Kant, Ideal Theory, and the Justice of Exclusionary Zoning*

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I. AN INTRACTABLE PROBLEM OF JUSTICE AND THE QUESTIONABLE PROMISE OF IDEAL THEORY

The place I have in mind is Mount Laurel, New Jersey, and the time the mid- to late 1970s. But with minor variations in detail, the description I give below fits a great many of today’s wealthy American suburbs equally well. Likewise, the question I raise could be asked as easily about them as about the Mount Laurel of twenty years ago. A New Jersey town near Camden and Philadelphia, Mount Laurel originally was a farming community. During the 1960s and early 1970s, though, new highways made it convenient to larger cities, and it became a popular home for upper-middle-class professionals commuting to urban jobs.

With the change in Mount Laurel’s population came the adoption of new land-use ordinances to govern building in the town’s residential zones. Among other restrictions, the ordinances limited new dwellings to single-family, detached houses, imposed substantial lot-size requirements, and permitted only one house to be built per lot. Relatively inexpensive apartments and mobile homes were expressly excluded. Lot-size requirements further encouraged developers to build larger, higher-priced houses and drove up the price of smaller ones. As a consequence, housing affordable to low-income people was virtually unavailable in Mount Laurel.

And why did Mount Laurel adopt such ordinances? At base, said the town’s attorneys, at a trial addressing charges by the National Association for the Advancement of Colored People (NAACP) that the regulations unconstitutionally excluded low-income people from the community, the ordinances were meant to promote the present and future interests

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of the town and its residents. In particular, they were designed to insure that land was employed in ways likely to produce the most substantial tax revenues to finance schools, police, fire, and other municipal services. They also were structured to prevent certain environmental hazards to town lands and to preserve the quiet, domestic character of Mount Laurel neighborhoods.1 Of course, the reasons Mount Laurel advanced may not have been its genuine or only reasons for passing and defending the zoning ordinances. In particular, it well may have had the aim of excluding some races, cultures, and economic backgrounds from its population. Nevertheless, for purposes of argument I will assume throughout that the reasons stated here and elaborated and examined at the end of my discussion are among those typically underlying exclusionary zoning ordinances. Where exclusion itself, especially on racial, cultural, or class grounds, is the aim, a different and simpler analysis would be required.

Courts and others throughout the United States have had difficulty in determining whether municipalities justly can adopt exclusionary zoning ordinances, as they have come to be called. (I assume, for simplicity’s sake, that the constitutional issues in these cases really boil down to questions of justice.) The difficulty can be summed up like this. On the one hand, if municipalities are allowed to enact exclusionary zoning ordinances, they effectively will prevent certain segments of the nation’s population from residing within their boundaries. This exclusion is especially troubling in areas where the ordinances are common, where nearly every well-to-do suburban town has enacted one. For in these areas, the less-well-off are excluded not just from a particular town in which they might, for whatever reason, wish to live, but from the quality schools and other municipal services, not to mention the safe and pleasant surroundings, that often are a benefit of suburban (as opposed to urban or rural) living.

On the other hand, to outlaw such ordinances is to prevent the municipality from taking steps it deems necessary to promote what we might well agree is the welfare of its citizenry. And this is a legitimate municipal goal if ever there was one. So there seems to be no way at all to decide which of these perfectly legitimate interests local zoning ordinances ought to serve.

The exclusionary zoning dilemma is a practical problem of justice with which we require assistance. We risk doing injustice to the disadvantaged if we maintain restrictive ordinances and risk unduly limiting government’s efforts to address legitimate concerns for the general welfare.

1. I take my example from Southern Burlington County NAACP v. Township of Mount Laurel (Mt. Laurel I), 336 A.2d 713 (NJ 1975). Other leading cases on exclusionary zoning include Berenson v. Town of New Castle, 341 N.E.2d 236 (NY 1975); Surrick v. Zoning Hearing Board of Upper Providence, 382 A.2d 105 (PA 1977); Britton v. Town of Chester, 595 A.2d 492 (NH 1991).
if we do not. Moreover, it is not an issue we likely will be able to address successfully simply by well-informed and unbiased appeal to moral intuition. The problem is precisely that even when we understand the facts and see the alternatives clearly, we are at an impasse; we cannot determine how justly to resolve competing claims.

This should be just the sort of case where what I will call an ideal theory of justice can be of assistance. By an ideal theory, I mean one that assumes, in enunciating principles of justice, that human beings and the world are both simpler and better than we know them to be. By simplifying and improving on the characteristics of actual human beings and the world in which they live, ideal theory can better explain what concerns are of primary importance in answering questions of justice and can emphasize the special role these must play in our deliberations.2

A theory providing this sort of explanation and guidance seems to be just what the exclusionary zoning issue cries out for. Where our everyday moral intuitions are so conflicted and confused, we require a tool that will help us rise above the messy tangle of facts that is our world and see clearly what we must do and why. Ideal theory is the way out of our troubling and dark dilemma and into the bright and cloudless dawn of justice.

But is it? Many critics (among them particularists, Wittgensteinians, some feminists, and no-nonsense, tell-it-like-it-is lawyers) proclaim the failure of ideal theory as a practical guide in solving otherwise intractable problems. Ideal theory cannot help us, they say, because it ignores morally relevant features of our situation. To put the point more technically, ideal theory engages not just in harmless abstraction (overlooking morally irrelevant details of the human situation) but in full-blown idealization; it ignores features we all agree are morally significant in the analysis of concrete practical problems of justice.

As they stand, ideal theories indeed are inadequate guides for resolving our most difficult practical problems. But we need not abandon the rich promise ideal theory first seemed to hold out. Applying Immanuel Kant’s theory of justice to the problem of exclusionary zoning, let’s explore how ideal theory might fulfill its promise. Kant’s theory provides a nice paradigm because it is so clearly ideal, so widely deemed to be ill suited to practical tasks, and relatively simple, proposing a limited number of basic principles whose interconnections are readily discernible (if not regularly acknowledged). Exclusionary zoning is a good test case be-

2. Thus, e.g., by assuming that the society principles will govern is well ordered, John Rawls can investigate interests in freedom and equality unhampered by complicated questions of imperfect compliance. This investigation allows Rawls to emphasize that freedom and equality, as recognized by his two principles of justice, are the most basic concerns of justice to be respected and relied on in answering all more concrete questions.
cause of its apparent intractability and, as we will see, the evident inability of Kant’s ideal theory alone to speak to it.³

There will not be space here to address exclusionary zoning in the detail we might. Nevertheless, I will develop two intermediate Kantian principles that will augment the theory in a way that can guide our thinking about exclusionary zoning.⁴

II. KANT’S ACCOUNT OF JUSTICE

A. The Universal Law of Justice

Kant’s theory of justice, presented in the Rechtslehre, is part of an attempt to set forth a hierarchical system of moral principles. The most fundamental components of this system are a priori universal principles applicable to rational beings as such.⁵ Less basic principles take the nature of human beings into account and help us determine what universal principles require in particular circumstances.⁶ The universal law of justice is the most basic component of Kant’s theory of justice. It commands:

So act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law.⁷

Justice is “the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”⁸ My chosen act is unjust, then, when the type or extent of its impact on another’s choice conflicts with the demands of universal law.

There is much more that we could say about the concept of justice on Kant’s view, in particular about the roles motivation and coercion play in his account. What is missing from our discussion so far is any indica-

³. My aim here is, in part, to defend ideal theory by demonstrating how one such theory can guide our treatment of practical problems. Not every ideal theory has the structure or substantive resources that allow augmentation of Kantian theory, though. So not every ideal theory can be defended in the way I propose for Kantian theory. I also intend, of course, an enlightening extension of Kantian moral theory that speaks usefully to the problem of exclusionary zoning; nothing less could yield a genuine defense of any ideal theory.

⁴. There are, of course, many issues of justice that arise with respect to zoning more generally. Not all, or even most, of these involve the concerns for persons of low income and for innocent contemporaries raised by what is commonly termed “exclusionary” (or sometimes “snob”) zoning. Whether the principles and applications I provide here are relevant to other zoning issues, then, would have to be determined with respect to each issue.


⁷. Ibid., 6:231. The universal law of justice is simply the imperative form of Kant’s universal principle of justice.

⁸. Ibid., 6:230.
tion of what the requirements of universal law might be. Yet we need to
determine this if we are to have any chance of discovering the substantive
requirements of justice on Kant’s view.

While Kant denies that any principle of his metaphysics of morals is
deducible from others by logical proof, less fundamental aspects do ap-
pear to follow through argument from the more basic. Kant’s refer-
ences, throughout the Rechtslehre, to maxims consistent with the freedom
granted by universal law, or to insuring that one is an end and not a
means for others, or to punishments that make humanity into something
abominable, suggest such a relationship. Likewise does his description
of free, equal, and independent citizens, who apparently are the free,
equal, and autonomous members of the kingdom of ends now described
for the special circumstances of justice (see the discussions below).

Each of the above harks back to some formulation of the Categori-
cal Imperative in The Groundwork of the Metaphysics of Morals and suggests
that less fundamental components of Kant’s system are charged with giv-
ing effect to this most basic principle in different contexts and at different
levels of generality. If we wish to know the nature and extent of the
freedom that justice protects, then it seems we should look to more basic
elements of the moral theory. The Categorical Imperative is the most
obvious choice, in particular the formulas of the kingdom of ends and
of humanity as an end in itself.

Members of the kingdom of ends are ends in themselves possessed
of ends of their own. They require broad freedom to set and pursue sub-
jective ends. But while insuring this freedom, we must take care not to
interfere with rational nature, the end in itself we seek to honor. Kant’s
examples of perfect duties to others that accompany the formula of
humanity can help determine what due respect for rational nature re-

10. Ibid., 6:230, 236, and 333.
11. There is much both in the introduction to The Metaphysics of Morals and in the
Rechtslehre to support the conclusion that principles of right follow from and give voice to
more basic components of Kant’s moral theory, and this view is widely accepted. See, e.g.,
Mary J. Gregor, Laws of Freedom (Oxford: Blackwell, 1963), pp. xi–xii; Patrick Riley, Kant’s
Political Philosophy (Totowa, N.J.: Rowman & Littlefield, 1983), chap. 1; and Allen D. Rosen,
Kant’s Theory of Justice (Ithaca, N.Y.: Cornell University Press, 1993), chap. 2. Nevertheless,
the conclusion is hardly uncontroversial; an alternative view holds that principles of right
are entirely independent of the rest of Kant’s practical philosophy. See Thomas Pogge, “Is
87 and the several works there cited; and Allen Wood, “The Final Form of Kant’s Practical
some reasons for accepting the more holistic view. For a more extensive defense of this
view, see Paul Guyer, “Justice and Morality: Comments on Allen Wood,” Southern Journal of
Paton (New York: Harper & Row, 1964), 4:433. A subjective end is whatever gives a particu-
lar rational agent reasons for acting one way rather than another.
quires. The particular duties that Kant identifies require us to refrain from making false promises to others, stealing from them, or restricting their bodily movements. We need not take these to be duties of all rational agents at all times; rather, we can understand them to mark the general concerns relevant in determining what our perfect duties are. We know that Kant recognized the pursuit of subjective ends as necessary to the life of a rational agent. We now find him identifying certain invasions of freedom as ones to which a person “cannot possibly agree.” We also know that, on Kant’s view, no one rationally could agree to sacrifice her rational nature.

One reasonable reading, then, understands Kant to suggest that there are some interests (e.g., those in property and bodily integrity) that are prerequisite to setting and successfully pursuing subjective ends, and so to living the life of a rational agent. The content of these interests, which I call fundamental, should be thought of as varying with place and time. Property and the like stand as familiar examples of interests that might well hold this position in some societies at some times. On this reading, the freedom that concerns universal law encompasses not merely the freedom to pursue subjective ends, but also the securing of the fundamental interests prerequisite to that freedom.

Finally, in determining what counts as appropriate respect both for individual freedom and for the fundamental interests necessary to develop and sustain rational agency, we also must be mindful of Kant’s discussions of autonomy and equal dignity. As autonomous agents, members of the kingdom of ends are to be regarded and evaluated as makers of universal law. Moreover, each rational agent is possessed of dignity, of intrinsic value that cannot be exchanged for what has mere price or for another rational nature. Thus justice, on the Kantian account, requires that we show equal and adequate respect for each in her autono-

14. Ibid.
15. Critics often point to Kant’s examples in the Groundwork as strikingly inconsistent with his project of setting forth principles applicable to all rational agents as such. Seemingly oblivious to the importance of context in determining what duties any given rational agent might have, they claim, Kant adopts for all the commonly accepted duties of his day. Here I instead understand Kant’s examples to provide guidance as to the general concerns relevant in determining duty.
17. I discuss this reading more fully in my “Kant’s Formula of Humanity and the Pursuit of Subjective Ends,” Proceedings of the Eighth International Kant Congress, ed. Hoak Robinson (Milwaukee: Marquette University Press, 1995), vol. 1, pt. 2, pp. 697–703. Specifying the considerations for determining what count as fundamental interests for a society is a tremendously complex project, one that I cannot pursue here. The vast literature on Rawlsian primary goods clearly is important to that task.
mous pursuit of subjective ends and in her access to and security in fundamental interests.

B. The Role of Ideal Citizens

On Kant’s view, we can insure adequate respect for freedom, equality, and autonomy only within civil society. We need not consider here why Kant takes this position. Rather, we simply can notice that we are to determine the requirements of justice within society by taking up the perspective of citizens who are free, equal, and independent and who legislate for persons like themselves.20

Each citizen requires significant freedom to pursue individual ends and concomitant respect for that freedom insofar as this is compatible with a like freedom for all.21 Further, as the subject of coercive laws, each must bear like burdens. She must be neither unequally limited in her own actions nor permitted to impose on others limits she does not bear herself.22 Last, each is to be viewed as independent, or perhaps better, as capable of self-government. As Kant’s examples suggest, what is crucial here is first the capacity to recognize common interests in freedom, equality, and independent judgment. One too dependent for her well-being on the interests of another (as a wife or servant of Kant’s time might have been) lacks this capacity, providing a poor model for just decision making.23 In addition, the independent citizen is one who directs and protects her own life rather than relying on others’ guidance and power. Within the bounds of justice, she effectively uses her freedom to shape and secure the life she has chosen.24

C. Idealization in Kant’s Theory

So described, the perspective of the Kantian citizen idealizes in a number of ways. Among them, two are especially significant in evaluating the theory’s ability to address the exclusionary zoning problem. First, in legislating, citizens do not take account of the fact that some may have at best limited ability to formulate short- or long-term plans, or to pursue those plans once formulated. The facts of physical or psychological impairment or of lack of education or material means are not within their province. Neither are the effects these can have on one’s ability to develop meaningful relationships, embark on a career, or otherwise choose

and pursue the components of a full human life. Citizens assume a possession and realization of abilities that we often do not find in actual men and women.

Similarly, Kantian citizens construct the legal system and the background principles governing it afresh. Thus, they never need consider past or ongoing injustices as obstacles to the just operation of present laws. Preexisting injustice, for example racial or gender-based, is beyond the scope of their inquiry.

Examined in light of the facts that surround contemporary use of exclusionary zoning, these idealizations present two problems for Kant’s theory of justice as it stands. We can call the first the problem of independence. It arises because of the theory’s inability to acknowledge, much less deal with, cases in which a person is free in the sense that no formal prohibitions bar her legitimate pursuit of subjective ends but lacks the means to take advantage of that freedom. This is precisely the situation in which the disadvantaged find themselves when communities enact zoning ordinances significantly discouraging or limiting the construction of low-cost housing. While no formal restriction bars those of low income from the community, lack of wealth (often compounded by lack of education, information, and self-respect) results in an inability to make use of that freedom where exclusionary zoning laws are in force. This, in turn, may mean an inability to enjoy the educational and other public benefits affluent communities offer, making the ultimate achievement of independence all the more difficult.

The exclusionary zoning issue raises what we can call the problem of preexisting injustice as well. For if these zoning practices indeed inflict injustice by unduly impinging on the capacity of some to act independently, it is an injustice they have been inflicting for some time. Given this, questions peculiar to preexisting injustice arise. Most significant for our purposes, we must consider our duties to innocent contemporaries, in this case present residents, who may suffer substantially in our attempts to remedy injustice done to others. This is not a question ideal citizens face in building their new society, a fact that raises our second problem for Kant’s ideal theory.

III. AUGMENTING KANTIAN THEORY

A. Kantian Purpose, Method, and Substance

Consistent with Kant’s own purposes and methodology, can we augment the ideal theory with intermediate principles, so as to bring the substantive commitments of the theory to bear on relevant problems? Since Kant’s project in moral philosophy is to set forth a hierarchical system of ever less general moral principles, augmentation through intermediate principles is in keeping with his purposes. Such principles would seem to be just what is required to fill out the system.
To argue for the more fundamental principles he develops, Kant proposes various decision-making perspectives and degrees of idealization at distinct levels of his theory. For example, from the perspective of a legislator for the kingdom of ends, described in the *Groundwork*, we choose the most general principles of morality. Legislators for the kingdom issue imperatives addressed to those who can, but might not, comply, but they do not focus on the possibility that the voluntary choices and actions of some may conflict. The perspective of the ideal citizen takes this complication into account as the special concern of justice. Citizens do not ask merely how we honor each as an end in himself with particular ends of his own; they ask how we do so when free actions inevitably will lead to morally problematic conflicts, remediable only within a civil society.

In keeping with Kant’s own method, we may begin to address real-world problems of justice first by increasing slightly the complexity of the ideal citizen’s perspective. This will allow us to take into account a sufficiently small amount of new information to insure careful and accurate analysis of the ways in which more basic concerns bear on new problems.

We further can insure that intermediate principles will have an adequate connection to the substantive commitments of the ideal theory by requiring that those taking up our less ideal perspectives follow what I will call the principle of consistency:

In determining how a theory of justice would respond to circumstances and issues it does not directly consider, appeal to commitments the theory does undertake, in the realm of substance as well as method.

This is not one of our intermediate principles but a general principle of interpretation that we can use whether we are working within ideal the-

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25. Kant, *Groundwork*, 4:433–34. I have in mind principles of equal dignity, freedom, and autonomy that would further specify the requirements set forth in the various formulations of the categorical imperative and the discussions accompanying those formulations.

26. I consider principles of just punishment chosen from the perspective of ideal citizens in my “Toward Social Reform: Kant’s Penal Theory Reinterpreted,” *Utilitas* 9 (1997): 3–21, pp. 16–17. The principles of guilt and equality there discussed help to clarify the relationship between justice and coercion on the Kantian view but take no account of the morally relevant circumstances (e.g., the deterrent effects of a penalty or its long-term consequences for a criminal offender) arising in still less ideal contexts. We can, of course, develop principles from this perspective relevant to other issues of justice. The requirement of Kant’s “Universal History” that civil society provide “the greatest freedom . . . [and] the most precise specification and preservation of the limits of this freedom in order that it can co-exist with the freedom of others” may be one such principle.


28. This increasing complexity is not a feature of the theory that Kant explicitly acknowledges but one we discover by comparing the perspectives of the ideal legislator for the kingdom of ends with that of the ideal citizen of a just society.
ory or moving from ideal to nonideal. The principle is based on the concern to maintain reasonable connections among a theory’s components and acknowledges that a set of principles lacking such connections is not a theory at all but an ad hoc grouping.

In a hierarchical theory like Kant’s, the principle requires that we appeal back to more fundamental substantive commitments wherever there is uncertainty or disagreement as to the issue at hand. Importantly for our purposes, the principle of consistency will require that we appeal to basic commitments to freedom, equality, and independence and to the notion of fundamental interests in developing intermediate principles of justice.29

B. Independence

1. The Principle of Independence

The first worry that the exclusionary zoning problem raises concerns the inability of low-income people to reside in, and enjoy the benefits of, more affluent communities. Can ordinances contributing to this result be just?

To determine this, we first must ask what Kantian theory can tell us about the failure to realize independence. Since the perspective of ideal citizens as Kant describes it does not acknowledge this failure, we must slightly complicate that perspective by supposing now that, in their deliberations, citizens take account of the fact that some members of society may lack independence in determining and pursuing their ends. This failing might have many sources, including physical or mental impairment, lack of education, lack of wealth, and lack of self-respect. These, in turn, may be the result of accident (whether of human or nonhuman origin), of the intentional acts of individuals, of a society’s laws and practices, or of some combination of these. Citizens thus must ask: what is required in order duly to respect each where some now are unable to make independent use of their freedom?

i) Issues of scope.—In determining the appropriate Kantian response to this question, two limitations of scope immediately are significant. We can treat them together because the justification for them is the same. First, cases of concern to justice will be limited to those where independence is substantially implicated. In adopting this limitation, citizens accept that not everyone will be equipped to take full advantage of her opportunities in every case. They also acknowledge that those whose

29. Of course what basic components require in more concrete settings may be underdetermined. No doubt Kant’s theory as it stands sometimes will provide equally good arguments for distinct intermediate principles. My project here is to develop two intermediate principles in a way that is friendly to Kant’s purpose, method, and substantive commitments. Onora O’Neill speaks helpfully about underdetermination in Towards Justice and Virtue (Cambridge: Cambridge University Press, 1996), pp. 78–85.
ability in these matters, though imperfect, is at or near the norm for adults of moderate means and sound body do not raise a morally problematic issue of independence. That I sometimes am physically, psychologically, or otherwise unable to recognize or pursue an attractive opportunity does not yet suggest morally significant impairment; for this my realization of independence must fall regularly and substantially below this norm.\textsuperscript{30} Second, the only such cases that can present problems of justice are those that result from the deprivation of one or more of the fundamental interests a person shares with others in her society.\textsuperscript{31}

The reason for these limitations has its source in the theory’s commitment to citizens as choosers and pursuers of ends. If there is to be substantial freedom to pursue subjective ends, a situation justice requires, we cannot remedy every impingement on independence. Every action, law, or policy implicates independence somewhere. To prohibit all constraints, then, is to thwart justice’s own aims. To promote these aims, we must limit efforts to cases where independence is substantially implicated by deprivation of essentials.

\textit{Positive state action versus legal prohibition}.—The question at issue also raises the possibility that society must take positive steps to promote independence. To what extent might a Kantian scheme demand such steps? Kant’s own discussion of the requirements of justice focuses predominantly on prohibitions, on limitations the state may place on the use of our freedom in order to foster justice. However, there are reasons to think that laws requiring positive action nonetheless are mandated, at least where less than ideal conditions prevail.

We should notice first that the language of the universal law of justice does not limit justice’s demands to ones of restraint. It simply commands that we act in ways consistent with the freedom of each. Kant does argue in \textit{The Metaphysics of Morals} that we require a society governed by laws of justice in order to prevent wrongful invasions of freedom, but

\textsuperscript{30} ‘Moderate’ and ‘sound’ are terms whose precise meaning may depend on what society or group we are considering. To avoid requiring remedy for relatively insignificant harms, the society must be one in which most are able to function as successful choosers and pursuers of ends most of the time. For present purposes, we can leave the matter at this general and intuitive level.

\textsuperscript{31} Thus, the principle of independence does not require remedy for those who suffer incapacity due to privations of interests other than the fundamental ones shared with members of their society. That, e.g., I use my freedom poorly without an expensive bottle of wine every week does not implicate concerns of justice. Again the considerations relevant in determining fundamental interests for a society require careful attention that I cannot give them here. Among others, questions of one’s responsibility for tastes and preferences and of the significant differences we often encounter in individual capabilities would have to be addressed. For an instructive discussion of some of these matters, see John Rawls, \textit{Political Liberalism} (New York: Columbia University Press, 1993), pp. 178–90 and the several works there cited.
again the fact that he saw restraints on individuals as a primary vehicle of justice does not mean that others may not sometimes be required.

This point carries more force when we note that Kant’s own discussion of justice idealizes not just in its assumptions about citizens but in the simplicity of the state it envisions. In society as we know it, coercive laws discouraging outright invasions of freedom are insufficient even to give each a reasonable possibility of realizing the characteristics of citizenship. This is in important part due to the fact that legal, economic, and other social structures control our means of individually remediing problems like that of limited independence.

Whether what we require is education, housing, employment, or medical care, availability is shaped by a wide variety of restrictions. These range from laws regulating school districting and funding to the conditions the insurance industry itself places on whom it will insure and when and how much it will pay. It often is difficult, perhaps impossible, for individuals to comprehend and successfully navigate these complex structures to achieve independence. This is all the more true for those whose socioeconomic or other circumstances limit their access to wealth, education, or other means of addressing these complexities. Where society itself makes it difficult to function as a citizen without aid, and where citizens suffer from disadvantages Kant did not envision, we have reason to think that a Kantian scheme indeed mandates laws providing positive assistance.\footnote{32. The suggestion here is not that independence requires legal remedy only when it is the result of state laws or other state action. Rather, the fact that legal systems complicate the means by which individuals can themselves respond to limits on their independence helps argue in favor of positive state duties to address independence as opposed to merely negative ones.}

Two of Kant’s own Rechtslehre discussions lend support to the conclusion that, as a matter of justice, the state may, and indeed must, impose affirmative duties on citizens to secure the independence of its members when less than ideal conditions prevail. The first speaks most importantly to the need for positive efforts where fundamental necessities are lacking and the second to the state’s duty to advance independence.

Among the rights “that follow from the nature of the civil union,” says Kant, is the state’s right to tax the people for the support of the poor, those who are “unable to provide for even their most necessary natural needs.”\footnote{33. Kant, The Metaphysics of Morals, 6: 326.} In explaining how the state comes to have this right, Kant tells us that “the general will of the people has united itself into a society that is to maintain itself perpetually” and has “for this end . . . submitted itself to the internal authority of the state in order to maintain those members of society who are unable to maintain themselves.”\footnote{34. Ibid.}
wealthy have an obligation to pay taxes to be used for this purpose because “they owe their existence to an act of submitting to [society’s] protection and care, which they need in order to live.”

Although Kant’s remarks are somewhat cursory, he seems to suggest that sustaining the poor with necessities helps to fulfill the purpose for which he argues the state is created, a purpose that serves the general will of the people. This purpose appears to be the protection and care of all its members.

To understand the state’s purpose in this way admittedly is to diverge from the more common interpretation. Most understand the state’s purpose on Kant’s account simply to be the maintenance of society. On the most accepted view, taxation for support of the poor is justified only to maintain social stability. However, this interpretation squares poorly with the language of the passage and with important elements of the larger account of justice. As to the passage itself, two points are significant. First, Kant here says nothing about stability, but rather seems quite straightforwardly to equate society’s maintenance with the sustenance of its individual members. Second, his justification for imposing tax burdens on the rich is neither that this is necessary for the protection and care of the wealthy nor that it is warranted by the needs of the state. Taxes are justified because they will be used to satisfy the needs of the people, which would include but not be limited to social stability. Finally, Kant’s reference here to the general will—a will in which each citizen participates qua citizen—recalls both his larger account of justice and its connection to his moral theory as a whole, again with its concern that we respect the rational agency of each individual.

To complete the argument for positive state action, recall Kant’s earlier claim that we have a duty to enter civil society to insure that each is treated as an end (a duty in which each participates not merely as citizen but as rational agent). Since appropriate treatment within the state is treatment that respects one as a citizen, those necessities for which the state may provide through taxation presumably are those required for the freedom, equality, and independence of a citizen. They

35. Ibid.


are what I earlier called fundamental interests. Thus it appears that, on Kant’s account, the state at least may undertake positive measures to fulfill its duty to supply each person the prerequisites to realize citizenship.38

Second, we must notice Kant’s distinction between passive and active citizens some pages earlier. Active citizens are those who are independent and thus are voting members of the commonwealth. Passive citizens must rely on others to direct and protect their lives and cannot (as we have seen) appropriately participate in the state’s government. Although passive citizens may not participate in organizing the state or making its laws, the state’s laws still “must not be contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom, namely that anyone can work his way up from this passive condition to an active one.”39

As violative of this requirement, Kant no doubt had in mind, among others, laws privileging the upper classes with respect to the purchase and inheritance of land.40 Such laws could exclude many from the real property ownership at the time so crucial to attaining the means to direct one’s own affairs. We, however, must take seriously not only the state’s duty not to prevent some from working their way to active status, but also the barrier that complex systems of law may raise to realizing independence, especially if one is poor. Viewed with this in mind, Kant’s own analysis not only allows, but requires, positive state efforts to restore independence in imperfect circumstances like our own.

iii) Independence and private property.—In arguing for the principle of independence, we must consider one further objection critics versed in Kant might advance. This is the claim that it is the protection of private property, not the promotion of freedom, equality, and independence, that justifies the state’s existence and determines what coercive laws it may and must enact.41 On this view, no purportedly Kantian principle that would limit private property in the name of independence could accord with Kant’s expressed theory of justice. Yet a principle that re-

38. I say “may” and not “must” since Kant here only argues that the state has authority to tax for the purposes at issue, not that it is required to do so. I take up the stronger claim in what follows.

39. Kant, The Metaphysics of Morals, 6:315. In his discussions of taxation and passive citizenship, Kant himself takes up problems arising only in imperfect societies. Although he provides no thoroughgoing analysis of the application of his ideal theory to such societies and their complex issues of justice, these examples not only help us to see the direction of Kant’s thinking on such issues but confirm that he recognized that the assumptions of his ideal theory diverge from our own situation in morally relevant respects.


stricted the scope and content of zoning laws in the name of independence well might do just that.42

The most basic response to this critique, given the account of his theory of justice sketched so far, is that Kant makes it clear, in the introduction and later portions of the *Rechtslehre*, as well as in the political essays, that it is respect for each as a free, equal, and independent citizen that justifies—in fact, requires—the state’s existence. As we have seen, we are to determine the content of justice from the perspective of these citizens. Indeed, Kant himself explains that the freedom with which justice is concerned encompasses the “innate equality” of each, the quality of being one’s “own master,” and an authorization “to do to others anything that does not in itself diminish what is theirs.”43 Here “innate equality” seems to correspond to citizens’ equality, being one’s “own master” to their independence of judgment, and the authorization to act, coupled with concern for one’s impact on others, to their freedom of choice and action.44 In other words, we might see Kant as himself understanding the freedom the law of justice requires in terms of the features of Kantian citizens. This reading connects two basic components of Kant’s account of justice and establishes the fundamental place of independence in that account.

To this insight, we might join Kant’s repeated claim, in his *Rechtslehre* discussion of private property, that just property holdings must accord with universal law and the “idea of a possible united will.”45 In this formulation, the institution of private property does not supersede but is conditioned on its relation to the freedom, equality, and independence that are central to justice.

Not surprisingly, though, the story is not so simple. Even in connecting the universal law of justice with the features of citizens, Kant describes a permitted action as one that does not “in itself diminish what is [another’s],” a phrase that may be read to condition action on its respect for private property. In the discussion of the original contract, similarly, Kant sometimes seems to suppose that we must found the state precisely (and only) to secure individual rights of private property.46 Certain of Kant’s more concrete discussions, for example, his claim that inheritance practices are just even when they seriously affect the balance of wealth, further may support the conclusion that private property is spe-

42. We can institute zoning requirements to serve a variety of purposes, both friendly to private property owners and less so. For example, exclusionary zoning often has the effect (sometimes also the purpose) of raising property values.
44. Kant joins to these a fourth aspect of freedom—the quality of being “beyond reproach.” This quality likely rests on a further aspect of independence, the capacity to recognize and conform one’s actions to just laws.
46. See ibid., 6:312.
cially situated in Kant’s theory of justice and immune to limitation in the name of independence. 47

A full discussion of Kant’s account of private property and its relationship to justice is beyond the scope of this article. Suffice it to say, for now, that in interpreting Kant we must take seriously not only the broader accounts of justice and citizenship on which the discussion of property seems to rest, but two further matters. First, in Kant’s society, as in our own, rights in private property have been recognized as crucial to realizing freedom, equality, and independence. Kant well may emphasize property precisely because it serves freedom, equality, and independence in important respects, not because it somehow is prior to them. Second, as Allen Rosen points out, Kant’s own conception of property is far broader than we typically intend. For example, the property required for political franchise includes, significantly, “any skill, trade, fine art or science.” 48 For Kant, there is much reason to suppose, property serves independence, not the reverse. If so, then the claim that the principle of independence warrants limits on private property is not contrary to Kant’s theory of justice, but most appropriate to it. 49

iv) The principle.—Taking limitations on scope and concerns for the realization of independence together, we can formulate the principle of independence appropriate for our imperfect circumstances. In doing so, we also must acknowledge that, all other things equal, the dignity of every rational agent suggests that any requirement of justice must be implemented as fully and as speedily as possible. To move more hesitantly without good cause is to fail to take seriously our equal obligations to each as a being of incomparable worth; it is to pay mere lip service to justice.

Principle of Independence: Where limits on fundamental interests are sufficiently severe that they impinge significantly on the realization of independence, the state must take steps to restore independence as fully and as quickly as possible, consistent with the equal and adequate freedom and ultimate independence of each.

2. Implications for Exclusionary Zoning

We used the exclusionary zoning problem to help identify areas of difficulty for Kant’s theory of justice, but we also would like to know, at least in a general way, what the augmented theory has to say about the prob-

47. For the discussion of inherited wealth, see Kant, “On the Common Saying,” 8:293.
48. Ibid., 8:295. See Rosen, p. 101. When property includes skills, fine arts, and the like, it appears more closely tied to the faculties, capabilities, and social circumstances that allow independence of decision and action.
49. This understanding of the relationship between property and independence squares well with Kant’s use of property as a familiar example of the fundamental interests prerequisite to the pursuit of subjective ends.
lem. It is important to note here, if it is not evident already, just how general intermediate principles will be. Meant to bridge the gap between ideal theory and problems of justice arising in particular societies at particular times, these principles will not tell us precisely what to do about our intractable problems of justice. Rather, they will identify the concerns that are relevant in addressing these problems and tell us something about the relationship among these concerns. As such, they are principles best suited to assist in developing a constitution or other fundamental guiding norms that legislators will follow more explicitly in developing and enacting laws. Nevertheless, these principles can offer guidance in a preliminary analysis of particular problems. Indeed where legislators or judges are uncertain what the constitution requires with respect to a problem, they must return to these more basic principles (in keeping with the principle of consistency).

In this case, our question is whether exclusionary zoning ordinances are unjust. The answer is that the system of laws of which they are a part certainly fails to satisfy one of the requirements of justice and that, at the least, exclusionary ordinances themselves often may represent a barrier to the realization of justice. According to the principle of independence, government must take steps to remedy significant impingements on independence that result from limitations on fundamental interests. Exclusionary zoning ordinances, so far from remedying impingements, actually contribute to them. They compound the effects of limitations on wealth, education, and the like by insuring that those who suffer them are excluded from communities offering the very benefits that would provide remedy. That interference with independence often is significant is clear from the frequent inability of these people and their children to provide for their own most basic needs or develop personal projects. That the interests invaded are fundamental is equally clear, for in our society no one can hope to develop and carry out short-term projects, much less more extensive life plans, without adequate wealth, education, self-respect, and more.

Exclusionary zoning ordinances have these effects, however, as part of a system of laws that at present provides few other remedies for these privations and their effects than the opportunity to live in certain privileged communities. Indeed were there other means of obtaining these

50. In discussing exclusionary zoning, I assume throughout that ordinances operate within our own legal system. This system at once authorizes municipalities to act on behalf of their citizenry and fails to take any significant steps on behalf of the disadvantaged.

51. I am here naming what I take to be fairly obvious examples of fundamental interests in our society. Identifying such interests more precisely would, of course, require careful evaluation of empirical evidence.

52. I do not mean to suggest that those of low income in no way contribute to their own plight or that changes in zoning or other laws fully will remedy problems of independence. To provide a person access to the means is not, and cannot be, to insure that she
benefits within the system, exclusionary zoning ordinances would not be exclusionary at all. Thus, the principle of independence allows us to identify the legal system as unjust, to the extent that it thwarts one of justice’s demands. Exclusionary zoning ordinances operating within such a system are likely instances of injustice because they often may function as unjustified barriers to justice. What more Kantian theory can tell us we will explore in the next section.

C. Preexisting Injustice

The principle of independence, I said above, identifies exclusionary zoning ordinances as likely instances of injustice because they perpetuate and compound, rather than remedying, significant impingements on independence brought on by privations of fundamental interests. This principle, however, requires that our efforts at restoring independence be consistent with showing equal and adequate respect for the freedom and independence of each. Evaluating the dilemma as a case of preexisting injustice will help bring out the reason that exclusionary zoning ordinances themselves, or some components of them, sometimes might be just (though the same cannot be said of the legal system of which they are a part).

Recall from our earlier discussion that the exclusionary zoning question is difficult because the zoning ordinances at issue address legitimate social welfare concerns. These include services and restrictions that protect and promote the health and safety of community members as well as providing them educational, cultural, and other opportunities central to developing the ability to function as an independent citizen in our society. These ordinances function, at least in important part, to serve the fundamental interests of town residents.

Notice too that we are not asking whether or not to enact exclusionary zoning ordinances. We are asking whether we must abandon them as unjust in circumstances where many now may rely on them to serve fundamental interests. In many cases, these may be interests for which we have no other means to provide, at least at present. Thus, repeal may come at a heavy price for those I will call innocent contemporaries, people who bear little or no responsibility for the wrong at issue.53 The
question then arises as to what to do where the most obvious remedy for injustice within the legal system may imperil interests justice and morality require us to protect and promote. To determine what augmented Kantian theory demands in such a situation, we again must complicate the perspective of ideal citizens. Now citizens are to view the society for which they make laws as an ongoing venture in which laws, practices, or combinations of them have operated, and continue to operate, unjustly toward some at the same time serving the legitimate needs of others.

1. The Principle of Minimization

Taking up this perspective and guided by the principle of consistency, citizens will enact, among others, the principle of minimization:

   a) No proposed remedy for preexisting injustice can itself be just if its interference with fundamental interests denies some any reasonable prospect of living the life of a rational agent.
   
   b) Otherwise, remedies for preexisting injustice must satisfy the requirement that any significant limits they may impose on fundamental interests of innocent contemporaries be the minimum consistent with genuine progress toward justice.

Recognizing that alternative remedies for preexisting injustice usually could be made available and that the extent to which different remedies disadvantage the innocent often varies, the principle of minimization both sets the outside boundaries of permissible constraints on fundamental interests and provides guidelines for them. Its first component is an absolute prohibition. This aspect of the principle follows directly from the demand of equal dignity. Our actions, laws, and policies must show equal respect for the rational nature of every individual. Where we sacrifice all prospects of one to regain them for role. While we might see greater sacrifices as appropriate for those whose role was more substantial, or who intended or should have been well aware of the likelihood of injury to others, those I describe raise a more difficult problem. I do not mean to suggest, of course, that the “innocent” affluent have no obligations of justice to those of low income or that they should not be required to take some responsibility for improving the prospects of those who are less well off. Together the principles of independence and minimization require precisely this.

54. In proposing the principle of minimization, I am not challenging Rawls’s difference principle as an appropriate standard of justice. Rawls’s principle is part of his ideal theory suited to a well-ordered society. Significantly, this society has no preexisting injustices to remedy and no need to deal with problems like that of innocent contemporaries.

55. I assume here and throughout that principles of justice apply only where circumstances of justice obtain. That is, they apply to situations (1) where the choices of one may limit those of others and (2) where lack of resources, power differentials, and the like do not make adequate realization of freedom, equality, and independence impossible.
another and our only justification is that, in so doing, we remedy an injustice for which our present victim is not responsible, we violate this requirement.56

Setting this outside boundary, the principle of minimization also provides guidance where the negative consequences of our proposals are less severe. Recognizing that it may be impossible satisfactorily to remedy past injustice without imposing some significant limitations on the fundamental interests of innocent contemporaries, the principle requires that these limits be the minimum consistent with genuine progress toward justice.

Naturally, the principle is useful only if we have some sense of when progress is genuine. To satisfy this requirement a remedy need not be complete, immediate, or fully available to all. In the world as we know it, such remedy may be impossible, or at least beyond our limited abilities to devise and implement. As Kant agrees in his “Idea for a Universal History with a Cosmopolitan Purpose,” “Nothing straight can be constructed of such warped wood as that which man is made of. Nature only requires of us that we should approximate to [ideal justice].”57

Further, any genuine remedy must be one we have good reason to expect will make substantial and timely progress toward justice, toward the realization of the characteristics of citizenship in each. As the “Universal History” also makes clear, progress toward ideal justice is required, and the ideal we must keep before us is that of a perfect political constitution administering universal justice. It is one we can hope to achieve only over time, one that must be seen as the end of human history rather than the task of any one person or generation.58 Nevertheless, as I suggested earlier, the fact that some suffer injustice in this progress means that we must not tarry or settle for less than is possible consistent with other moral demands.

The requirement of minimum interference with fundamental interests enunciates one of these further moral demands by asking that we take seriously certain arguments favoring paths to greater justice that are somewhat slower or less fruitful than available alternatives. To clarify

56. Certainly the demand for equal dignity, especially in nonideal contexts, permits us to treat some differently from others, even when all initially appear to be similarly situated. However, to justify different treatment, we must provide a reason that demonstrates an equal concern for the rationality of both parties. In this limiting case, the argument that depriving the innocent contemporary will help restore the victim of preexisting injustice clearly focuses only on the rationality of the second. The remedy it proposes works not just to the disadvantage, but to the destruction, of the first. This remedy thus cannot satisfy the demand for equal dignity.


this requirement, a word about impingements on fundamental interests is in order. As I indicated, these are interests prerequisite to the realization of rational agency and may vary significantly from time to time and society to society. Although there is not space to explore the nature of fundamental interests in detail here, it is important to see that as justice only requires remedy for those invasions that significantly threaten independence where that is our concern, only invasions that significantly threaten realization of freedom, equality, or independence will be relevant to justice here. Thus, if wealth or education is identified as a fundamental interest in some society, the principle of minimization will not be concerned with all limitations on these, but only with those that significantly threaten realization of one’s status as a citizen. Any remedy we might choose will affect interests identified as fundamental. Absent this requirement of significant invasion, the principle of minimization would frequently require us to choose a far less productive course where implications for the core concerns of justice to innocent contemporaries in fact were nonexistent.

In this regard, we also must keep in mind that in a complex society like our own, constraints on fundamental interests will be borne by victims of injustice and innocent contemporaries alike. A remedy that involves significant environmental damage or a dramatic reduction in funds available to support the arts may negatively affect all parties concerned. Thus, in addition to limitations imposed by the principle of minimization, our goal of doing justice to the disadvantaged itself will limit our options and act as a protection for the presently advantaged as well.

Again our intermediate principle provides boundaries and guidelines for applying the basic tenets of Kant’s theory of justice to nonideal circumstances. A way between ideal theory and its ultimate application to problems arising in myriad nonideal circumstances, it cannot give us a ready solution to the dilemmas to which it admittedly is relevant. The answers it does yield require substantial argument and typically the development of further principles suited to the special circumstances of particular societies and historical periods.

2. A Return to Exclusionary Zoning

I want to end where I began, in Mount Laurel and places like it. Challenges to Mount Laurel’s zoning ordinance occasioned a groundbreaking response by the New Jersey courts, which in 1975 held the ordinance unconstitutional and later implemented wide-ranging requirements designed to insure that suburban zoning would provide realistic opportunities for affordable housing. Each community now was responsible for providing its “fair share” of such housing for the surrounding region. In pursuit of this aim, the courts both instituted stringent oversight of sub-
urban ordinances and required that communities act affirmatively to encourage affordable housing within their boundaries.\textsuperscript{59}

Despite these efforts, various barriers have kept families waiting more than twenty years for affordable housing to come to Mount Laurel. Obstacles include an undercurrent of unease among the better-off regarding public safety and the continuing availability of rich (not merely adequate) educational, cultural, and other resources; ongoing financing difficulties for those hoping to build affordable housing in suburban communities; and formal challenges to housing projects on environmental and related grounds. Although some affordable housing, mainly for those of moderate income, was available in Mount Laurel by the mid-1980s, low-income housing comes only as the century closes. It comes not with local fanfare, celebrating a step toward the realization of justice, but after the town and its residents devoted more than two decades to resisting changes necessary for affordable housing to be built in Mount Laurel.

True, other New Jersey suburbs have met judicial and legislative requirements more quickly; here more affordable housing is available to those of low as well as moderate income. By all accounts, though, the less-well-off remain largely excluded from communities where educational, cultural, medical, and other resources are most widely available; they are relegated to inner cities and rural areas where these services are inadequate to serve fundamental interests by even the most generous evaluation. More important, New Jersey’s response to exclusionary zoning remains at the forefront. Many states where the geographic divide between rich and poor is no less acute have done little or nothing to address the question.

In light of these circumstances, we finally must consider what Kantian principles of independence and minimization have to say about the justice of exclusionary zoning and whether they inform our approach to this vexed topic. At the close of our discussion of the principle of independence, we were able to conclude that the U.S. legal system as a whole indeed fails to satisfy one requirement of justice, for it perpetuates rather than alleviates serious privations of fundamental interests. Since exclusionary zoning laws do the same, we found their injustice likely, though not certain. In particular, we had still to consider the serious claims of innocent contemporaries.

Taking the demands of the principle of independence and the cau-

tions of the principle of minimization together with the recent history outlined above, we now can say more. What renders the justice of exclusionary zoning a difficult question is that there are considerations basic to justice (fundamental interests) on each side. To do right seems to require that we serve them all, yet we cannot see a way to do this. In response to this dilemma, the principle of independence places in relief both the nature and extent of the injustice the less-well-off suffer under the present legal system and our obligation to put this right. As we consider how best to satisfy our responsibilities, the principle of minimization identifies those considerations on the other side that justice requires us to take seriously and, less directly, those it does not. It allows us to determine, we might say with Kant, when the choices and actions of one citizen can coexist with those of all others consistent with due respect for the freedom, equality, and independence of each. Importantly, the principle of minimization should help us evaluate the claims that suburban communities and their residents raise against zoning provisions that permit or encourage affordable housing and in favor of regulations we are tempted to label unjust. Which if any of these claims mitigates in favor of these ordinances, or some elements of them, when justice is our aim?

One fear that residents of well-to-do communities frequently voice is that those who live in affordable housing, if it is built, will threaten the security of the present community. Crime, especially prevalent among inner-city populations, now will plague the once-safe suburbs. Another fear is for a loss of tax base to support high-quality social services—schools, hospitals, parks, museums. If municipalities cannot prefer upscale housing and industrial parks to low-rent apartment complexes and mobile home parks, they may not be able to support the high-quality educational, health care, and other programs now available.

Certainly personal safety, education, medical care, and cultural and natural amenities may all be prerequisite to our realization of freedom, equality, and independence. Each may, in our culture, be a necessary element of the foundation on which such ideals are realized (or at least approached). Yet the principle of minimization lets us disregard a proposed remedy to injustice only when limitations on fundamental interests significantly threaten the realization of freedom, equality, and independence in innocent contemporaries.

Mere perceptions that personal safety or exceptional services will be jeopardized do not establish such a threat. Yet perceptions typically

60. This is, of course, particularly true given the class and racial biases that often color these perceptions. Although some who qualify for affordable housing are elderly people of newly limited income, most are poor and belong to racial minorities. Even if we assume, as here, that suburban towns and their residents do not have exclusion of such persons as their primary aim, underlying biases are likely to make other arguments in favor of restrictive zoning seem weighty even where adequate evidence is lacking to support them.
are all that are offered. Even if more can be shown, risks to safety may often be met, for example, by careful planning regarding the number, distribution, and style of affordable housing units; by various responses in public school curricula (e.g., after-school programs and job training geared to poor children and teenagers); and by educational and job-training efforts aimed at parents. Our principles do not demand unlimited efforts in the cause of independence. No community is expected to absorb a vast population of poor residents. This surely would jeopardize the realization or maintenance of freedom, equality, or independence for those of greater and lesser means. But neither do our principles deny that various changes in the status quo may be necessary to insure due respect for each as citizen; indeed quite the contrary is true. Likewise, high-quality educational, medical, and other services need not be jeopardized when affordable housing becomes available. But even if they are, their preservation does not support exclusionary zoning. It is likely that the costly services and facilities many suburbs offer might be scaled back significantly without substantially risking anyone’s freedom, equality, or independence. In short, we find in these two oft-voiced concerns no reason to suggest that exclusionary zoning laws are other than unjustified barriers to the realization of independence.

The difficulties prospective providers of affordable housing face in obtaining adequate funding or financing, once municipalities ease setback, lot-size, and other exclusionary requirements, signal a second reason for responding most cautiously to the protests of the better-off. Principles of independence and minimization condemn laws and policies that perpetuate rather than remedy those limits on fundamental interests that significantly threaten the realization of independence, unless they secure freedom, equality, and independence elsewhere. The principle of minimization, then, does not free the better-off of all burdens to assist those of limited means. It acknowledges only that significant invasions of fundamental interests should be minimized where this is consistent with genuine progress toward justice.

The lack of funding for affordable housing in the suburbs is a symptom of a larger phenomenon. It reflects the nationwide outcry against taxation to fund social welfare projects. Without revenues, the state cannot address significant threats to independence as it must. It can neither assist in funding affordable housing in suburbs freed of exclusionary requirements nor facilitate, for example, adequate housing in cities and rural communities or the improvements in public transit that might help the less-well-off access better jobs, schools, medical care, and other advantages of suburban living. Public unwillingness to fund welfare spending, whether at home or elsewhere, does not of course tell us that exclu-

61. For a discussion of some monetary difficulties that face prospective providers, see Kirp, Dwyer, and Rosenthal, pp. 185–92.
tionary zoning laws fail to serve the fundamental interests acknowledged by the principle of minimization. Nor conversely does it help us discern which of many alternative solutions to injustice might satisfy that principle if zoning laws are needed to protect the better-off from significant threats to freedom, equality, or independence. But this general unwillingness to contribute to the righting of injustice should raise genuine doubts when municipalities claim that exclusionary provisions are the only, or best, way to provide for the fundamental interests of the present community. It gives us strong cause to demand clear proofs that protests of injustice by the better-off are not merely a pretext for the desire to escape the social burdens recognized by the principle of independence.

Given recent resistance to tax-funded social programs, we also should notice that together our Kantian standards do not distinguish between what we might think of as negative and positive strictures on zoning ordinances. They make no qualitative distinction between the demand that zoning provisions be abandoned as unjust and the demand that affordable housing be encouraged. The principle of independence requires that the state act to remedy failures of independence within specified bounds. The principle of minimization limits affirmative measures no more than negative ones. Together, the principles demand a package of measures, negative and affirmative, that conduces to and is consistent with the freedom, equality, and independence of each.62 Suburban outcry thus is no more legitimate when raised against tax-funded encouragements to affordable housing than against the repeal of exclusionary provisions.

Last, we must consider claims that affordable housing will stress sensitive natural environments, overburden municipal infrastructure, disable historic preservation, or contribute to the urban sprawl that threatens to extinguish the rural landscape. Whether they affect health, safety, or the natural or man-made beauty conducive both to personal development and to relaxation and peace of mind, these matters all may implicate fundamental interests.63 Unlike fears about a degradation of public safety or municipal services, our worries about them often are expressed by the regional community at large. Thus, we often have less reason to suspect that concerns flow from unsubstantiated fears or a general unwillingness to bear burdens for the benefit of fellow citizens. Often, too, environmental sensitivities—water and sewer limitations and

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63. I do not mean here to advance any final claim about the relationship between fundamental interests and the environment or to suggest that preservation of natural or man-made environments is always or only a concern of justice.
the like—are more readily established by concrete evidence available before the fact, and the damage, once done, will be permanent. Finally, these types of damage historically have been ignored, so that attention to them may be especially needed, and the options available for effectively addressing them may be quite limited.

Where we have objective evidence that an ordinance is calculated to address such potential harms, then, the principle of minimization often may counsel us to seek some course other than repeal. Such a showing will be case-specific; moreover, a justification of this sort is unlikely to underlie the most exclusionary aspects of zoning ordinances. Outright prohibitions on apartments or mobile homes, substantial lot-size and setback requirements, and demands that new complexes conform to a particular architectural style rarely will rest on environmental or other pressing concerns.

The principles of independence and minimization alone will not tell us precisely how to evaluate and address exclusionary zoning in the present context of stark class segregation and intense suburban resistance. They do not tell us, for example, precisely what rules of evidence and burdens of proof should apply to suburbs that wish to maintain elements of an ordinance that excludes all or most affordable housing. Nor do they tell us what particular programs and policies will most effectively and justly address the independence of the less-well-off.

These principles do tell us that we live in a society that fails dismally at meeting its duties of justice to those of lesser means. They tell us too that the vehement defense of exclusionary zoning and the unwillingness to fund rectificatory efforts to benefit those of lesser income evidence something approaching a commitment to injustice. They tell us that even if the reasons we advance in support of exclusionary ordinances and against affirmative responses are sincere, even if exclusion itself is not our underlying aim, these reasons cannot legitimate present practices. Moreover, our principles warrant that we treat many arguments for exclusionary ordinances, arguments that have influenced politicians, the press, and the citizenry at large, with deep skepticism; our principles also warrant that we reject others outright. They caution us too that those who would purchase open suburbs at any cost also fail to appreciate or stand behind justice’s demands. Last, they give us reason to believe that a just approach to both exclusionary zoning ordinances and broader failings of independence will be complex, part of a larger program that takes seriously both the needs of the less-well-off and the legitimate concerns of those in suburban communities.

I have argued that Kantian theory, with its idealized starting points, hierarchical structure, and context-sensitive commitments to fundamental interests, not only has the resources to speak to our seemingly intractable problems of justice but does so with sophistication and perceptivity.
With a commitment to the freedom, equality, and independence of each, designed carefully to entertain and evaluate relevant real-world circumstances, it is at once unwilling to countenance exclusionary claims that we often take to be dispositive and equally firm in protecting local interests that our approach might fail to heed.