RIGHT FOR A REMEDY: OBSERVATIONS ON THE STATE CONSTITUTIONAL UNDERPINNINGS OF THE *MOUNT LAUREL* DOCTRINE

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It is more than a year since the untimely death of my friend and colleague Professor John Payne. As I watch the current New Jersey administration's endeavors to dismantle many of the land use and housing policies long accepted by its residents, I cannot help but imagine Professor Payne redoubling his attempts to identify clearly the state constitutional right underlying the *Mount Laurel* doctrine.[1] In an effort to protect the rights and aspirations of those shut out of exclusionary municipalities, he would call on the advocates, the scholars and the judiciary, as he did just before he died, "to reclaim the singular tool that we have in New Jersey to get this right–the power of our Constitution."[2]

Professor Payne viewed the *Mount Laurel* doctrine as a state constitutional imperative but was never quite satisfied with the New Jersey Supreme Court's articulation of the right at issue. Although he admired the awe-inspiring rhetoric of *Mount Laurel II*,[3] which he felt firmly established the moral justification for requiring municipalities to zone for affordable housing, he observed that the eloquence of the opinion was equally effective at obscuring any firm constitutional basis on which to support the aggressive remedies of the decision. The opinion's unanswered questions that he identified a decade ago, are the ones that still haunt judges and practitioners today–namely, "why *affirmative* action on the part of governments is

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

2. John M. Payne, *The Unfinished Business of Mount Laurel II, in* MOUNT LAUREL II AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING 10 (Timothy N. Castano & Dale Sattin eds., 2008).

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

constitutionally required to address the housing needs of poor people, and how it is that a court, which normally reviews rather than instigates public policy actions, gets to take the lead."[4]

In an attempt to reconcile both the *Mount Laurel I* and *Mount Laurel II* cases, and the bold remedies of *Mount Laurel II* with that opinion's clear unwillingness to establish an absolute constitutional right to shelter, Professor Payne proposed recognizing a "'conditional' constitutional right" to shelter.[5] The conditional right is one in which the interests of the individual in having shelter may properly be balanced against local government's interest in sound land use controls and allowing local elected officials to effectuate the wishes of their constituents. Recognizing this right, Payne believed, was essential to the continued vitality of the *Mount Laurel* doctrine. A clear and commonly understood conditional right would both illuminate the remedy and ensure its vigor.

This Article is my attempt to pick up the torch from where Professor Payne has prematurely laid it down–to explore the ways in which to reconcile these two cases, and to clarify a consistent constitutional holding so that the *Mount Laurel* doctrine may persist and function effectively in future generations. Although my reading of the cases may not go as far as to find, conceptually, a conditional right to shelter, I agree that a clear understanding of the violation and the contours of an appropriate remedy may functionally achieve the same ends. In my view, the *Mount Laurel* doctrine is grounded in the court's unassailable conclusion that the exercise of local government power must be limited when it is used to protect parochial interests that conflict with the advancement of the general welfare.

MOUNT LAUREL I AND THE FOUNDATIONS OF THE DOCTRINE.

The theory of the *Mount Laurel* doctrine and the durability of its principles can best be understood through a review of Justice Hall's planning jurisprudence and his respect for the scholarship of Professor Norman Williams.[6] In his 1955 article, *Planning Law and Democratic Living*, Williams outlines some of the constitutional principles that are later discernable in the *Mount Laurel* opinions.[7]

4. John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J. L. & POL'Y 555, 556 (2000).

5. *Id.* at 569.

6. The respect and esteem in which Justice Hall held Professor Williams was reciprocal. *See, e.g.*, Norman Williams, Jr. & Tatyana Doughty, *Studies in Legal Realism:* Mount Laurel*,* Belle Terre *and* Berman*,* 29 RUTGERS L. REV. 73, 94 (1975) (describing Justice Hall as land use law's "most distinguished exponent" and his opinions as "luminous").

7. Norman Williams, Jr., *Planning Law and Democratic Living*, 20 LAW &

Most notably, he argues it is an "essential part of the judicial function" to take care that the primary values of a democratic society–institutionalized in the federal Constitution–are not flouted in the exercise of government power.[8] In the land use context, it is incumbent upon judges to prevent local governments from exercising land use power parochially or in a way contrary to national policy or the general welfare. Judges should act correctly as gatekeepers responsible for making sure that when a local government engages in zoning or land use planning, it considers not only its own interests, but also the greater constitutional issues of freedom and opportunity at stake.

Although addressing the New Jersey Constitution as opposed to the federal Constitution, the influence of this reasoning is first plainly seen in Justice Hall's vigorous dissent in *Vickers v. Gloucester County*.[9] In the dissent, Hall argued against the constitutional validity of a municipal zoning ordinance which completely prohibited mobile homes. Eschewing the "fairly debatable" standard used by the majority, Hall pointed out that concepts like health, safety, morals, and welfare, if considered in the abstract and only with respect to the particular municipality enacting the ordinance, provide no safeguard against the myopic exercise of zoning power by local jurisdictions at the expense of the general welfare of the state.[10] Instead, Hall advocated not for a test concerned with whether it may be "fairly debatable" that a municipal exercise of land use power furthers some detached notion of general welfare, but rather a test that contemplates

> an objective, realistic consideration of the setting—the evils or conditions sought to be remedied, a full and comparative appraisal of the public interest involved and the private rights affected, both from the local and broader aspects, and a thorough weighing of all factors.[11]

This "realistic consideration of the setting" led Hall to review both the historical origins of the stereotypes against trailer park

CONTEMP. PROBS. 317, 318 (1955). Although Professor Williams addressed federal constitutional principles, the *Mount Laurel* opinions drew on his writing and applied it to the interpretation of the New Jersey Constitution. *See infra* note 9.

8. *Id.*

9. *Vickers v. Twp. Comm. of Gloucester*, 181 A.2d 129, 140-50 (N.J. 1962). It is worthwhile noting that while Hall quotes extensively from Williams's article, *Planning Law and Democratic Living*, his dissent is framed as a rebuttal to the majority's state constitutional holding, and therefore implicitly founded in the New Jersey Constitution and its values. Ambiguity between federal and state constitutional values in this and subsequent opinions may be explained by Hall's recurrent invocation of values shared by both documents.

10. *Id.* at 145.

11. *Id.* at 144.

residents and contemporary sociological data relating to the average skill set and income level of such residents.[12] Finding the actual conditions of mobile home parks not as deleterious as imagined, the town's economic rationale for the law was scuttled, leaving only an impermissible aesthetic rationale, or perhaps even more improper and unspoken motives.

Eight years later, in his opinion in *DeSimone v. Greater Englewood Housing Corp. No. 1*,[13] Justice Hall began to transform theory into practice. In *DeSimone*, the Supreme Court reviewed the Englewood Board of Adjustment's finding that the construction of affordable housing for low- and moderate-income families then living in a blighted area of the city promoted the general welfare and, as such, qualified as a "special reason" supporting the grant of a zoning variance pursuant to section 40:55-39(d) of the New Jersey statutes.[14] In granting the variance the Board found, "that the program in question will serve to alleviate urban blight; to promote the health, morals and general welfare of the residents of this City; and to encourage appropriate land use throughout the City."[15] In upholding the Board of Adjustment's determination, the Council of the City of Englewood augmented those findings concluding

> that freedom of choice of residents of the impacted area of the Fourth Ward to reside within or without said area in safe, decent and attractive housing that they can afford serves the community's interest in achieving an integrated, just and free society and promotes the general welfare of all citizens.[16]

Writing for a unanimous court, Justice Hall upheld the grant, holding:

> as matter of law in the light of public policy and the law of the land, that public or, as here, semi-public housing accommodations to provide safe, sanitary and decent housing, to relieve and replace substandard living conditions or to furnish housing for minority or underprivileged segments of the population outside of ghetto areas is a special reason adequate to meet that requirement of N.J.S.A. 40:55-39(d) and to ground a use variance.[17]

That *DeSimone* signaled a change in the judicial view of municipal exclusionary land use regulations and decisions is underscored by Justice Hall's observation, albeit in dicta, that not only was the grant of a variance entirely proper, "a denial of it under

12. *Id.* at 144, 148-49.
13. 267 A.2d 31 (N.J. 1970).
14. *Id.* at 36-39.
15. *Id.* at 37.
16. *Id.* at 38.
17. *Id*. at 38-39.

the circumstances and proofs could not well be sustained."[18] No longer would the court simply defer to the local government's land use authority. Instead, the court would concern itself with the relationship between land use decisions and the general welfare.

Five years later, in *Mount Laurel I*, Justice Hall's concerns in *Vickers* and articulation of public policy in *DeSimone* emerged as the bases for his majority opinion.[19] Although without explicit exclusion of a particular class of persons, Mount Laurel's zoning ordinance effectively prevented low-income housing–and thus low-income residents–through measures like large minimum lot sizes, minimum dwelling floor sizes and low maximum density requirements.[20] The Township of Mount Laurel did not dispute that the purpose of the zoning ordinance was to prevent low-income housing growth; indeed, it conceded that its land use regulation "was intended to result and has resulted in economic discrimination and exclusion of substantial segments of the area population," but that "its policies and practices are in the best present and future *fiscal* interest of the municipality and its inhabitants and are legally permissible and justified."[21] Presuming that a municipality's economic concerns were still constitutionally sufficient to permit exclusionary zoning, the township's economic arguments were actually stronger than the arguments in *Vickers*. Exclusion of low-income housing *does* tend to maintain a favorable tax base relative to the current population. In 1975, however, Justice Hall was no longer writing in dissent and even less willing to accept economic justifications for exclusion of low-income residents. Instead of attacking the factual premises of the township's economic motives, he dismissed them as shortsighted and therefore impermissible.

Hall's expanded notion of the general welfare was key in this analysis. As in *Vickers*, Hall eschewed any abstract conception of the general welfare, but additionally, Hall broadened the idea to contemplate not just the immediate and tangible welfare of a single community, but the welfare of the entire state. Accordingly, any municipality using power for its own economic interests at the expense of the interests of the state would be unjustified.

Framed in terms of the New Jersey Constitution, the *Mount Laurel I* holding reads as a necessary limitation on the exercise of municipal power. In order to justify the state's use of the police power, the state constitution requires that the power be exercised

18. *Id.* at 39.

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

20. *Id.* at 719.

21. *Id.* at 717-19 (emphasis added).

within the limits of substantive due process and equal protection, or in other words, that the law be exercised reasonably and equally for the general welfare.[22] This welfare, of course, must be that of the people of New Jersey and not confined to one particular geographic area or one particular group of people. State legislators cannot delegate rulemaking authority without these limitations, because the state cannot allocate power it did not possess in the first place. Thus, despite being authorized by the state constitution to exercise land use authority, municipalities are subject to the same state constitutional restrictions as if that power were exercised by the state at large.

Accepting this broader, constitutionally grounded notion of the general welfare, application of the *Mount Laurel I* test requires a judge to consider real world effects of an ordinance both internal and external to the town enacting that ordinance. Applying the rubric to land use law in 1970s New Jersey, Hall saw to his dismay that "almost every [municipality] acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing."[23] Two factors especially important in Hall's assessment were: (1) the reality of the "basic importance of appropriate housing and the longstanding pressing need for it"; and (2) the fact that the need was going unfulfilled because of "the exclusionary zoning practices of so many municipalities."[24] It was these circumstances that drove the state constitutional violation. Put simply, the economic motives of Mount Laurel Township could not be justified as serving the general welfare, because in actuality, they did not.

The broadening of the general welfare concept made *Mount Laurel I* the next step beyond the *Vickers* dissent in the development of the judge as the constitutional gatekeeper. Not only must a judge make an independent assessment of the situational reality in order to examine the factual premises of a municipality's stated basis for a law, but the exigencies of that reality on a statewide level, along with the predictable effects of that law, must also weigh against that law's constitutional justification. After *Mount Laurel I*, previously permissible bases for lawmaking were subject to review on a case-by-case basis. Hall's mandate of a wide-eyed, "realistic consideration" became necessary to define the contours of the general welfare itself, and with that, municipalities were forced to internalize statewide equality and fairness concerns or risk judicial review.

22. *Id.* at 725 (citing N.J. CONST., art. I, para. 1).

23. *Id.* at 723.

24. *Id.* at 728.

The question then became: once a judge finds a constitutional violation, what was to be done? Regarding the same township and using purportedly the same analytical framework only eight years later, Chief Justice Wilentz came up with a very different remedy than Justice Hall had articulated. The departure from the "passive" remedies of *Mount Laurel I* to the "active" remedies of *Mount Laurel II* led Professor Payne to conclude that the constitutional composition of the violation is essentially a conditional right to shelter.[25] But whether the driver behind the remedy is this conditional right or a reasonableness test by any other name, the obligation to realistically consider current housing conditions and the probable extra-municipal impacts of zoning laws remains the consistent constitutional thread throughout the cases.

THE "REALISTIC OPPORTUNITY" REMEDY IN *MOUNT LAUREL I* AND *II*.

The fundamental demand of *Mount Laurel I* is that all developing municipalities have an obligation to provide for a "realistic opportunity" for affordable housing within their boundaries.[26] Although both Hall's recognition of the plight of excluded low-income residents and the "basic importance" of housing were significant in the finding of a constitutional violation, it seems clear that Hall stopped well short of extending an absolute constitutional right to shelter to the people of New Jersey. *Mount Laurel I*'s incarnation of the realistic opportunity remedy had both explicit affirmative and negative dimensions,[27] but the affirmative duties did not go so far as to guarantee a place to live. The remedy of *Mount Laurel I* instead suggests that within the general welfare balancing test, the town's economic and autonomy interests are to be counterbalanced by statewide concerns. Furthermore, a realistic consideration of an evil to be remedied seems to demand that the remedy also be realistically achievable and not more burdensome on a municipality's right to zone than is necessary to correct that evil. Presumably for these reasons, Justice Hall limited the affirmative duties of a municipality to provide opportunity only "to the extent of the municipality's fair share of the present and prospective regional need therefor."[28]

The unstated assumption of *Mount Laurel I*, and why Professor

25. PAYNE, *supra* note 4, at 569.

26. *Mount Laurel I,* 336 A.2d at 728.

27. In the affirmative, "each such municipality [must act] affirmatively to plan and provide by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing . . . [for] all categories of people who may desire to live within its boundaries," and in the negative, that a municipality "may not adopt regulations or policies which thwart or preclude that opportunity." *Id.*

28. *Id.* at 724.

Payne described its remedy as passive, is that removing exclusionary laws was thought to be enough to reasonably afford housing opportunities to low income people. If municipalities just "got out of the way" by removing exclusionary devices, developers would be able to fulfill the demands of low- and moderate-income home-seekers in those desirable suburban neighborhoods, and the constitutional violation would disappear.[29] At the very least, in the years immediately following the case, *Mount Laurel I* was interpreted as requiring only passive remedies, and as such had a necessarily limited impact. While some overtly exclusionary zoning regulations could be, and were, excised under *Mount Laurel I*, New Jersey continued to experience severe difficulties in providing decent low-income housing opportunities.

Before Chief Justice Wilentz famously declared his intention to "put some steel" into the doctrine,[30] however, one case, *Oakwood at Madison, Inc., v. Township of Madison*,[31] did add a few teeth. In *Madison*, the New Jersey Supreme Court reaffirmed that municipalities by their zoning ordinances must "provide the opportunity for a fair share of the lower income housing needs of its region" and declared Madison Township's ordinance unconstitutionally exclusionary.[32] Although the court did not require any affirmative remedies on the part of the municipality,[33] it did award a "builder's remedy" to the plaintiff–that is, the court declared that the builder-plaintiff was entitled to approval of the proposed development that was too dense by the standards of the ordinance.[34] The builder's remedy would eventually become an important part of the *Mount Laurel* doctrine despite the court's prescription that it be rarely used.[35] *Madison*, though, ultimately did not answer the fundamental question of what the courts could or should do when passive remedies proved to be insufficient to correct the larger social, and possibly legal, deficiencies in affordable housing.

By the time *Mount Laurel II* was argued, the question was no longer avoidable. The passive remedies prescribed in *Mount Laurel I* had been clearly insufficient to produce more affordable housing–or indeed much zoning with a less exclusionary impact–even in the subject town of the original litigation. This time, instead of stopping short at passive remedies, the court recast the "realistic opportunity"

29. PAYNE, *supra* note 4, at 561-62.

30. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel II*), 456 A.2d 390, 410 (N.J. 1983).

31. 371 A.2d 1192 (N.J. 1977).

32. *Id.* at 1213.

33. *Id.* at 1224-25.

34. *Id.* at 1226-27.

35. *Id.* at 1226.

standard of *Mount Laurel I* as requiring more than the removal of excessive and exclusionary zoning measures when that removal did not in fact help provide the obligated minimum of affordable housing options. A "best efforts" test was no longer enough:

> [S]atisfaction of the *Mount Laurel* obligation shall be determined solely on an objective basis: if the municipality has *in fact* provided a realistic opportunity for the construction of its fair share of low and moderate income housing, it has met the *Mount Laurel* obligation to satisfy the constitutional requirement; if it has not, then it has failed to satisfy it.[36]

That is, "[g]ood or bad faith . . . [was now] irrelevant."[37]

To ensure that municipalities would meet their objective obligations, the court implemented an oversight regime, in which three Supreme Court-appointed trial judges became responsible for all *Mount Laurel* litigation. The judges were to evaluate each challenge to a municipality under *Mount Laurel II's* remedy in order to establish consistency in the application of the revised doctrine, and to ensure that each municipality was meeting its constitutionally obligated "fair share" of affordable housing.[38] The court also endorsed more readily granting builder's remedies to provide incentive for compliance with the *Mount Laurel* holding.[39] These remedies solidified an active and direct role for judges in ensuring that a municipality's constitutional affordable housing obligations were met.

A CONDITIONAL RIGHT TO SHELTER OR A LIMIT ON LOCAL LAND USE POWER?

Although the stated basis for *Mount Laurel II* was the same as that for *Mount Laurel I*–that the power to zone constitutionally must be exercised for the general welfare, a notion that necessarily contemplates the welfare of the regional population and its housing needs[40]–the drastic variation in the remedies between *Mount Laurel I* and *Mount Laurel II* has led some to believe that the opinions are based on two different constitutional readings, or worse yet, have no constitutional basis at all. As mentioned earlier, Professor Payne believed that while the Chief Justice's florid language helped establish the moral basis for his aggressive remedies, the move beyond the regulatory neutrality of *Mount Laurel I* could not be justified without recognizing what he dubbed a "conditional right" to

36. *Mount Laurel II*, at 421 (emphasis in original).
37. *Id.* at 422.
38. *Id.* at 418-21.
39. *Id.* at 452.
40. *Id.* at 415.

shelter. In his article, *Reconstructing the Constitutional Theory of Mount Laurel II*, Professor Payne commented that by the court's "failing to draw the obvious comparison" between that case and *Brown v. Board of Education*, "the *Mount Laurel II* court invites the conclusion that inclusionary zoning is not a remedy for unconstitutional exclusionary zoning, but instead is a remedy for a new theory of constitutional violation that the court declines to articulate."[41] Instead of functioning as reparation for the harms of past exclusion, inclusionary zoning is a safeguard to protect a present conditional constitutional right.

The contours of the conditional right are very similar to the general welfare balancing test from *Mount Laurel I*. The right is one that "cannot . . . be exercised free of entanglement with a larger set of social systems in which the collective citizenry has a strong and legitimate claim."[42] In other words, exercise of the right "trigger[s] a balancing test" where the individual's claim to shelter is weighed against a municipality's right to determine appropriate land uses within its borders and feasibility concerns.[43]

The idea of a conditional right provides a nice bridge from the *Mount Laurel I* to the *Mount Laurel II* opinion. In 1983, Chief Justice Wilentz found that the same violations of the same rights had continued uncured by the remedies of *Mount Laurel I*, and so newer, more aggressive remedies were justified to safeguard those rights.[44] State action that satisfies the state constitution was not hard to find. Every time a law puts restrictions on the size or use of a piece of land, those restrictions affect the price of the land, usually having the effect of making the land more expensive. In a world of crisscrossing regulations regarding use, lot size, and building and fire codes, it is impossible to find an area where government action has not affected the price of land. As such, it seems modest enough to demand that a municipality not exercise its land use authority unreasonably to interfere with an individual's ability to find affordable shelter.

Professor Payne did admit that his finding of a conditional right to shelter in the *Mount Laurel II* opinion might constitute a "revisionist rereading,"[45] but although there may be more than one way of squaring these cases, seeing "a constitutionally recognized and protected right in the balance insures that the balance will not

41. PAYNE, *supra* note 4, at 562.
42. *Id.* at 570.
43. *Id.*
44. *Mount Laurel II,* 456 A.2d at 390.
45. *Id.* at 574.

be struck hastily or insensitively."[46] I see Professor Payne's desire for a conditional right as twofold: first, it provides the consistency and constitutional grounding that will persuade future judges and practitioners that the *Mount Laurel* doctrine is more than just a flight of judicial activism; and second, the conceptual force of a constitutional right to shelter, even if conditional, will prevail on a judge to consider the interests of low-income individuals more seriously.

While I agree that there must be a consistent constitutional rationale to guarantee the continued vitality of the *Mount Laurel* doctrine, I am perhaps more persuaded by the notion that these cases represent a limitation on the exercise of government power. My trouble with reading either *Mount Laurel I* or *Mount Laurel II* as granting an *individual* right to shelter, is that the cases do not deal in individuals; they deal in gestalt effects. A right of an individual that gains enough weight to be protected only when aggregated with those of other sufferers seems not to be much of an individual right in character. But whether these cases are seen as supporting a conditional right or a limitation on the exercise of government power, the difference largely boils down to the conceptual feel, as the operative mechanism is the same–a balancing test. A judge may consider an individual's interest in affordable housing opportunities either for the sake of that individual or as the litmus paper that reveals an abuse of government power, but the practical end result should be the same. If the worry is that the individual interest will not be weighed heavily enough without the protection of a constitutional right, then the limitation could be re-characterized as an individual or societal right–the right to be free of unreasonable lawmaking.

To a degree, the remedy for an abuse of government power may look different in a theoretical world than that for an infringement of a right. If the system of delegation itself naturally leads to abuse of a limited power, then the simplest solution would seem to be to revoke that delegation–either by vesting land use authority at the state level, or eliminating land use controls altogether–rather than creating a judicial patch for the violation. As Professor Payne wrote, however, the justices recognized that, in the real world, municipal land use controls were not going away any time soon.[47] In both *Mount Laurel* cases, feasibility of the remedy is a part of the calculation of the violation. The "paradox," as Professor Payne described, of the cases "is that while the nominal focus of the *Mount Laurel* opinions is on the *individual's* 'realistic opportunity' to

46. *Id.* at 570.

47. *Id.* at 574.

acquire shelter, the actual, practical consequence is to focus on the municipality's 'realistic opportunity' to provide it."[48] The question becomes, how much can a judge's opinion of the feasibility of a remedy drive the right to that remedy? Perhaps part of the criticism of the *Mount Laurel II* remedies is that Chief Justice Wilentz focused too heavily on the realistic likelihood of a municipality *not* providing affordable shelter and overestimated the realistic likelihood that *a judge* could correct the situation.

THE FUTURE OF THE *MOUNT LAUREL* DOCTRINE.

It is clear from his opinion in *Hills Development Co. v. Township of Bernards*[49] that Chief Justice Wilentz was well aware of the criticism of *Mount Laurel II* and was probably sensitive to it. In *Hills,* Wilentz recognizes that "no one wants his or her neighborhood determined by judges," but reminds readers that, for many years, there was no better alternative to judicial enforcement if the constitutional holding of *Mount Laurel* was to be taken seriously.[50] With the passage of New Jersey's Fair Housing Act ("FHA"), and the creation of the Council on Affordable Housing ("COAH"), a more democratically legitimate solution became available (at least in appearance), and Chief Justice Wilentz seized the opportunity to get the judiciary out of the zoning oversight business. *Hills* allowed the state government to take control of the enforcement of the *Mount Laurel* doctrine, and allowed municipalities, afraid of the imposition of a builder's remedy, to seek protection from judicial constitutional review by cooperation with COAH.

Perhaps in a more perfect world, the birth of COAH and the *Hills* decision would have been the end of the constitutional saga of the *Mount Laurel* doctrine. In retrospect, Chief Justice Wilentz's hopeful predictions for the FHA and COAH seem overly optimistic—"if the Act works according to its apparent intent, that within the not-too-distant future most municipalities . . . [will be] providing a realistic opportunity for the construction of their fair share of the region's need for low and moderate income housing."[51] Unfortunately, this bright-eyed vision has, in large part, gone unfulfilled. Despite some modest growth in the availability of affordable housing, the statutory program has not been successful at meaningfully providing housing for the lowest income groups.

The lackluster performance of COAH may be partially attributable to contemporary political trends, but Professor Payne

48. *Id.*

49. 510 A.2d 621 (N.J. 1986).

50. *Id.* at 654-55.

51. *Id.* at 640.

also identified a number of structural problems. Voluntary compliance allows municipalities to completely opt out of the program altogether and, because COAH has little coercive power, it is put in the "unseemly position" of having to sell the idea of compliance by sweetening deals for municipalities.[52] Additionally, the largest block of seats on COAH is allotted to "elected officials representing the interests of local government,"[53] presumably the very same people most likely to be opposed to inclusionary land use decision-making. Perhaps most controversial is the sanctioning of Regional Contribution Agreements ("RCAs") that allow municipalities to export fifty percent of their fair share obligations to other communities with an appropriate financial contribution. Given the structural problems and political issues surrounding COAH, it's no surprise that the effect of COAH has been, to the extent possible, a dodge from the constitutional responsibilities of the *Mount Laurel* decisions rather than a powerful tool for enforcing them. In recent years, the failings of COAH have become so apparent that the courts have been less willing to defer to its judgment on the constitutional sufficiency of its fair share calculations, as evinced by the Appellate Division's decision to invalidate the first iteration of COAH's Third Round Rule.[54]

Increasing judicial involvement could go a long way to putting the "real" back into the "realistic opportunity" standard, but it would also resurrect concerns regarding unchecked judicial activism. Can there be a middle ground between a weak and possibly counter-productive COAH and the seemingly extreme judicial oversight of the *Mount Laurel II* remedies? Constitutionally speaking, I think the answer is yes. In the *Hills* decision, Chief Justice Wilentz would not entertain skepticism that the FHA would not fulfill the constitutional mandate of *Mount Laurel* because it was too speculative. At that point in time, he concluded, "the judiciary must assume, if the assumption is at all reasonable, that the Act will function well and fully satisfy the *Mount Laurel* obligation" and that, before the presumption could be reversed, the Act's unworkability "must be close to a certainty."[55] That certainty may well be upon us, and it could be time for a new approach to the old constitutional problem.

At the heart of the constitutional holding of the *Mount Laurel*

52. PAYNE, *supra* note 2, at 11.

53. *Id.* (quoting N.J. STAT. ANN. §§ 52:27D-303, 309(a) (West 2010)).

54. In re Adoption of N.J.A.C 5:94 and 5:95 by the N.J. Council on Affordable Housing, 914 A.2d 348 (N.J. App. Div. 2007). The Fair Housing Act requires COAH to promulgate regulations governing municipal compliance with the Act and satisfaction of its "fair share." The Act initially identified "rounds" of six years and later amended the length of the rounds to ten years. N.J. STAT. ANN. § 52: 27D-307 (West 2010).

55. *Hills*, 510 A.2d at 643.

cases is the realistic consideration of the setting, and when it became certain that a particular remedy was dysfunctional, a new remedy became necessary to solve the underlying constitutional violation. Although the various remedies of the *Mount Laurel* decisions over the years seem inconsistent when viewed in isolation, each remedy is a similar attempt to rectify the constitutional violation derived from the real-world effects of land use policy and practice. If we have indeed reached a juncture where we can no longer ignore that this constitutional violation still remains uncured, a new remedy should not only be constitutionally acceptable, but mandatory.

In the end, for those "forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted,"[56] it matters not whether the *Mount Laurel* doctrine represents the finding of a new conditional right or a limitation on government power. What is important is that there is a consistent constitutional basis for the doctrine that promises relief. The mechanics, as with those of any balancing test, may worry some as inviting excessive judicial discretion, but on a broader scale, the role of the judge after *Mount Laurel II* is not excessive. A constitution not only sets out the structure of government power, but the limits of that power, grounded in principles of equal and reasonable exercise. Those who create and exercise power generally are not good at recognizing when they step beyond the bounds of the Constitution, and that is why the job of constitutional interpretation is structurally committed to a distinct judicial branch. Judges must not abdicate their responsibility to ensure that lawmakers have internalized constitutional concerns. It is these concerns that make the *Mount Laurel* doctrine a relevant and vital doctrine today.

56. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mount Laurel II*), 456 A.2d 390, 415 (N.J. 1983).