselves are assumed to be "neutral" or disinterested. This dynamic further assumes that all interests will be served by the individuals most interested in a particular issue prevailing on any given issue.157 In reality, those who are poor, uneducated, young, female or black are disproportionately under-represented in all measures of political participation. In terms of influence, these groups are unable to make the large campaign contributions neccessary for effective representation. An interesting corollary of these facts is that the political agen-

156. As was noted earlier, race discrimination law is concerned with functional, rather than formal, access to the political system.
157. See generally R.A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).
das of non-participants are likely to be significantly different from participants.

Policy makers probably know that the policy preferences of lower-status nonparticipating persons are different from those of higher-status participating persons. For one thing, most policy makers themselves are upper-status participants. Most of them probably share the value preferences of other upper-status participating citizens. And it should come as no surprise if they believe that those preferences should be reflected in public policy. Nor should it come as a surprise if policy makers are reluctant to bring public policy in line with the policy preferences of lower-status nonparticipating citizens.158

If one accepts the idea that the prohibition against naked transfers embodied in the due process and equal protection clauses stands for the proposition that the judiciary is constitutionally mandated to take an active role in assuring that legislation be directed at a public value, the issue of the judiciary's role becomes one of degree. As presently constituted, rationality review allows the town of Brookhaven to justify an acknowledged policy of inhibiting low-income housing based on general economic circumstances. This standard of review is so weak that it prevents courts from ever determining whether a legitimate public value was considered by the legislature. According to this model, the appellant's remaining option is to seek redress with the local legislature. However, poor people as a group are unlikely to participate in any measurable forms of political activity.159 This deficiency is reinforced by a self-image of ineffectiveness.160 Lack of education, inability to speak in public, low levels of capital, and inadequate access to information and propaganda161 create recognized impediments to voicing concerns over issues like low-income housing.

E. Why Closer Scrutiny is Necessary

In Suffolk Housing Services, the town of Brookhaven engaged in a market manipulation which inhibited the development of low-income housing by squeezing an already tight market. Though the idea of judicial intervention in this case may appear superficially similar to the plaintiff's claim in San Antonio School District v. Rodriguez,162 there are

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158. G. Henderson, American Democracy 87 (1985). For an analysis of recent voting trends which supports this observation, see R. Kuttner, supra note 156 at 109-150.
159. G. Henderson, supra note 158 at 89.
significant enough differences between the cases to warrant distinct analyses. In Rodriguez, the Supreme Court was faced with a claim for direct redistribution of education resources. Plaintiffs demanded that the state equalize per capita educational expenses across Texas.

In Suffolk Housing Services, the appellants claim can be construed as a request that the town be prevented from manipulating the market to discourage development. Implicit in Rodriguez is a belief that the market-as-politics will decide issues such as school expenditures. If this market orientation is taken seriously, there is little sense in allowing a municipality to interfere with the private development of housing, especially when the intent is to exclude. While Rodriguez concerns the redistribution of existing resources, the application of heightened scrutiny in Suffolk Housing Services is analogous to an antitrust action to assure that the housing market is not unfairly manipulated. If the original justification for zoning—that every use should have its place according to a comprehensive plan—has any meaning, there appears to be little reason to single out and discourage multi-family/low-income housing.

Cases like Suffolk Housing Services should be subjected to closer judicial scrutiny for several reasons. First, as this comment has argued, a major premise of the presumption of constitutionality/rationality review is that each individual or group has a formally equal opportunity to choose members of the legislature and petition it for redress. Even a cursory look at the American political system highlights the stiff formalism of this premise. There is a severe disjunction between the theory of formal equality and the reality of the functional socio-economic inequality. This uneasy co-existence is historically susceptible to judicial recognition.

Coppage v. Kansas and Adair v. United States are illustrative. In these cases, the Supreme Court struck down statutes which prohibited workers from signing promises not to join unions ("yellow dog contracts") in order to work under the due process clause of the fourteenth amendment. These cases have two primary meanings. First, they represent the evil of the long-gone Lochner-era. Secondly, the cases demonstrate the overwhelming power of the classical legal conceptual scheme. In these cases, the Supreme Court applied a highly formalistic notion of

163. The market may not be an appropriate model for the provision of housing.
165. 236 U.S. 1 (1915).
166. 208 U.S. 161 (1908).
In Adair, despite the Court's failure to deny the inequality of bargaining power of labor and capital, the statute was held to violate the implied constitutional right of freedom of contract.

The Court refused to accept that argument, not because it denied the obvious inequality . . . , but because freedom of contract had to be defined objectively . . . without regard to the equities of the particular situation. . . . Since the common law had excluded economic pressure from its definition of duress as a legal excuse for nonperformance of contracts, then by definition yellow dog contracts were not formed under duress and were therefore freely entered.168

In Suffolk Housing Services, the Court of Appeals is engaged in the same sort of objective boundary definition in terms of wealth, judicial review, and the political process. To constitutionally deny legislative recognition of inequality of bargaining power is now unthinkable. Yet society continues to ignore the influence of wealth on political power and the allocation of resources.

The second reason for applying closer judicial scrutiny to the implementation of zoning ordinances is its essential dissimilarity to other legislative acts.169 A doctrinal shift away from presuming the constitutionality of zoning laws first gained judicial recognition in Fasano v. Board of Zoning Examiners.170 There, the issue was the degree of judicial scrutiny to be afforded a spot zoning amendment. The Supreme Court of Oregon held that the quasi-judicial nature of the "legislative" decision to approve the proposed change placed the burden on the developer to prove that the amendment should be granted.171 The decision is an unequivocal recognition that zoning amendments do not result from the same deliberative process as bona fide legislative decisions.

Ironically, except perhaps for exclusion, land use planning is done on a largely ad hoc basis. The maintenance of property values, the preser-

168. Id. at 25-26.
170. 264 Or. 574, 507 P.2d 23 (1973). In Fasano, The Supreme Court of Oregon held that in approving any zoning amendment, the local government must prove "that the change is in conformance with the comprehensive plan." Id. at 583-84, 507 P.2d at 28.
171. Id. at 581, 507 P.2d at 30.
vation of the tax base, and the notion that a municipality has a sacred right to maintain its present character and exclusivity have overwhelmed the original justifications for zoning.172 If society is committed to assuring that legislation has public value, zoning is a substantive area which cries out for closer judicial scrutiny. The idea that zoning is administered according to any comprehensive plan is honored primarily in its breach.

V. A Proposal for Heightened Scrutiny of Statutes Which Unduly Disadvantage Low-Income Persons' Access to the Housing Market

A. Reversing the Presumption?

In 1982, the Reagan Administration announced its intent to support a reversal of the presumption of constitutionality of zoning ordinances.173 The Presidential Commission on Housing proposed that a zoning ordinance which denies development will be found to be valid only if it is necessary “to achieve a vital and pressing governmental need.”174 The proposal would afford developers the same degree of judicial scrutiny that victims of intentional racial discrimination now receive. Presently, a developer has recourse to takings law and state court review to protect herself.175

This proposal is not justified. The Presidential Commission’s approach must be rejected for three reasons. First, it over-emphasizes growth. By eliminating all restrictions controlling the quantity and quality of growth, communities would lose their ability to prevent the ‘McDonaldization’ of their communities. If a proposed development is subject to the “necessary to achieve a vital and pressing governmental need” standard suggested by the Commission, communities will lose their ability to control or limit commercial strip development, shopping malls and the like. While this comment has been critical of local land use planning, it does not reject the concept. When the general welfare goals of the police power account equally for all racial and socio-economic groups, land use planning can become a mechanism for reflecting community value formation.

Secondly, developers would become empowered beyond what his-
tory warrants. In Korematsu v. United States, the Supreme Court announced that laws which discriminate on the basis of race "must be subjected to the most rigid scrutiny," and that only a compelling governmental purpose could legitimate such laws. No such compelling reason to promote development exists. Furthermore, the School Desegregation Cases and Craig v. Boren reflect an understanding that only historically invidious discrimination can justify a reversal of the presumption of constitutionality. Affording this same degree of judicial protection to developers would be a gratuitous insult to those of oppressed backgrounds. Land developers simply have no history of invidious discrimination.

Thirdly, advocates of deregulation have little or no interest in low-income housing. Rather, the focus is on abuses in the zoning process. These abuses include raising the price of housing by requiring large house and lot size, thereby excluding even the middle class from certain areas. The deregulators view low-income housing as the exclusive province of government.

As this comment has argued, the unique historical and theoretical position of the poor in our society makes closer judicial scrutiny necessary when they are disadvantaged by a statute which unfairly manipulates a market, such as housing. The purpose of heightened scrutiny of legislation of this type is not to give a special advantage; it merely ensures that the legislation which disadvantages the poor in the housing market is enacted and implemented to carry out a public purpose. The essentially non-legislative nature of zoning amendments provides an especially attractive milieu for closer scrutiny when land use decisions of this kind are at issue.

B. "Substantially Related to Important Government Purposes"

In analyzing any piece of legislation, it is necessary to ask several questions. First, does the statute pursue a permissable end? Secondly, are the means used to achieve a permissable end constitutional? An additional question might be: are there less drastic means available to achieve

176. 323 U.S. 214 (1944).
177. Id. at 216. This is not to say that the case was correctly decided. Among other deficiencies, Korematsu presents a very weak means-ends nexus as a justification for the internment of all west coast Japanese-Americans.
179. Id. at 38.
the desired end? If society is committed to giving its legislation public value, these questions must be rigorously applied. The state's weak burden of proof prevents a claim like Suffolk Housing Services from succeeding in all but the most egregious instances. This comment proposes that in suits where the plaintiff makes out a prima facie case tending to prove that a land use policy leads to a significant reduction or moratorium in the construction of low-income housing, the presumption of constitutionality should be eliminated. Instead, the state should be forced to prove, by a preponderance of evidence, that the statute's means-end nexus is not unduly burdensome to the poor. The standard would be similar to the one enunciated in Craig v. Boren. There, the Court held that a statute which created distinct gender categories had to be "substantially related to important governmental purposes." The Supreme Court rejected Oklahoma's position that prohibiting the sale of beer to men, but not women, under the age of 21 was necessary to prevent drunk driving accidents. In support of its position, Oklahoma asserted that males in this group were much more likely to be involved in alcohol-related mishaps than were women.

By utilizing a prima-facie case, preponderance of evidence standard, the law would recognize the twin goals of ensuring that the poor are not unduly burdened by land use laws and maintaining flexibility in local land use policy. By contrast, a reversal of the presumption would prevent the implementation of land use policies which had any negative impact on the poor. Noting the pervasive influence of zoning regulation on the housing market, such a reversal would not be warranted. An intermediate level of scrutiny would force local governments to fully consider the implications of their policies and help bring about less drastic means to

181. 429 U.S. 190 (1976). As Justice Stevens noted in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (Stevens, J. concurring), the multi-tiered analysis of modern equal protection law may not be the most logical approach. Instead, "the rational basis test . . . adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation . . . violates the equal protection clause. . . . We do not need to apply strict scrutiny or even heightened scrutiny to decide such cases." Id. at 452-53.

In Cleburne, the majority invalidated a zoning ordinance that required a group home for the mentally retarded, but not similar uses, such as fraternity houses, nursing homes, and dormitories, to seek a special permit in order to develop. Despite refusing to apply strict scrutiny, the court found the distinction to be arbitrary under a rationally related analysis. 473 U.S. 432.

With Justice Stevens's comments in mind, the suggestion that courts follow the approach outlined in Craig v. Boren is not meant to be overly rigid. The Town of Brookhaven's zoning policy, this comment argues, could also be invalidated under the rationality analysis put forth by Justice Stevens.
achieve permissible goals without stripping them of the power to inhibit development.

Analyzing the implementation of the town of Brookhaven's multi-family housing policy will put the above proposal into perspective. First, it is necessary to look at the purpose of the legislation. If its goal is to control the level of growth and assure that multi-family development is close to necessary infra-structure requirements such as arterial roads, public transportation, and shopping these are surely permissible legislative goals. Having concluded that the suggested ends are appropriate, the means of achieving the ends must be considered. Rather than pre-mapping land to further its goals, the town of Brookhaven utilized the zoning amendment process and its attendant costs, risks, and inevitable public disapproval. These procedures were, according to the Appellate Division, "at least a contributing factor" in the lack of low-cost housing. Assuming that the plaintiff proved this deficiency by a preponderance of evidence, the jury or judge would find that the town failed to promote its end through less restrictive means such as specifically pre-mapping land for specific multi-family housing.

This approach serves the goals mentioned earlier, as well as maintaining stability by informing other property owners where such housing would be located. Admittedly, other fact situations might present a more difficult case for the trier of fact. The preponderance standard ensures that where great doubt exists as to the legality of the municipality's means-ends nexus, the case will be resolved in favor of the government. This standard only ensures that the poor are not the victims of brushback pitches in the game of pluralist hardball.

The prima-facie case/preponderance of evidence standard will help to reconcile the prevailing theory of judicial review with the way in which the poor socially and economically experience zoning. The prohibition of naked preferences and our civic republican heritage suggest that an important task of modern constitutional law is to prevent groups such as the poor from being unnecessarily handicapped within current market ideology. Perhaps, this goal can be furthered by adopting the model of judicial review suggested in these pages.

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