

3-1997

Public Choice Theory: A Unifying Framework for Judicial Activism

Dana Brakman Reiser

Brooklyn Law School, dana.brakman@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Courts Commons](#), [Housing Law Commons](#), [Legislation Commons](#), and the [Other Law Commons](#)

Recommended Citation

110 Harv. L. Rev. 1161 (1996-1997)

This Book Review is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

BOOK NOTE

PUBLIC CHOICE THEORY: A UNIFYING FRAMEWORK FOR JUDICIAL ACTIVISM

SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES. By Charles M. Haar.¹ Princeton: Princeton University Press. 1996. Pp. xiv, 266. \$29.95.

In *Suburbs Under Siege: Race, Space, and Audacious Judges*, Charles M. Haar advocates intense judicial activism in the narrow subset of cases that qualify as "institutional reform litigation."² He describes the history and effects of New Jersey's *Mount Laurel* decisions³ and showcases the New Jersey Supreme Court's stance in those cases as a model of "audacious" judicial activism in the field of exclusionary zoning. Although many of Haar's descriptions and arguments implicate public choice theory,⁴ he unfortunately fails to draw on it to provide a coherent theoretical framework for understanding his empirical data and integrating his analysis.⁵

Much of Haar's book describes the *Mount Laurel* exclusionary zoning cases from 1975 to the present (pp. 16-126). Like many suburban towns, Mount Laurel, New Jersey had a zoning ordinance that, by its terms, made construction of low- or moderate-income housing within the town's limits very difficult, if not impossible.⁶ In *Mount Laurel I*, the local NAACP chapter brought suit challenging the ordinance as exclusionary and invalid.⁷ *Mount Laurel I* was an ideological breakthrough: the New Jersey Supreme Court interpreted the state constitution to require every municipality, "by its land use regulations, presumptively [to] make realistically possible an appropriate variety and choice of housing."⁸ The court's holding was sweeping, but it did

¹ Louis D. Brandeis Professor of Law Emeritus, Harvard Law School.

² Although Haar does not explicitly define this term in his book, he apparently refers to litigation that seeks to remedy widespread lawbreaking by a governmental institution.

³ Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*]; Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*]; Hills Dev. Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986) [hereinafter *Mount Laurel III*]. This Book Note refers to this series of cases together as the *Mount Laurel* cases.

⁴ Public choice theory utilizes economic theory to explain political behavior. See DENNIS C. MUELLER, PUBLIC CHOICE II, at 1 (1989).

⁵ Haar's advocacy of intense judicial activism is also subject to objections on separation-of-powers grounds (pp. 130-37). However, discussion of these arguments is beyond the scope of this Book Note.

⁶ See *Mount Laurel I*, 336 A.2d at 729 (N.J. 1975).

⁷ See *id.* at 716-17.

⁸ *Id.* at 724.

not specify how municipalities should meet this requirement (pp. 26-27). Unsurprisingly, communities failed to respond to the decision.⁹

In 1983, the court again addressed the lack of local efforts to provide affordable housing in New Jersey's suburbs.¹⁰ The court adopted the key idea of "regional welfare," which required localities to provide housing that would meet their "fair share" of regional need as contemplated by a statewide development plan (p. 38). It also established a specialized three-member judiciary, aided extensively by special masters, that would specifically deal with *Mount Laurel* cases (pp. 43-44). Finally, the court created an extraordinary builder's remedy, whereby "if a builder successfully demonstrates that a municipality's land-use regulation is exclusionary, and promises to deliver a substantial number of low-income housing units, that builder is granted permission to build additional market-priced units over and above the nominal number permitted by the zoning ordinance" (pp. 44-45).

In response to the judiciary's activism, the New Jersey legislature passed the Fair Housing Act¹¹ (FHA) in 1985 (pp. 92-94). The FHA created the Council on Affordable Housing (COAH), an administrative agency empowered to administer *Mount Laurel* obligations.¹² Although it upheld the constitutionality of the FHA,¹³ the court criticized COAH's actions in subsequent cases in which the agency failed to pursue its mission with the necessary vigor (p. 117).¹⁴

Haar describes the evolution of the *Mount Laurel* cases in great detail, with a focus on the effects of *Mount Laurel II* and the efficacy of the new *Mount Laurel* judges and special masters (pp. 55-86). He describes the judges' prestige within the New Jersey legal community (pp. 55-56), the underlying uniformity of their decisions (p. 67), the commitment of both the judges and the masters to the goals of the *Mount Laurel* opinions (pp. 85-86), and their effectiveness in crafting viable remedies to attain more affordable suburban housing (p. 131).¹⁵ This description illustrates Haar's radical thesis: that state judiciaries can be effective agents of institutional reform through intense activism

⁹ See *Mount Laurel II*, 456 A.2d 390, 410 (N.J. 1983).

¹⁰ See *id.*

¹¹ N.J. STAT. ANN. § 52:27D-301 (West 1996).

¹² See *id.* § 52:27D-305, -307.

¹³ See *Mount Laurel III*, 510 A.2d 621, 633, 642 (N.J. 1986).

¹⁴ Haar characterizes *In re Petition for Substantive Certification Filed by the Township of Warren*, 622 A.2d 1257 (N.J. 1993), and *Holmdel Builders Ass'n v. Township of Holmdel*, 583 A.2d 277 (N.J. 1990), as examples of the New Jersey Supreme Court's "continued and rigorous protection" of the *Mount Laurel* doctrine (p. 117).

¹⁵ For example, Haar cites zoning revisions allowing for the construction or rehabilitation of 54,000 additional low- and moderate-income housing units in New Jersey suburbs between 1987 and 1992, 75% of which were formulated under the *Mount Laurel* courts' supervision (p. 131). But cf. John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 667-80 (1996) (describing two major studies of *Mount Laurel* housing that show an increase in affordable housing but criticizing the decisions' inefficacy in achieving racial integration and voluntary compliance).

(pp. 184-85). Further, Haar argues that, in cases of institutional reform litigation, the judiciary *should* assume an intensely activist, "audacious" role, as had the New Jersey Supreme Court (pp. 184-85).

In order to make his prescription more concrete, Haar proposes five prerequisites for audacious judicial activism (p. 184). The first three requirements ensure that radical judicial intervention will not be undertaken lightly. "Law-breaking by the state or a unit of the state" must exist; the "illegality [must] affect[] a sizable segment of social life, with a detrimental impact on the legal interests of an indefinitely large number of persons";¹⁶ and the wrongdoing must not be "isolated but systematic, indicating a persistent pattern of law-breaking over time" (p. 184). Haar's last two requirements reveal his concerns regarding the limits of the majoritarian branches' capacity to deal with institutional lawbreaking. In order to warrant audacious judicial activism, the lawbreaking involved must "violate[] a constitutional provision, not simply an ordinary law," because Haar assumes that the legislature will correct violations of ordinary laws through statutory amendments (p. 184 & n.12).¹⁷ Finally, the wrongful practice must be "entrenched" and likely to "project itself into the future," and the executive and legislative branches must be unwilling and unable to correct it (p. 184).¹⁸

By limiting the application of audacious activism to cases in which both the norms of group behavior and the traditional structure of political institutions inhibit reform, Haar sets the stage for utilizing a framework culled from public choice theory literature. In particular, Haar's argument is informed by public choice theory's understanding of the negative incentives that inhibit legislators and executive officials from undertaking institutional reform. Furthermore, Haar's support of the post-*Mount Laurel II* judiciary's activism can be integrated into a public choice framework by explaining how this kind of activism overcomes traditional arguments against courts as institutional reformers. An explicit public choice theory framework would also have provided a theoretical companion to Haar's meticulous description of the *Mount Laurel* cases and their progeny.

¹⁶ This criterion implicates the public choice notion of the collective action problem. See MUELLER, *supra* note 4, at 307-19. If the illegality affects a large group, free-ridership will hinder the motivation and organization of individuals necessary to achieve the collective goal of remediation. See *id.* at 310.

¹⁷ Under public choice theory analysis, this assumption is of questionable validity. Rather, corrections of statutory law would depend upon the political incentives of legislators and executive officers.

¹⁸ Other possible instances of institutional reform litigation calling for audacious activism include school desegregation, large-scale environmental clean-up, and prison reform. Haar's theory will apply to these situations as well so long as his criteria are satisfied. The usefulness of public choice theory as a bulwark for Haar's theory extends to these areas as well, because his final criterion presupposes that legislative and executive incentives mitigate against reform.

In particular, public choice theory provides support for Haar's thesis of legislative and executive inadequacy to rectify exclusionary zoning on both the local and state levels. Local governmental institutions in suburbs with exclusionary zoning ordinances lack the proper incentives to address problems like the affordable housing shortage.¹⁹ Popularly elected city council members and mayors would risk losing their seats if they proposed the repeal of exclusionary zoning, because their constituents — current residents — are those most vehemently opposed to changes in zoning laws.²⁰ This attitude is not necessarily the result of any invidious motives of suburbanites.²¹ Rather, it is often traceable to their concern for maintaining property values,²² preserving the balance of property tax rates and the level of amenities provided to residents,²³ and protecting the community from excessive development.

Members of the state legislative or executive branches will also find it difficult to champion proposals to ban exclusionary zoning. Like town officials, legislators from suburban districts are constrained by the preferences of their constituents. Urban legislators also have little incentive to legislate against exclusionary zoning.²⁴ Legislators from rapidly decaying inner cities may have more immediate legislative goals than the health of the affordable suburban housing market; even if urban constituents made strong appeals to their legislators for action on this issue, legislators might hesitate to advocate a policy that would enable their grateful constituents to leave their districts.²⁵ Even governors, who are charged with safeguarding statewide interests, are under pressure not to push reforms unpopular with suburbanites.²⁶

¹⁹ See Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI-KENT L. REV. 959, 961 (1991) (describing the public choice theory assumption that political officials and their constituents make decisions to improve their personal welfare).

²⁰ See WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 126 (1985) (arguing that "[t]he political power of the suburb . . . is entirely in the hands of current residents" and that local governments are responsive to "the preferences of the median voter"); cf. Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1671 (1979) ("In the suburbs, . . . the taxing and spending levels set by the winning majority are likely to correspond closely to the preferred taxing and spending levels of all community residents."). Of course, local government is an imperfect system and may be dominated by special interests. See, e.g., Gillette, *supra* note 19, at 978 (suggesting that, due to collective action problems among residents, local governments will select a suboptimal allocation of public goods in zoning decisions by catering to developers, who have "the greatest capacity to make their preferences heard").

²¹ This is not to say that racial and economic prejudice does not play a role, explicit or implicit, in creating exclusionary zoning rules. See MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 7, 11-12 (1976).

²² See Inman & Rubinfeld, *supra* note 20, at 1685-86.

²³ See *id.* at 1685 (describing suburban residents' rational desire to exclude potential owners of residences with lower property values in order to keep tax rates low).

²⁴ See FISCHER, *supra* note 20, at 318.

²⁵ See *id.*

²⁶ See Stephen Clutter, *Governor Candidates to Battle for Suburbs*, SEATTLE TIMES, Mar. 25, 1996, at B1 (describing the importance of suburban voters in Washington's 1996 gubernatorial

Further, the political return on action against exclusionary zoning is questionable even from urban constituents, because they may move to the suburbs and adopt the suburban attitudes supporting exclusionary zoning. In sum, Haar could have organized and strengthened his claims of executive and legislative incapacity to initiate reforms by drawing on public choice theory.

By using an explicit public choice theory framework, Haar would also have unified his arguments that the *Mount Laurel II* model of judicial activism can overcome the traditional obstacles to effecting institutional reform through the courts (pp. 133-37). The traditional judiciary seems ill-suited to implement institutional reform. First, judges tend to be generalists: they preside over many types of cases, gaining only incidental expertise in the diverse fields upon which lawsuits touch. This generalist experience and the adversarial system under which traditional judges operate frustrate judges' ability to remedy complex institutional lawbreaking effectively (pp. 136-37). Second, the traditional judiciary's inability to initiate legal claims renders it passive.²⁷ Further, in the zoning context, the judiciary's attempts at institutional reform may be frustrated by communities' use of alternative strategies to exclude low-income residents.²⁸ Given the serious obstacles the traditional judiciary faces in initiating and implementing reforms, institutional reform may seem best suited for the legislature or the executive.²⁹ Haar's book, however, posits that *audacious* courts overcome these traditional difficulties and become effective institutional reformers (pp. 182-85).

In the *Mount Laurel* cases, the appointment of specialized judges (p. 44) and reliance on planning professionals, serving as special masters, to craft viable remedies (pp. 73-76) addressed the problem of generalist judges, unschooled in the intricate administrative problems raised in institutional litigation. The creativity of the *Mount Laurel* cases also responded to the traditional judiciary's passivity problem. Exclusionary zoning laws are unlikely to be litigated in a traditional, passive court system, because those most adversely affected by these

election); cf. Jeffrey A. Roberts, *Parties Tuning in to Suburbs' Hopes*, DENVER POST, Aug. 25, 1996, at 1A (noting that approximately 58% of Colorado's voting-age population lives in the suburbs).

²⁷ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283 (1976); Gillette, *supra* note 19, at 992 ("Judicial process is not self-executing; judicial intervention occurs only when a local act is challenged.").

²⁸ See Inman & Rubinfeld, *supra* note 20, at 1739. For example, even if the courts can correct exclusionary zoning laws, suburbs may increase taxes to make relocation less feasible or reduce the level of services to make it less desirable for lower-income families. See *id.* at 1739-40. The pressures of competition among suburbs for desirable residents may exacerbate this reaction. See *id.* at 1744. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416-24 (1956) (outlining the original theory of competition among suburbs to attract consumer-voters); HARVEY S. ROSEN, *PUBLIC FINANCE* 529-33 (3d ed. 1992) (updating Tiebout's theory).

²⁹ See, e.g., Inman & Rubinfeld, *supra* note 20, at 1748-50.

ordinances — potential residents unable to move to the suburbs — usually do not have standing to sue.³⁰ By establishing the builder's remedy, the court made future litigation more likely by giving an individual with standing a strong economic incentive to sue (p. 45).³¹ Moreover, by characterizing the provision of affordable housing as an affirmative obligation on all communities, the New Jersey judiciary virtually assured liability for any suburb sued nonfrivolously.³² By increasing the chances of litigation's success, this characterization enhanced builders' incentives to sue and made such suits a stronger threat to local governments. Haar's arguments for an audacious judiciary would have benefitted from explicit analysis of the ways incentives and institutional structure affect the behavior of government actors. Public choice theory offers such an analysis.³³

Suburbs Under Siege is a valuable resource as a description of *Mount Laurel* and its progeny in New Jersey and as a thoughtful analysis of the issues involved in exclusionary zoning cases generally. However, the absence of a unifying theoretical framework undermines the force of Haar's argument. Haar's call for judicial activism could have been strengthened by utilizing public choice theory to support his claim that an "audacious" judiciary is the "one government agency able to act" as a successful institutional reformer (p. 11).

³⁰ Such potential residents may also suffer from lack of information and collective action problems.

³¹ See Inman & Rubinfeld, *supra* note 20, at 1686 (noting the economic incentive for developers to build high-density housing).

³² "By the time litigation begins . . . there is general agreement that the administrative branch of government has botched the handling of a social need or, in the *Mount Laurel* situation, that the locality is engaged in exclusionary zoning practices that violate constitutional demands. Liability is not the issue" (p. 153).

³³ Even audacious activism may not address alternative methods that suburbs may use to exclude outsiders. Audacious courts theoretically could attack such practices, given that they probably also fit Haar's prerequisites for such activism. However, implementing such intense activism on so many fronts will be extremely difficult in practice.

Also, audacious judicial activism suffers from the criticism that judges lack accountability to the electorate and effective power to enforce their activist judgments. Moving to a system of elected judges might address the accountability problem; however, it might also chill judicial activism by giving judges exactly those incentives that make their intervention necessary. The enforcement problem may be mitigated by activist judges who are willing to revisit issues over time and use all of the tools at their disposal — including remedial orders, police intervention, and special masters — to craft creative enforcement solutions that can effectively bring about the desired changes.