The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?

Throughout most of the United States, local governments regulate the use of privately owned land. Local land use regulations are usually embodied in zoning and subdivision ordinances and in building and housing codes. These regulations often require large lots or large houses; prohibit row housing, apartment buildings, or factory-built housing; and restrict the number of bedrooms or persons allowed in a housing unit.\(^1\)

\(^1\) A recent survey indicated that approximately fourteen thousand local governments (out of approximately eighteen thousand in the sample survey) employ some form of land use regulation. National Comm'n on Urban Problems, Building the American City 208-09 (1968). A number of states differ from the national pattern by reserving the exercise of certain regulatory powers to state agencies. See, e.g., HAWAI'I REV. STAT. § 205 (1968); MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (Supp. 1971); VT. STAT. ANN. tit. 10, §§ 6001-091 (Supp. 1971); WISC. STAT. ANN. § 144.28 (Supp. 1972). See generally Council on Environmental Quality, The Quiet Revolution in Land Use Control (1971). The ALI Model Land Development Code arts. 7, 8 (Tent. Draft No. 3, 1971) provides for state control of certain land use decisions now usually made by local governments. Florida has adopted the Code, and other state legislatures are considering adoption. State agencies are more likely to consider the extraterritorial effects of local land use regulations and are therefore less likely than local agencies to impose excessive burdens on residence in local communities. For a comprehensive description of land use regulation in the United States, see Cunningham, Land-Use Control—The State and Local Programs, 50 Iowa L. Rev. 367 (1965).

The manner in which some local governments have exercised their power to regulate land uses has often been criticized. These localities are said to have misallocated the nation's scarce resources by employing land use regulations to benefit their own residents at the expense of other citizens. In particular, they are accused of retarding the growth of their populations or of creating tax and service havens for their own residents by excluding higher-density or lower-cost housing. In addition, some land use regulations are thought to be means by which members of minority groups are excluded from better living conditions, better jobs, or better schooling for their children.

This rising tide of criticism has prompted commentators to reevaluate the constitutionality of local land use regulations. This comment reviews the traditional federal constitutional challenges based on unjustified deprivation of property or racial discrimination and concludes that the Supreme Court is not likely to invalidate most local land use regulations on either basis. The comment then considers recently articulated challenges based on discrimination against the poor and denial of the right to housing or to the necessities of life and concludes that the Court is not likely to invalidate any local land use regulations on these grounds. The body of the comment examines the possible consequences for local land use regulations of the constitutional right to travel from state to state. Although courts have not yet discussed whether this right is a sufficient basis for invalidating local land use regulations, the right to travel may become the most significant federal constitutional standard for public regulations that prevent additional persons from residing in local communities.

I. TRADITIONAL CONSTITUTIONAL STANDARDS FOR LOCAL LAND USE REGULATIONS

A. Deprivation of Property

The fourteenth amendment to the Constitution provides that no state
shall "deprive any person of life, liberty, or property, without due process of law." This constitutional standard applies to local governments as well as to the states. In interpreting this provision, the Supreme Court has distinguished public " takings" of private property, which require just compensation, from justified public regulation of the uses of private property. If a private use is harmful to the public, a state or its local governments may forbid or condition the use to protect the public health, safety, morals, or general welfare. To challenge such use regulations successfully, the owner of land is required to prove that regulation bears no reasonable relation to a constitutionally permissible governmental interest.

The difficulty of sustaining such a burden of persuasion is illustrated by Village of Euclid v. Ambler Realty Co. The trial court found that the Village of Euclid's comprehensive zoning ordinance had reduced the value of the plaintiff's land by several hundred thousand dollars and held that the ordinance, considered as a whole, did not sufficiently promote the public welfare to justify the significant harm it imposed on the plaintiff. The Supreme Court reversed, holding that the ordinance was not on its face "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." The Court's opinion is remarkable because it ignored the trial court's finding that the true purpose of Euclid's ordinance, as judged by its likely effect, was "to classify the population and segregate them according to their income or situation in life." Although Euclid had implicitly discriminated on the basis of wealth, the Court found sufficient justification for the regulation in its plausible "rational relation to the health and safety of the community." In Euclid and in three of the five subse-

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6 U.S. CON. amend. XIV, § 1.
7 See, e.g., Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).
9 See generally E. Freund, The Police Power: Public Policy and Constitutional Rights (1904); Comment, supra note 3.
10 272 U.S. 365 (1926).
12 272 U.S. at 395. The Court reserved decision on the question whether particular provisions of the ordinance as applied to the plaintiff's land were unconstitutional as unjustified deprivations of property.
13 297 F. at 316.
14 272 U.S. at 391.
sequent land use regulation cases that it heard on the merits, the Court deferred almost entirely to the judgment of the local legislature.\footnote{Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Nectow v. City of Cambridge, 277 U.S. 183 (1929); Gorieb v. Fox, 274 U.S. 603 (1927); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927); cf. Berman v. Parker, 348 U.S. 26 (1954). In Washington and Nectow the Court held the regulations in question unconstitutional without establishing standards for judging subsequent land use regulation cases.}

Although the Court has recently invalidated some state laws regulating private property, the Court's intervention appears to be limited to guaranteeing fair judicial procedure.\footnote{E.g., Fuentes v. Shevin, 92 S. Ct. 1983 (1972); Lindsey v. Normet, 405 U.S. 86 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). But cf. Lynch v. Household Fin. Corp., 92 S. Ct. 1113, 1118 (1972) (dictum): "Equality in the enjoyment of property rights was regarded by the framers of [the Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee." Taken literally, this passage and others, e.g., id. at 1122, suggest that stricter standards of judicial review may be applied to the substance of governmental regulations. Other recent cases, however, seem to preclude such an interpretation. See, e.g., Richardson v. Belcher, 404 U.S. 78 (1971); James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970). See also authorities cited note 17 infra. Although in Lindsey the Court relied on the equal protection clause to invalidate the double-bond and double-penalty provisions of Oregon's Forcible Entry and Detainer Act, the same result could have been reached by interpreting the due process clause. For most purposes the two clauses appear to be equivalent. E.g., Shapiro v. Thompson, 394 U.S. 618 (1969). See text and notes at notes 41–49, 123–24 infra.}

Such a posture is consistent with the Court's continued deference to the judgment of Congress and state and local legislatures on questions involving the substance of governmental regulation of private property.\footnote{See, e.g., Richardson v. Belcher, 404 U.S. 78 (1971); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).} The Court will usually find such legislation constitutional "if any set of facts reasonably may be conceived to justify it."\footnote{A few state courts have adopted constitutional standards that require a higher level of justification for certain local land use regulations. See, e.g., Leet v. Montgomery County, 264 Md. 606, 287 A.2d 491 (1972); Molino v. Mayor & Council, 116 N.J. Super. 195, 281 A.2d} Given the difficulty of establishing unreasonableness under the present federal standard, most local land use regulations will not be invalidated as unjustified deprivations of property.\footnote{For detailed discussions and criticism of the Court's "deference," see Schrock, The Liberal Court, the Conservative Court, and Constitutional Jurisprudence, in Left, Right and Center: Essays on Liberalism and Conservatism in the United States 87 (R. Goldwin ed. 1967); McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 SUP. CT. REV. 34; Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 80 HARV. L. REV. 1463 (1967).}
B. Racial Discrimination

Regulations that discriminate on the basis of race are, in the Supreme Court's words, "'constitutionally suspect' . . . and subject to the 'most rigid scrutiny.'" To justify racial classifications, the state is required to prove that they are "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Unlike the land use regulation cases discussed above, the Court will find prima facie cases of racial discrimination unconstitutional unless the state sustains a "very heavy burden of justification." No state has ever succeeded in carrying this burden of persuasion.

Some of the first local land use regulations were declared unconstitutional because they discriminated, either on their face or as applied, against a racially defined minority. In *Yick Wo v. Hopkins*, the Court reviewed a San Francisco ordinance regulating the use of buildings for laundries. As a supposed fire prevention measure, the San Francisco Board of Supervisors required persons wishing to continue to operate laundries in wooden buildings to obtain special permits. Such permits were granted to approximately eighty non-Chinese applicants and denied to one non-Chinese and all of approximately two hundred Chinese applicants. The Court held that since San Francisco had offered no justification for such discrimination, "the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which petitioners belong . . ." Although the local

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23 See text and notes at notes 2-19 supra.


25 The only recent case in which a government sustained its very heavy burden of persuasion is Korematsu v. United States, 323 U.S. 214 (1944), which suggests that only the equivalent of the "pressing public necessity" of national survival in wartime would be a sufficient justification. Id. at 216.


27 118 U.S. 356 (1886).

28 San Francisco had approximately 320 laundries; about 240 were owned and operated by Chinese and about 80 by non-Chinese. All but about 10 laundries were constructed of wood. All of the Chinese were aliens.

29 118 U.S. at 374.
ordinance was constitutional on its face, the Court viewed its application as sufficient evidence of the racial discrimination forbidden by the fourteenth amendment. 30

More recently, in *Kennedy Park Homes Association v. City of Lackawanna*31 the Court of Appeals for the Second Circuit found unconstitutional similar racial discrimination in the administration of local land use regulations. The City of Lackawanna refused permission to a proposed residential subdivision to tie into the city's sewer system on the ground that its sewage disposal facilities were inadequate. After a detailed review of the record, the court agreed with the district judge's finding that the city had refused permission to prevent a proposed federally subsidized housing project for lower-income and minority families from being built in the city's almost all-white Third Ward. Since the Third Ward provided better living conditions than the racially integrated First Ward (where 98.9 percent of the city's nonwhites lived) the court agreed that the city's actions constituted unconstitutional discrimination against a racially defined minority. The city's public health justification for its refusal to permit a tie-in to the city sewage system was vitiated, in the court's judgment, by the fact that other subdivisions in the Third Ward had been granted such permission despite a long-standing inadequacy in the system.

Other lower courts have also found certain applications of local land use regulations to constitute unjustified racial discrimination. In each case the plaintiffs were able to make a prima facie showing of intentional racial discrimination by the local government.32 It is doubtful, however, that such a showing could be made with respect to the content or administration of most local land use regulations. Most local systems of land use regulation appear to exclude additional residents from the locality not on the basis of race, but on the basis of insufficient financial resources. By limiting the supply of lower-cost housing, local land use regulations appear to prevent lower-income persons and families from settling in better residential areas.

It might be argued that discrimination against the poor is effectively the same as discrimination against nonwhites. Although this opinion is widely held, it is, as a general matter, false in fact. In absolute numbers more than twice as many whites as nonwhites are below the gov-

ernmentally defined poverty level.\textsuperscript{33} Even assuming a wide margin for error in these statistics, a court would not be justified to conclude without additional evidence that higher prices for housing in desirable areas exclude solely or even primarily nonwhites. Although the traditional constitutional standard of racial discrimination is clearly relevant to some local land use regulations, it does not appear to be the comprehensive judicial standard that critics of local controls are searching for.\textsuperscript{34}

II. PROPOSED CONSTITUTIONAL STANDARDS FOR LOCAL LAND USE REGULATIONS

A. Discrimination Against the Poor

Many commentators appear to have recognized the insufficiency of the racial discrimination standard and have shifted their attention to the fact that many land use regulations appear to discriminate against the poor by raising the costs of living in desirable areas.\textsuperscript{35} These higher-cost areas are desirable residential locations not only because of the

\textsuperscript{33} As defined by the Social Security Administration, the poverty level, in 1969 dollars, ranged from $1,487 for a single female sixty-five years of age or older and living on a farm to, for example, $6,116 for a seven-person family headed by a male and not living on a farm. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 321 (1971). In 1969 approximately 16.7 million whites and 7.6 million nonwhites were below the poverty level. \textit{Id.} at 322. For a comprehensive discussion, see A. Downs, \textit{Who Are the Urban Poor?} (Committee for Economic Development, Supplementary Paper No. 26, 1968).


various amenities they may offer, but more importantly because they are often thought to provide access to better public schooling and better job opportunities than lower-cost areas of residence. Exclusion of the poor from better schooling or job opportunities is often said to be similar to those governmental discriminations against indigents that have recently been declared unconstitutional. The Supreme Court appears to have supported this view in *McDonald v. Board of Election Commissioners* by saying that "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race . . . , two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." This dictum and a number of recent cases seem to suggest that governmental discrimination against a politically impotent minority implicitly defined by its relative poverty is constitutionally suspect or at least one of a number of factors prompting more searching judicial review.

It is sufficient for the purposes of this comment to note that the Court has invalidated relatively few governmental discriminations against the poor. In every such case the payment of a fee was a statutory precondition to the effective enjoyment of what the Court has described as a fundamental personal right. In most cases the fundamental right denied to indigents was the constitutional right not to be imprisoned without due process of law. Without the opportunity to obtain a trial transcript or its equivalent, or without a lawyer on appeal, an indigent criminal defendant, in the Court's opinion, could not enjoy his state-granted right to appeal a criminal conviction. Although decided on the basis of the equal protection clause, these cases are consistent with earlier due process cases protecting an indigent defendant's right to a fair trial by providing him with trial counsel at government expense. Other cases favoring indigent criminal defendants are also consistent with a traditional due process analysis. The Constitution's protection of the individual from unjust imprisonment thus appears

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36 *See generally* authorities cited note 35 *supra.*
38 *Id. at* 807 (dictum).
39 *See generally* cases cited notes 42–46, 50 *infra.*
to be at the heart of these cases. It is the fundamental right to personal liberty and not the government’s discrimination against the poor that appears to be the primary rationale for the Court’s decisions.45

**Boddie v. Connecticut**46 appears to support this interpretation. In **Boddie** the Court held that filing and service-of-process fees averaging sixty dollars could not be required of an indigent as a precondition to commencing an action for divorce. Justice Harlan’s opinion rested on the ground that due process was denied to those unable to pay the fees only when the sole means for adjusting a “fundamental human relationship”47 was at stake. From this point of view, **Boddie** is plausibly a continuation of a line of cases implicitly recognizing the fundamental importance of the individual’s right to make his own decisions with respect to raising and educating a family.48 However this may be, **Boddie** and its progeny in the lower courts49 are clearly based on the constitutional right to fair judicial procedure and do not appear to extend the Court’s protection of the poor to the world outside the courtroom.

**Harper v. Virginia Board of Elections**50 is likewise consistent with a fundamental rights analysis. In **Harper** the Court held that a state may not require payment of a fee or a tax as a qualification for the right to vote in state and local elections. Properly understood, **Harper** is not a poverty case. The Court made clear that the poll tax was an unconstitutional burden on a fundamental right regardless of a potential voter’s ability to pay. In the words of Justice Douglas’s opinion, “the right to vote is too precious, too fundamental to be... burdened or conditioned”51 by a requirement, such as a poll tax, bearing “no relation to voting qualifications.”52

47 Id. at 383.
51 Id. at 670.
52 Id. For an application of **Harper** to candidate filing fees, see Bullock v. Carter, 405
As this discussion indicates, governmental discriminations against the poor are not, by themselves, constitutionally suspect and therefore are not subject to strict judicial scrutiny. Any legal argument addressed to the constitutionality of local land use regulations should therefore focus its attention on constitutionally protected fundamental rights. If local land use regulations can be shown to impose a significant burden on the exercise of one or more fundamental rights, the Court is likely to shift the heavy burden of persuasion from the challenger of the regulation to the government agency that enforces it.

B. Denial of the Right to Housing

Some commentators have suggested that the right to housing is a fundamental constitutional right; others have suggested a two-level theory bringing together the “quasi-suspect” classification based on wealth with the “quasi-fundamental” right to housing or to “the necessities of life” and have concluded that searching judicial review would be justified on this basis.

The Supreme Court, however, appears to have rejected these theories. In the recent case of *James v. Valtierra*, the Court upheld the constitutionality of California’s requirement that federally subsidized public housing projects receive prior approval by majority vote in a local referendum. Although the interest of the poor in decent housing was at stake, the Court found that the injury to those unable to pay for unsubsidized decent housing was outweighed by the state’s justifications for requiring a referendum.

In *Valtierra* the Court applied the

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U.S. 134 (1972). In *Bullock* the Court examined “in a realistic light the extent and nature of [the filing fees] impact on voters.” *Id.* at 143. The Court held that “the very size of the fees imposed under the Texas system gives it a patently exclusionary character.” *Id.* In the absence of reasonable alternative means of access to the primary ballot, the Court held that excessive filing fees are an unconstitutional burden on the fundamental right to vote. The Court added that “reasonable” candidate filing fees might not be unconstitutional. *Id.* at 149.


57 The local referendum furthered, in the Court’s opinion, the legitimate state interest of “democratic decision-making,” which “ensures that all of the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues.” *Id.* at 143. Although the governmental interest in democratic control of taxing and spending decisions is legitimate, it is not sufficiently compelling to justify abridgements of fundamental personal rights.
traditional "rational relationship" standard of judicial review. Because the plaintiffs had not proved that the local referendum rejecting a public housing project discriminated against them on the basis of race or imposed a significant burden on the exercise of their fundamental personal rights, they were required to prove that the referendum requirement was clearly arbitrary and unreasonable. Valtierra is a clear indication that the right to housing is not a constitutionally protected fundamental right. If land use regulations are unconstitutional, therefore, it can be only because they impinge on a recognized fundamental right.

III. THE RIGHT TO MIGRATE AND SETTLE IN ANY STATE IN THE UNION

Much of the current criticism of local land use regulations is based on the belief that the natural and intended effect of some regulations is to exclude certain classes of individuals, such as the poor, racial minorities, or families with school-age children, from living in the more desirable areas of a state. If some local land use regulations do in fact prevent certain individuals from moving to and residing in some parts of a state, these exclusionary regulations would be a significant burden on an individual's freedom to migrate and settle within the state. If this freedom is recognized and protected as a fundamental personal right similar to the fundamental rights to vote or to freedom of speech, it will be unnecessary to focus, as do the equal protection arguments discussed in previous sections, on the personal or class characteristics...
of the individuals excluded, since a prima facie showing of a significant burden on the exercise of a fundamental right requires the government to justify the regulation imposing the burden with more than a rational relation to a legitimate governmental interest.\(^{61}\)

Freedom to migrate to and settle in any state in the Union is constitutionally protected by the fundamental right to travel.\(^{62}\) Although the Constitution contains no provision explicitly mentioning this right, the Supreme Court, in a long line of cases beginning with *Crandall v. Nevada*,\(^{63}\) has protected the freedom of United States citizens to travel from one state to another. The Court has often quoted approvingly Chief Justice Taney's dissent in the *Passenger Cases*\(^{64}\): "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."\(^{65}\) In the recent case of *Dunn v. Blumstein*,\(^{66}\) the Court again described the "'freedom to travel throughout the United States ... as a basic right under the Constitution.'"\(^{67}\)

More significantly, the Court suggested that the freedom to migrate to and settle in any state in the Union is a "'fundamental personal right'"\(^{68}\) equal in constitutional stature to the fundamental right to vote. In *Dunn* the Court placed "'a heavy burden of justification ... on the State'"\(^{69}\) and held that any statute directly impinging on the "'uncondi-


\(^{62}\) The Court has used the word "travel" to mean both mere movement, see, e.g., *United States v. Guest*, 383 U.S. 745 (1966); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), and migration with the intent to reside indefinitely, see, e.g., *Dunn v. Blumstein*, 92 S. Ct. 995 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). To avoid ambiguity this comment refers to the second sense of the right to "travel" as the right to migrate and settle. For a discussion of the Court's use of "travel" to include migration with the intent to settle, see text and notes at notes 66–83 infra. See also notes 86, 121 infra.


\(^{64}\) 48 U.S. (7 How.) 283 (1849).

\(^{65}\) Id. at 492 (quoted approvingly in, e.g., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48–49 (1867); *United States v. Guest*, 383 U.S. 745, 758 (1966); and *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969)).

\(^{66}\) 92 S. Ct. 995 (1972).

\(^{67}\) Id. at 1001.

\(^{68}\) Id.

\(^{69}\) Id. at 1003.
tional personal right'”70 to travel would be “closely scrutinized.”71 Dunn is a logical successor to a line of cases recognizing that the right to travel from state to state includes a right to migrate to and settle in any state in the Union.72 Two key earlier cases are Edwards v. California73 and Shapiro v. Thompson.74

Edwards involved a statute imposing a criminal penalty for bringing an indigent nonresident into the state. California had enacted the challenged law as part of its effort to stem the huge influx of poor migrants from the “dust bowl” states of the Southwest. The additional burden that these indigent new residents placed on California was severely aggravated by the great depression of the 1930s. The Court held, however, that the nature of the union established by the Constitution did not permit any one state to “isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders.”75 Although members of the Court disagreed about the source of constitutional protection for the right,76

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70 Id. (emphasis omitted).
71 Id.
73 314 U.S. 160 (1941).
75 314 U.S. at 173.
76 In Edwards the majority opinion relied on the fact that California’s criminal penalties were a burden on commerce among the states and therefore prohibited by the Court’s interpretation of the commerce clause. In a concurring opinion, Justices Douglas, Black, and Murphy thought it more appropriate to base constitutional protection of “the right to move freely from State to State” on the privileges and immunities clause of the fourteenth amendment. Id. at 179. Justice Jackson also preferred the privileges and immunities rationale. His concurring opinion stated that “the migrations of a human being . . . do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually in distorting the commercial law or in de-naturing human rights.” Id. at 182. Justice Jackson argued that Truax v. Raich, 239 U.S. 38 (1915) (where the Court declared that an alien lawfully admitted to the United States had the constitutionally protected privilege “of entering and abiding in any State in the Union,” id at 39), was sufficient authority “to hold that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens . . . .” 314 U.S. at 184. Moreover, he referred to the citizenship clause of the fourteenth amendment and American history as additional authorities for a constitutional privilege “to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof.” Id. at 183. For a detailed discussion of possible constitutional sources of the right to travel, see Z. Chafee, Three Human Rights in the Constitution of 1787, at 162 et seq. (1956); Vestal, Freedom of Movement, 41 IOWA L. REV. 6 (1955); Note, Interstate Migration and Personal Liberty, 40 COLUM. L. REV. 1032 (1940); Note, Depression Migrants and the States, 53 HARV. L. REV.
Edwards clearly holds that a state may not impose a penalty or an unjustified restriction only on the migration of nonresidents into the state.\textsuperscript{77}

In Shapiro v. Thompson\textsuperscript{78} the right to migrate and settle was clearly in question. Several states and the District of Columbia required that persons reside within the state or the District for one year before becoming eligible for federally assisted state or District welfare payments. The Court held that the one-year waiting period was unconstitutional as an unreasonable burden on the exercise of the constitutional right to travel.\textsuperscript{79} Justice Brennan's opinion recognized that a one-year residency requirement for welfare benefits clearly injured an indigent person "who desires to migrate, resettle, find a new job, and start a new life."\textsuperscript{80}

Although the persons disadvantaged by the regulations in Edwards and Shapiro were indigents, it is significant to note that it is the right to migrate and settle and not the economic status of the person asserting the right that was the decisive factor for the Court. Previous right-to-travel cases, such as Crandall, did not rely on the economic status of the persons affected by the challenged regulations. Indeed, the tax imposed by Nevada on all persons leaving the state by common carrier was only one dollar.

In the recent case of Dunn v. Blumstein,\textsuperscript{81} the right to migrate and settle was impermissibly burdened by Tennessee's denial to new resi-

\textsuperscript{77} California's purpose was to prevent migration to and settlement in the state. The burdens on California's economy and government were not caused by travelers passing through the state, but by additional residents of the state. For a general discussion of the political and economic background of the case, see Select Comm. of the House of Representa-tives Investigating National Defense Migration, 77th Cong., 1st Sess., Analysis of Material (Comm. Print 1941) (filed as a supplement to the brief of John H. Tolan, Amicus Curiae, in Edwards). See also authorities cited note 76 supra.

\textsuperscript{78} 394 U.S. 618 (1969).

\textsuperscript{79} The District of Columbia is governed by Congress, to which the fourteenth amendment's equal protection clause does not apply. The Court held that the due process clause of the fifth amendment prevented Congress from discriminating against new residents of the district. The dissenting opinion of Chief Justice Warren (joined by Justice Black) interpreted the Court's decision as holding that "residence requirements constitute 'an arbitrary deprivation' of liberty." Id. at 652. The dissenting opinion of Justice Harlan concluded "that the right to travel interstate is a 'fundamental' right which, for present purposes, should be regarded as having its source in the Due Process Clause of the Fifth Amendment." Id. at 671. Thus, the Court appears to have held that the right to travel from state to state or from states to the District is a fundamental liberty. For the possible implications of this view, see text and notes at notes 112-19 infra.

\textsuperscript{80} Id. at 629.

\textsuperscript{81} 92 S. Ct. 995 (1972).
dents of the State of the right to vote for United States Senators and Representatives and various state and local officers by means of one-year-in-the-state and three-month-in-the-county residency requirements. Dunn is a significant example of the Court's continuing protection of the right to migrate and settle. Although durational residency requirements for voting were also held unconstitutional as an unjustified denial of the right to vote, the Court made clear that the burden imposed on the right to migrate and settle was a sufficient basis for its decision. In discussing this additional, and apparently unnecessary, ground, the Court appears to have gone out of its way to emphasize "that the freedom to travel includes the 'freedom to enter and abide in any State in the Union.'"83

Despite the Supreme Court's holdings in Edwards, Shapiro, and Dunn, the extent to which the right to migrate and settle in any state in the Union is a constitutional basis for challenging local land use regulations is an open question. In Edwards and Shapiro the right to travel was abridged by regulations that had the effect of equally penalizing any new resident of the state no matter where he chose to reside within the state. It may therefore be argued that regulations imposing a local but not a statewide burden might be constitutional since migration and settlement in other parts of the state would not be penalized.84 A more promising distinction is that in Edwards and Shapiro the challenged regulations in fact discriminated only against interstate migrants.85 If state or local regulations equally restricted the

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82 The actual plaintiff in Dunn was a migrant from another state. Although the plaintiff sued as a representative of that class of bona fide residents of Tennessee who had not resided in the state for twelve months or in the county for three months, he himself did not necessarily represent the class of intrastate migrants.

83 Id. at 1001 (quoting Oregon v. Mitchell, 400 U.S. 112, 285 (1970) (concurring opinion)).


85 In Edwards only the immigration of nonresidents of California was penalized. Shapiro also involved actual discrimination only against interstate migrants. From a purely formal point of view, of course, durational residency requirements apply to both migrants and nonmigrants; both must reside in the state or locality for the required period of time. By its very nature, a state or local durational residency requirement for a public benefit imposes a burden on all new residents. But not all new residents are migrants; some are born in the state or locality. In Shapiro, however, the states and the District had discriminated against recent interstate migrants because newborn children of old state
freedom of both interstate and intrastate migrants to migrate and settle, they might be constitutional.\textsuperscript{86}

\textit{Dunn} does not clearly resolve these questions for three reasons. First, although the Court invalidated Tennessee's statewide voting qualification of three months residency in the county, this part of the Court's holding may have been grounded solely on the fundamental right to vote rather than on the right to migrate and settle. Second, Tennessee did not in fact treat all migrants equally. Intercounty migrants otherwise eligible to vote were permitted to vote in the county of their former residence if they had not resided for three months in their new county; intracounty migrants were not penalized at all. Interstate migrants suffered most from the county residency requirement. Third, the three-month county residency requirement applied uniformly throughout the state and was therefore not a purely local burden. From the point of view of an interstate migrant, Tennessee significantly burdened his settlement everywhere in the state.

In another recent right-to-travel case, \textit{Evansville-Vanderburgh Airport Authority District v. Delta Airlines}\textsuperscript{87} the Court again left these questions undecided. In \textit{Evansville} the court held that a local airport authority's use and service charge of one dollar for each passenger boarding any commercial aircraft was not forbidden by the commerce clause, the equal protection clause, or the constitutionally protected right to travel. To reach this result, the Court distinguished \textit{Crandall v. Nevada}\textsuperscript{88} on the ground that Nevada had discriminated against interstate travel by imposing a one dollar tax only on those leaving the state, while the airport authority taxed both persons leaving the state and those traveling within it. The Court, however, also distinguished \textit{Crandall} by viewing the airport tax as a reasonable approximation of the cost of conferring a benefit on the traveler, the use of a publicly built and operated airport. For this reason, it held that the fee charged was "not a burden in the constitutional sense" and that therefore "[t]he principle that burdens on the right to travel are constitutional only if..."
shown to be necessary to promote a compelling state interest has no application in this context." Since the Court found that no burden had been imposed on the fundamental right to travel, the case does not shed light on whether a state or local government is permitted to impose a burden on the right to migrate and settle if it treats interstate and intrastate migrants equally.

Although the position of the Court on these questions remains ambiguous, lower federal courts have held that regulations imposing significant burdens on all interstate and most intrastate migrants are unconstitutional. In Cole v. Housing Authority, the Court of Appeals for the First Circuit held that the local requirement of two years residency in the city of Newport, Rhode Island was an unconstitutional prerequisite for access to a federally assisted public housing project. Although one of the plaintiffs had migrated to Newport from another state and another plaintiff had migrated from a community within Rhode Island, the court's opinion assumed sub silentio that both migrations were protected by the right to travel enunciated in Shapiro.

The same result was reached in the nearly identical case of King v. New Rochelle Municipal Housing Authority, in which the Court of Appeals for the Second Circuit stated that "the use of the term 'interstate travel' in Shapiro was [nothing] more than a reflection of the statewide enactments involved in that case." Since the Shapiro opinion "relied on 'our constitutional concepts of personal liberty' " as a source of the right to travel, the court thought it would be "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."

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89 92 S. Ct. at 1349.
91 495 F.2d 807 (1st Cir. 1970).
92 442 F.2d 646 (2d Cir. 1971), cert. denied, 404 U.S. 863 (1971).
93 Id. at 648.
94 Id. (quoting Shapiro v. Thompson, 394 U.S. 618, 629 (1969)).
95 Id.
IV. Two Views of the Constitutional Sources of the Right to Travel

Although Cole and King extend judicial protection of the right to migrate and settle so as to reach purely local regulations that impose burdens on all interstate and most intrastate migrants, it is open to question whether the right would invalidate local land use regulations. The answer may depend on a determination of the constitutional source of the right to migrate and settle. The right may be constitutionally protected either because of "the nature of our Federal Union,"96 in which case most land use regulations that applied equally to interstate and intrastate migrants would appear to be constitutional, or because the right is "a fundamental precept of personal liberty,"97 in which case most such regulations would appear to be subject to strict judicial scrutiny when they impose burdens on the exercise of the fundamental right to migrate and settle.

A. The Nature of the Union

In numerous cases, including Edwards, Shapiro, Dunn, and Evansville,98 the Supreme Court has interpreted the Constitution on the basis of underlying presuppositions about the nature of the Union. It is reasonable to say that the Constitution established neither a mere customs and trading union of independent states nor a confederation designed only for common defense against external enemies, but rather one nation with a general government having, in certain cases, authority to rule throughout the country.99

The limits of Congress’s legislative power with respect to the states are the explicit prohibitions of the Constitution and the traditional pattern of allocation of responsibilities between the national and state governments. It should be emphasized that in recent times the latter limits have usually changed when Congress chose to change them.100

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96 Shapiro v. Thompson, 394 U.S. 618, 629 (1969); see text and notes at notes 98–111 infra.
97 King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir. 1971); see Shapiro v. Thompson, 394 U.S. 618 (1969); note 79 supra; text and notes at notes 112–19 infra.
98 For a discussion of these cases, see text and notes at notes 66–89 supra.
The political power of the states and their local governments is protected not so much by the explicit prohibitions of the Constitution as by the political representation the states have in Congress. If Congress enacts a national land use statute limiting the power of the states or their local governments to regulate the uses of land within their jurisdictions, the Court would probably find such legislation constitutionally authorized by the commerce clause or section five of the fourteenth amendment.

In the absence of congressional legislation, the Court is more cautious, traditionally deferring, as has been discussed above, to most economic and social legislation by the states and their local governments. Nevertheless, the Court will hold state and local regulations unconstitutional if they are repugnant to the nature of the Union established by the Constitution. State and local governments may not unduly restrict the free flow of persons and goods throughout the Union and may not discriminate against persons and goods from sister states and from abroad. The Court thus prevents the “Balkanization” of the Union into hostile states and localities, each attempting to “feather its own nest” at the expense of the others.

In light of this traditional doctrine, the Court is not likely to invalidate many local land use regulations if the primary constitutional source of the right to migrate and settle is the nature of the Union. Under this view the Court has generally found state and local regula-


104 See text and notes at notes 2–19 supra.

tions to be unconstitutional (1) when they raise the costs of carrying on commerce among the states and the burden imposed is not justified or (2) when they discriminate primarily against out-of-state persons or goods. The first rule usually applies only in commercial contexts and may at best serve to invalidate only a few local land use regulations. The second rule appears to exempt most local land use regulations from invalidation since they usually affect interstate and intrastate migration equally.

A notable application of the first rule to a local ordinance that discriminated against both interstate and intrastate commerce is Dean Milk Co. v. City of Madison. The challenged ordinance required all pasteurized milk sold in Madison, Wisconsin to be processed and bottled at plants approved by the Madison Public Health Department. In the interest of "convenient, economical and efficient plant inspection," Madison required all pasteurization plants to be within a five-mile radius of the center of the city. Since Dean Milk, an Illinois milk company, did not have a pasteurization plant within the five-mile limit, it could not sell its pasteurized milk in Madison. The Court, finding that reasonable, nondiscriminatory alternatives were available to accomplish the city's public health interest, held that the ordinance imposed an unconstitutional burden on interstate commerce.

Applied broadly, the Dean Milk standard might invalidate many local land use regulations. Particularly vulnerable would be localities whose regulations significantly raised the costs of settlement without sufficient justification. Such an application of Dean Milk, however, seems unlikely. Even if such a standard were applied to local land use regulations, the Court might find the burdens imposed in most cases to be justified. If the source of the right to migrate and settle is the nature of the Union, local regulations whose effect on interstate migration and settlement appears to be fairly small might be justified by the public interest in local government.


109 Id. at 352.


B. Fundamental Personal Liberty

In *Gitlow v. New York* the Supreme Court began to recognize certain "fundamental personal rights and 'liberties'" as part of the liberty that is "protected by the due process clause of the fourteenth amendment from impairment by the States." The right to travel from state to state has been explicitly designated by the Court as a fundamental personal right, and in *Shapiro* and *Dunn* the right to migrate and settle was added to that select group of rights regarded by the Court as fundamental to American liberty.

Such a result is sensible, especially insofar as the very notion of liberty for Americans and their English ancestors included the right to exercise the natural power of locomotion free from unjustified governmental restraints. In addition to freedom of movement, Americans have enjoyed and valued the liberty of living anywhere within the United States. Even today, long after the passing of the frontier and massive European immigration, nearly twenty percent of the nation's population changes its place of residence each year. Freedom "to migrate, resettle, find a new job, and start a new life" may be viewed as part of the liberty that distinguishes American life from the more stratified and less mobile societies of the "old world."

If the freedom to migrate and settle is as fundamental to American liberty as freedom of speech, unjustified local restrictions on such a fundamental liberty would be unconstitutional even if they applied equally to both interstate and intrastate migrants and did not have a significant adverse impact on interstate commerce or travel. Funda-

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112 268 U.S. 652 (1925).
114 See text and notes at notes 61–83 supra.
115 See 1 W. Blackstone, Commentaries *134: "Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." See generally Z. Chafee, supra note 76; Boudin, The Constitutional Right to Travel, 56 COLUM. L. REV. 47 (1956); Vestel, Freedom of Movement, supra note 76; Note, Residence Requirements After Shapiro v. Thompson, 70 COLUM. L. REV. 194 (1970); Note, Shapiro v. Thompson: Travel, Welfare and the Constitution, 44 N.Y.U.L. REV. 989 (1969); Comment, The Right to Travel and its Application to Restrictive Housing Laws, supra note 4; Comment, The Right to Travel—Its Protection and Application Under the Constitution, supra note 4; authorities cited note 76 supra.
116 U.S. BUREAU OF THE CENSUS, supra note 95, at 54. Between March, 1969 and March, 1970, 18.4 percent of the population moved to another residence; 11.7 percent moved within the county of their former residence; 3.1 percent moved to another county within the state of their former residence, and 3.6 percent moved to another state. *Id.* See generally H. Shryock, Population Mobility Within the United States (1964).
mental liberties are protected by the Constitution wherever they may be abridged.118

In Shapiro the Court's invalidation of the District of Columbia's durational residency requirement seems to indicate that the right to migrate to and settle in any state in the Union is a fundamental personal liberty since under the traditional view congressional legislation can be held unconstitutional only on such a basis and not on the basis of the nature of the Union.119

It is altogether possible for the Court to hold explicitly that the right to travel is based primarily on the constitution's protection of personal liberty rather than the nature of the Union established by the Constitution. The guarantee of liberty contained in the fifth and fourteenth amendments is large enough for an interpretation protecting the freedom to migrate and settle anywhere within the United States. Both judicial precedent and a long-standing American tradition of individual liberty would support the Court should it choose to adopt this view.

V. SIGNIFICANT BURDENS, JUSTIFICATIONS, AND JUDICIAL REMEDIES

As has been discussed above, the key to a successful challenge of the constitutionality of local land use regulations is a showing that they impose significant burdens on a person's fundamental right to migrate and settle. If the Supreme Court chooses to adopt the nature of the Union as the constitutional source of the right, a successful challenge is likely to require prima facie evidence that the regulations discriminate against or impose significantly higher costs on interstate migration or commerce. Although such a showing would appear to be difficult, it might be possible for at least some land use regulations.120 If, on the other hand, the Court chooses to adopt the fundamental personal liberty rationale, a prima facie case of a burden on the right to migrate and settle might well be established if local regulations imposed higher costs on settlement in the locality.121

119 See 394 U.S. at 645 (Warren, C.J., dissenting); id. at 655 (Harlan, J., dissenting); Aptheker v. Secretary of State, 378 U.S. 500 (1964); note 79 supra.
120 See note 107 supra. National associations of home builders or building suppliers and large firms with national interests may well have sufficient financial incentives to gather and present the relevant information to a court.
121 But cf. text and note at note 111 supra. The right to migrate and settle should not be confused with the right to settle. A constitutional right to travel, the origin of the right to migrate and settle, is infringed by significant burdens on migrants. Since most land use regulations raise housing costs for all residents, migrants and nonmigrants alike, they indirectly impinge on the right to migrate and settle, but directly impinge on the right to
Under the latter view, once a prima facie case is established, the state or local government will be required to justify the burden imposed by its regulations by proving that they are "'necessary to promote a compelling governmental interest'" or that the degree of restriction is outweighed by "countervailing State interests of overriding importance." Although these different wordings of the constitutional test may have different implications, whatever verbal formula the Court applies is likely to demand far better justification for local settlement. Cf. Dunn v. Blumstein, 92 S. Ct. 995, 1003 n.12 (1972). The right to settle differs from the right to decent housing rejected in Lindsey v. Normet, 405 U.S. 56 (1972), and James v. Valtierra, 402 U.S. 137 (1971). See notes 59, 86 supra. Even if the right to migrate and settle is infringed by local regulations imposing significantly higher costs on the right to settle, it is open to question whether a potential migrant has sufficient standing to maintain such a claim. In Park View Heights Corp. v. City of Black Jack, 335 F. Supp. 899 (E.D. Mo. 1971), the court held that the corporate plaintiffs did not have standing to raise the claim "that the purpose and effect of the zoning ordinance is to exclude persons of moderate and lower income, including Negroes, from the City of Black Jack." Id. at 902. If a potential migrant is without standing to maintain such a claim, it is arguable that the owner of the property may assert the claim on behalf of those allegedly excluded by the regulation. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 299 U.S. 33 (1915). [122] Dunn v. Blumstein, 92 S. Ct. 955, 1003 (1972) (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969); emphasis on "necessary" added in Dunn). [123] Boddie v. Connecticut, 401 U.S. 371, 377 (1971). Compare Justice Harlan's dissent in Shapiro: "The core inquiry is 'the extent of the governmental restriction imposed' and the 'extent of the necessity for the restriction.'" 394 U.S. at 650 (quoting Zemel v. Rusk, 381 U.S. 1, 14 (1965)). Abate v. Mundt, 403 U.S. 182 (1971), suggests that some local land use regulations might be justified under either formulation. Abate; Whitcomb v. Chavis, 403 U.S. 124 (1971); and Gordon v. Lance, 403 U.S. 1 (1971), are additional evidence that the "necessary to a compelling governmental interest" test does "not have the precision of mathematical formulas . . .", but rather "emphasize[s] a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes." Dunn v. Blumstein, 92 S. Ct. 995, 1003 (1972); see note 124 infra. [124] The differences appear to be largely verbal. Compare Boddie v. Connecticut, 401 U.S. 371 (1971) (Harlan, J.), with id. at 383, 386 (Douglas & Brennan, JJ., concurring). For a discussion of "substantive equal protection" and its similarity to "substantive due process," see Karst, Invidious Discrimination: Justice Douglas and the Return of the "Natural Law-Due Process Formula," 16 U.C.L.A. L. Rev. 716 (1969); Karst & Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection, 1967 Sup. Ct. Rev. 39; Michelman, supra note 41. The different judicial positions that sometimes appear to be the result of which verbal formula is applied, see, e.g., Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969), are more likely different judicial evaluations of the extent of the burden imposed and the sufficiency of the explanation offered for the burden. Cf. text and notes at notes 43-61 supra. What saves such judicial "balancing" from pure subjectivism is the fundamental rights doctrine inherent in the American tradition and enunciated in the Declaration of Independence and the Bill of Rights. For a philosophic discussion, see L. Strauss, NATURAL RIGHT AND HISTORY (1959).
land use regulations burdening the right to migrate and settle than
that held sufficient in Euclid. Even if a state's health or safety interest
is adjudged to be compelling or overriding, the means employed to pro-
tect that interest will also be required to be necessary, not merely rea-
sonable or convenient. Thus, although adequate sewage disposal is a
compelling governmental interest, a local community probably could
not justify large-lot requirements as a necessary means to insure ade-
quate septic tank capability. Performance standards, such as bacteria
counts, may provide an adequate but less onerous alternative means.
If so, large-lot requirements that significantly burden the right to
migrate and settle would be unconstitutional. In judging whether the
burden imposed by any particular regulation is justified, the Court
would be required to make difficult decisions about the actual effect of
different economic regulations and the availability of practical alterna-
tives. Such decisions are similar to those once made by the Court in
"substantive due process" cases.

A second justification for local land use regulations is the desire,
through exclusion of additional residents, to keep the rate of taxation
low and the level of governmental services relatively high. In Edwards,
Shapiro, and Bullock v. Carter, however, the Court rejected such
justifications. Although the state or local government's interest in pre-
serving a lower rate of taxation or a higher level of governmental
services is legitimate, it is, in the Court's view, an insufficient reason
to burden the exercise of the constitutional right to migrate and settle.
In addition, if the School Financing Cases are upheld by the Court
(which appears to be unlikely), one of the primary reasons for local
exclusiveness is likely to lose much of its persuasive power.

126 See notes 16-17, 123-24 supra. See also Note, Legitimate Use Exclusions Through
127 92 S. Ct. 849 (1972); see note 52 supra.
128 Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Rodriguez
noted, 40 U.S.L.W. 9576 (U.S. June 7, 1972); Van Dusart v. Hatfield, 394 F. Supp. 870 (D.
Minn. 1971); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972); Sweetwater
129 Serrano apparently rests on an independent state ground adequate to support the
judgment of the California Supreme Court. 5 Cal. 3d at 596 n.11, 487 P.2d at 1249 n.11, 96
Cal. Rptr. at 609 n.11; see Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965), on
remand, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965). If the argument that
 classifications based on wealth are not constitutionally suspect is correct, see text and notes
 at notes 35-54 supra, then to uphold the other cases, the Court would be required to hold
that the right to education is a constitutionally protected fundamental right, see text
and notes at notes 55-61 supra. Although such a decision might be desirable, the right to
education, unlike the right to travel, has very little support in previous cases. The Court's
A third justification for local land use regulations is the need for a comprehensive community development plan. Even if such a plan is a compelling state interest, however, it is clear that most land use regulations are not applied in such a way that a community could demonstrate their necessary relation to a comprehensive plan. Most regulations appear to follow the vagaries of private and public demand rather than the principles of a public planner.\textsuperscript{130}

Fourth and fifth justifications for local land use regulations are the widespread desires for neighborhood homogeneity and preservation of property values. It is doubtful, however, that the Court would classify these interests as "compelling."\textsuperscript{131} In any event, sufficient less onerous means are available to both state and local governments to encourage the attainment of these ends. As previously mentioned, performance standards or their equivalents may be used to achieve certain ends.\textsuperscript{132} To the extent that individuals desire additional protection, private agreements are likely to secure and protect private interests. The experience of Houston, Texas, a major city lacking most traditional land use regulations, suggests that private agreements provide an equal,

decision in Brown v. Board of Educ., 347 U.S. 483 (1954), clearly rested on a racial discrimination rationale. The fact that the particular injury to the plaintiffs was the denial of equal educational opportunities appears to have little constitutional significance absent racial discrimination. Later cases involving racial discrimination in other contexts were often per curiam decisions citing Brown. See, e.g., Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (public golf courses). But cf. Wisconsin v. Yoder, 92 S. Ct. 1526, 1544 (1972) (White, J., concurring). There is evidence that present differences in per capita pupil expenditures do not have a significant effect on either educational opportunities or achievement. See generally J. Coleman et al., \textit{Equality of Educational Opportunity} (1966); F. Mosteller & D. Moynihan, \textit{On Equality of Educational Opportunity} (1972). Consequently, there appears to be little practical reason for concluding that the typical property tax system imposes a significant burden on the right to education, even assuming that it might be a constitutionally protected fundamental right. See generally Goldstein, \textit{Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny}, 120 U. Pa. L. Rev. 504 (1972).


and perhaps a higher level of protection for both private and public interests.\footnote{See Siegan, Non-Zoning in Houston, 13 J. Law & Econ. 71 (1970); Note, Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative, 45 S. Cal. L. Rev. 335 (1972). The Court’s decision in Shelley v. Kraemer, 334 U.S. 1 (1948), suggests that court enforcement of private land use agreements would be state action and therefore subject to the same judicial scrutiny as present governmental regulations. Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), on the other hand, suggests that the judicial test is whether the private property is “clearly the functional equivalent” of a “community business block.” Id. at 318–19. Perhaps the important question is whether racial discrimination or first amendment rights are at issue. After Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), and Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), Shelley is no longer needed for racial discrimination cases. If Mr. Siegan is correct, private regulations usually result in less severe burdens than public regulations. If so, more private than public regulations are likely to pass the constitutional test, assuming that it applies. Moreover, Logan Valley suggests that the right of privacy may be, in some cases, sufficient to justify reasonable private regulations of private property. The right to privacy adds weight to the argument for private, as opposed to public, regulation of private property. Public regulations are also, generally speaking and in the absence of a private monopoly, less responsive to changes in private preferences than are private regulations. Public regulations appear to impose higher costs by causing needless delay in planning and building. See Siegan, supra. Although a system of predominantly private regulations is not likely to enable all of the poor to move into all of the better neighborhoods, it may very well tend to lower overall costs and to facilitate migration and settlement. Such a result, although not likely to satisfy more radical critics, is likely to be a desirable one, not only for the poor, but more importantly, for the nation as a whole.}

If the Court defines and protects the right to migrate and settle as a fundamental liberty, few local land use regulations are likely to survive in their present form. Performance and other more discriminating standards are likely to replace the present system of use districts, building and housing codes, and subdivision controls. Private agreements, such as covenants running with the land or neighborhood associations, are likely to assume many of the tasks now performed by governmental regulation. Given the magnitude of some of these changes, judicial decrees in local land use regulation cases should probably allow governments and private parties sufficient time to adjust to different and constitutional forms of protection of their legitimate interests. Blanket decrees invalidating all local land use regulations should be avoided; simple prudence would seem to require judicial moderation in such a sweeping task.

**CONCLUSION**

Commentators have described local land use regulations as governmental barriers serving to fence Americans out of many parts of their own country. In light of this criticism, serious constitutional challenges
to such regulations are inevitable. This comment has presented the case for a challenge based on the fundamental right to migrate and settle. It is perhaps to this constitutional right that the barriers will prove the most vulnerable.

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