BATTLE OF THE HEAVYWEIGHTS: IN THIS CORNER ENVIRONMENTAL RIGHTS AND IN THE FAR CORNER FREE TRAVEL RIGHTS

*By Susan F. Dewey**

Preface

Recently real estate developers and home owners have filed a complaint challenging the Santa Barbara water moratorium herein discussed.[1] The issue to be litigated concerns an alleged mandatory duty to provide water and whether the moratorium denies plaintiffs equal protection of the laws.[2]

The Santa Barbara water moratorium is used in this article simply as a catalyst, bringing the right to free travel and the right to preservation of environment into direct confrontation. The pending litigation, therefore, will have little effect on the thesis of this article, that is, the right of a community to affect growth so it might conserve its environment must one day come to blows with the right to travel as individual communities' capacities to accomodate new growth reach their respective saturation points.

Until recently, community growth was the proud hope of every town. Growth meant progress and progress brought jobs and prosperity. American towns have traditionally competed with one another for new business and new residents, their assumption being that "bigger is better."

Suddenly this assumption has waned and many Americans fear that population distribution is a growing problem.[3]

---

* B.A., 1969, University of California, Santa Barbara; J.D., 1975, University of California, Hastings College of the Law.

1. Pomatto v. Goleta County Water Dist. No. 101404 (Santa Barbara, Cal. Super. Ct., filed Oct. 26, 1973).

2. *Id.* Complaint at 12-16. Additionally, plaintiffs have filed a complaint challenging the Goleta County Water Dist.'s use of the Goleta Ground Water Basin. Pomatto v. Goleta County Water Dist., No. 101485 (Santa Barbara, Cal. Super. Ct., filed Nov. 2, 1973). Complainants argue that the water district has no authority to restrict use of ground water since true ownership lies with the individual property owners. The water district has cross complained against plaintiffs' overdrawing the water basin with their own wells.

3. REPORT OF THE COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE 44 (Signet ed. 1972).

Some state legislatures are instituting studies of the efficacy of the growth ethic[4] and others are searching for population stabilization.[5] States that once welcomed growth are now legislating to discourage it.[6]

While the citizens of many areas are investigating and discussing optimizing types of land use planning,[7] Santa Barbara, California has reached the end of its presently available resources, as many communities eventually must, and has abruptly halted growth.

In many ways, the Santa Barbara area is a model community. The city of Santa Barbara proper is of moderate size, having a relatively stable population of 74,000. Undeveloped building lots in the city are few. Like many other American communities, particularly those in California, Santa Barbara is bordered by open space which in recent years has rapidly filled with new living units. The reasons for the unusually rapid development of land in the Santa Barbara area become obvious with one visit. A low mountain range forming its northern boundary and vast stretches of warm beach to the south provide an attraction to tourists and would-be residents alike.

Located in arid Southern California, the community suffers from a fluctuating and often sparse water supply. A series of relatively dry years can create a potentially severe water shortage. During the 1860's such a condition brought to an end the era of the "Empires of the Dons." The lush green lands of the Santa Barbara area which, prior to 1862 had supported millions of cattle, the livelihood of the California *rancheros*, turned to dust when two consecutive winters brought no rain. By 1864, few cattle remained alive and crops lay withered in the fields.

Santa Barbara presents an ideal focus for a study of appropriate land use. Every geographical area on this continent has the ability

4. S. 155, Fla. Legis., 1972 Sess. (creating a commission to investigate the impact of population growth); H. 734, Hawaii Legis., 1972 Sess. and H. 1322, Hawaii Legis., 1972 Sess. (creating a permanent commission on population stabilization, including determination of an optimum population distribution within the state).

5. Lamm & Davison, *The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives*, 49 DENVER L.J. 1, 3 n.3 (1972) [hereinafter cited as Lamm & Davison].

6. ME. REV. STAT. ANN. tit. 12, §§ 681 *et seq.* (Supp. 1973); VT. STAT. ANN. tit. 10, §§ 6001 *et seq.* (Supp. 1972). *See also*, Lamm & Davison, *supra* note 5, at 3 n.5.

7. Boulder, Col., in 1971 listed a partial catalogue of techniques available to affect growth rates and, while studying techniques for application in the area, declare a temporary building moratorium. Fairfax County, Va., strictly controls sewer hookups to limit population growth while it studies population control methods. Washington Post, Dec. 20, 1971, § 13, at 1, col. 4. Additional communities which have instituted similar studies are listed in YEARBOOK OF AGRICULTURE 20 (1972); HOUSE AND HOME, May 1972.

to support a given population of human beings. With a mushrooming population, a delicate ecosystem, and a poor water supply, the residents of Santa Barbara have reached the crucial time when they must determine the exact population capacity of the area. The time is not far distant when other communities must make the same determination. The decisions made in Santa Barbara may serve as a model for others as their time of ultimate decision approaches.[8]

Growth Limitation

In 1972, the water shortage forced the residents of the Santa Barbara area to choose either to import leased water from the Feather River Project[9] or curtail further growth to avoid a crisis which would necessitate water rationing during summer months. To area residents, appalled and dismayed by the recent influx of newcomers bringing smog, traffic congestion, and an end to the rural atmosphere of the community, the solution was clear. The Goleta County Water District, serving the area where the population was growing the fastest, declared a moratorium prohibiting further water permits after December 7, 1972.[10]

From the standpoint of the average Santa Barbaran, the moratorium may appear fully justified, but to local real estate developers and to residents of Los Angeles and other metropolitan areas who looked to Santa Barbara as their future home, the moratorium is unreasonable and unrealistic. The moratorium gives rise to two important issues: 1) Have the constitutional rights of potential residents been violated? 2) If so, may potential residents, or real estate developers representing them, obtain injunctive relief to compel the municipality to open its water system to all who so request? Such an action would force the community to locate an additional source of water since present demands now burden the water system to its capacity. In recent dry years, water demands have created the danger of an overdrawn condi-

8. "Before water and sewer services may be extended to new housing and other facilities, most communities require certification that public capacities are adequate to supply the services. . . . Suburban and regional shortsightedness has left some towns with inadequate water supplies and sewage treatment facilities for new residential, commercial, and industrial growth. . . . The disruptive conditions which led to recent decisions in Washington, D.C., Cleveland, and New Jersey, prohibiting further hookups dramatize the need for proper land use planning techniques to assure a predictable rate and direction of growth and development." F. GRAD, ENVIRONMENTAL LAW: SOURCES AND PROBLEMS 8-12 (1971) [hereinafter cited as GRAD].

9. The Feather River Project was instituted to pipe Northern California water to Central Coastal and Southern California areas. See discussion at note 112 *infra*.

10. Goleta County Water Dist., Santa Barbara County, Cal., Ordinance 72-2 (Dec. 7, 1972); supplemented by Goleta County Water Dist., Santa Barbara County, Cal., Responsible Water Policy Ordinance, May 15, 1973.

tion whereby the water table is lowered considerably below normal by drawing more water each year than has entered the table during the previous year.[11]

Constitutional Challenge

In dispensing water service to area residents, the Goleta County Water District serves as an instrument of the county administration. A municipality has wide discretion in distributing public services, but it must exercise its discretion reasonably.[12] Failure to fairly and rationally distribute utility services to all residents can result in a finding of unconstitutional discrimination through denial of equal protection against those excluded from use of the services.[13]

Where a party alleges denial of equal protection of the laws as a result of the exercise of discretionary power, as with municipal services, the courts traditionally have applied one of two tests: either the "rational relation" test or the "compelling interest" test is deemed appropriate according to the court's analysis of the particular facts of the case.[14]

The United States Supreme Court's interpretation of the equal protection clause traditionally has required that statutory schemes treat classes of citizens differently only if the classifications so created are "rationally related" to the purpose of the statute.[15] When the courts

11. A report prepared in February 1969 for the Water District, LEEDS, HILL & JEWITT, INC., SURFACE RESOURCES AVAILABLE TO GOLETA COUNTY WATER DISTRICT 26 [hereinafter cited as LEEDS, HILL & JEWITT], placed the ground water safe yield at 5,000-5,800 acre feet. Added to the Cachuma Project (a county-wide reservoir project used by five water districts) allocation of 10,300 acre feet, the total available water for 1969 was between 15,300 and 16,100 acre feet. Demand was at 14,600 acre feet. In August 1972, the Goleta County Water District Board of Directors arranged to borrow from the Santa Barbara County Water Agency between 519 and 1769 acre feet of water (the actual amount to vary according to rainfall for the year) to cover its needs for 1972-73. Letter from Goleta County Water Dist. Bd. of Directors to Santa Barbara County Water Agency, August 17, 1972.

12. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

13. *Id.* The court found discrimination on the basis of race and declared unconstitutional provision of utility services in middle class white areas which were vastly superior to services provided poor black areas. *Accord*, Reid Dev. Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 89 A.2d 667 (1952).

14. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 190-93 (1964); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955). *See also*, Note, *A Question of Balance: Statutory Classifications under the Equal Protection Clause*, 26 STAN. L. REV. 155, 156-57, nn.6-11 (1973) [hereinafter cited as *A Question of Balance*].

15. Reed v. Reed, 404 U.S. 71 (1971). *See also*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897).

apply this "rational relation" test, they grant to the governmental action in question a general presumption of validity[16] and will not interfere in the absence of capricious or arbitrary conduct or abuse of discretion.[17]

In *Lindsley v. Natural Carbonic Gas Co.*,[18] for example, the Supreme Court refused to review the judgment of the New York legislature as to the necessity of passage of a statute which, consistent with due process of law, prohibited a land owner from pumping gas, oil, and water on his own land.[19] The purpose of the statute, protection of nearby mineral springs, was found to be within the legitimate police power of the state.[20] The remaining question was whether or not the statute bore a rational relation to its purpose. The Court placed great stress on the role of the local government in determining the rationality of an action, stating:

> A classification having some reasonable basis does not offend against [the equal protection clause of the Fourteenth Amendment] merely because it . . . results in some inequality. . . . When . . . such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed . . . . One who assails . . . such a law must carry the

16. "The presumption of validity attends official action and the burden of proof to the contrary is upon those who challenge the action." Aero Mayflower Transit Co. v. Carpentier, 167 F. Supp. 898, 902 (S.D. Ill. 1958). *Accord*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Tower Realty, Inc. v. East Detroit, 196 F.2d 710 (6th Cir. 1952); Rochester v. Macauley-Fern Milling Co., 199 N.Y. 207, 92 N.E. 641 (1910). *See* Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971). *See also*, Note, *Local Government—A Municipality Has the Power to Regulate by Local Ordinance the Emission of Air Pollutants*, 22 SYRACUSE L. REV. 1173 (1971).

17. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) stated *inter alia* that a presumption of constitutionality is granted a regulation even if some inequality results unless the classification causing the inequality "rests on grounds wholly irrelevant to the achievement of the State's objective." In Standard Oil Co. v. Marysville, 279 U.S. 582, 584 (1929), the Court noted "that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision." A state court noted in Samuels v. Harrison, 195 N.Y.S.2d 882, 885 (Sup. Ct. 1959) that a municipal enactment is presumed to be supported by facts known to the legislative body and the burden of proof rests on one who seeks the declaration of unconstitutionality to demonstrate that the action is unreasonable. When the validity of the action is debatable, the judgment of the legislative body must control. *See also*, Jefferson v. Haskney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); McLaughlin v. Florida, 379 U.S. 184 (1964); Morey v. Doud, 354 U.S. 457 (1957); United States v. Carolene Prod. Co., 304 U.S. 144 (1938); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

18. 220 U.S. 61 (1911).

19. *Id.* at 82.

20. *Id.* at 77.

> burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[21]

Only where a complainant can demonstrate the denial of a "fundamental right"[22] or creation of a "suspect classification"[23] will the Supreme Court add to the basic requirement of a "rational relation," the stipulation that the government show a higher degree of rationality and a "compelling state interest" to justify the action.[24]

Recently the United States Supreme Court has begun a shift away from the strict dichotomy of the "rational relation" and "compelling state interest" tests.[25] During its 1971 Term, the Court in a significant number of cases seemed to approach equal protection cases from a new angle. In seven of the fifteen "basic"[26] equal protection decisions during the term, the Court upheld the constitutionality claim or remanded it for consideration without mention of the "strict scrutiny" formula.[27] After years of adhering to the "rational relation" requirement,[28] the Court now is intervening in governmental actions and

---

21. *Id.* at 78-79.

22. The Court alone determines which interests it will label "fundamental." *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate). *See generally, A Question of Balance, supra* note 14 at 155-56 n.5; Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

23. Suspect classifications are groups which have a special need of protections because they are "discrete and insular" minorities. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938). *See generally*, Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 356-65 (1949).

24. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) wherein the Supreme Court stated that an action "which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional"; Hunter v. Erickson, 393 U.S. 385 (1969).

25. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972) (law prohibiting distribution of contraceptives to unmarried persons voided); Reed v. Reed, 404 U.S. 71, 76 (1971) (statute giving preference to men over women as estate administrators declared invalid). *But see*, Dandridge v. Williams, 397 U.S. 471, 485-86 (1970) (welfare grant ceiling sustained). Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155 (1897). *Accord*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

26. The term "basic" is applied because these cases fit the following criteria: 1) they were decided after argument and with full opinion; 2) the equal protection issue was central rather than peripheral on the face of the prevailing opinion; and 3) the equal protection issue was not within one of the two active areas of equal protection litigation which have developed their own specialized doctrinal offshoots—racial discrimination and reapportionment.

27. James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

28. See text accompanying notes 14-24.

seems to gauge the reasonableness of questionable means used toward a governmental end on the basis of evidence *before the Court*, not on rationalizations created by judicial hypothesizing.[29]

Professor Gerald Gunther[30] suggests that perhaps the Supreme Court is moving toward a new model for analysis of all equal protection cases.[31] The model he proposes would stress the means used by a government scheme, not its ends. Thus, the state could achieve a wide range of objectives. The measure of acceptability of the means would be the purposes chosen by the legislature, not constitutional interests subjectively perceived by the justices. Professor Gunther argues that the strengthened "rationality" scrutiny would curtail the state's choice of means far less severely than the Warren Court's "strict scrutiny" which inquired whether the means were necessary and whether less drastic means were available to achieve the statutory purpose.[32] Professor Gunther prefers the technique focusing on the means used because it allows the Court to judge the purposes and the methods of a governmental action based on evidence actually before the Court. Ultimate value judgments of the legitimacy and importance of supposed legislative purposes thus could be avoided.[33]

Whatever promise of adherence to a perceptible model the 1971 Term may have shown, the 1972 Term of the Supreme Court effectively dispelled Professor Gunther's hope for a predictable approach to equal protection issues. In *San Antonio Independent School District v. Rodriguez*,[34] the Court resurrected its former judicial abdication stance. Rather than stringently applying Professor Gunther's model, suggested by *Mosley*,[35] (judging rational connection on the basis of evidence before the Court), the Supreme Court sustained school finance schemes on a basis which three of the dissenting justices thought reduced "equal protection analysis [to] no more than an empty gesture."[36]

---

29. See the discussion of Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) *supra* notes 18-21 and accompanying text; 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, 21 (1972) [hereinafter cited as Gunther].

30. Gunther, *supra* note 29.

31. Professor Gunther points out that in Chicago Police Dept. v. Mosley, 408 U.S. 92, 95 (1972), the Court tried to formulate a question appropriate to all equal protection cases: "Is there 'an appropriate governmental interest suitably furthered by the differential treatment?'" *Id.* at 17.

32. *Id.* at 21.

33. *Id.* at 21-22, 47-48.

34. 411 U.S. 1 (1973).

35. See discussion at note 31 *supra*.

36. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 68 (1973) (White, J., dissenting).

In *Roe v. Wade*,[37] the Court mentioned the "compelling state interest" requirement once again. Extending the right to privacy to a woman's right to terminate her pregnancy in the first trimester, the justices stated that invasion of that right through prohibitions of abortion can only be justified by a compelling state interest.[38] The Court in *Roe* questioned neither the legitimacy of the legislature's goals nor the rationality of their relation to the challenged statutes, preferring instead to balance the relative weights of the respective interests involved and concluding that the goals of state abortion prohibitions are not important enough to sustain the invasion of a woman's privacy.[39]

During the brief period from 1971 through 1973 the Supreme Court's approach to equal protection cases has varied markedly, but two generalizations concerning the issue remain intact:

1) Where traditional "fundamental rights" or "suspect classifications" are involved, the state must show a compelling interest to justify interference. The Court will balance the interests involved to determine which must prevail.[40]

2) When infringement of other important individual rights is alleged, the Court will generally apply Gunther's modified "rational relation" test to the governmental action, reviewing it to determine whether the means used are appropriate for furthering the legitimate governmental purpose professed.[41]

Determination of which category the Santa Barbara cases best fits depends on whether or not the water moratorium violates individuals' fundamental right or rights. The two possibilities are the right to fair and adequate housing and the right to free travel, including free migration and settlement.

Right To Adequate Housing

Development of the right to housing as a fundamental constitutional right halted in 1972 when the United States Supreme Court held in *Lindsey v. Normet*[42] that the right to adequate housing is not

37. 410 U.S. 113 (1973).

38. *Id.* at 154-55. Recognizing that the state has a compelling interest to preserve human life, the Court allowed for state interference only at a point when the unborn fetus becomes viable, i.e. capable of living outside the womb. *Id.* at 162-63.

39. *Id.* at 152-53, 164-65.

40. Roe v. Wade, 410 U.S. 113 (1973). See discussion of "fundamental rights" at note 22.

41. Reed v. Reed, 404 U.S. 71 (1971). *But see*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

42. Tenants withheld their rent because the landlord had not remedied certain substandard conditions. The landlord threatened eviction so the tenants filed a class action for a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer Statute ORE. REV. STAT. §§ 105.105-160 (1909) was unconstitutional. Applying

a fundamental right under the Constitution. A municipality need only show a rational basis to justify an action which infringes on the right. If proponents of the moratorium convince a court that the action is rationally related to a specific legitimate governmental interest, that is, preservation of the existing water supply for the use of those presently dependent on it and limitation of population density so it conforms with environmental strictures, the right to housing is not likely to present serious opposition to the validity of the ordinance.[43]

Right To Free Travel

The right to free travel, including migration and settlement, is well-established in American law, having been first recognized by the United States Supreme Court in 1849 in the *Passenger Cases.*[44] The Supreme Court developed the concept more fully in 1867 in *Crandall v. Nevada.*[45] In this landmark decision, the Court declared that a state tax placed on stage coaches and railroads, taxing them for each passenger transported out of the state, was an unconstitutional limit on the right to travel between states. Considering the right to travel to the Capitol to petition the government essential to the preservation of a democracy, the Supreme Court could not tolerate infringement of the right.[46] The right to travel between the states has since been expanded to include migration and settlement,[47] as well as intrastate

the "rational relation" standard, the Court stated that: "We do not denigrate the importance of decent . . . housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . . Absent constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not judicial [function]." 405 U.S. 56, 73-74 (1972). Though the Court discussed adequacy of housing, it is reasonable to infer from its application of the "rational relation" test that the Court cannot bring itself to declare the right to housing to be on a par with recognized "fundamental rights" (*e.g.* right to vote, right to free association, right to privacy). The Court sustained the Oregon statute which 1) allows a landlord to bring a suit for eviction within six days after service of complaint unless security for accruing rent is provided, and 2) limits triable issues to the tenant's default (defenses relating to the landlord's failure to maintain the premises are precluded). This statute in essence allows the landlord to evict any tenant after a successful showing in court that the tenant has not paid rent. Therefore, though the Court directly mentioned "decency" and "adequacy" of housing, inherent in its discussion is the recognition that the tenant has no "fundamental right" to a roof over his or her head.

43. The California Supreme Court has declared the obligation to pay rent to be interdependent with the landlord's duty to repair, but the issue was decided from a contract, rather than a constitutional standpoint. Green v. Superior Court, 517 P.2d 1168, 111 Cal. Rptr. 704 (Cal. 1974).

44. 48 U.S. (7 How.) 282, 491-92 (1849).

45. 73 U.S. (6 Wall.) 35 (1867).

46. *Id.* at 48-49.

47. Shapiro v. Thompson, 394 U.S. 618 (1969) struck down the requirement of a one year state residency for obtaining welfare benefits because the Supreme Court

travel.[48]

In *Truax v. Raich*,[49] the United States Supreme Court declared that the right to freedom of travel grew out of the Fourteenth Amendment to the Constitution. The right to travel gained renewed strength in *Edwards v. California*,[50] wherein the Court held unconstitutional a California statute passed at the height of the depression, prohibiting any person from bringing, or assisting in bringing into the state any non-resident of the state, knowing that person to be indigent. The Court held that though it recognized the magnitude of the problem created by the massive influx of migrants into California, there are boundaries to the permissible area of state legislative activity.

> And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.[51]

To allow this statute to stand would "withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity."[52] In *Edwards*, the majority based their finding of unconstitutionality on the commerce clause, but Justice Douglas, joined by Justices Murphy and Black, stated the right to free travel to be an implied right, protected by the Constitution and "fundamental to the national character of our Federal government."[53] A fourth justice, Justice Jackson, found the basis of the right in the privileges and immunities clause of the Fourteenth Amendment.[54]

---

found that the purpose of the waiting period was to discourage persons from entering the state who would likely become burdens on the state welfare program. The Court stated that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible. . . . [T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout . . . our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 629. In Cole v. Housing Authority, 312 F. Supp. 692, 702 (D. R.I.), aff'd, 435 F.2d 807 (1st Cir. 1970), the district court found that a refusal of an application for public housing because of failure to satisfy a two year city residency requirement constituted a very real inhibition upon the constitutionally protected right to travel and could not be used to fence people out of the city.

48. King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971). Supporting a challenge to a requirement that a family reside in the city for five years prior to application for admission to a low income housing project, a federal court stated that the right to travel is derived from constitutional concepts of personal liberty so it "does not depend on the interstate nature of the travel . . . but encompasses movement within a state as well." *Id.* at 648.

49. 239 U.S. 33, 39 (1915).

50. 314 U.S. 160 (1941).

51. *Id.* at 173.

52. *Id.* at 181 (Douglas, J., concurring).

53. *Id.* at 178 (Douglas, J., concurring).

54. *Id.* at 182-83 (Jackson, J., concurring).

In 1966,[55] the Supreme Court further broadened the scope of the right to travel, extending its coverage to actions by individuals as well as government, stating,

> [i]t is important to reiterate that the right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.[56]

The Court made no attempt to pinpoint the origin of the right to free travel, stating that it is a basic human right generally protected by the Constitution as a whole and repeatedly affirmed by the Court in the past. The Court seemed anxious to end the debate over the origin of the right to travel, thus avoiding artificial distinctions among the different forms of travel.[57]

Proponents of the moratorium may argue that Santa Barbara's situation is so drastic that it should be allowed to restrict migration since its action has a negligible effect on national travel. The primary objection to their argument is that reduction of housing starts in any community has national repercussions. An analogy can be drawn to the 1942 case of *Wickard v. Filburn*,[58] in which the Court voiced its concern over restrictions on interstate commerce. The justices declared a wheat farmer's crop, grown solely for the use of his family, to be the proper subject of restrictions imposed for regulation of interstate commerce. Though his crop was trivial in itself, "his contribution, taken together with that of many others similarly situated, is far from trivial."[59]

"Compelling State Interest" Requirement

Under the old "strict scrutiny" standard applied by the Court when a fundamental right is involved, a government action limiting migration and settlement will be upheld only if it can be shown to protect a "compelling and substantial government interest." Once it is determined that a burden has been placed upon a constitutional right, "the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden."[60] The modern test (suggested in *Roe v. Wade*[61]) would balance the importance of the community's compelling interest against that of the individual interest it al-

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

56. *Id.* at 760 n.17.

57. *Id.* at 759.

58. 317 U.S. 111 (1942).

59. *Id.* at 127-28. *Accord*, United States v. Darby, 312 U.S. 100, 123 (1941).

60. Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (Harlan, J., dissenting and concurring) (dealing with the power of states to regulate voting).

61. 410 U.S. 113 (1973). See text accompanying notes 37-40 *supra*.

legedly abridges.[62] If Santa Barbara's moratorium is to stand against constitutional attack, its proponents must affirmatively show that protection of the environment and the obligation to supply water to present residents comprise a compelling interest which will prevail when balanced against potential residents' right to settle in the area. If, however, the Court revives its old "strict scrutiny-compelling interest" standard, its proponents additionally will be required to show that the municipality has reasonable access to "no less intrusive means"[63] of accomplishing its objective.

Considering its present water supply only, the municipality should be able to show that its obligations to present consumers, both residential and agricultural, fulfill the compelling interest requirement; for extension of its water to the use of newcomers would result in a shortage during summer months. In normal years, such a shortage would simply require mandatory water rationing for four or five months of the year. In years of light rainfall, however, the situation would be grim; there would be insufficient water for the heavy agricultural demands, with orchards and livestock dry and residential and commercial water use reduced to bare necessity only. The community which now seems a paradise to its residents could well turn into a wasteland similar to that of the 1860's when the land became essentially useless for a period of over five years.

Although the general rule applied by the courts to public utilities is that a public utility must serve on reasonable terms all those who desire the service it renders,[64] and may not arbitrarily discriminate against members of the public,[65] discrimination as to service may be based upon a reasonable classification.[66] The right of inhabitants of a municipality to compel extension of service to them is not an absolute and unqualified right; it is based to a large extent on the reasonableness of the demand.[67] Because a public utility may not dis-

62. See text accompanying notes 25-41 *supra* for discussion of the Supreme Court's new technique for handling equal protection cases. The Court's 1973-74 Term has been conspicuously lacking in references to equal protection. *E.g.*, Lau v. Nichols, 94 S. Ct. 786 (1974) (the Court focused on the violation of the Civil Rights Act of 1964, ignoring the equal protection challenge); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 94 S. Ct. 407 (1973) (the due process rational relation test applied instead of equal protection).

63. Oregon v. Mitchell, 400 U.S. 112, 238 (1970).

64. United Fuel Gas Co. v. Railroad Comm., 278 U.S. 300, 309 (1929).

65. Elk Run Tel. Co. v. General Tel. Co., 160 N.W.2d 311, 314 (1968).

66. Bilton Mach. Tool Co. v. United Illuminating Co., 110 Conn. 417, 426, 148 A. 337, 340 (1930).

67. Lukrawa v. Spring Valley Water Co., 169 Cal. 318, 332-33, 146 P. 640, 646 (1915). Factors which enter into the determination of the reasonableness of a demand for an extension of service include the need and cost of the requested extension, and

continue service to consumers, knowing they are dependent on the service,[68] a refusal to extend service to new customers would seem reasonably justified when the resource demanded becomes limited. When there is barely enough water to service present users, refusal to inconvenience them by adding additional burdens to the water system surely cannot be termed arbitrary and discriminatory.

Taking into consideration only the present water available to the Santa Barbara area, there seems to be a sufficient basis for the refusal to allow any further water hookups. Weighed against non-residents' right to settle in the area, the community's interest appears the more substantial.

Use of the available water supply is not, however, the sole path open to the community. Santa Barbara County has access to leased water from the Feather River Project which has been adopted by several California counties.[69] Absent the desire on the part of Santa Barbara citizens to inaugurate this project,[70] a court must determine whether the community's legislative body, which has weighed ecological considerations against the economic advantages of further growth, may be forced to adopt an expensive and limited program to allow for unwanted expansion in population.[71] The court must balance non-residents' right to travel against residents' right to preserve the integrity of their environment.

Right To Preserve Environmental Quality— The Challenge Answered

The environmental impact of further growth is of particular importance to the Santa Barbara area. The mountains to the north and ocean to the south prevent development in two directions, forcing an east-west sprawl potentially on a par with that existing in the Los An-

---

the advantage to the public to be derived from it. Cedar Island Improvement Ass'n v. Clinton Elec. L. & P. Co., 142 Conn. 359, 365, 114 A.2d 535, 538 (1955).

68. Sawyer v. City of San Diego, 138 Cal. App. 2d 652, 657, 292 P.2d 233, 239 (1956).

69. The project pipeline presently ends in Northern San Luis Obispo County, a substantial distance north of the Goleta County Water District boundary. SANTA BARBARA COUNTY WATER AGENCY, INVESTIGATION OF STATE WATER RESOURCES DEVELOPMENT SYSTEM AS A SOURCE OF SUPPLEMENTAL WATER FOR SANTA BARBARA COUNTY 100 (1961) [hereinafter cited as INVESTIGATION].

70. Since the 1972 moratorium, the citizens of the Santa Barbara area have refused to approve water importation by ballot and observers predict they will renew their refusal in 1974.

71. The term "limited" is appropriate here because Santa Barbara County has contracted for a set amount of water per year from the project. It may not obtain a larger allocation unless another participating county agrees to sell part of its allotment. LEEDS, HILL & JEWITT, *supra* note 11 at IV-3.

geles Basin. Extension of the population over a long, narrow area makes the job of supplying all public services doubly difficult and expensive. The mountain range traps any existing smog, intensifying its effect. The area traditionally has been argicultural; the mild climate is ideal for production of a large variety of citrus fruit, as well as avocados and year-round lettuce. The total loss of these orchards and fields to housing developments not only would deprive the area of its semi-rural atmosphere, but would exert a significant influence on the supply of this produce to Southern California consumers.

Recognition that environment plays an important part in a municipality's land use planning is not new. In 1926, the United States Supreme Court in *Village of Euclid v. Ambler Realty, Inc.*,[72] declared that a community may dictate the speed and pattern of its growth, though unfettered growth in the past had been permitted or even welcomed. At the time of this case, the Village of Euclid adjoined Cleveland and was practically a suburb of that city, though the greater part of the municipal area was comprised of farm lands and unimproved acreage. The village inaugurated a comprehensive zoning plan which substantially interfered with appellee's use of the large tract of land he owned within the municipal boundaries.[73] Regarding the village's ordinance as within the general scope of municipal power and a valid exercise of its authority, the Court upheld the validity of the ordinance with the following statement:

> Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained . . . [which] half a century ago probably would have been rejected as arbitrary and oppressive . . . . And in this there is no inconsistency, for while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.[74]

Official interest in ecological preservation has grown markedly in recent years. On the federal level, Congress has commanded federal and local governments to study carefully the environmental impact of any programs they adopt before proceeding, and to begin an affirmative action policy to

> attain the widest range of beneficial uses of the environment without degradation, risk to health or safety . . . ; [and] achieve a balance between population and resource use which will permit high standards of living and wide sharing of life's amenities.[75]

72. 272 U.S. 365 (1926).

73. *Id.* at 379-83.

74. *Id.* at 387.

75. National Environmental Policy Act., 42 U.S.C. § 4331(b)(3), (5) (1970). More recently, Congress passed the Coastal Zone Management Act of 1972, 16 U.S.C.

On the state level, the people of California with a 1972 referendum approved the Coastline Initiative to preserve the California coastline and areas contiguous to it from further damage.[76]

Recognizing the popular concern over increasing population overshadowing the necessity for clean, well-balanced ecological surroundings, courts have increasingly found environmental considerations relevant to upholding a municipality's land use restrictions. Proper planning of land use and population concentration is a natural extension of the traditional goals of police power and eminent domain power to promote the public health, safety, and welfare.[77] Consequently, the scope of the police power has broadened considerably over the years without judicial interference except in extreme cases of abuse of the power. In *Berman v. Parker*,[78] for example, the United States Supreme Court stated:

> The concept of public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as

§§ 1451-64 (Supp. 1973), in recognition of the need for maintaining the natural virtues of coastal zones.

76. Known officially as the California Coastal Zone Conservation Act of 1972, the law now comprises CAL. PUB. RES. CODE §§ 27000-650 (West Supp. 1974). The statute defines the coastal zone and outlines criteria for a statewide plan intended to preserve the coastal ecosystem for the present and future enjoyment of the public. The stated objective of the California Coastal Zone Conservation Plan are: 1) the overall quality of the coastal zone environment will be maintained, restored, and enhanced (*Id.*, § 27302(a)); 2) all species of living organisms will continue to exist (*Id.*, § 27302(b)); 3) an orderly, balanced utilization and preservation of coastal zone resources will be maintained (*Id.*, § 27302(c)); 4) irreversible, irretrievable commitments of coastal zone resources will be avoided (*Id.* § 27302(d)). For a further outline of the California Coastal Zone Conservation Act of 1972 and the Federal Coastal Zone Management Act of 1972, see Note, *Saving the Seashore: Management Planning for the Coastal Zone*, 25 HASTINGS L.J. 191 (1973).

77. Berman v. Parker, 348 U.S. 26 (1954). In Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895, 897-98 (N.D. Cal. 1971), a federal court recognized the authority of the municipality to conduct urban planning, including preservation of natural amenities of the urban landscape. The court noted the growing use of green belts, scenic easements, and planned unit developments as a means for accomplishing these goals. Stating that such matters are the province of the local community involved, the court was loathe to interfere with the judgment of the local authorities except in the most extreme cases. The court in Steel Hill Dev., Inc., v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), extended the municipality's duty to promote public health, safety, and general welfare under its police power to prevention of proposed large scale development that would "have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of this small town, [and] pose substantial financial burdens on the town for police, fire, sewer, and road service." *Id.* at 961. Feeling uncertain as to how to attain the right balance between ecological and population pressures, the court allowed the statute to stand as a "legitimate stop-gap measure." *Id.* at 962. *Cf.* Village of Euclid v. Ambler Realty, Inc., 272 U.S. 365, 387 (1926).

78. 348 U.S. 26 (1954).

> well as monetary. 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.[79]

More recently, a New York court in *Nattin Realty, Inc. v. Ludewig*[80] defined in clear terms the necessity of considering the factor of ecology as a criterion in reviewing municipal legislation:

> Respecting ecology as a new factor, it appears that the time has come—if, indeed, it has not already irretrievably passed—for the courts . . . to take "ecological notice" in zoning matters . . . . [Municipal regulations] prompted by such environmental considerations may appreciably limit the uses and profitability of land; yet if both factors were to be placed upon the scales, the *pro bono publico* considerations must prevail.[81]

Other state courts, including those of Wisconsin, Minnesota, Oregon, and New Jersey, have gone so far as to declare preservation of the quality of a community or neighborhood, to protect property values or scenic beauty, to be a valid basis for exercise of the municipality's police power.[82] The rationale of these courts is a logical extension of the traditional legal philosophy that a private land owner's use of his or her property must be subordinate to the interests of the public

---

79. *Id.* at 33.

80. 67 Misc. 2d 828, 324 N.Y.S.2d 668 (Sup. Ct. 1971).

81. *Id.* at 832, 324 N.Y.S.2d at 672.

82. State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W. 2d 217 (1955) extended municipal police power to promoting public convenience and general prosperity, as well as public health, morals, or safety. Protection of property values in a neighborhood was included in the former categories and regarded as a legitimate objective of a municipal ordinance. In State *ex rel.* Berry v. Houghton, 164 Minn. 146, 150, 204 N.W. 569, 570 (1925), *aff'd*, 273 U.S. 671 (1927), the Minnesota court noted that, "The police power, in its nature indefinable, and quickly responsive, in the interest of common welfare, to changing conditions, authorizes various restrictions upon the use of private property as social and economic changes come. A restriction, which years ago would have been intolerable . . . is accepted now without a thought that it [unconstitutionally] invades a private [property] right. As social relations become more complex restrictions on individual rights become more common." To the question of "whether a city can wholly exclude a use of property on the ground that the use is offensive to aesthetic sensibilities," the court answered, "yes," in Oregon City v. Hartke, 240 Ore. 35, 43, 400 P.2d 255, 262 (1965). Upholding a minimum lot zoning, the court in Fischer v. Bedminster Township, 11 N.J. 194, 205, 93 A.2d 378, 384 (1952), stated, "there would appear to be ample justification for the ordinance in preserving the character of the community, maintaining the value of property therein and devoting the land throughout the township for its most appropriate use." The "police power" mentioned in the text refers to the authority of federal, state, and local government to impose regulations on, or seize by means of eminent domain (using due process and, in the case of seizure, with just compensation to the owner), private property if such action is taken in reasonable furtherance of public health, safety, and general welfare.

as a whole.[83] The issue becomes whether this philosophy can be extended to the situation in the Santa Barbara area in support of the community's decision to restrict permanently presently undeveloped areas to their traditional agricultural use by refusing to furnish water for residential, commercial, or industrial development.

Compliance with the contention of opponents of the water moratorium that further development should be allowed despite the area's geographical inability to handle additional growth appears unwise if the advice extended by various environmental study commissions is heeded. In 1971, the California Environmental Quality Study Council reported that

> [w]e simply have to slow down our growth and stabilize the population of our regions according to their carrying capacities. This may be hard to accomplish, for growth has served us well in this country since its beginnings. But the harsh reality is that unrestrained growth and environmental quality have become incompatible.[84]

Some environmental scholars insist that each community and geographical area has a different capacity for growth and that eventually a community must be allowed to prevent its own destruction by halting development, thereby balancing available resources, both land and water, with population growth.[85] As a coastal community, Santa Barbara has an additional burden; for its ecosystem is particularly sensitive to imbalance and destruction. California citizens by referendum in 1972 expressed their concern that the unique and fragile beauty of coastal areas be preserved.[86] Their mandate makes Santa Barbara's responsbility as a coastal community clear and pressing.

The Santa Barbara area has developed rapidly over the last ten years, some observers might say too rapidly. If the water shortage had been fully recognized in time, development could have been slowed years ago to avoid the need for this abrupt halt. Area residents and their municipal officials, enamored with the prosperity accompanying growth, failed to recognize the danger until two succes-

83. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1927); Mugler v. Kansas, 123 U.S. 623 (1887); Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126 (N.D. Ind. 1973).

84. Lamm & Davison, *supra* note 5, at 3.

85. "If we are to live in harmony with that which has been given to us from preceding generations and from the earth before man, we must make certain assumptions with respect to every available piece of land in the United States: each is intrinsically suitable for certain uses. . . . Any area is vulnerable to serious, permanent and irreparable damage if development ignores naturally imposed environmental constraints. Any law regulating the use of land must include protection of natural resources as an element of human welfare." V. YANNACONE, JR., B. COHEN, & S. DAVISON, 2 ENVIRONMENTAL RIGHTS AND REMEDIES 556 (1971) [hereinafter cited as YANNACONE, COHEN & DAVISON]. *See also*, Lamm & Davison, *supra* note 5.

86. CAL. PUB. RES. CODE §§ 27000 et seq. (West Supp. 1974).

sive years of light rainfall caused the reservoir to drop drastically enough to frighten even the most adamant supporter of the growth which brought wealth to the community. The consequent emergency required immediate action—the moratorium seemed the only course open to the thirsty community. The issue of whether the moratorium should stand, thus stopping growth in an area which could quickly outgrow its water resources, can be resolved by looking to prior cases of growth limitation.

California courts have demonstrated a policy of allowing municipalities to limit growth in certain areas which are unable to support the burden imposed by concentrated use, though they have never extended this reasoning to the closing of an entire community. One of the most recent cases of limited growth restriction is *Confederacion de la Raza Unida v. City of Morgan Hill.*[87] The city of Morgan Hill, California, adopted a zoning ordinance intended to regulate and restrict housing density in certain hilly areas. The city recognized the inherent geological instability of the areas affected and imposed the restrictions to preserve the physical and aesthetic character of the foothills.[88] Plaintiffs challenged on the grounds of racial discrimination the refusal to grant a variance for low cost, multi-unit housing on a tract in the area restricted by the ordinance.[89] Noting its reluctance to interfere with the judgment of local authorities, the court rejected plaintiffs' allegation of racial discrimination and upheld the ordinance, allowing aesthetic considerations as a valid basis for the restriction of growth in areas peculiarly sensitive to physical or aesthetic damage.[90]

In 1971, Associated Home Builders of the Greater East Bay, Inc. challenged the constitutionality of a statute authorizing cities and counties to require dedication of land or payment of fees as a condition of approval of a subdivision plan, and of a Walnut Creek ordinance thereunder.[91] The California Supreme Court upheld the statute and the ordinance, stating that total city needs are a proper consideration in imposing land use regulations, in addition to the rational connection of the regulations to the proposed subdivision.[92]

87. 324 F. Supp. 895 (N.D. Cal. 1971).

88. *Id.* at 896.

89. *Id.* at 896-97.

90. *Id.* at 898.

91. Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

92. "A subscriber who . . . [is] seeking to acquire the advantages of subdivision . . . [has] the duty to comply with reasonable conditions for dedication so as to conform to the welfare of the . . . general public." *Id.* at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634. *Accord,* Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949). *See generally,* Fitzgerald, *The Regulation of Subdivisions,* 14 WM. & MARY L. REV. 249 (1972).

If the courts will allow restriction of certain areas as in *Morgan Hill* or in the case of municipalities which declare certain parcels of land to be green belts,[93] a proponent of Santa Barbara's moratorium may argue that in light of the obvious physical limitations imposed on Santa Barbara by its geography, it is logical to extend this reasoning to recognize the community's right to halt further burdens on its already overburdened land and water resources.[94] A decision to allow the moratorium to stand, thereby substantially eliminating migration to the area, may be fiercely criticized by opponents of the moratorium. The value of undeveloped property, locked into agricultural use by the moratorium, would plummet while property values in developed areas with access to sufficient water for residential, commercial, or industrial use would climb markedly. To the owners of developed property, such a result is highly desirable. The use of public welfare as a rationale for actions with purely selfish motives is frequent and a Pennsylvania court has remarked,

> it must always be ascertained at the outset whether, in fact, it is the *public* welfare which is being benefited or whether, disguised as legislation for the public welfare . . . [an] ordinance actually serves purely private interests.[95]

In even stronger terms, the same court rejected altogether population growth controls by a community:

> A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.[96]

---

93. CAL. GOV'T CODE §§ 35009-09.1 (West 1968). California empowers cities and counties to use zoning to regulate open space for recreation and use of natural resources (*Id.* § 65850(a) (West Supp. 1974), *amending* (West 1966)). Its cities and counties are required to adopt local open space plans to provide for "comprehensive and long range preservation and conservation of open space land within their jurisdiction" (*Id.* § 65563 (West Supp. 1974), amending (West 1966)), and such open space plans must include specific implementing programs. General plans of local planning agencies must consider open space requirements and provide for the conservation, development, and utilization of natural resources (*Id.* § 65302(d)-(e) (West Supp. 1974), *amending* (West 1966)).

94. *But see*, Construction Indus. Ass'n v. Petaluma, Civil No. 73-663 (N.D. Cal., filed Apr. 24, 1973), in which real estate developers challenged the constitutionality of parts of an official plan of the City of Petaluma (known as the "Petaluma Plan") designed to limit urban growth. The stated purpose of the plan was to preserve the city's small town character and its surrounding open space by setting the growth rate at approximately 500 units per year, discouraging high density housing, and establishing a greenbelt park on the eastern and northern edges of the city. Finding a substantial infringement of the right to travel, a federal court has declared the "Petaluma Plan" invalid. Appeal of the decision is probable.

95. National Land and Inv. Co. v. Easttown, 419 Pa. 504, 530, 215 A.2d 597, 611 (1965). *Accord*, Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970); Girsch Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

96. National Land and Inv. Co. v. Easttown, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965).

A New York state court expressed similar concern that community restrictions on building would limit the free mobility of nonresidents but upheld a comprehensive community plan developed to significantly limit the density of land use by the Town of Ramapo.[97] Pennsylvania seems to stand alone in its rabid fear that individual municipalities, if permitted to limit population growth to suit the capacity of the land and resources, will eventually restrict individuals from moving at all.

One significant federal case on the subject is *Steel Hill Development, Inc. v. Town of Sanbornton.*[98] The court in *Steel Hill* warned that "[w]here there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channelled by the happenstance of what town gets its veto in first."[99] Despite its reservations, the court did admit that a municipality has an affirmative duty to promote public health, safety, and general welfare, including the prevention of abnormal growth. The town's refusal to permit the building of increasing numbers of summer and weekend homes because it would change the rural character of the area, cause pollution of a nearby lake, and increase traffic and air pollution was upheld.[100]

The law dealing with land use and other growth controls is in a state of change. One eastern state has rejected the concept that a community might limit growth in the interest of promoting safe, healthful, and aesthetically pleasing surroundings,[101] despite the policy announced by the National Environmental Policy Act, encouraging an affirmative duty on the part of each municipality to do so.[102] Another eastern state has voiced its concern that community growth limitation necessary to preserve the environment will unconstitutionally restrict travel, though the courts interpreting that state's laws seem unsure ex-

97. Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). *Cf.* Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969) (restrictions on land use may not permanently prevent the reasonable use of private property for the *only purposes to which it is practically adapted*, but the municipality may place restrictions on land use which are reasonably related to an over-all general plan to promote the ultimate good of the municipality as a whole).

98. 469 F.2d 956 (1st Cir. 1972).

99. *Id.* at 962.

100. *Id.* at 960, 963.

101. National Land and Inv. Co. v. Easttown, 419 Pa. 504, 215 A.2d 597 (1965). "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid." *Id.* at 504, 215 A.2d at 612.

102. 42 U.S.C. § 4331(b)(2) (1970).

actly how to handle the problem.[103] California courts have only gone so far as to allow restriction of population density within certain areas of a municipality, based on naturally imposed limitations.[104] The problem is serious. Awareness of the ecological crisis cannot help but prompt strong sympathy for the community which, blessed with an idyllic environment, suddenly awakens to the threat of destruction or damage to the ecological balance that continuing population growth must inevitably cause. No wonder the people of Santa Barbara are uneasy when, remembering that only ten years ago they enjoyed the delights of a small town set on a warm, clean coastline, they now see their paradise disintegrating before them simply because the demands on the area are becoming too great. Los Angeles and its unbreathable air, dying trees, and congested freeways, lies only one hundred miles to the south, a grim reminder to all Santa Barbarans of what their community will surely become if accelerating growth held at bay by the moratorium is resumed.

Viewed from another angle, the water moratorium effectively reduces the opportunity for new housing in the area nearly to zero, thereby substantially interfering with the right of outsiders to travel to and settle in the community. On a balance with the right to travel, the judicial history of environmental rights is short and its origin in the Constitution vague. The Ninth Amendment of the United States Constitution reserves to the people additional rights unnamed in the instrument itself.[105] Some legal scholars have suggested that it is in the Ninth Amendment that we should seek support for environmental rights.[106] Whatever its pedigree, American courts and legislatures show increasing respect for environmental quality and the individual citizen's right to a pleasant and healthy environment.

Injunctive Relief

The form of relief sought by challengers of the Santa Barbara moratorium has an impact on the case. A prohibitory injunction orders cessation of a harmful action; a mandatory injunction orders commencement of an affirmative action.[107] Since the object of the suit

103. Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972).

104. Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971). *Cf.* Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

105. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

106. 1 YANNACONE, COHEN & DAVIDSON, *supra* note 85, at 65-81; *citing*, Colorado Anti-Discrimination Comm. v. Case, 151 Colo. 235, 380 P.2d 34 (1962); 2 YANNACONE, COHEN & DAVISON, *supra* note 85, at 267.

107. W. DE FUNIAK, HANDBOOK OF MODERN EQUITY 15 (2d ed. 1956).

would be to compel the municipality to offer to new developments continuing water service, a mandatory injunction is necessary. Courts have long followed the doctrine that injunctions ought not be granted unless *absolutely necessary* for the protection of constitutional rights.[108] Courts are even more reluctant to grant injunctive relief where the action of a governmental agency acting within the scope of its authority is involved,[109] particularly if the injunction would necessitate a municipality's appropriation of tax funds or imposition of obligations on the government to use its resources in a particular affirmative manner.[110] Compliance with the injunction would force the city to immediately seek new water resources to fill the needs of potential residents.[111] Several solutions have been suggested, the most practical of which is the Feather River Project mentioned earlier.[112] Construction of necessary pipelines and other facilities for carrying, treat-

108. *E.g.*, Hague v. CIO, 307 U.S. 496 (1939); *Ex parte* Young, 209 U.S. 123 (1908).

109. Monroe v. Pape, 365 U.S. 167 (1961).

110. Barnes v. Gadsden, 174 F. Supp. 64 (D. Ala. 1958).

111. Res. 714, Goleta County Water Dist. Bd. of Directors (Dec. 7, 1972), presented the following statistics:

	Acre Feet	
Total Ground Water	200,000	
Safe Use	50,000	
Total Available Water (annually)	16,531	(5800 safe yield from ground water plus 10,731 allocation from Cachuma Project)
Present Demand	17,800	

Overdraft, *i.e.*, dipping into the ground water at a rate greater than the safe yield (amount replaced by rainfall, seepage, etc.) can be done safely over a period of time to a maximum of 50,000 acre feet. LEEDS, HILL & JEWITT, INC., GOLETA COUNTY WATER DIST. WATER MGMT. PROGRAM PHASE I 21 (Apr. 19, 1969), warned that there was no available information to indicate whether or not deep-seated brines and other minerals might intrude into the ground water body if the levels were reduced further by overdraft. Limited overdraft to fill needs of present residents in years when demand exceeds available water likely would not exceed the 50,000 acre feet safe use level, but demands of additional residents would certainly do so. The district set the annual increase in demand (prior to the moratorium) at 850 acre feet per year.

112. The Feather River Project, officially known as "The State Water Resources Development System," was authorized by the California legislature in 1959 and by the voters in the 1960 general election, CAL. WATER CODE § 11260 (West 1967). The authorized facilities consist of storage works in Northern California and an aqueduct system to convey surplus Northern California water southward to service areas in the San Joaquin Valley, Central Coastal area, and Southern California. The aqueduct system is to eventually include a coastal aqueduct leading from the main aqueduct into the San Joaquin Valley, westward into San Luis Obispo County, and southward to Santa Barbara County, enabling delivery of the imported water to those two counties as well as to a portion of the Antelope Plain area in Kern County. INVESTIGATION, *supra* note 69 at 100.

ing, and distributing the water will necessarily cost area taxpayers a great deal of money and the first drop of water from the project could not reach Santa Barbara for five years or more.[113] Because the water obtained from the project is a set allocation,[114] any forcing of residents of the Goleta County Water District to institute the project will not alter the situation substantially; it will delay solution of the water shortage to a later date. When the area's needs consume additional water provided by the project, another moratorium must be declared; for the community's only reserve tank will be empty. Area residents have refused this alternative,[115] possibly because of the expense, possibly because it postpones the problem instead of solving it. Will a court consider area residents' desire to preserve their environment sufficiently compelling, when balanced against nonresidents' right to travel, to justify a permanent interference with population growth?

Conclusion

Santa Barbara has become a battle ground for two formidable opponents: the well-established right to travel meets head-on with a young, but increasingly strong contender, the right to a balanced ecology. There is no longer room for compromise; for the crowd has gathered and the bell sounded. A wise court must act as referee in determining which will prevail.

A look to the recent trend in the United States Supreme Court's handling of equal protection cases may provide a preview of the proper procedure for the heavyweight bout. As the two contenders don their gloves, the court will likely set in place its scale of justice and stack on each balance the merits of the conflicting interests.[116]

The right to free travel has substantial judicial standing. The right to environmental quality and ecological balance is relatively new and regarded by some as desirable but not altogether essential. This spectator concludes that a court will hold the moratorium unconstitu-

113. LEEDS, HILL & JEWITT, *supra* note 11 at IV-3.

114. The allocation for the entire county, including five water districts, is per year 1200 acre feet in Year 1, increasing to 10,900 acre feet by Year 5, and further increasing to the maximum of 57,700 acre feet in Year 11. The contract allows for some flexibility in the delivery schedule, but provides for no stretching of the maximum. The allocation must be equitably divided among the five districts, all of which have similar growth difficulties. *Id.*

115. Goleta County Water Dist. Bd. of Directors, Minutes of Nov. 30, 1972 at 3. Public support was voiced in favor of water rationing when necessary, termination of new hookup permits, and requirement of public approval of any supplemental water supplies. The Responsible Water Policy Ordinance was instituted as of May 15, 1973, by voter referendum. It formally established as public policy the community sentiment.

116. *See* Reed v. Reed, 404 U.S. 71 (1971). *See also,* Gunther, *supra* note 29, at 18-37.

tional and compel the municipality to obtain sufficient water elsewhere to service future building. It is hard for even the most forward-looking court to realize that the time must come when water and other natural resources will no longer be plentiful. A stubborn faith in the ability of our technological and scientific expertise to bail us out of trouble supports the assumption that by the time the water purchased through the Feather River lease is consumed, Santa Barbara and other communities similarly situated will have access to an alternative water supply. Recent experience with the shortage of fossil fuels should awaken an awareness that no natural resource is unlimited and that we must adjust our lives, even giving up important conveniences and "necessities," to adapt to available supplies.

Perhaps this heavyweight match will be rescheduled for the date when the Santa Barbara area's water supply, including imported water, has been committed totally. In the interim, the people of the county must inaugurate a strict plan for intelligent land use. Such a plan should allow for an even balance of residential, commerical, industrial, and recreational use and avoid reaching the second crisis stage where there is, finally, no room for additional water consumers.

The only true solution to the problem lies in a program sponsored by the state government to distribute the total state population density evenly throughout the state, allowing for lighter density in areas like Santa Barbara which cannot support heavy building.[117] Humankind has been given a unique opportunity to choose whether the species will drown in its own sewage, be buried in its own garbage, choke to death on air it cannot breathe, or be driven to homicide or suicide by the noise surrounding it.[118] The time has come when the state government must take the situation in hand and, in cooperation with other states and the federal government, prevent the uneven population distribution which causes high density in some areas which cannot tolerate it and density in other areas far below their capacities.

Land use planning on a state and national level is vital. A carefully balanced mixture of land use techniques and powers can often balance private economic interests and the public benefit. The state can influence zoning patterns to discourage the kind of development

117. "Conflicts among the rights of an individual landowner, his neighbors, and the community should be resolved by the unit of government best able to take into account broad regional interests. Urban growth has outstripped the ability of small government units to handle environmental decisions that have metropolitan, regional, or even state-wide impact. . . . Americans are recognizing the need to examine carefully what government can do to assure that land is treated as a resource to be managed and not merely as a commodity to be marketed." GRAD, *supra* note 8 at 8-10.

118. *See*, 1 YANNACONE, COHEN & DAVISON, *supra* note 85, at 1-3; GRAD, *supra* note 8, at 1-6-1-7.

that over-taxes the local environment or costs more in municipal spending that it will pay in property taxes. Subdivision controls can permit cluster development and require open space preservation.

Exercise of the power of eminent domain by federal, state, and local government to purchase land in scenic areas like Santa Barbara can allow for preservation of the land in its natural state for controlled use by the public.

A final incentive for preservation of open space in areas which will not tolerate heavy population concentration includes a variety of state and federal tax benefits. Low property taxes can be extended to landowners whose property is desirable for development (and thus normally taxed heavily) to take pressure off them to sell the land if they contract to hold the land in its natural or agricultural state for a given number of years. Gifts of desirable land to the public should be assessed liberally when determining their value for income tax deduction purposes.

A number of states have state planning commissions for determining the best use of land throughout the state.[119] Such a plan could be adopted on a national scale. A nationwide land use plan would place some burden on free travel, but it would be a burden shared by all Americans equally. Thus, there would be no denial of equal protection. All would be equally free and equally burdened in exercising their right to travel.

---

119. *See, e.g.*, HAWAII REV. STAT. § 205-2 *et seq.* (1968 Supp. 1970), which divides all lands in the state into four categories: urban, rural, agricultural, and conservation. *See generally* GRAD, *supra* note 8, at 8-1 *et seq.*