Volume 55 | Number 2 Article 4

1-1-1977

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LOCAL GROWTH MANAGEMENT: A DEMOGRAPHIC PERSPECTIVE

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The increased concentration of the American population in urban areas has caused a corresponding increased concern about the appropriate governmental response to rapid population growth.[1] Many local governments have erected legal barriers to population growth under the authority vested in them to protect the health, safety and general welfare of their communities.[2] These barriers to growth may warp migration streams by constraining the level and density of population in affected areas.[3] Courts are increasingly called upon to balance the right of local governments to control population growth against the right of the American population to move and settle where they please.

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1. *See, e.g.*, COMMITTEE ON COMMUNITY DEVELOPMENT, THE DOMESTIC COUNCIL, REPORT ON NATIONAL GROWTH AND DEVELOPMENT: THE CHANGING ISSUES FOR NATIONAL GROWTH 21-35 (1976); Hodge & Hauser, *The Challenge of America's Metropolitan Population Outlook—1960 to 1985*, in BUSINESS AND THE CITIES 57 (N. Chamberlain ed. 1970); Holleb, *The Direction of Urban Change*, in AGENDA FOR THE NEW URBAN ERA (H. Perloff ed. 1975).

2. See Gleeson, Ball, Chinn, Einsweiler, Freilich & Meagher, *Urban Growth Management Systems*, 309-10 A.S.P.O. PLANNING ADVISORY SERVICE 3-27 (1975) [hereinafter cited as Gleeson], for descriptions of operating growth management systems including Boca Raton, Florida; Boulder, Colorado; Brooklyn Park, Minnesota; Dade County, Florida; Fairfax County, Virginia; Loudoun County, Virginia; Montgomery County, Maryland; Petaluma, California; Pinellas County, Florida; Prince George's County, Maryland; Ramapo, New York; Sacramento County, California; and Salem, Oregon. It should be noted that equally effective legal barriers may also be imposed by local governments whose actions lack the conscious motive or sophistication to be labelled "urban growth management systems."

3. Local governmental growth management systems, as defined by urban planners, will not always have the effect of limiting the level or density of population; while some systems do try to influence the rate at which population growth occurs or the total amount of growth that will be accommodated within the jurisdiction, other systems concentrate on influencing the type of growth (*i.e.*, mix of residential, commercial, and industrial), the location of development within the jurisdiction, or the design quality of new development. D. GODSCHALK, D. BROWER, L. MCBENNETT & B. VESTAL, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 8-9 (1977) [hereinafter cited as GODSCHALK] (soon to be published by the ASPO Press). This article is concerned only with those growth management systems that constrain the level or density of population within their jurisdiction.

While there has been extensive study and debate about the legal, social and economic aspects of local growth management,[4] the controversy has been largely unaided by contributions from demographers engaged in migration research. This article attempts to identify aspects of the controversy that could reach a more satisfactory resolution if the debate were reexamined in terms of the effects on migration patterns.

The analysis is divided into five parts. First, the types of legal devices used to control state and local population growth are reviewed. Most of these devices are land use controls that either directly or indirectly affect migration. Second, the legal theories used to supervise the application of state and local growth control laws are categorized and described. Third, an economic and demographic interpretation of these legal theories is proposed. Fourth, a brief discussion of the empirical evidence germane to the legal principles is presented. Finally, a few ways in which demographers can assist the courts are suggested.

I. Local Resistance to Population Growth

The problem of growth control often arises in jurisdictions located in a growth corridor of an expanding metropolitan area.[5] In many cases the growth corridor is created by an improved transportation infrastructure. The corridor could also be the result of a creeping spillover of residential and economic development from neighboring growth zones.[6] In some jurisdictions, population growth may be sudden, and the degree of alarm in the resident population may be great. In other places, population growth may be more gradual. Local residents may adopt an anti-growth attitude as they realize that the rural or environmental amenities that first attracted them are being destroyed by

4. *See, e.g.*, S. Powers & K. Carpenter, Legal, Social and Economic Aspects of Growth Management: Annotated Readings and Case Law (1975); Gleeson, *supra* note 2, at 115-38.

5. The use of growth controls is not confined to jurisdictions surrounding large cities, however. In a 1975, non-random, exploratory survey, it was found that pursuit of conscious growth management policies was fairly wide-spread. Of 191 respondents chosen because they were believed to be engaged in growth management, 125 agencies in 113 different cities in 33 states confirmed that they were, as a matter of policy, engaged in growth management. These respondents included cities, townships, counties, merged city/counties and regional planning agencies. While a large number were jurisdictions close to large cities, others were free standing developed cities or counties, small towns experiencing population booms due to new energy production, and rural communities. Godschalk, *supra* note 3, at Appendix B.

6. M. Clawson, Suburban Land Conversion in the United States: An Economic and Governmental Process 50-51 (1971).

development.[7] Or they may come to oppose growth as the existing urban infrastructure reaches its capacity or deteriorates to such an extent that substantial capital investments will be needed before the jurisdiction can accommodate a population increase.[8] In these and similar situations, local governments are pressured into using whatever powers they possess to protect the community from the real or imagined threats to their pocketbook and life-style attendant to substantial population growth.

Much of the litigation to date has involved attempts by small incorporated communities to shield themselves from migration emanating from neighboring cities.[9] Sometimes the controversy involves the net effect of actions taken by several communities to curb the influx of new residents, actions that may be harmless in isolation but taken together have adverse social consequences.[10] Recently, entire counties[11] and multi-county areas[12] have entered the population growth control field, and it is conceivable that state governments may take a major role in the arena in the near future. Indeed, states may eventually be forced to shoulder the burden of developing population policy. The Domestic Council concluded that "there appears to be a new public, political and academic sensitivity and appreciation for the interrelated nature of all the factors of growth and development, [*sic*] More and more, various states are recognizing policies for growth that take into account the

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7. For a good discussion of one area's approach to dealing with the problem of suburban growth pressure, see BUCK'S COUNTY PLANNING COMMISSION, THE URBAN FRINGE (1970).

8. *See, e.g.*, E. FINKLER & D. PETERSON, NONGROWTH PLANNING STRATEGIES: THE DEVELOPING POWER OF TOWNS, CITIES, AND REGIONS, 16-18, 28-29 (1974).

9. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

10. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975); Urban League v. 23 Municipalities, No. C-41, 22-73 (Middlesex County Ct., N.J., Ch. Div. 1976); Williams & Norman, *Exclusionary Land Use Controls: The Cases of North-Eastern New Jersey*, in LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM 105 (D. Listokin ed. 1974).

11. See Gleeson, *supra* note 2, at 3-27, for descriptions of the growth management systems in Dade County, Florida; Fairfax County, Virginia; Loudoun County, Virginia; Montgomery County, Maryland; Pinellas County, Florida; Prince George's County, Maryland; and Sacramento County, California.

12. *See, e.g.*, METROPOLITAN COUNCIL [Minneapolis/St. Paul metropolitan area], DEVELOPMENT FRAMEWORK CHAPTER, METROPOLITAN DEVELOPMENT GUIDE (1975); METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, A PROPOSAL FOR A METROPOLITAN GROWTH POLICY PROGRAM (1975); MID-WILLAMETTE VALLEY COUNCIL OF GOVERNMENTS, AN URBAN GROWTH POLICY FOR THE SALEM, OREGON AREA (1974).

frequently conflicting claims of social, economic and environmental objectives."[13]

Growth control disputes are seldom resolved in a clear, satisfying way because there are several groups of potentially affected parties[14] and a multiplicity of interests on both sides of the dispute. Growth control is often advocated to protect the physical environment, to preserve the peaceful, uncluttered ideal of rural America and to prevent fiscal strain on local governments.[15] But, it may also be supported by local residents who wish to inhibit certain socio-economic groups from migrating to their jurisdiction.[16] Opponents of growth control may be developers who see their profits diminished by the management policies.[17] Opponents may also be lower income people or social theorists who argue that growth control retards economic efficiency and results in social injustice.[18] Often environmentalists are pitted against civil

13. COMMITTEE ON COMMUNITY DEVELOPMENT, THE DOMESTIC COUNCIL, NATIONAL GROWTH AND DEVELOPMENT 63 (1974).

14. Five major groups affected by growth management programs have been identified as follows:

> Land owner/developer—one whose interest derives from holding title or option to property that is regulated or restricted by a growth management program in such a way that the owner's rights to use, or derive value from, the land are threatened.
>
> Neighbor—one whose interest derives from owning or using land adjacent to the property at issue and within the same jurisdiction, whose rights may be affected by the use of the adjoining land.
>
> Local resident—one whose interest derives from being a citizen of the jurisdiction in which the growth management program operates, whose rights may be affected by the public costs imposed or by the impacts on private property or personal freedom.
>
> Regional resident—one whose interest derives from being a citizen of a neighboring community or area within the economic or geographic region, whose rights may be affected by the impact on his community of another community's growth management actions.
>
> Potential resident—one whose interest derives from a desire to settle in a particular jurisdiction, whose rights may be threatened by growth management actions that limit the opportunity for migration to that jurisdiction.

GODSCHALK, *supra* note 3, at 14.

15. *See, e.g.*, Train, *Growth with Environmental Quality*, in 1 MANAGEMENT & CONTROL OF GROWTH 42, 46 (R. Scott, D. Brower & D. Miner eds. 1975) [hereinafter cited as Scott]; Metropolitan Council, Cost of Providing Services to Alternative Regional Development Patterns (June 19, 1974) (Staff memorandum to Physical Development Committee, Metropolitan Council, Minneapolis-St. Paul, Minn.). *But see* Gruen, Gruen & Associates, *The Impacts of Growth: An Analytical Framework and Fiscal Example*, in 2 Scott, *supra*, at 512.

16. H. FRANKLIN, D. FALK & A. LEVIN, IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 37-38 (1974).

17. *See, e.g.*, Epstein, *The Current Crisis in Real Estate: A Developer's Perspective*, in 3 Scott, *supra* note 15, at 479; Searles, *Is Growth Good? An Industry Perspective*, in *id.* at 497.

18. *See, e.g.*, H. FRANKLIN, CONTROLLING URBAN GROWTH—BUT FOR WHOM? (1973); Agelasto, *No Growth and the Poor: Equity Considerations in Controlled*

rights advocates. It is the kind of controversy in which responsible persons can argue for either side, and resolution of the conflicting interests is difficult, if not impossible.

There are many tools available for controlling population growth. A 1975 survey of 105 local (non-regional) agencies engaged in growth management found that over half of the agencies were using or intended to use the following tools:[19]

1. Public Acquisition of Land
   a. Fee-simple acquisition
   b. Less than fee-simple acquisition
2. Public Improvements
   a. Requirements for adequate off-site facilities for new development
   b. Location of facilities to influence growth location[20]
   c. Capital programming to influence growth timing
   d. Control of access to existing facilities
3. Environmental Controls
   a. Standards for special areas (*e.g.*, flood plains)
   b. Designation of critical environmental areas[21]
   c. Pollution control standards
   d. Environmental impact statements
   e. Designation of developments of regional impact[22]

Growth Policies, 9 PLANNING COMMENT 2 (1973); Alonso, *Urban Zero Population Growth*, DAEDALUS, Fall, 1973, at 191, 194; Finkler, *Nongrowth as a Planning Alternative: A Preliminary Examination of an Emergency Issue*, 283 A.S.P.O. PLANNING ADVISORY SERVICE 4, 4 (1974); Johnson, *Should the Poor Buy No Growth?*, in THE NO-GROWTH SOCIETY 165 (M. Olson ed. 1973); Stahl, *"Cost Repercussions" of the No-Growth Movement*, URBAN LAND, Dec. 1973, at 17; Thompson, *Problems That Sprout in the Shadow of No-Growth*, A.I.A.J., Dec. 1973, at 30.

19. GODSCHALK, *supra* note 3, at 12-13.

20. This allows the developer to build only if adequate public facilities will be available to meet the demands generated by the development. It may consider off-site facilities such as police and fire protection, schools, parks, water and sewer systems, and transportation systems. If combined with a capital improvements program staging the provision of off-site facilities, it may regulate the timing of development. *Id.* at Appendix C. *See also* Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234, 242-45 (1973).

21. Critical environmental areas or areas of environmental concern are natural areas of environmental importance that are regulated by strict development controls because of the sensitive nature of the environmental system. GODSCHALK, *supra* note 3, at Appendix C.

22. Designating developments of regional impact is a technique that requires a de-

4. Zoning Techniques
   a. Conventional zoning
   b. Planned unit development[23]
   c. Flexible zoning[24]
   d. Downzoning
   e. Special permit zoning
   f. Exclusive agricultural or non-residential zoning
   g. Conditional zoning[25]
   h. Performance standard zoning[26]
5. Subdivision Techniques
   a. Conventional subdivision regulations
   b. Mandatory dedication of land or capital facilities
   c. Money in lieu of land or capital facilities
6. Tax and Fee Systems
   a. Preferential taxation (*e.g.*, agricultural land)
   b. Special assessment
   c. Development district (special taxing district)
7. Other Controls on the Land
   a. Official map
   b. Restrictive covenants

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velopment permit from a local government if the nature or magnitude of the development is likely to result in significant impacts beyond the local government's jurisdiction. *Id. See also* AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE (Proposed Official Draft, 1975).

23. Planned unit development is a provision whereby land development larger than a stated minimum size may be planned, reviewed and approved as a unit. It usually allows planners and developers to bargain over densities, cluster patterns, amenities and similar specifics, thus permitting greater flexibility than conventional zoning. GODSCHALK, *supra* note 3, at Appendix C. *See also* Elliott & Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls*, 1 HOFSTRA L. REV. 56, 85-87 (1973).

24. Flexible zoning is a regulation that allows for variation in location and density of development on specific parcels as long as the entire development project does not exceed an overall density. GODSCHALK, *supra* note 3, at Appendix C.

25. Conditional zoning is a technique in which the land owner offers to restrict his use of the property in some way in order to obtain a favorable rezoning decision from the zoning authority. *Id.*

26. Performance standard zoning is land use control by specification of standards that must be met rather than by limitation according to use and density as is done in conventional zoning. *Id.*

Other tools that were less widely used, but often more controversial, include bonus zoning,[27] transfer of development rights,[28] exclusion of multi-family housing, low or moderate income housing requirements,[29] development limit line, population/employment targets, regional fair share allocations (*e.g.*, of low and moderate income housing), total population limits, and temporary restraints through water, sewer or building permit moratoria.[30]

It should be noted that a few of these techniques may involve purely private arrangements. Other tools utilize public sector incentives or disincentives to guide private decisions. Finally, other techniques involve direct regulation of private actions by the local government; these techniques rely primarily on the local government's police power to regulate, but also make use of the locality's power to spend (*e.g.*, to provide services and facilities), power to acquire (*e.g.*, to buy property rights in fee or less than fee for open space or conservation easements) and power to tax. Growth management policies are usually implemented through combinations of the above tools and techniques.

Most growth management policies concentrate on influencing the amount of residential housing in the community. Restrictions on housing may be implemented either directly or indirectly. Direct restrictions limit the number and type of housing units that can be built

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27. A technique used in conjunction with conventional or performance zoning in which the municipality allows the developer to exceed the limitations (*e.g.*, density or height restrictions) in some profitable way in exchange for the developer providing additional amenities. *Id.* *See also* Elliott & Marcus, *supra* note 23, at 61-72.

28. One definition of transfer of development rights is:

> A transaction in which the unused rights to develop, belonging to one parcel, are separated from that parcel and transferred (usually sold) to another parcel which can then be developed more intensely than was previously allowed. Usually transferor and transferee sites are designated by district or characteristics . . . . The parcel from which the development rights have been removed cannot be developed to a greater intensity, and this restriction of only being able to develop to the extent of the retained development rights becomes a permanent legal encumberance [*sic*] on the land.

GODSCHALK, *supra* note 3, at Appendix C.

29. This technique requires the developer to provide housing that will be affordable by lower income people, usually as a certain percentage of the total number of units developed. Usually this requirement applies only to larger developments, requires only a small proportion to be for low or moderate income people and is tied to the availability of federal housing subsidies or allowability of increasing densities in order to make it economically feasible. *Id.* *See also* H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 16, at 131-40.

30. GODSCHALK, *supra* note 3, at Appendix B. See also Gleeson, *supra* note 2, at 35-48, for a discussion of 55 growth management techniques.

in an area and thereby influence the number and socio-economic characteristics of future residents, many of whom will be migrants. Examples of direct restrictions include zoning, population caps and moratoria on building permits. Indirect restrictions work through the price mechanism and, in effect, raise housing prices to discourage potential residents from moving into an area. Subdivision regulations are a good example of a technique that allows a local government to force a developer to include the cost of roads, sidewalks, sewer and water systems, recreation facilities, and set-asides for public facilities in the price of housing. By requiring elaborate facilities, the price of housing can be increased by many thousands of dollars.[31] Most of the tools listed above can be manipulated to increase the price of housing and thus retard population growth.[32]

Direct restrictions have been the ones most frequently attacked in the courts, perhaps because they are more visible and their impact on affected parties is easier to prove,[33] whereas indirect restrictions are less visible and their impacts are intermingled with the normal workings of the economic system. However, indirect restrictions are no less important than direct restrictions in affecting potential residents and manipulating migration patterns. A few recent cases have been brought by plaintiffs who wanted courts to scrutinize these indirect effects, but judicial analysis to date has been rather unsophisticated.[34]

II. Legal Theories Affecting Migration

Although judicial response to challenged growth management programs is in an unsettled state and may vary substantially among courts, it is possible to make some generalizations about theories available to challengers. Some theories upon which plaintiffs may attack

31. It is not being suggested that all subdivision requirements are necessarily bad because they raise housing prices. Some of the requirements are justifiable in terms of being necessary to a minimum quality of life. Other requirements, however, seem to have only marginal relation to the health and safety of the inhabitants.

32. *See* B. Siegan, Land Use Without Zoning (1972).

33. *See, e.g.*, cases cited in Gleeson, *supra* note 2, at 138-41. *Cf.* Jacobsen & Redding, *Impact Taxes: Making Development Pay Its Way*, 55 N.C.L. Rev. 407 (1977) (judicial treatment of one regulatory device).

34. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975), in which the Court suggested that the exclusionary effects of Penfield's zoning ordinance, which allowed only 0.3% of the land available for residential construction to be used for multifamily structures and made lower cost housing economically unfeasible because of density and other amenity requirements, could be attributed to the economics of the area housing market rather than any illegal acts. *Id.* at 506.

local growth management programs are only indirectly related to migration patterns; judicial cognizance of the claims may have an effect on migration patterns, but the alleged violation is not premised on harm to potential residents. Litigation on the theories of taking of land,[35] violation of equal protection as between two similarly situated pieces of land,[36] and violation of environmental protection standards as a result of local growth management policies[37] are examples of indirect challenges.

Several legal theories may, however, be available to plaintiffs who want directly to question the permissible impact of growth management programs on migration patterns and rights of potential residents. In state courts, plaintiffs may be able to proceed on theories of regional general welfare or racial or economic equal protection. In federal courts, a modified regional welfare theory, the right to travel, racial equal protection or statutory grounds such as those created by the Housing and Community Development Act of 1974 may be included in plaintiff's arsenal. But access to theories for direct attack does not guarantee potential residents the right to move where they please. There are many restrictions on conditions under which each theory may be used, and there is some question which courts will be responsive to which theory. Even when a plaintiff prevails, the remedy may be so partial, mechanical or artificial as to deprive potential migrants of

35. *See, e.g.*, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 44 U.S.L.W. 3544 (U.S. March 30, 1976) (downzoning); Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971) (fiscal impact); Robinson v. City of Boulder, — Colo. —, 547 P.2d 228 (1976) (non-extension of public facilities); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (timed development over eighteen years); Board of Supervisors v. DeGroff Enterprises, 214 Va. 235, 198 S.E.2d 600 (1973) (mandatory inclusion of lower cost housing); F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973); GODSCHALK, *supra* note 3, at 53-64; THE POTOMAC INSTITUTE, LOCAL GROWTH MANAGEMENT POLICY: A LEGAL PRIMER, 29-31 (1975); Gleeson, *supra* note 2, at 62-66.

36. *See, e.g.*, City of Greeley v. Ells, 186 Colo. 352, 527 P.2d 538 (1974) (no discrimination between similarly situated property); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (phased provision of services); Board of Supervisors v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975) (discrimination found between similarly situated property); Citizens for Underground Equality v. City of Seattle, 6 Wash. App. 338, 492 P.2d 1071 (1972) (geographic discrepancy in services); GODSCHALK, *supra* note 3, at 177-91; Gleeson, *supra* note 2, at 69-70.

37. *See, e.g.*, Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); GODSCHALK, *supra* note 3, at 105-112; Gleeson, *supra* note 2, at 109-14.

meaningful relief. Judicial response to each of these theories will be examined to determine the magnitude of burden localities may impose on potential migrants in order to manage growth and the effectiveness of the remedy if the court finds the actual burden to be excessive.

A. Range of Judicial Interpretation

In order to understand the range of judicial interpretation from state to state, it is helpful to place the states within a generalized framework. Norman Williams has designed a helpful typology of judicial response to land use controls, based on his study of over ten thousand land use and zoning cases.[38]

Williams identifies four periods in American land use controls. The first, "pre-zoning," was typified by a lack of acceptance of zoning, reliance on the nuisance doctrine and total exclusion of certain objectionable uses.[39] This is no longer the prevailing view in any state.[40]

The second stage, "acceptance of the zoning principle," was reached by most state courts in the late 1920's when they held that private land could have broad restrictions placed on its use without the payment of compensation and that the uses of land could be arranged into districts.[41] The burden of proof was generally on the local government to prove why a certain restriction should be enforced. Most of the states have passed beyond this stage as well.[42]

"Faith in local autonomy," identified as the third stage, is the current rule in most states. Courts in this stage accord great respect to zoning and land use decisions made by local agencies.[43] It is characterized by a strong presumption of validity of government actions, a rule that zoning is valid as long as the case is fairly debatable and a belief in the propriety of local definitions of the general welfare. Williams cited a built-in bias toward fiscal zoning and exclusionary zoning as a shortcoming of this approach and observed that permitting this

38. 1 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER §§ 5.01-.06 (1974).

39. *Id.* § 5.02.

40. *Id.*

41. *Id.* § 5.03.

42. *Id.* Williams comments that "Illinois is still clearly (and happily) resting there. Michigan has wavered back and forth . . . . New York clearly reverted to this stage during the Keating period. If Ohio and Rhode Island are out of this stage, they are only barely so." *Id.* § 5.03, at 105.

43. *Id.* § 5.04.

bias to operate results in preventing the migration of large groups of people into areas where better housing, improved employment opportunities and good public services exist.[44]

A fourth stage, "sophisticated judicial review," is beginning to emerge and is described by Williams as "still more an attitude than a body of coherent doctrine . . . ."[45] It represents the "revival of creative judicial review, as an active force to protect really basic values . . . ."[46] Among the characteristics are increased judicial scrutiny of the relationship of means to ends; increased concern about exclusionary zoning, with an indication that the presumption of validity might be reversed when regulations exclude uses with high social value, particularly lower income housing; increased review of the policy background for restrictions, accompanied by some deference to regulations imposed pursuant to a comprehensive plan and increased concern over what weight to give environmental factors. New Jersey is an example of a state that has reached this fourth stage.

Williams foresees a major turning point ahead with the third period, municipal autonomy, ending.[47] States may return to some variation of stage two, thereby strengthening the position of developers in land use decisionmaking. Or states may move forward to the fourth stage, thereby encouraging probing judicial review to protect basic values particularly as they affect "third party nonbeneficiaries." While in the future some states may revert to stage two, potential migrants currently challenging growth management programs will probably confront courts embracing the third or fourth stage approach.

B. *State Courts, Potential Migrants and the Regional General Welfare Challenge*

In state courts adopting the "local autonomy" stage of analysis, there appears to be no specialized theory on which potential migrants can challenge a restrictive growth management policy. Even if they get standing to challenge on a general due process or exclusionary zoning theory, courts are not likely to be very receptive to their claims. State courts often view the major responsibility of local government as the

44. *Id.* He cites California, New Jersey before 1973, Massachusetts, and Maryland as good examples of states at this stage.

45. *Id.* § 5.05, at 107. New Jersey is an example of a state that has reached this fourth stage. *See* text accompanying notes 67-83 *infra*.

46. 1 N. WILLIAMS, *supra* note 38, § 5.05, at 110.

47. *Id.* § 5.06.

enhancement of the well-being of local residents without regard to the effect on regional residents or potential migrants.[48] However, in some states embracing variations of the second or fourth stage—acceptance of the zoning principle or sophisticated judicial review—a legal theory has emerged that provides a way for potential residents to challenge negative impacts of local growth management systems.[49] This theory is regional general welfare.[50]

Regional general welfare challenges have been based on statutory interpretation of state planning enabling legislation and state constitutional due process provisions. The theory is premised on the fact that state due process clauses require that local governments only exercise their regulatory powers to further the health, safety, morals or general welfare of the community.[51] The theory assumes that the police power is delegated to localities with the understanding that it will be used to further the interests of the state as a whole; the theory further postulates that the aggregate of actions intended to enhance regional welfare is better for the state welfare than the aggregate of actions intended to enhance the welfare of individual localities and that, therefore, enhancement of regional welfare is the appropriate standard for evaluating any growth management control.[52]

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48. Writing when most of the state courts were at the local autonomy stage, Bosselman expressed his disapproval of this traditional state approach. While his concern was not based on migration alone, it was based on the negative consequences he foresaw in allowing local governments to time growth with disregard for regional impacts:

> Local government's assertion of the power to undertake development timing might be at least partly beneficial if any of three conditions existed: an effective system of regional planning, an extensive program of land banking, or detailed judicial scrutiny of the effects of development timing. None of these now exists. Consequently, authorizing local governments to exercise development timing power might be analogized to giving dynamite to a baby. It is a risky business, but at least it induces the parents to watch the child more closely.

Bosselman, *supra* note 20, at 265.

49. These states are New Jersey, New York and Pennsylvania. Michigan has been in this category by virtue of lower court decisions, but the Michigan Supreme Court has recently rejected the regional general welfare approach. *See* text accompanying notes 59-60 *infra*.

50. *See generally* GODSCHALK, *supra* note 3, at 65; THE POTOMAC INSTITUTE, *supra* note 35, at 21.

51. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928), established this interpretation of the federal due process clause. This meaning is usually accepted as also being required by their state due process clause in those 44 to 46 states with equivalent constitutional provisions. 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 4.1 (rev. 3d ed. 1973).

52. H. FRANKLIN, *supra* note 18, at 20-22. An alternative theory provides that even if one could not prove that there is an explicit directive that the police power only be used to enhance the welfare of the state as a whole, arguably this limitation would

Pennsylvania courts were the first to imply that a regional need for residential development took precedence over a local desire to limit growth. In a 1965 case[53] the court invalidated a four acre minimum lot size requirement citing the chaos and hardship that would be experienced if all townships in the area adopted similar zoning restrictions. The court stated that zoning "must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities. . . . Zoning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring."[54] While this appears to be a good start toward reconciling the interests of potential migrants to the region with those of local government, subsequent judicial developments in Pennsylvania have not contributed significantly to analysis of this conflict.[55] A decision requiring townships to zone at least one area for new multi-family dwellings has been expanded to require that each locality provide areas for a whole host of residential building types.[56] No standards have been established for the amount of "natural growth" a community must accept, and no attempt has been made to analyze the socio-economic impacts of such land use controls.[57] This mechanical standard of requiring zoning for a wide range of residential building types demands accommodation of new residents without distinguishing among community types, without analyzing migration patterns or labor markets and without measuring the degree to which a locality has already accommodated regional growth.[58] The Pennsylvania approach, while accepting a regional standard, appears to have the shortcomings typical of the second stage of judicial review. It tends to favor developers' interests in a mechanical manner without balancing those interests or invoking a level of judicial scrutiny necessary to the protection of basic values.

For a few years the Michigan lower courts followed a similar regional analysis emphasizing the accommodation of particular uses.

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have to be implied since the state could not constitutionally delegate its power to be used in ways harmful to the state even if it desired to do so. *Id.* at 22.

53. National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

54. *Id.* at 527-28, 215 A.2d at 610.

55. *But see* Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975), in which the court cited the New Jersey regional welfare cases and adopted a fair share approach. *See* text accompanying notes 67-83 *infra*. The effect this will have on the mechanical Pennsylvania standard remains to be seen.

56. *Compare* Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), *with* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970).

57. 3 N. WILLIAMS, *supra* note 38, at § 66.26.

58. Williams, Doughty & Potter, *The Strategy on Exclusionary Zoning: Towards What Rationale and What Remedy*, 1972 LAND USE CONT. ANN. 177, 199-201.

They held that upon a finding that a particular land use substantially advanced the regional public interest and was appropriate for a given site, the burden shifted to the locality to justify its exclusion of that use.[59] This formulation was rejected by the Michigan Supreme Court when it replaced the regional welfare test with a test of total exclusion.[60]

It is clear that neither of these state courts reached its decision through a careful balancing of the rights of regional and potential residents against the interests of local governments.[61] The decisions of the courts of New York and New Jersey appear to be more informed of these concerns, qualifying these states as having achieved the fourth stage of judicial review. The first important regional welfare case in New York is *Golden v. Planning Board of the Town of Ramapo*.[62] In a challenge to a growth management system that timed development by staging the provision of facilities and requiring adequate facilities as a condition precedent to granting a building permit,[63] plaintiffs alleged that the system enhanced the welfare of the locality to the detriment of the rest of the region. The court accepted the regional standard as the appropriate one, but upheld the local growth controls on the basis that the plan evidenced sufficient concern for future population assimilation.[64] The judicial scrutiny was limited, however, since the court looked to the language of the ordinance rather than the projected impact of the restrictions. Further, the court was reluctant to invalidate the system because no other body was prepared to take over growth management on a regional basis.[65]

Although the New York court did not engage in full judicial scrutiny in its first case, New Jersey courts extended judicial review

59. Green v. Township of Lima, 40 Mich. App. 655, 199 N.W.2d 243 (1972); Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971); Comment, *The Michigan Preferred Use Doctrine as a Strategy for Regional Low-Income Housing Development: A Progress Report*, 8 URB. L. ANN. 207 (1974).

60. Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974).

61. In fact, one commentator wrote with reference to Pennsylvania: "the specific rationale can only be described as laughable (no exclusion of billboards, and no exclusion of lighted signs, or of quarries—and so not of apartments either!)" 3 N. WILLIAMS, *supra* note 38, § 66.26, at 74.

62. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). But note the later evolution of the New York standard in Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

63. For the text of the zoning amendment creating the growth management system, see 2 Scott, *supra* note 15, at 7-13.

64. Golden v. Planning Bd., 30 N.Y.2d 359, 376, 285 N.E.2d 291, 300-01, 334 N.Y.S.2d 138, 150, *appeal dismissed*, 409 U.S. 1003 (1972).

65. For a critique of the limited judicial scrutiny, see, *e.g.*, H. FRANKLIN, *supra* note 18, at 26; Bosselman, *supra* note 20, at 253.

much further. The New Jersey courts also developed a notion of affirmative action by localities—a requirement that they actually promote regional welfare.[66] This was in marked contrast to the Pennsylvania, Michigan and New York formulations that merely required a passive "open door" policy to avoid harming the regional welfare.

In the first New Jersey case, *Oakwood at Madison, Inc. v. Township of Madison*,[67] the superior court invalidated a zoning ordinance for failing to promote a balanced community in accordance with the general welfare.[68] In its analysis the court defined the region as "the area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalid exclusionary zoning."[69] In devising a remedy, however, the court merely employed a quota system using the township, not the region as the base; it held that the township must maintain the same proportion of low-income housing as existed at that time.[70]

In a similar case, *Southern Burlington County NAACP v. Township of Mount Laurel*,[71] the New Jersey Supreme Court held that a zoning ordinance that fails to meet the housing needs of residents of all incomes living within the region does not serve the general welfare and is invalid. Specifically, it held:

> We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.[72]

This fair share requirement would be modified for community type[73]

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66. Scott, *Beyond 'sic Utere . . .' to the Regional General Welfare*, 27 ZONING DIG. 6 (1975).

67. 117 N.J. Super. 11, 283 A.2d 353 (Super. Ct. Law Div. 1971), *cert. granted*, 62 N.J. 185, 299 A.2d 720 (1972). Madison Township amended its ordinance before the Supreme Court's resolution and the case was tried again on remand and reported at 128 N.J. Super. 438, 320 A.2d 223 (Super. Ct. Law Div. 1974). On appeal to the New Jersey Supreme Court, this case is still undecided after its fourth hearing.

68. 117 N.J. Super. at 21, 283 A.2d at 358.

69. 128 N.J. Super. at 441, 320 A.2d at 224.

70. *Id.* at 447, 320 A.2d at 227.

71. 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

72. *Id.* at 174, 336 A.2d at 724.

73. The fair share requirement applies only to "developing communities"; those that are already predominantly developed and those experiencing no development pressures are excluded. *Id.* at 180, 336 A.2d at 728. For an application of this doctrine

and substantial environmental threat.[74] While fiscal reasons would probably not be sufficient to avoid accommodation of one's fair share of regional growth, *Mount Laurel* indicated that growth restriction techniques that allocate the fiscal burden of development, such as the scheme used in *Ramapo*, might be approved if they provided for a mix of building types and income groups at an early stage.[75] Additionally, the judicially created fair share standard was to defer to a binding housing allocation agreement among all municipalities in the region.[76]

Beyond these qualifications, *Mount Laurel* left the fair share requirement rather vague. The region was to be determined according to local conditions but limited to one state.[77] In the case of the township of Mount Laurel, the region was defined as a semicircle of a particular radius. The amount of the fair share was to be determined by the municipal, county and state planning bodies. The court indicated that the housing needs of low and moderate income people presently or formerly residing in substandard dwellings and the housing needs of people presently or reasonably expected to be employed in the township should be considered.[78]

While the particular definition of the Mount Laurel region appears to be fairly arbitrary, the court, in leaving formulation of fair share to planners, provided the opportunity for the fair share allocation to be sensitive to important factors such as housing markets, labor patterns and social interaction. In a subsequent lower court decision, however, a court attempted mechanically to apply the fair share standard with numerical precision without the assistance of planners. In *Urban League of Greater New Brunswick v. 23 Municipalities*,[79] Middlesex County, a Standard Metropolitan Statistical Area (SMSA), was designated as the apposite region, primarily based on political boundaries and the availability of data rather than considerations of housing markets or employment patterns.[80] After dismissing complaints against twelve municipalities because of exemptions provided in *Mount Laurel*, the court analyzed the remaining eleven municipalities with

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by a lower court in a subsequent decision, see Segal Const. Co. v. Zoning Bd. of Adjustment, 134 N.J. Super. 421, 341 A.2d 667 (Super. Ct. App. Div. 1975).

74. 67 N.J. at 186, 336 A.2d at 731.
75. *Id.*
76. *Id.* at 188-89, 336 A.2d at 732-33.
77. *Id.*
78. *Id.*
79. — N.J. Super. —, 359 A.2d 526 (Middlesex County Ct., Ch. Div. 1976).
80. *Id.* at 531-32.

regard to percentage of low and moderate income resident families, number of industrial employees, and vacant acreage suitable for housing. A ten year county-wide low and moderate income housing need was projected, motivated by a desire to maintain the same ratio of county resident employees of low and moderate income.[81] As a first step, units were allocated to municipalities to bring them even with the county-wide proportion of low and moderate income families.[82] The remaining unallocated units were then apportioned among the eleven municipalities equally.[83] Whether this interpretation of the fair share requirement will be sustained by the New Jersey Supreme Court remains a question.

New York has recently followed New Jersey into the fair share formulation. In *Berenson v. Town of New Castle*,[84] the court held that a locality may prohibit multi-family housing only if regional and local needs for such housing are supplied in that locality or in other accessible areas in the region. The precise methodology that will be used in this determination is not yet defined.

As a major specialized state based challenge available to potential migrants,[85] the regional general welfare theory does have the capacity to force localities to recognize and provide for the needs of migrants. It is only accepted as a legitimate claim, however, in a small number of leading states. Furthermore, where a region is multi-state, the theory appears to be restricted to that part of the region lying within one state. Additionally, it may concentrate on keeping current patterns of housing segregation from intensifying, rather than on promoting increased socio-economic integration. Finally, it runs the risk of degenerating into an arbitrary process that manipulates numbers and

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81. *Id.* at 541.

82. *Id.*

83. The balance of 14,667 units was divided by 11, allocating 1,333 units per municipality. *Id.* at 542.

84. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

85. Another theory that may be of use to migrants that may be found only in state constitutions is equal protection based on wealth. There is some indication that the New Jersey court may prohibit economic discrimination in some situations related to growth management. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

Additionally, the state courts may be important to potential migrants to the extent that the proof they require of racial discrimination under the state constitution is less rigorous than the proof required to prove a violation of the federal equal protection clause. *See* discussion of the federal standard of proof in text accompanying notes 122-141 *infra*.

forgets about the basic general welfare values the judiciary set out to protect.

C. Federal Courts and Potential Migrants: Regional General Welfare, the Right To Travel, Racial Equal Protection and the Housing and Community Development Act of 1974

Federal courts, in reviewing challenges to land use controls based on the Federal Constitution or federal statutes, tend to use the third stage of judicial review.[86] The Supreme Court has held that local police power should be given a broad scope[87] and has sustained the validity of municipal zoning entirely for single family housing.[88] In conformance with this position, lower federal courts have held preservation of a town's rural environment to be a legitimate objective of zoning.[89]

To their general support for local autonomy, limited judicial scrutiny and apparent lack of concern for potential migrants, the Court has recently added another major hurdle for potential residents—a more demanding standing requirement.[90] In *Warth v. Seldin*,[91] plaintiffs included individuals who wanted to move into Penfield, a suburb of Rochester, New York. The Court denied them standing, stating that they had to allege facts demonstrating that the challenged practice (a zoning ordinance and its enforcement) harmed them personally, that they personally would benefit from judicial intervention or that they had a present interest in property in the defendant municipality. The present interest did not have to be ownership of land or a contractual interest in a project, but by implication, the interest had to be as concrete as the desire and ability to move into a particular proposed development currently precluded by the challenged practice.[92]

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86. 3 N. WILLIAMS, *supra* note 38, § 66.34, at 101.

87. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954), in which the Court wrote: "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33.

88. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The Court held the police power "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 9. This may be distinguishable from other growth management cases because of the small size of the municipality, approximately 700 people.

89. *See, e.g.*, Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974). *See also* 1 N. WILLIAMS, *supra* note 38, at § 7.05.

90. There is room for debate over whether this is a new standard or merely articulates a previous policy regarding the need for potential residents to join with developers in order to bring suit. *See* GODSCHALK, *supra* note 3, at 39-40; Moskowitz, *Standing of Future Residents in Exclusionary Zoning Cases*, 6 AKRON L. REV. 189 (1973).

91. 422 U.S. 490 (1975).

92. *See id.* at 508 n.18.

The effect of *Warth* is to limit migrants' challenges to growth management policies on federal constitutional theories to a project by project attack; challenges to whole municipalities or regions are precluded.[93] This prevents potential migrants from bringing the type of suit that would be most effective.[94] Despite these basic restrictions, some lines of attack have emerged that may be of limited assistance to those who wish to challenge local growth controls in federal courts.

First, federal courts have shown some willingness to invoke due process to require consideration of regional welfare in housing litigation. Unlike leading state courts, however, federal courts have usually interpreted regional welfare to require a locality to accept growth or accommodate lower cost housing only if there is no other alternative site in the whole region.[95] Due to overwhelming problems of proof, this standard usually results in upholding local restrictions.[96] Clearly, this is a much weaker standard than the ones used in Pennsylvania, New Jersey and New York, since it is applied only on a single project basis and since it is successful only when plaintiff can prove that harm to the regional welfare would be the inevitable result. While there are some signs that federal courts may broaden their regional perspective,[97] it is probable that potential migrants will have to invoke other theories in order to obtain judicial relief.

One theory potential residents might invoke instead of the regional general welfare is the right to travel.[98] As it has been applied, the right to travel includes the right of transient passage between states as well as the right to migrate to settle in another state. It has not been established by the Court whether the right to travel applies equally to

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93. Compare this to the strategy used in Urban League v. 23 Municipalities, — N.J. Super. —, 359 A.2d 526 (Middlesex County Ct., Ch. Div. 1976).

94. See 3 N. WILLIAMS, *supra* note 38, § 66.36, at 106-07 for a description of the most effective lawsuit to challenge exclusionary land use controls. It includes bringing suit against a whole county or group of municipalities.

95. Bosselman, *Growth Management and Constitutional Rights—Part I: The Blessings of Quiet Seclusion*, 8 URB. L. ANN. 3, 22 (1974).

96. *See, e.g.*, Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (exclusion of lower income residents upheld on the ground that ample housing opportunities were available elsewhere in the region); Acevedo v. Nassau County, 369 F. Supp. 1384 (E.D.N.Y. 1974) (refusal to allow construction of multifamily housing upheld on theory that land was available elsewhere in county).

97. *See, e.g.*, Hills v. Gautreaux, 96 S. Ct. 1539 (1976), in which the Court held that it was permissible to order inter-district (or regional) relief for discrimination even when the violation was not inter-district since that was the only way that relief would be possible.

98. *See generally* Comment, *The Right to Travel and Its Application to Restrictive Housing Laws*, 66 NW. U.L. REV. 635 (1971); Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612

interstate and intrastate movement.[89] Some commentators believe that this distinction is not crucial in the area of land use controls because restrictions that tend to affect intrastate migration also affect interstate migration.[100] Others cite the interstate/intrastate distinction as the major determinant of whether the right to travel is pertinent in growth management litigation; they contend that if the right to travel goes only to interstate travel, plaintiffs will have the heavy burden of proving that the challenged local control restricted movement into the state.[101] Infringement of this fundamental right of interstate travel would be justified only by a compelling state interest. When there is no proof of a negative impact on interstate migration, plaintiffs would have to show that the local controls were unreasonable, arbitrary or capricious in order to invalidate them.

Which interpretation will ultimately be accepted by the courts may depend on the source to which the court attributes the right to travel. Early cases grounded the right to travel in the privileges and immunities clause of article IV, section 2 of the Constitution.[102] Subsequent cases have attributed the right to travel, instead, to the privileges and immunities clause of the fourteenth amendment,[103] the commerce clause,[104] the due process clause of the fifth amendent,[105] the equal protection clause of the fourteenth amendment[106] and the Constitution generally.[107]

Arguably, only if a court accepts the equal protection clause as the basis of the right to travel and views the right to move intrastate as well as interstate as a fundamental precept of personal liberty would a local regulation that burdened only intrastate migration be subject to strict

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(1972); Comment, *The Right to Travel—Its Protection and Application Under the Constitution*, 40 U.M.K.C. L. REV. 66 (1971).

99. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974). *But see* King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); Cole v. Housing Auth., 435 F.2d 807 (1st Cir. 1970), in which lower federal courts held the right to travel extended to intrastate movement.

100. GODSCHALK, *supra* note 3, at 101-02.

101. Gleeson, *supra* note 2, at 71.

102. Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

103. Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); Twining v. New Jersey, 211 U.S. 78 (1908).

104. Edwards v. California, 314 U.S. 160 (1941); Passenger Cases, 48 U.S. (7 How.) 282 (1849).

105. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

106. Shapiro v. Thompson, 394 U.S. 618 (1969).

107. United States v. Guest, 383 U.S. 745 (1966).

scrutiny.[108] Other sources of the right to travel would allow courts to uphold any regulation that treated interstate migrants and intrastate migrants equally if there was a rational basis for the regulation.[109] If courts adopt this latter rationale, the right to travel will not be of great importance in challenges to local growth management schemes.

Only one case has specifically addressed the relation of the right to travel to local growth management efforts. In *Construction Industry Association v. City of Petaluma*,[110] developers challenged the system of land use restrictions on several grounds, including the allegation that the Petaluma Plan violated the right to travel. The Plan was designed to control the future rate and distribution of growth " '[i]n order to protect its small town character and surrounding open spaces.' "[111]

The district court struck down the restrictions on the basis of the right to travel, saying that Petaluma had failed to prove a compelling state interest.[112] In adopting the personal liberty view of the right to travel, the district court wrote:

> In essence, the plaintiffs contend that the question of where a person should live is one within the exclusive realm of the individual's prerogative, not within the decision-making power of any governmental unit. Since Petaluma has assumed the power to make such decisions on the individual's behalf, it is contended that the city has violated the people's right to travel. Considering the facts of the case, we agree.[113]

The district court rejected claims of fiscal burden, inadequate water supply and a preference not to grow as insufficient demonstration of compelling state interest.[114] This opinion was a substantial departure

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108. Gleeson, *supra* note 2, at 72.

109. *Id.*

110. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

111. *Id.* at 576 (quoting the Official Statement of Development Policy for the City of Petaluma). The Plan consisted of an annual building permit limit of 500 units per year in projects involving five or more dwelling units, an urban extension line beyond which the city would not expand for at least twenty years, density limitations, and plans to limit available facilities. The goal was to limit the 1985 population from a projected 77,000 without growth controls, to a maximum of 55,000 with growth controls.

112. *Id.* at 586.

113. *Id.* at 581.

114. In discussing the claim of right to choose not to grow, among the cases cited with approval in *Petaluma* were the Pennsylvania regional general welfare cases, including Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

from the rational basis test usually employed by federal courts reviewing local land use restrictions.[115]

The Court of Appeals for the Ninth Circuit reversed the district court, dismissing the right to travel claim for lack of standing.[116] While the landowners and construction industry association were able to satisfy the "injury in fact" test, the court held they did not meet the "zone of interest" requirement because the right to travel is meant to protect potential migrants, not developers.[117] The court of appeals went on to find against plaintiffs on their substantive due process and commerce clause claims, for which they had standing. Using a rational basis test, it held that the local restrictions were rationally related to the permissible governmental objectives of preserving a small town character and open spaces and of growing at an orderly and deliberate pace.[118]

While the court of appeals' decision in *Petaluma* did not reject the right to travel challenge if brought by a proper plaintiff, two major hurdles remain for potential migrants who wish to utilize this theory. First, *Warth*[119] imposes some fairly stringent requirements for standing.[120] Additionally, the court of appeals' use of the rational basis test in dealing with the other challenges in *Petaluma* is probably indicative of the level of review most federal courts would adopt for a right to travel challenge. The Supreme Court has practiced and encouraged federal judicial deference to local land use and zoning matters in cases brought on theories other than the right to travel.[121] There is no indication that higher federal courts are prepared to assume a more rigorous level of judicial scrutiny of local land use controls when the challenge is based on the right to travel; such a challenge will probably

115. For examples of federal courts using the rational basis test, see Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

116. Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

117. *Id.* at 904.

118. *Id.* at 909.

119. *See* discussion in text accompanying notes 91-94 *supra.*

120. But there are ways of circumventing the *Warth* requirements. In Planning For People Coalition v. County of DuPage, 70 F.R.D. 38 (N.D. Ill. 1976), plaintiffs were granted standing without alleging an interest in a specific housing project currently precluded by the challenged ordinance. Instead, they alleged a conspiracy between county officials and large developers not to propose any low or moderate income housing projects.

121. *See* text accompanying notes 86-94 *supra.*

be useful to potential migrants only when local controls penalize interstate migration or when local controls are arbitrary and capricious.

Potential migrants seeking to challenge local growth restrictions in federal courts will probably have to explore other theories for litigation. A third possible allegation is that the controls are an unconstitutional violation of equal protection on racial grounds.[122] Since judicial adoption of either the rational basis test common to equal protection analysis or the new increased scrutiny of the relationship of means to ends[123] will usually result in upholding the challenged policy,[124] a challenge is viable only if plaintiffs can convince courts to invoke the strict scrutiny test, by showing a suspect classification[125] or a fundamental interest.[126] If plaintiffs are successful in making this showing, the ordinance can be upheld only if it is designed precisely to accomplish the state's purpose, if a less burdensome alternative is not available,[127] and if the ordinance is necessary to further a compelling governmental interest.[128] The government is rarely able to meet this heavy burden.[129]

A potential migrant who is poor or a member of a racial minority group can avail himself or herself of three possible theories for equal protection challenges: restriction on access to housing, a fundamental

122. This section is limited to claims of discrimination based on constitutional grounds. Particular statutes may also provide the basis for litigation when racial discrimination is alleged.

123. Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-24 (1972); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972).

124. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Gleeson, *supra* note 2, at 68.

125. The following have been held to be suspect categories: race, McLaughlin v. Florida, 379 U.S. 184 (1964); alienage, Graham v. Richardson, 403 U.S. 365 (1971); ancestry, Oyama v. California, 332 U.S. 633 (1947); and possibly when there is a total deprivation of an important entitlement, wealth, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 20 (1973).

126. The following have been held to be fundamental interests: the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942); the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right to personal privacy, Roe v. Wade, 410 U.S. 113 (1973); the rights guaranteed by the first amendment, Williams v. Rhodes, 393 U.S. 23 (1968); and perhaps, the right to the essential facilities for prosecution of a criminal appeal, Griffin v. Illinois, 351 U.S. 12 (1956).

127. Dunn v. Blumstein, 405 U.S. 330 (1972).

128. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

129. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

interest; classification according to wealth, a suspect category; and classification according to race, a suspect category. None of these theories, however, currently appear to be very promising for use by potential migrants. The idea that housing is a fundamental interest has been rejected by the Court.[130] Additionally, the Court has limited wealth as a suspect criterion to situations where an inability to pay for a desired benefit results in "an absolute deprivation of a meaningful opportunity to enjoy that benefit."[131] An absolute deprivation of lower cost housing will not be found unless plaintiffs can prove the unavailability of decent and relatively convenient lower cost housing anywhere in the region.[132]

The allegation of racial discrimination when predominantly white suburbs have inhibited or prevented the provision of lower cost housing has proved slightly more successful. Courts appear to have distinguished between passive non-cooperation with and active resistance to low and moderate income housing projects. The former has been allowed as long as it is based on "legitimate governmental reasons."[133] Active resistance taking the form of governmental obstruction[134] or elimination[135] of lower income housing occupied primarily by minorities has been declared invalid racial discrimination. The distinction between active and passive resistance, however, is not always followed by the courts.[136]

Even when active resistance to lower cost housing can be shown, plaintiffs have the burden of showing that the classification was racial. Courts have refused to equate economic discrimination with racial

130. *See* Lindsey v. Normet, 405 U.S. 56 (1972); James v. Valtierra, 402 U.S. 137 (1971).

131. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 20 (1973).

132. Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974). Note the similarity between this requirement and the federal variation on the regional general welfare, discussed in text accompanying notes 95-97 *supra*.

133. *See, e.g.*, Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975); Mahaley v. Cuyahoga Metropolitan Hous. Auth., 500 F.2d 1087 (6th Cir. 1974); Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

134. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

135. Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974).

136. *E.g.*, Metropolitan Hous. & Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir.), *cert. granted*, 423 U.S. 1030 (1975). This decision was recently reversed by the Supreme Court, thus resolving the conflict among the courts of appeals. 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977).

discrimination based on the proportion of lower income people belonging to minority groups[137] or based on the proportion of minority groups being of lower income.[138] In the past, courts have accepted a showing of disproportionate racial impact of an ordinance as proof of classification according to race.[139] However, the recent Court decisions of *Washington v. Davis*[140] and *Village of Arlington Heights v. Metropolitan Housing & Development Corp.*[141] rejected a showing of disproportionate racial impact as sufficient in itself to require an inference of racial discrimination; disproportionate impact is still relevant, but now it must be accompanied by other facts that taken together prove racially discriminatory intent or purpose on the part of the government. It appears that this new standard substantially reduces the usefulness of challenges based on the equal protection clause in the Federal Constitution. Whether states will adopt similar requirements for proof of racial discrimination when relying on state equal protection clauses remains unclear.

A final federal theory on which potential residents may rely is statutory rather than constitutional. One of the objectives of the Housing and Community Development Act of 1974[142] is the spatial deconcentration of lower income groups.[143] One of the ways this objective is to be furthered is by requiring that no grant be made unless preceded

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137. *E.g.*, Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

138. Metropolitan Hous. & Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir.), *rev'd on other grounds*, 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977).

139. *See, e.g.*, Gautreaux v. Romney, 448 F.2d 731, 738 (7th Cir. 1971) (dictum) (public housing); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (1972) (municipal services); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (zoning); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970) (dictum) (zoning); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) (urban renewal); Crow v. Brown, 332 F. Supp. 382, 391 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (public housing).

140. 96 S. Ct. 2040 (1976). The Court, footnoting the cases listed in note 139, *supra*, wrote:

> [V]arious Courts of Appeals have held in several contexts . . . that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. . . . [T]o the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

Id. at 2050.

141. 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977).

142. 42 U.S.C. § 5301 (Supp. V 1975).

143. *Id.* § 5301(c)(6).

by an application containing a housing assistance plan[144] that surveys housing conditions and assesses the housing assistance needs of persons of lower income "residing in or expected to reside in the community."[145] According to Department of Housing and Urban Development (HUD) regulations, the "expected to reside" figure refers to lower income persons and families planning or "expected to reside in the community as a result of existing or planned employment facilities."[146] The community is required to set realistic annual goals and develop a plan for meeting the housing needs.[147] HUD has a duty to review the "expected to reside" figure and to determine whether the planned projects are calculated to meet the identified needs. If the Secretary of HUD finds that the description of needs and objectives is plainly inconsistent with facts or data, that the proposed projects will not meet the needs described or that the proposal does not comply with other requirements, he or she is to disapprove the grant.[148]

Statutory requirements may provide a basis for litigation by potential migrants and by regional residents, such as residents of a central city who want to compel the suburbs to accept lower income residents. In *City of Hartford v. Hills*,[149] plaintiffs (the City of Hartford, eight city officials and two representatives of a class consisting of minority, low income persons living in inadequate housing) were given standing to bring suit for declaratory and injunctive relief against seven suburbs, the Secretary and other officials of HUD and HUD itself.[150]

144. *Id.* § 5304(a)(4).
145. *Id.* § 5304(a)(4)(A).
146. 24 C.F.R. § 570.303(c)(2).
147. 42 U.S.C. § 5304(a)(1), (a)(4)(B).
148. *Id.* § 5304(c).
149. 408 F. Supp. 889 (D. Conn. 1976).
150. The city and lower income minority plaintiffs were held to have standing. Hartford satisfied the zone of interest test since the Act was passed in part to ameliorate the problems of central cities. Injury in fact was found since it would stand to benefit financially through disapproval of the challenged grants and reallocation of the funds with first priority to cities in the same metropolitan area. *See* 42 U.S.C. § 5306(c) (Supp. V 1975). The low income minority residents of Hartford satisfied the zone of interest test because they are the people whom the Housing and Community Development Act of 1974 is supposed to help. Standing was buttressed by their claims of violation of Title VIII (Fair Housing) of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d6. They fulfilled the injury in fact test by a possible loss of benefits of redirected priorities by the applicant town or loss of benefits from projects implemented by Hartford with reallocated funds.

But see Evans v. Lynn, 537 F.2d 571 (2d Cir. 1975), *rev'd on rehearing en banc*, 537 F.2d 589 (1976). The district court in *Hartford v. Hills* cited the first *Evans v. Lynn* opinion, which granted standing to similar plaintiffs, as controlling. 408 F. Supp. at 896 (citing Evans v. Lynn, 537 F.2d at 574). In the first *Evans* opinion, low income

The theory of the suit was that defendants had abused their discretion in awarding funds under the Housing and Community Development Act of 1974 when statutory standards mandated that the applications be disapproved.[151] Six of the towns submitted applications with zero people in need of housing assistance expected to reside, and the seventh submitted figures based only on the housing authority waiting list. The district court held that HUD acted contrary to the law when it approved the six grants and acted arbitrarily when it approved the seventh. The court enjoined all the towns from spending funds granted them under the Housing and Community Development Act of 1974.[152]

There are obvious problems with this strategy, but it may prove useful in certain situations. HUD is having trouble deciding how to calculate the "expected to reside" figure so it is uncertain for what types and magnitude of migration towns will be required to prepare. In addition, a suit would only be successful if the figure submitted and approved was clearly inconsistent with available data. Moreover, the only sanction would be withdrawal of specific federal funds; the local government policies would not be invalidated. Finally, it is unclear whether this result, particularly the grant of standing, would be available in other courts.[153]

D. Summary

There are multiple legal theories potential or regional residents may invoke to force local residents to adjust their growth management systems to allow for migration. However, these challenges are only likely to meet with success in a minority of courts. Since a majority of the state courts and the federal courts approach land use litigation

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minority residents of a county who lived in socially concentrated low income neighborhoods were given standing to challenge grants for sewer and recreation to one of the county's towns. The claim was that the federal departments violated statutory affirmative action requirements by making grants to municipalities without evaluating the economic and racial consequences of their housing and development practices, with the effect of maintaining racial residential segregation in Westchester County. Since the *Hartford* opinion, on rehearing *Evans v. Lynn*, the majority found a lack of standing, stating that plaintiffs sustained no injury as a consequence of HUD's actions in making the grants to the town. 537 F.2d at 589.

151. They also alleged violation of Title VIII (Fair Housing) of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d6; constitutional claims under civil rights statutes 42 U.S.C. §§ 1981, 1982 & 1985; and the fifth amendment of the United States Constitution.

152. Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976).

153. *See* discussion of *Evans v. Lynn* in note 150 *supra*.

from the third stage, "acceptance of local autonomy," intra-metropolitan migration is not usually considered a process that deserves constitutional protection. There is some indication that this attitude may change in some states in the future; but in federal courts stiffened standing requirements combined with a heightened burden of proof to show racial discrimination signal increased hostility of federal courts, particularly the Supreme Court, to claims of potential migrants based on constitutional grounds. Perhaps Congress, by providing statutory grounds for litigation by potential migrants, may be able to counterbalance this hostility and force federal courts to promote the inclusion of lower income and minority groups in the suburbs.

Prospects for successful constitutional challenges by potential migrants are much greater in states accepting the second or fourth stage of judicial review. In the former, suspicion of local government actions predisposes courts to be receptive to these challenges. In the sophisticated fourth stage of judicial review, appreciation of the value of intra-metropolitan migration and the need for a regional perspective account for the optimism. Even though potential residents may prevail on the merits in these states, problems remain with the adequacy of the remedy. Courts tend to resort to numbers games without satisfactory examination of factors essential to determine optimum migration patterns.

III. An Economic and Demographic Interpretation of the Law Affecting Migration

The law affecting migration is in a very uncertain state. Many courts appear to have recognized that interferences with residential patterns through land use controls might have an antisocial effect on population dynamics. Some of these courts seem to be waiting until the policy implications of land use law are more adequately explained to act on this general recognition. Other courts are willing to attempt to grant relief even though their remedies are crude. The level of judicial performance in both situations might be improved if social scientists, demographers in particular, could answer two basic questions: (1) Why are the mechanisms of population growth (*i.e.*, migration) important for maintaining the general well-being of society? (2) What are the proper standards with which local governments should comply in formulating growth management policies of the sort that affect migration and population distribution?

The migration mechanism has drawn much attention from land use planners because it has been a major element in the metropolitan explosion of the 1960's and 1970's. Many local governments have developed the attitude that population growth and structural change are evil and must be controlled. It follows, they feel, that mechanisms that produce population growth and structural change are socially destructive if left uncontrolled. This position needs further exploration. Is it true that forces like migration must be controlled to preserve the welfare of the community? Does a locality have a right to preserve its welfare at the expense of the region? Does migration have any intrinsic value to society? If it does, when do legal controls so encumber migration that they impermissibly prevent the migration mechanism from making its contribution to the general health of society?

It is the hypothesis of this article that migration does, indeed, have intrinsic value to society. Growth controls that substantially distort migration patterns should be applied only as extraordinary measures after attempts to enable the migration mechanism to operate properly have failed. In support of this, the Committee on Community Development of the Domestic Council recommended that "most of the time, a competitive, private decision economy that effectively utilizes the capacity to produce will provide a geographic and functional distribution of people, activities and resources that is more efficient and more desirable than alternative methods."[154]

It is generally recognized by demographers that migration, as well as the other mechanisms of population dynamics, is not in itself socially evil. Rather, migration is a regulatory mechanism that helps society adjust to changing socio-economic conditions. The migration mechanism is important to the well-being of local labor markets. It is also important in a social sense, as an element in social learning and cultural assimilation. Sometimes the migration mechanism may malfunction and produce an undesirable result. The possibility of malfunction, however, should not negate the fact that the migration mechanism is a necessary element of our socio-economic institutions and is worthy of legal protection. Malfunction of the migration mechanism is a special case and should be dealt with as such.

The migration mechanism draws part of its intrinsic value from its support of other institutions that are vital to our nation's economic

154. COMMITTEE ON COMMUNITY DEVELOPMENT, THE DOMESTIC COUNCIL, NATIONAL GROWTH AND DEVELOPMENT 6 (1974).

health, particularly labor markets.[155] Specifically, migration is necessary to promote mobility in labor markets. Without migration some labor markets would experience a shortage of labor while others would experience a labor glut.[156] Existing talent could not be matched with its best opportunity, and overall the economy would suffer a drop in efficiency. Wage rates would rise in labor-short markets and, assuming that wage rates resist downward adjustments, unemployment would rise in markets with a labor surplus. Even though this analysis is very simplistic, it may reflect the typical situation in metropolitan areas in which suburban economies are flourishing and central city economies are becoming more depressed.

The migration mechanism is also important for social reasons. Migration is an important element in the cultural assimilation of minority groups.[157] If cities become totally populated by minority groups and suburbs become all white, they will face striking differences in fiscal capacity, availability of public services and facilities, and quality of urban infrastructure. It may become increasingly difficult for minorities to accumulate human capital because of the difference in the quality of formal education and related public services offered in the two types of political jurisdictions. If land use controls have the effect of keeping minorities out of suburban jurisdictions and "white flight" from the cities to the suburbs continues, America runs the risk of

155. For an excellent theoretical discussion of land use law, migration and labor markets, see Stull, *Land Use and Zoning in an Urban Economy*, 64 AM. ECON. REV. 337-48 (1974).

156. *See generally* J. KAIN, HOUSING SEGREGATION, NEGRO EMPLOYMENT, AND METROPOLITAN DECENTRALIZATION (1967); Greenwood, *Research on Internal Migration in the United States: A Survey*, 13 J. ECON. LITERATURE 397 (1975); Johnson, *Should the Poor Buy No Growth?*, in THE NO-GROWTH SOCIETY 165 (M. Olson ed. 1973); Mishan, *Growth and AntiGrowth, What Are the Issues?*, CHALLENGE, May-June, 1973, at 26; Morrison, *Use of the Social Security Work History Sample in Studying Metropolitan Migration*, in THE LABOR FORCE: MIGRATION, EARNINGS, AND GROWTH (Bulletin Y-63 of the National Fertilizer Development Center, Tennessee Valley Authority, Aug. 1973).

157. *See generally* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970s at 47-58 (1973); H. FRANKLIN, D. FALK & A. LEVIN, *supra* note 16; J. KAIN & J. QUIGLEY, DISCRIMINATION AND A HETEROGENEOUS HOUSING STOCK (1974); J. MCCALL, INCOME MOBILITY, SOCIAL DISCRIMINATION, AND ECONOMIC GROWTH (1973); B. SIEGAN, LAND USE WITHOUT ZONING 85-122 (1972); Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and Residential Patterns of the Poor*, in LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM 57 (D. Listokin ed. 1974); Davidoff & Gold, *The Supply and Availability of Land for Housing for Low- and Moderate-Income Families*, in *id.* at 279; Note, *The Use of Zoning Laws to Prevent Poor People from Moving into Suburbia*, 16 HOW. L.J. 351 (1971).

developing a dual society—one for whites and one for minority groups —in which the difference in the availability of financial resources dictates substantial differences in the public contribution to the quality of life. Thus, in answer to the first basic question, we may say that the migration mechanism is important for maintaining the general well-being of society because migration is an adjustment mechanism through which pressures that tend to produce dual labor markets and dual cultures are dissipated and because migration is an important, supporting element of a free market system.

As mentioned above, however, there are rare instances in which the migration mechanism does not contribute to the general welfare. Sometimes, migration results not from the efficient operation of labor markets but from a malfunction of the migration mechanism. Occasionally, poor labor market information is at fault. In other instances, great quantities of persons, perhaps displaced by economic calamity, are forced into an area that then has more people than its economy can absorb.

When such a malfunction occurs, population growth controls may be justified to correct the error. When land use controls are used to correct the migration mechanism, however, a situation develops in which a government tries to control a control mechanism—a very tricky situation indeed. Such policies can cause more harm than good, especially in major metropolitan areas where land use responsibility is divided among several jurisdictions. In these cases, growth control in one jurisdiction forces migrants into neighboring jurisdictions. As a result migration may be distorted rather than controlled, and the region as a whole may be worse off than before growth control.

This brings us to the second major issue—the proper standards to which local governments should conform in formulating growth management polices that affect migration and population distribution. As seen above, many courts, notably those in the third stage of development, have set very low standards that require only arguable enhancement of the local welfare.[158] Other courts have gone beyond this to require a regional perspective. However, the standards set by courts

158. *See, e.g.*, Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976). In upholding a plan that would result in a 25% shortfall in needed housing units in 1980 if adopted throughout the region, the court stated: "It does not necessarily follow, however, that the due process rights of builders and landowners are violated merely because a local entity exercises in its own self interest the police power lawfully delegated to it by the state." *Id.* at 908 (emphasis omitted).

utilizing a regional perspective vary greatly and tend to be described in phrases that are not based on operational definitions from related social science disciplines. For example, some courts have stated that a jurisdiction must accept the population increase dictated by natural forces;[159] some focus on the jurisdiction's "fair share" of population;[160] some talk in terms of quotas for low income or minority populations;[161] still others refer to the need to grow at the rate dictated by prevailing market demand.[162]

What do they mean? At present, no one is quite sure. It may be a good sign, however, that it is impossible to identify one clear standard. This means that courts will probably be grappling for criteria that dictate a locality's responsibility to potential migrants for some time. The opportunity may still be open for demographers and other social scientists to lead the courts to adopt a rational standard based on empirical studies. Demographers can recommend a rational population growth policy that allows enough growth to keep labor markets operating efficently and the social structure fluid. The recommended growth control policy should not be a "beggar-thy-neighbor" attempt to force unwanted growth into neighboring jurisdictions, but rather it should be a regional, metropolitan approach to economic and community development. In sum, demographers can urge courts to balance the negative effects of a growth management policy on labor markets, minority group assimilation and regional population structure against any substantial and irreparable environmental damage or any insurmountable fiscal disabilities that would be encountered if migration were not controlled.

Beyond this level of general recommendations, however, the state of the art breaks down; no formulae are available to say precisely how much freedom to migrate is needed to keep labor markets operating efficiently and the social structure fluid. A review of current empirical studies is needed to determine what studies are forthcoming from demographers that might be of assistance to the courts and what

159. *See* Steel Hill Dev. Corp. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

160. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

161. *See* Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (Super. Ct. Law Div. 1974). See note 67 *supra* for an explanation of the history of the case.

162. *See* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

gaps in the understanding remain that demographers or those in related fields should seek to fill.

IV. CURRENT EMPIRICAL STUDIES

Empirical research that lends itself to policy analysis in growth control disputes is in its infancy. The problem has been examined in the literature of regional and labor economics and in planning circles. Other disciplines have addressed the problem but their efforts have not jelled into firm policy recommendations. Since the bulk of this research was initiated after 1965 as a result of civil rights interest in housing, employment and education, the greatest achievements to date are found in the literature measuring the effects of racial discrimination. There is a great need to duplicate this type of research in all areas pertinent to growth control.

In confronting the question of the responsibility of local governments to accommodate migration, the most useful research would measure the effects of present growth controls on our economic system and would refine our ability to forecast the economic and demographic potential for small areas. There has been some progress on both of these topics, but many crucial questions are still unanswered.

There has been some effort to determine whether metropolitan housing patterns are related to racial discrimination. These studies could be generalized to measure the effects of growth control on other socio-economic groups. The hypothesis might be that if segregated residential housing patterns are deleterious to the well-being of urban blacks, similar negative impacts might be experienced by all lower income people precluded by growth controls from migrating to economically integrated residential patterns.

Many United States metropolitan areas have segregated residential patterns, and the concentration of blacks in central cities may be increasing. Kain[163] and others[164] have found that segregated housing

163. J. KAIN, HOUSING SEGREGATION, NEGRO EMPLOYMENT AND METROPOLITAN DECENTRALIZATION (1967).

164. *See generally* E. BERGMAN, ELIMINATING EXCLUSIONARY ZONING: RECONCILING WORKPLACE AND RESIDENCE IN SUBURBAN AMERICA (1974); M. CLAWSON, *supra* note 6; J. KAIN & J. QUIGLEY, *supra* note 157; R. LINEBERRY & I. SHARKANSKY, URBAN PROBLEMS AND PUBLIC POLICY (1972); J. MCCALL, *supra* note 157; Crecine, Davis & Jackson, *Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J.L. & ECON. 79 (1967); de Leeuw, *The Demand for Housing: A Review of the Cross Section Evidence*, 53 REV. ECON & STATISTICS 1 (1971); Straszheim, *Housing Market Discrimination & Black Housing Consumption*, 1974 Q.J. ECON. 19.

patterns have a significant inverse correlation with employment opportunities. In addition, many central cities are losing their employment base while employment opportunities seem to be expanding in many suburban communities. Many analysts predict that the black community will suffer economic strangulation if it is not allowed to break out of inner-city ghettos and migrate to suburbs in search of jobs. They contend that growth control policies are an anathema to intraurban black migration and must be revoked in order to allow blacks to advance economically.

This theory has drawn criticism on two fronts. First, it is argued that blacks have not accumulated sufficient "human capital" (*e.g.*, education) to advance to high income jobs and, even if they lived in the suburbs they would not have enough skill and training to find employment in the "white collar" industries located there.[165] Because of low levels of human capital, blacks and other low-income people would not be able to increase their income by moving to the suburban areas and, in fact, they might be forced to commute back into the city to find work. Thus, according to theorists using strictly income measures, blacks and other lower-income minorities would not be helped by easing growth controls.

Second, some analysts argue that labor market discrimination, not housing discrimination, is the major factor explaining racial income differentials. This school of thought argues that reducing residential segregation will not reduce labor-market discrimination and black socio-economic status will be unchanged.[166] One analyst summarizing empirical studies wrote:

> Our basic conclusion is that we have found no support for the hypothesis that housing segregation, together with the suburbanization of jobs, have had a significant effect on the black-white income ratio. . . . [T]wo obvious possibilities are (1) Noll's hypothesis that central city labor markets are tighter than suburban areas, and (2) the hypothesis that blacks can find suburban jobs without undue difficulty when such jobs are available.[167]

Kain's thesis about the negative correlation between segregated housing patterns and employment opportunities might be reconciled with these findings by admitting the correlation but positing a causal

165. *See generally* J. KAIN & J. QUIGLEY, *supra* note 157; J. MCCALL, *supra* note 157.

166. For an excellent survey of empirical studies in this area, see S. MASTERS, BLACK-WHITE INCOME DIFFERENTIALS (1975).

167. *Id.* at 50.

factor other than geographic separation. One might reason that if blacks are crowded into fiscally weak inner city ghettos, the lack of quality education and related services will foreclose any opportunity to accumulate sufficient human capital to qualify for employment in suburban industries, assuming that suburban employment requires a higher level of skills. Thus, whether or not suburban communities were closed to migration by locally imposed growth controls would have little impact on these people.

Society has tried to combat this residential location barrier to human capital accumulation by busing school children in urban jurisdictions, but busing may be ineffective in situations where the entire jurisdiction is incapable of contributing to human capital formation. Moreover, it may well be that a remedy aimed at improving formal education cannot overcome the disadvantages of living in a ghetto.

One problem is that low paying jobs and low income people are crowded into central cities. One theorist writes:

> The most important feature of an economy in which discrimination is practiced is the simple fact that some jobs are open to Negroes and some are not. The jobs open to Negroes are not a random selection, even allowing for Negroes' relatively lower education. They tend to be predominantly low in status and to be concentrated very heavily in a few occupations.[168]

Housing segregation may compound the effect by maintaining the status quo by keeping industries that would provide employment to lower income minority groups out of suburban locations where such workers are unavailable. Thus, housing segregation may be a device by which our society obscures and justifies labor market discrimination.

The housing discrimination literature suggests that demographers and other social scientists can assist in public policy formulation. If they can relate migration to human capital formulation, employment growth and income, population growth controls can be evaluated as to whether they harm low income, minority groups or the overall efficiency of our economy. There have been some recent attempts to estimate these interrelationships.[169] A number of analysts have made progress on this front by using a simultaneous equations approach.[170]

168. *Id.* at 10 (quoting Bergmann, *The Effect on White Incomes of Discrimination in Employment*, 79 J. POLITICAL ECON. 294 (1971)).

169. See Greenwood, *Research on Internal Migration in the United States: A Survey*, 13 J. ECON. LITERATURE 397 (1975), for a summary of these recent attempts.

170. *See id.* at 418-21.

Most of this analysis, however, has explored the mutual dependence of employment growth and migration. Work needs to be done to relate migration to income and human capital formation, as well as to employment growth. Also, the effects of differential racial factors on these relationships should be explored, and if the effects cannot be explained by normal economic analysis, social scientists should try to convince courts that population growth controls should be modified to correct these inequities.[171]

Another crucial area for research is the estimation of population growth potential for small areas. It is curious that while many have labored in small area population estimation, few have achieved any meaningful results. In fact, the area may be over-researched by naive investigators who are willing to predict population change on the basis of any data compatible with their regression package.[172] This is an area in which we need fewer numbers and more thought.

To advance the state of the art in small area population estimation and projection, social scientists must develop better data bases, especially with respect to migration. They must also develop a structural equation methodology to relate population growth to the major elements of national, regional and local economics.

An interesting experiment to develop small area data bases for analysing intra-SMSA population dynamics is being performed at the Washington, D. C. Center for Metropolitan Studies. In its periodical, *Trends Alert*, the Center publishes the results of its mini-census survey. The process has been rewarding in measuring the center city/suburban population dynamics in the Washington area. Hopefully, the experiment will be duplicated in other areas and will result in solid data bases for modeling purposes.

The prevailing methodology for linking local population growth to state and national socio-economic trends is shift-share analysis. The forecasting done by the Bureau of Economic Analysis of the United States Department of Commerce is a good example of shift-share methodology. Basically, the trends in an area's share of state, regional and national growth is calculated and adjusted to conform to national economic and population projections. This technique has been useful

171. *But see* discussion of *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing & Dev. Corp.* in text accompanying notes 140 & 141, *supra.*

172. One of the writers had the experience recently of trying to advise a local jurisdiction of a proposed growth control policy on the basis of eight independently estimated and contradictory population projections for that county.

and enlightening but it is basically a descriptive analysis. It cannot predict turning points or answer any of the important questions about causation.

Social scientists must develop a more analytical approach than shift-share analysis if they are going to shed much light on intra-SMSA population change. In arguing that a simultaneous equations approach is the logical way to approach this problem, one theorist concludes:

> [S]uch an approach has not yet been [taken] in a regional, policy oriented context. Because the local public sector is largely endogenous to migration, and because many of the policy impacts of higher levels of government are likely to be exerted through the local public sector, the local public sector should be included as an important component in a policy-oriented model of national population redistribution.[173]

A review of current empirical studies shows an attempt to relate the components of population change, especially migration, to socioeconomic forces. Only recently, however, have migration analysts discussed their topic in a way that lends itself to policy application in local growth control litigation. Much work needs to be done to improve data collection and methodology for small area demographic analysis and projection. Until that time, courts in the third stage of evolution[174] will be able to justify ignoring the impact of growth controls on potential residents, and courts in the fourth stage of evolution[175] will have to continue to grope in the dark or use crude models of intra-urban relationships as they search for an appropriate resolution of growth control controversies involving direct or indirect limitations on migration.

V. CONCLUSION

Many of the increasingly prevalent local efforts to manage growth are likely to put constraints on migration through direct or indirect controls. There are several theories through which potential migrants can challenge these growth controls, including regional general welfare, racial or economic equal protection, right to travel and statutory claims. The prognosis for a successful challenge depends on whether the claim is based on federal or state constitutional or statutory grounds and the state in which the action is brought.

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173. Greenwood, *supra* note 169, at 442.
174. *See* text accompanying notes 43-44 *supra.*
175. *See* text accompanying notes 45-46 *supra.*

In courts adopting the current majority attitude of "faith in local autonomy," a local government will probably be able to have its growth management system sustained against a challenge by potential residents. Little weight will be given to the claims of harm to potential migrants. In courts taking either a stage two approach requiring the local government to defend the restriction, or a stage four approach, sophisticated judicial review, potential migrants will have a greatly increased chance of success. Such courts are more likely to hold that a local government has a regional responsibility that includes the accommodation of a certain number of migrants in the region. Even in courts most protective of the rights of potential residents and most impressed with the need to avoid exclusionary residential patterns, however, the analysis is largely uninformed by an in-depth understanding of the migration mechanism and its relationship to income differentials, human capital formation and employment growth. The remedies show a parallel lack of sensitivity to these factors.

The failure to consider these factors in judicial decisionmaking may be due, in part, to constraints on a court's ability to engage in extensive socio-economic impact analysis and to practical limits on remedies it may award. It is also due, however, to the shortcomings in the data base, theories and methodologies that social scientists have been able to develop to deal with these questions. While recent efforts to improve simultaneous equations techniques to relate migration to the dynamics of the economic system are promising, much work needs to be done by social scientists in order to provide local decisionmakers and courts with knowledge on which to evaluate local constraints on migration.

The following is a preliminary list of the questions that need to be answered in order to gain a better understanding of the relationship of migration to local land use controls. A general analytic approach is suggested after each question in the hope that demographers and social scientists will be inspired to continue the research and quantification process.

A. Why is migration important enough to merit legal protection? Migration is an adjustment mechanism that helps keep the social system fluid and the economic system efficient. In order to argue that migration is worthy of legal protection, one must quantify the relationship among social progress, economic efficiency and the migration mechanism.

B. When is population growth through net in-migration efficient? In any growth area, net in-migration and attendant population growth is judged by a variety of efficiency yardsticks. The private and societal economic benefit/cost ratio must be considered. Additionally, substantial long-run environmental impacts that are not part of the benefit/cost calculation should be considered. Another, and perhaps the best, test of migration efficiency is whether migration facilitates the Pareto efficiency of the economic system.

C. When does population growth through net in-migration contribute to social progress? Migration is a key mechanism for a melting pot society. Not only does migration match job skills with labor demand but it also facilitates a form of social learning that is necessary if society is to grow and function with an acceptable degree of unity and coherence. One must quantify whether migration actually promotes this unity among groups.

D. When should net in-migration be controlled? It is conceivable that growth mechanisms, acting partly through migration, could malfunction to the detriment of economic efficiency and social progress. Inefficient growth could occur through imperfect labor market information or by a distortion of normal processes brought about by outside interference with the mechanism, such as zoning laws, taxation policy or discrimination. Also, the migration mechanism may not take into consideration all the social costs and long-run environmental impact of growth and thereby produce a suboptimal social result. One could construct a solid argument for controlling population growth and movement when any of these factors are present, if there are techniques for measuring the divergence between the result produced by a malfunctioning migration mechanism and the optimal social result.

E. How should population growth and net in-migration be controlled? Only abberations of population growth mechanisms should be controlled. Too often growth control law is heavy-handed, ignoring the positive aspects of growth. In controlling population growth mechanisms through legal intervention, one should be very careful not to retard economic efficiency or social progress.

F. What is the proper paradigm for migration and growth? Population growth or decline is the result of natural processes, a major element of which is the migration mechanism. In many ways, the migration mechanism is analogous to the price mechanism and as such, it should be studied in terms of its value as a control mechanism. Too

often lawyers regard population growth as an immutable, natural force and formulate the law in terms of quotas designed to apportion population growth to its natural place of residence. Migration, however, is really only one of a set of interlocking, simultaneously determined relationships that bind the economic system together. Migration is an adjustment mechanism that has value only insofar as it functions smoothly with other mechanisms to produce optimal socio-economic results.

G. How does one quantify the "fair share" of population to be accommodated by a region? Instead of formulating a population quota system, a region should be required to absorb as much population growth as is necessary to keep the socio-economic system operating efficiently. In other words, the focus of attention should shift from the numbers game characteristic of past litigation to a thorough consideration of how migration interacts with other elements of the socio-economic system. This exercise requires simultaneous consideration of many factors, and the ultimate test should be whether the system as a whole is producing socially optimal results.

H. Which geographic area is the proper unit of analysis? Because the socio-economic system is sensitive to national, regional and local influences, it is difficult to constrain an analysis to a particular geographic entity. The fault of many past growth control laws has been that they focused on too small an area. The result was, of course, parochial and anti-social when considered in a broader context. Presently, there is a push to regionalism. The region is a more appropriate geographic unit for analysis. But a question remains as to the proper definition of a region for population growth control purposes. It may be a State Economic Area, a labor market, a housing market or some other unit. The elusive nature of regionalism is a major problem confronting any research dealing with population growth and redistribution.