Book Review. Opening Up the Suburbs by A. Downs

A. Dan Tarlock
Indiana University School of Law

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Reviewed by A. Dan Tarlock†

As every American knows, since World War II upper- and middle-income families have moved into the suburbs and left central city residences to poorer families. Cities have lost not only their wealthier residents; industries also have joined the flight to suburbia. The shift to truck rather than fixed rail or water transportation and the construction of the interstate highway system have aided dispersal, since all parts of a metropolitan area are now suitable for industrial and residential development. Stripped of wealth and business, many central city areas have become ghettos of unrelieved poverty and manifold social problems, with a small sterile core of high-rise commercial buildings.

The low-income families in the cities need inexpensive, small, and decent dwelling units. Most buildings recently constructed in central cities, however, have been offices or high-rise, high-rent apartments. In theory decent city housing vacated by departing suburbanites should "trickle" or "filter" down in good condition to low-income families remaining in the city. In actuality as the housing filters down it inevitably deteriorates and poor housing remains a familiar problem of the low-income urban family. Nor is housing readily available in suburbia, for the problem-ridden poor are systematically excluded.

Suburban governments effect this exclusion by maintaining low population densities and requiring high construction standards. The homes that can be constructed are thus far too expensive for low-income families. Racial prejudice has doubtless played a role in the exclusionary zoning of the suburbs. But suburban governments prefer to attract only middle- and upper-income families as residents

† Professor of Law, Indiana University School of Law, Bloomington.
5. "The resident of suburbia is concerned not with what but with whom. His overriding motivation is less economic than social." R. Babcock, The Zoning Game 31 (1966) (emphasis in original).
for economic reasons as well. Wealthier families pay more taxes and demand fewer government services than poorer families, which may receive welfare payments and certainly send more children to public school.

Confronting powerful social and economic reasons for the exclusion of low-income groups from the suburbs, Anthony Downs contends that the suburbs can and should be opened up by assigned risk quotas. Downs argues that low-income families ought to be allotted a small percentage of the dwelling units of each suburban area. He proposes that the number of poor in the central cities in 1970 be cut in half by 1980; this would require construction of 578,000 new subsidized units in suburban areas.

Downs bases his argument on the assumption that all income groups desire the benefits of life in the suburbs: decent housing, low crime rates, and good schools. He does not believe that urban residential areas can be revitalized unless many residents move out. He wants to afford the benefits of suburban life to low-income urban families, therefore, by effecting a diaspora of the poor into the middle- and upper-income suburbs.

Downs's premises may be questioned. Some ethnic and racial groups may prefer life together in urban neighborhoods to suburban amenities. Moreover, low-income urban groups afflicted with various social problems may not be able to leave those problems behind when they become the low-income minority of a high-income suburban neighborhood.

Mr. Downs, however, is a first-rate economist and a highly successful real estate entrepreneur. He is entitled to some credibility when he contends that the social and economic integration of the suburbs is possible, that the problems of urban poverty will thereby

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7. Id. at 38.
8. A. Downs, Opening Up The Suburbs (1973) [hereinafter cited to page number only].
9. P. 156.
10. Downs admits that he is a middle-class chauvinist, pp. 97-98, but he contends that "low- and moderate-income households . . . need to live in neighborhoods where middle-class influences are dominant in order to achieve their own residential objectives." P. 95. Some low-income families, however, might not want or need to live in such neighborhoods. P. 110. Moreover, the social problems of this economic and social integration might be vast and difficult to forecast. Cf. pp. 62-63, 98.
be ameliorated, and that the social benefits of suburban life will not be reduced. Ultimately, however, Downs rests his case on ethical grounds. Low-income urban families must be admitted to the suburbs, he argues, because the wealthier suburbanites cannot in conscience exclude them.

Middle- and upper-income families have employed zoning laws and housing quality standards and have enjoyed government subsidies and tax advantages in order to construct for themselves impregnable belts of amenable living around the nation's cities. Downs contends that such use of law to deny to poorer families the benefits of suburban living is not conscionable.\(^\text{13}\) He argues that opening up the suburbs would benefit society and even the present suburban residents.\(^\text{14}\) In fact, however, he is frankly asking suburban families to risk the quality of their life and "make significant sacrifices to benefit others out of idealism, altruism, or love—not just self-interest."\(^\text{15}\)

To render migration less risky in the eyes of the suburbanites, Downs suggests that low-income families with serious social problems or destructive tendencies should not, at least in the initial stages of the program, be unduly concentrated in any particular suburban community.\(^\text{16}\) Some bureaucracy, therefore, would have to identify such families and, presumably, scatter them as far apart as possible throughout a wide suburban area. This vision is administratively outlandish and ethically outrageous, but Downs concludes that some "screening" is necessary to mollify suburban opposition to his program.

Downs may be correct in predicting that inclusion of a small percentage of select low-income families would not threaten the viability\(^\text{17}\) of suburban life. Nevertheless, his proposal for screened migration from the ghettos to the suburbs will not win the support of the political leaders of urban racial and ethnic groups. The dispersal into the suburbs of their constituencies will cost them votes. Nor will housing developers rush to Downs's side; low-income housing is simply less profitable than more expensive housing for high-income families.

Downs fails also to take adequate account of the opposition of

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15. P. 182.
17. "I define a neighborhood as viable if it would be considered a reasonably decent, safe, and healthful living environment for families with children if judged by the standards currently held by a majority of Americans." P. 88.
environmentalists. Low-density zoning helps to bar low-income families from suburbs, but it is also a device by which planners attempt to alleviate the effect of urban sprawl and preserve green space. Those reciting the litany of environmental benefits derived from low-density zoning, however, are often guilty of mistaking the varying importance of these benefits. Some are more in the nature of mere comforts and amenities and are not necessary conditions for the “essential welfare of individuals or . . . the good health of society.”

Low-density zoning, for instance, produces housing on large lots, but residents who profit from such green space number but a few. High-density zoning by contrast may be employed to create open space, which people who cannot afford expensive houses are able to enjoy.

The development plan of the city of Ramapo, New York, aptly illustrates the triumph of local environmental concerns over broader social considerations. Ramapo, directly in the line of the northward expansion of the New York City metropolitan area, decided in 1966 to preserve its semi-rural character by limiting its population to 72,000 people. The provision of ample services is guaranteed as the population grows, because the municipality will not issue a residential development permit unless the developer plans the construction of facilities which will supply municipal services to the residents he intends to house. The Ramapo plan was challenged in court as an ultra vires exercise by the municipality of nondelegated legislative power to halt land development and as an unconstitutional taking. The New York Court of Appeals, while announcing that it would not tolerate exclusion of new residents, held that the Ramapo plan was a “bona fide effort to maximize population density consistent with orderly growth.” The court did not add the ob-

18. E. Banfield, supra note 1, at 10.
19. For a useful survey of planning critiques of low-density development see Susina, Residential Densities or a Fool’s Paradise, 54 J. LAND ECON. 1 (1973).
21. Those who argue that the concept of “environmental quality” contains within itself meaningful principles for the resolution of social conflicts have oversimplified the problems of deriving such principles from the science of ecology. See L.K. Caldwell, Environment: A Challenge to Modern Society (1970), for an example of this oversimplification.
23. 30 N.Y.2d at 382, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.
vious: The Ramapo timed-development technique is likely to exclude low-income families even more effectively than low-density zoning does in other areas. Requiring installation of municipal services before new residents arrive invites expensive housing and expensive housing together with a limit on the total number of residents in the town will effectively exclude lower-income families.

Suburban municipalities, of course, should consider the environmental impact of development and, in some instances, they should be able to preserve a semi-rural character in the face of population growth. In some ecologically fragile areas low-density planning might be absolutely essential. If the only "environmental" benefit of the Ramapo plan is the preservation of expensive and beautiful country homes within driving distance of New York, however, Ramapo cannot in conscience ignore the social problems recited by Downs in *Opening Up The Suburbs*.

To implement economic and social integration, Downs proposes that each metropolitan area be divided into commuting zones—squares with a diagonal five miles long, 12.5 square miles in area. Planning would aim to provide, within the 30-minute commuting time between the zone's most distant points, decent housing for a broad range of income classes and employment for those housed. The integration of income classes is to be tightly controlled: Within the commuting zone the number of low- and moderate-income households will be limited so that they do not contribute more than 25 percent of the children attending public school. While the actual number of low- and moderate-income families might vary from zone to zone, this schoolchildren limit should guarantee that each zone retains a solid majority of middle- and upper-income families.

Downs believes his plan can be carried out by means of a strategy

24. For a good description of the California “no growth” movement, which might well emulate the Ramapo plan, see Leary, *California, The ATLANTIC MONTHLY*, November 1973, at 10. See also Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972) (sustaining a six-acre lot minimum size).
27. P. 104.
28. Downs considers $8,000 to $15,000 a year to be the earnings of a middle-income family. P. 8. Low-income families presumably earn less than $8,000; upper income, more. I take it that a moderate-income family would earn $8,000 to, perhaps, $11,500. Downs is not specific on these matters.
which “resembles and takes advantage of free markets.” In brief, he suggests that housing subsidy programs be heavily funded and that constraints on the construction of inexpensive housing in the suburbs be lifted. Although he favors a decentralized approach for the present, he believes that planning decisions eventually ought to be made through institutions whose authority extends to entire metropolitan areas rather than single isolated suburbs.

By housing subsidy Downs means “any form of financial assistance that a government provides to help a household pay for its housing.” He estimates that more than the 25 million Americans officially considered poor in 1970 would need housing subsidies. Downs realistically admits, however, that the level of subsidy likely to be appropriated in the future will not be high enough to enable low-income families to move into the suburbs.

Existing subsidy programs have not resulted in a great deal of dispersal because the suburbs have excluded most subsidized housing projects and because the Nixon Administration has not pushed for the authority to override the local zoning ordinances which tend to exclude such housing. Reformers have identified large lot and minimum house size regulations as important barriers to construction of low-cost housing in the suburbs. The battle to lift these barriers is led at the present time by those arguing that large lot and minimum house size zoning discriminates against a fundamental right to “social mobility.” This alleged right sanctions access to decent suburban housing; zoning regulations, and perhaps construction standards, which deny access for lower-income groups are thus said to be unconstitutional.

Litigation based on this argument has little chance of success, primarily because the existence of a right of access to decent housing does not imply that the right is infringed by all suburban housing restrictions. Many of these restrictions are not intended to exclude the poor but are arguably necessary to insure the “decency” of suburban housing. Excluded families must still pay for the housing. Yet decent suburban housing is simply beyond the budgets of low-income

29. P. 144.
30. Id.
32. P. 46.
33. It has been suggested that the state affirmatively discriminates against the poor when its action raises the cost of some resource above what it would be in the private market. See Note, Exclusionary Zoning and Equal Protection, 84 Harv. L. Rev. 1645 (1971). See also Note, Snob Zoning: Must A Man’s Home Be a Castle?, 69 Mich. L. Rev. 339 (1970).
families. A right of access to decent suburban housing cannot erase the cost of that housing; thus low-income families may be said to be excluded from the suburbs because of a lack of wealth rather than by affirmative efforts of suburbanites to exclude them. A recent study of housing in New Jersey confirms the indications of earlier studies that minimum house size standards rather than lot size is the most important variable affecting the cost of housing, but concludes that "changes in zoning policies making land available for higher-density single-family units would not be a sufficient condition to generate housing for low- and moderate-income families."

The legal attack on exclusionary zoning can only succeed if a court finds that decent suburban housing must be provided for low-income families, no matter what the cost. San Antonio Independent School District v. Rodriguez is a bad omen for those fighting exclusionary zoning on constitutional grounds. The Court in that case reasoned that the Texas system of school finance did not create a suspect classification: The class of children attending schools in property-poor school districts was said to be "large, diverse, and amorphous." Analogously, there is no easily definable suspect classification which includes those families excluded from the suburbs. The Rodriguez

34. The free market price of moving into suburban housing will rarely be within the budget restraints of urban families who may meaningfully be described as "poor." See Bergin, Price Exclusionary Zoning: A Social Analysis, 47 St. Johns L. Rev. 1, 34 (1972). The Pennsylvania Supreme Court, which has never departed from substantive due process as a basis for judicial control of local zoning, has recently rendered a series of decisions invalidating large-lot zoning and ordinances totally excluding multifamily uses. See Appeal of Kit Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Investment Co. v. Easttown Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). The court has added equal protection language to its opinions, stressing the inability of a city which is in the corridor of growth to deflect growth patterns and the rights of new entrants. The court, however, has required only that zoning requirements be such that small houses and garden apartments are feasible—both types of housing which are beyond the means of low-income families. See Lefcoe, The Public Housing Referendum Case, Zoning and The Supreme Court, 59 Calif. L. Rev. 1384, 1429 (1971).

35. Existing studies of suburban housing costs are reviewed in Williams, Doughty & Potter, supra note 2, at 183-85. The latest study is B. Sagalyn & G. Sternlieb, Zoning and Housing Costs: The Impact of Land Use Controls on Housing Price (1973).

36. Of course, it may be possible to prove specific instances of discrimination. See Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), aff'd, 436 F.2d 108 (2d Cir. 1970); cf. Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291 (9th Cir. 1970), where both economic and racial discrimination were relied upon in holding that a city had a duty to provide land for indigent housing. Racial discrimination was a factor in the decision, but the relief granted was to indigents, not a racial minority. The court was suspicious, however, of the high correlation between economic and racial segregation. See Note, The Responsibility of Local Zoning Authorities to Nonresident Indigents, 23 Stan. L. Rev. 774, 786 (1971).

37. See B. Sagalyn & G. Sternlieb, supra note 35, at 69.


39. Id. at 28.

plurality held also that education was not a fundamental interest; the Court would probably be even less likely to discover a fundamental right to decent suburban housing.

Not only the Court, but perhaps Downs himself would oppose the recognition of a right of access, for in principle it would hamper the creation of his income-integrated suburbs. Downs calls for limitations on the number of public school children from lower-income families in each commuting zone, and he asks for screening to prevent the concentration in single suburban communities of families with multiple problems. A right of access, however, could presumably be invoked by any number of low-income families, no matter how many children or how many problems they had. No principled limitation is readily apparent, but without some qualification of the right of access Downs's proposals could not be implemented.

If constitutional law fails to open the suburbs, the Downs plan will have to be implemented by metropolitan-wide governmental authorities. Municipalities can be seen either as sovereignties entitled to regulate diverse local matters or as producers of a limited range of goods and services for a small, localized market. The former model presupposes a nation of small, self-contained units, whose plans respond only to local needs. But local plans have substantial, albeit usually unintended, effects on far wider geographical areas. Reality is reflected more accurately by a conception of municipalities as producers of limited goods and services, competing among themselves for residents by offering low-priced, high-quality products. Such a model would reveal that no single suburban community can absorb all the costs of social and economic integration. A hypothetical volunteer community would probably be unable to pay for the new services required by recently arrived poor families; certainly it would suffer in the competition for high-income families. The Downs plan can only be carried out, therefore, on an area-wide basis, with economic and social costs borne equally by all communities in the area.

The present method for allocating the social and economic costs of development is local zoning. Implemented in New York City in

41. 411 U.S. at 29-39. Justice Powell did stress, however, that the Texas educational system was an attempt to improve the quality of education everywhere in the state; the lack of good intentions behind local zoning, however, might make it more vulnerable to constitutional challenge.


1916 and championed across the country by then Secretary of Commerce Herbert Hoover, zoning was supposed to be first, a substitute for costly and complex private covenant schemes and second, a means by which an activity could be classified as a nuisance without litigation. Applied to undeveloped land, however, zoning functions not to protect the value of extant uses but instead to assign values to hitherto unused land. Zoning has thus made some developers wealthy, but it has proved unable to shape new communities satisfactorily. It can shape the social composition of an area only very crudely; and whereas low-density zoning may usually attract white, high-income families, high-density zoning alone cannot guarantee social and economic integration.

New, broad-based government authority is necessary to carry out Downs's programs. Most proposals for such authority invoke its necessity only when local decisions have substantial external effects on an entire area. Some have suggested, however, that cities could be treated as agencies charged with the implementation of regional plans. A state or regional governmental body, armed with authority to regulate the flow of subsidies to participating low-income families and local communities, thus could map a plan of dispersal and authorize cities to carry out the design.

There is a need not only for new methods of administering land use allocation, but also for a reexamination of the basic planning concepts which underlie development doctrine. Most plans for the control of development, for instance, encourage compaction of housing so that public services may be easily located near all housing units and open space may be preserved. Low-density zoning, of course, encourages costly single-family homes, while compaction might seem to permit less costly multi-family housing. But high-density zoning drives land prices in the areas designated for development so high that "the housing that is built is out of the reach of lower income families, even under the present subsidy system." Perhaps future

44. See generally S. TOLL, ZONED AMERICAN (1969).
47. See generally Mandelker, The Role of Zoning in Housing and Metropolitan Development, in PAPERS SUBMITTED TO SUBCOMM. ON HOUSING, PANEL ON HOUSING PRODUCTION, HOUSING DEMAND AND DEVELOPING A SUITABLE LIVING ENVIRONMENT, PART 2, HOUSE COMM. ON BANKING AND CURRENCY, 92d CONG., 1ST Sess. 785 (1971).
48. See id. at 793.
subsidies will have to reflect the increased land costs likely to be the consequence of higher-density zoning. Or perhaps the suburbs might more efficiently be opened by permitting low-density housing and subsidizing the purchase of single-family homes by lower-income groups. In any event an area-wide government committed to achieving the economic and social integration urged by Downs will have to grapple with such problems.\textsuperscript{49}

Redefinition of land use purposes and reassignment of governmental authority are two tasks for legislatures. Courts, however, can spur reconsideration of existing methods of land use control by exercising increased judicial review of present planning decisions. Michigan's highest court has properly shifted the burden of justification to the community when its plan totally excludes some use.\textsuperscript{50} The Oregon Supreme Court has gone further and held that there is no presumption of validity to any zoning map amendment.\textsuperscript{51} Close judicial scrutiny of planning decisions should mean that a zoning authority's denial of a use has to be supported by proof that (1) the development would impose substantial costs on the surrounding community or property; (2) that the costs to the community cannot be minimized by stricter construction and design standards; and (3) that the use cannot be permitted elsewhere in the community, consistent with the regional plan.\textsuperscript{52} Requiring such a showing would facilitate developers' efforts to respond to the housing needs required by the Downs plan. These standards would permit, however, a plan such as Ramapo's if it were part of or consistent with a regional plan. In the absence of such a showing a court might well adopt the presumption that techniques such as the Ramapo timing ordinance are not authorized by existing legislation.

The role of the judiciary in opening up the suburbs cannot be great. Nor can a regional decisionmaking authority armed with the power to allocate subsidies necessarily achieve Downs's goals of economic and social integration in the suburbs. Downs has argued that

\textsuperscript{49} See R. Babcock, supra note 5, at 115-37.


\textsuperscript{51} Fasano v. Board of County Comm'rs, 507 P.2d 23, 26 (Ore. 1973).

\textsuperscript{52} The assumption here is that communities can best accomplish the dual objectives of protecting environmental quality and providing a broad assortment of types of housing by passing ordinances which allow discretionary review on a case by case basis of projects which are proposed. While undertaking such a review procedure communities may also encourage large-scale multi-unit developments. \textit{The Use of Land: A Citizens' Policy Guide to Urban Growth} 189-98, 246-61 (W. Reilly ed. 1973).
the suburbs must be opened lest we perpetuate a divided, inequitable, and frightened society. He has addressed himself primarily to the denizens of suburbia. Ultimately only their willingness to respond to the social obligations recited by Downs can guarantee success of his program. One may hope, along with Downs, that those who live in the closest existing approximations of the American Dream will be willing to risk what they have built for themselves in the hopes of the achievement of a way of living better for everyone.


Reviewed by Oliver E. Williamson†

Ward Bowman's analysis of restrictive patent licensing and, for that matter, of vertical market restrictions generally, reasserts a position that both he and Robert Bork have taken previously; namely, vertical market restrictions usually, virtually always, have beneficial efficiency consequences and ought to be regarded as lawful. The argument relies heavily on two propositions: (1) vertical market relations can never create monopoly power (the so-called "scope" problem); and (2) mobilizing latent monopoly power yields allocative efficiency gains.

While I concede that both of these propositions hold in many and perhaps most circumstances, neither holds without qualification. Both occasionally fail to take account of transaction cost considerations. Such costs have been persistently neglected by critics and supporters of the Bowman position alike. This neglect has impeded an accurate assessment of the effects of vertical market restrictions and has played into the hands of those who assert that such restrictions are invariably innocent or beneficial.

Transaction costs can be disregarded, of course, in circumstances where they can plausibly be held to be negligible. It is incautious,

† Professor of Economics, University of Pennsylvania.