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Neal A. Roberts
Osgoode Hall Law School, Toronto

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An Appropriate Economic Model of Judicial Review of Suburban Growth Control

NEAL A. ROBERTS

Many American suburban governments, concerned about the shape and rate of growth in their communities, have been making inventive use of their police and tax powers to direct, slow or change development. These efforts have often been challenged in court, where judges have generally failed to develop a body of consistent doctrine.¹ What they have done instead is to attach a general presumption of validity to the municipal land use policies² and then intervene sporadically on constitutional grounds to protect developers, certain housing consumers or landowners.³

In response to this general policy of deference combined with occasional intervention, academicians like Professor Robert Ellickson have called for a substantial change in judicial approach. They

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** A.B. 1966, M.A. 1967, University of California, Santa Barbara; J.D. 1970, University of California, Berkeley. Visiting Professor, School of Law, University of California, Los Angeles; Associate Professor, Osgoode Hall Law School, Toronto.


would like to "make it relatively easy for a genuinely aggrieved party to shift to the suburb the burden of proving the efficiency and equity of suburban policies." We are told this change from the present "Pollyannish view that giving suburbs a free hand at planning will lead to a better urban future," is needed in order to protect the citizenry against "housing monopolies and inequities among landowners and consumers." The underpinnings of this call for such unprecedented judicial intervention is the fear of serious misallocations of resources through the cartelization of housing supply. This new doctrine of trust-busting of the suburbs is based upon an economic model of the suburbs which accents their potential for monopoly profits.

This article, which provides a more accurate model of the suburbs, seeks to show that such a fear of cartelization is not a valid reason for increased judicial intervention and that the present posture of judicial deference allows for the efficient production of a wide range of housing products while encouraging efficient local government. Similarly, the present sporadic constitutional intervention allows judges to force suburban governments to redistribute wealth at the local level, as needed. It also allows the courts to supervise the access to local procedures. The model points out why injunctive, rather than compensatory, remedies are most often chosen by intervening judges.

The analysis in this article is based on the assumption that the behavior of suburban governments in a given region is not unlike the behavior of small firms in a competitive industry. The first section of this article, Economic Reasons for Growth Control, examines this assumption in the context of growth control, describing the economic motivations which lead suburbs to behave competitively. This first section also develops three basic economic motivations which might encourage a suburb to impose growth controls: avoidance of congestion externalities, better product development or an attempt to extract monopoly profits due to artificial scarcity. The analysis shows that it is impossible to tell in any given circumstance which justification is controlling in the minds of government

* Ellickson, supra note 1, at 469.
officials. Moreover, even in those situations where it is obvious that a suburb is attempting to extract monopoly profits, that effort may merely represent one cost of achieving an efficient system of local government.

The second section of this article, A Model for Analyzing Growth Control, develops a model to explain the mechanics of suburban growth control. The section begins with a focus on the individual suburb, noting the various methods by which a suburb can seek to control growth (i.e., regulation, subsidies and charges) and illustrating the superiority of a system of charges over other alternatives. This analysis also addresses the tricky problem of distinguishing subsidies from "compensation," suggesting that prior discussions of the problem have failed to take account of the manner in which the risks or possibilities of governmental growth control actions are capitalized in the price which the landowner pays for his property.

The second section then changes its focus from the individual suburb to the region in which the suburb operates, describing the mechanics of regional suburb competition and introducing into the model the impact of such factors as the provision of public goods and services, and the control of negative externalities by the suburban government. The conclusion drawn is that a regional urban system where individual suburbs compete with each other by means of growth controls is in fact an economically efficient system. Thus, judicial intervention in such a system to invalidate growth controls cannot be justified on efficiency grounds.

The second section finally surveys the effect of the ad valorem property tax on the model. This survey leads to a conclusion that distributional considerations constitute the only valid justification for judicial invalidation of suburban growth control measures. That argument is based on an assumption that wealth redistribution is desirable and that local governments under instructions from a court can be a good vehicle for accomplishing such a redistribution. If such an assumption is accepted, it follows that achieving an efficient system of suburban competition by means of growth controls may require periodic intervention by the courts to insure that wealthy economic interests do not isolate themselves in homogeneous suburbs. The discussion emphasizes, however, that even intervention on distributional grounds must be used sparingly in view of the risk that such intervention may engender serious inefficiencies in the system.

The third section of this article, Judicial Review of Growth Con-
controls, utilizes the conclusions drawn from the model to construct a
description of judicial attitudes toward growth controls. This dis-
cussion points out that the nature of the legal rules adopted by the
courts is strongly influenced by policy considerations which are in
turn molded by an admittedly idiosyncratic pattern of value judg-
ments. The discussion shows, however, that if these value judg-
ments and policy considerations are made explicit, the current pat-
tern of judicial decisionmaking with respect to growth controls is
not merely an ad hoc exercise in arbitrary behavior but rather can
be justified both on efficiency and distributional grounds.

**ECONOMIC REASONS FOR GROWTH CONTROL**

_Economic Motivations: Why Does a Suburb Compete?_

This article takes as its basis an economic or public choice model
of local government which presupposes that the local legislature is
a vehicle for the private self-maximization of its constituents’ in-
terests. While there are other ways to analyze local government
decisionmaking, usually based on a public value or public interest
model, the economic model seems the most relevant for a discus-
sion of the possible dangers of local monopoly. Suburban govern-
ments in a metropolitan region are thus assumed to make decisions
in a manner similar to that utilized by small firms operating in a
competitive industry. Because this proposition is not self-evident,
it is best to begin with an examination of this assumption, focusing
on the extent of this similarity and describing its impact on the
analysis of suburban government behavior in imposing growth con-
trols within individual suburbs.

An economist would tell us that the hypothetical small firm in a
competitive industry operates with a profit-maximizing motiva-
tion. This simple axiom forms the basis of most of microeconomic
theory and analysis concerning the behavior of the firm in the mar-
ketplace. If we are to analogize the suburb to a small firm and as-
sume that suburbs in a metropolitan region “compete” with each

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6 For an elaboration of this public choice model, see generally J. Buchanan & G. Tul-
lock, _The Calculus of Consent_ (1962); G. Stigler, _The Citizen and the State_ (1975); W.
Riker, _The Theory of Political Coalitions_ (1962). For a contrast between the public
choice model and the public value or interest model, see Michelman, _Political Markets and
Community Self-Determination: Competing Judicial Models of Local Government Legiti-

we must attempt to explain what it is that suburbs are trying to maximize and why it is that they want to maximize it.

We begin by observing that an individual chooses to live in one suburb, as opposed to another, in order to maximize the satisfaction of his own internal preferences. Thus, the desirability to him of living in a particular location is represented by the excess of the benefits derived from the location over the costs associated with living in the location. The benefits derived from the location include such things as convenience, scenic values and the general quality of municipal services in the suburb. The costs include not only land and housing costs but also the costs associated with a particular location such as the transportation costs incurred in getting to work, schools or shopping centers, and the taxes and charges which the resident will have to pay for the support of the municipal government.

For any individual, the desirability of a particular location will be determined by his own unique tastes and preferences. But for the society as a whole, the market price of land at a particular location is a function of its social desirability. The incoming resident will choose to live in that location which maximizes the positive difference between his own subjective valuation of the location and its market price. To this incoming resident, the market price is only one of the “costs” associated with the location. The situation, however, is somewhat different for the established resident. It is in his interest to maximize the market price of his land so long as this maximization does not decrease his own subjective valuation of the location’s desirability. Each member of the suburb’s population, through the collective decisionmaking process of municipal govern-

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8 The notion that suburban governments “compete” with each other is not unheard of. See generally Anderson, Introduction to Symposium: Exclusionary Zoning, 22 Syracuse L. Rev. 465, 467 (1971). While a certain amount of “competition” has been recognized by lawyers in the past, it has not been analyzed in an economic sense and therefore has been generally characterized as selfish and socially undesirable.

9 Some observers might argue that local governments are so inept that they do not in fact maximize the interests of the local majority and thus the analogy to the firm is inapt. If this were true one would of course not have to worry about local monopolies seeking to maximize local interests at all.


11 This assumes that the resident’s motivation for buying the property was investment and the enjoyment of the habitation. The investor seeks to maximize the market price of his parcel and his own subjective valuation of his enjoyment of the property, that is, his consumer surplus.
ment, thus attempts to maximize first, his own subjective valuation of desirability and second, the market price of his land. In many cases, the collective decisions of the suburb’s population will approximate society’s preferences and the suburban government will be motivated in general to maximize the average market price of land in the suburb. The extent to which the preferences of a suburb’s population differ from general social preferences will determine the degree of differentiation between and among suburbs.

If suburbs and suburban governments are motivated by a force analogous to the profit maximization motive of the firm, it should be expected that in a metropolitan region composed of many different suburbs, each attempting to maximize its own desirability in the eyes of its residents, a system will evolve which is not unlike competition. We now turn to an exploration of why a “competing” suburb, motivated to maximize its own desirability, would attempt to impose growth controls.

Economic Justifications: Why Does a Competing Suburb Impose Growth Controls?

If we accept the notion that a suburb behaves much like a firm, the next question would appear to be, “What ‘product’ is the suburb producing?” One answer would be that suburban municipal governments are primarily concerned with providing municipal services for consumption by the suburb’s population. But this view is too confining because it excludes the incoming resident and also because it makes the “shareholders” (i.e., the established residents) in our “suburban firm” its only consumers. What, in fact, is being produced is the suburb itself, or perhaps more accurately, residential units in the suburb. The potential consumer “buys” the product by becoming a resident of the suburb.

A firm decides how many units of its product to produce in response to market price and its own marginal costs. Our “suburban firm,” however, cannot directly control the number of residential units produced. It can only indirectly influence the pro-

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12 Some writers have made the mistake of ignoring the subjective valuation and concentrating on the market price. See Ellickson, supra note 1, at 449 n.175. While market price is important, it is probably considerably less so than the subjective valuation. This is because any increase in subjective valuation occurs almost immediately while any increase in market price is realized only on sale. See Willemsen & Phillips, Downzoning and Exclusionary Zoning in California Law, 31 Hastings L.J. 103 (1979).

13 See generally M. McCarty, Dollars and Sense: An Introduction to Economics 24-33 (1976).
duction by the imposition of various types of growth controls. These controls are imposed because of three basic economic considerations.

Declining Marginal Benefits from Growth for the Congested Suburb

Some empty suburbs may be able to absorb new entrants costlessly while some choked and teeming suburbs may suffer a tremendous burden from even one more entrant. A marginal analysis of the productivity of the suburbs in accommodating new entrants in a metropolitan region shows that some municipalities have a much lower cost per new entrant than others. If this is so, then controls in the high-cost suburbs have the effect of pushing production towards the least cost producers.

To understand this, the concept of marginal analysis must be explained. In the context of a firm, the focus would be the marginal productivity of the plant: as the quantity of one input, such as labor, increases in combination with a fixed quantity of other inputs, such as the machinery in the plant, the marginal physical productivity of the variable input must eventually decline. That is, while the first additional unit of labor will result in an increase in production of $X$ units, each additional unit of labor will result in something less than an $X$-unit increase.\(^{14}\)

The same general notion can be applied to a suburb that provides benefits which are consumed by all of its residents and paid for out of tax monies. As residents are added to a new community, the cost per unit of consumption of municipal services will go down. That is, the larger the number of residents in the community, the lower will be the tax price per capita for a specific quantity of municipal services. The individual resident will find that he is benefiting from having the service at progressively lower unit prices. However, at some point the resident will also discover that he is beginning not to enjoy the consumption of the services as much because the number of other residents with whom he must share the services is ever increasing. That is, the marginal benefits flowing to the residents of the particular suburb will, at some point, start to decline.

From the standpoint, then, of each suburb with a given physical size, there will be an early time in its development when it needs

\(^{14}\) See K. Lancaster, supra note 7, at 102.
residents in order to decrease the per capita costs of new facilities such as schools and parks. There will also come a time when the marginal benefits that the existing residents derive from having a new neighbor are equal to the costs of the neighbor moving into the community. However, at some point, because residents will have decreasing enjoyment in the shared community facilities, the marginal benefits flowing to the members of the community will start to be less than the marginal costs that the new residents occasion by their arrival. This means that there will exist an optimal size and density for each suburb.\textsuperscript{15}

Assume, for example, a suburb which has only one municipal facility, a beach with a lifeguard. The first resident will have a very high tax bill, namely the entire salary of the lifeguard, but also a considerable amount of enjoyment since he will have to share the lifeguard's services with no one. As new residents arrive, however, the tax price for the first resident will go down as he shares the lifeguard's salary with his new neighbors. His enjoyment of the beach will presumably decrease slightly as he is forced to share it with a few other individuals. At some point, as more and more new residents move in, the decrease in his enjoyment which one more new resident causes will exceed the benefit to his tax bill resulting from the addition to the community of one new taxpayer. The suburb thus goes from a position of less than optimum size to a position of optimum size where the benefit the resident receives from the new entrant is exactly matched by the new entrant's cost. If it then continues to grow past optimum size, the suburb could attempt to deal with this problem by opening up more beach or training more lifeguards. Still, at some point the physical limits of the facility will bring about an optimum size.\textsuperscript{16}

In analyzing a suburban world containing a series of suburbs, it would be desirable to be able to determine when each suburb reaches its optimum size, for the efficiency of the entire system would be furthered not by endlessly increasing the inputs, but by capping some suburbs and opening up new ones with lower present marginal costs which have not yet reached their optimum size. Since costs are not absorbed by suburbs at a uniform marginal rate, suburbs will benefit from their ability to vary this regulatory

\textsuperscript{15} Analogizing to the firm again, for any given schedule of costs and for any given market price, there is a corresponding optimal output for the firm. This optimal output will maximize the firm's profits. See M. McCarty, supra note 13.

\textsuperscript{16} This example can be shown in a graph from Professor Buchanan's economic theory of clubs. Buchanan, An Economic Theory of Clubs, 32 Economica 1 (1965).
package or to impose development charges. For a suburb which had already reached its optimum size (i.e., marginal costs now equal marginal benefits), the efficient strategy would be to attempt to continue making the marginal costs equal the marginal benefits. This could be done by either decreasing the costs that the new residents impose upon the community or by increasing the benefits that their arrival would occasion. This type of system will necessarily impose higher entry costs on later entrants than on earlier

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**COSTS AND BENEFITS ASSOCIATED WITH VARIOUS SUBURB SIZES**

![Graph](image)

The X axis represents the costs and benefits from the beach and the Y axis represents the number of residents in the community. Line Y,C represents the decreasing costs per capita of paying the lifeguard and line E,B represents the per capita enjoyment of the beach. (It is concave because beach enjoyment eventually declines when so many people are on the beach.) From the time the first resident arrives until the time resident S, arrives the marginal cost of the new residents is less than the marginal benefits which each resident enjoys. With the arrival of resident S, the marginal cost is exactly equal to the marginal benefit all residents derive (i.e., the slopes of the cost curve and the benefit curve are equal). After this point, for each new resident, the marginal benefits begin to be less than the marginal cost. The S point thus represents the optimal size of the suburb with one beach and one lifeguard.

If the suburb does not wish to cap its size at S, it could expand its physical facilities by putting in more beach and hiring more lifeguards. Such an expanded facility could be represented by the lines Y,C,N and E,B,N. Again, however, there would be an optimum size for the suburb to make use of these facilities, namely S,N. Since there are physical limits to the amount of beach that could be developed (or similarly the amount of parkland or school land or whatever) this suburb would reach a point where the optimum point could be passed.
ones. New and old entrants will be treated dissimilarly, a result that some commentators have criticized as being unfair.\textsuperscript{17}

The difficulty with these commentators' interpretation of equal treatment is that it attempts to force uniform costing on a suburb which cannot possibly know its average cost over the time of production. For the efficient operation of the system of suburbs, marginal costing of the impact of the new entrant is preferable, even though this will lead to different treatment of oldtimers and newcomers. This differential treatment is not unfair, however: the oldtimer got his low price when he entered a then relatively remote new suburb with few amenities; the newcomer can find similar housing on the same terms if he is willing today to go out to the sticks and buy a home in a least-cost suburb.

There may well be occasions when it might be desirable to distribute wealth from the oldtimers to the newcomers or vice versa, but this is a question quite divorced from that of equal treatment and it would, of course, depend upon the relative wealth positions of the two groups. If the new entrants are, for example, low-income homebuyers, one might want the oldtimers to subsidize the new entrants' more expensive entry to a crowded suburb. This could be done by requiring equal entry prices for the latecomers and then spreading their higher costs throughout the group of oldtimers in the form of higher taxes.\textsuperscript{18}

\textbf{The Need to Produce a Better Product}

A second reason why a suburb might want to change its pattern of controls is that the demand for various types of housing and communities has changed in the metropolitan area. Consider a sparsely settled municipality at the edge of a major city where the suburb's initial development resulted from the establishment of a fish packing plant or other harbor facility. The controls in such a municipality would be designed to accommodate the workers in the local industry and the general housing package of combined shelter and municipal services would result in a modest product to meet the modest pocketbook of the workers. It would be a Chevrolet suburb. Now assume that the major city enjoys economic prosperity and the fishing industry suffers a decline. It may be that

\begin{itemize}
  \item \textsuperscript{17} See, e.g., Ellickson, \textit{supra} note 1, at 459-65.
  \item \textsuperscript{18} The concept of wealth redistribution is discussed in more detail in the second section of this article, \textit{A Model for Analyzing Growth Control}, \textit{infra}.
\end{itemize}
there is a demand for a better housing package. This suburb can then begin to produce that needed product by building better schools or putting in larger houses. It can become a Cadillac suburb.

This change from one type of housing product to another will have an impact upon the number of units produced within that suburb, but this may or may not be efficient depending upon housing demand and the existence of other suburban housing-producing suburbs within the region. If there is now a high demand for Cadillac suburbs and a lower demand for Chevrolet suburbs, then this shift from one product line to another is simply a response to that demand.

If the demand for Cadillac suburbs increased, the private market in the absence of any governmental intervention would begin to increase the production of Cadillac-type housing. Governmental action may be required to insure that the Cadillac section of the suburb maintains its Cadillac character. For instance, if one developer built a tract of $250,000 homes, there would be a tremendous incentive for another developer to build a tract of $50,000 homes across the road, thereby raising the value of the less expensive homes and lowering the value of the more expensive ones. In essence, he would be reaping an external benefit by locating his tract next to the $250,000 tract.¹

So long as there are myriad possible housing-producing suburbs within the region, this shift from one product line to another will have no impact on the productive efficiency of all the suburban producers. Again, it should be observed that in any given set of controls, it would be difficult to tell whether this reason was the motivating rationale.

Attempts to Extract Monopoly Profits

Returning to our analogy of the firm for a moment, there exist instances in the private market when a firm develops a new and unique product. The firm, in its effort to maximize profits, will attempt to exploit this uniqueness by denying its competitors access to information on how to produce the new product. If the product is unique, that is, if there are no feasible substitutes, the firm may become a monopolist with respect to its new product. If it has mo-

¹ See Justice Sutherland's discussion of this rationale in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).
nopoly power, the firm will attempt to restrict the supply of the new product, thus artificially raising prices and extracting monopoly profits.20

A suburb which is in some way unique may also attempt to exploit that uniqueness and extract monopoly "profits" by artificially restricting the housing supply in the suburb. If one were only to look at a single suburb, one might conclude that this would result in a deadweight social loss since it would produce fewer housing units than if the suburb were not attempting to restrict supply. However, this may not be a social loss at all when one looks at the region as a whole.

There exist many situations where small, or temporary, monopolies are allowed in some parts of an industry in order to make the industry as a whole more efficient. An example is the granting of a patent. The patent holder invests time and effort in producing a better product and for that investment is rewarded with a monopoly on that particular product. This local monopoly has two efficient effects. First, it provides him with the incentive to invest in research and development in his production process. Second, his competitive advantage forces other producers to invest in their production processing in order to produce a competing product.21

Returning to the suburbs, we can see that there is a similar reason for permitting local monopolies. If a given suburb is unique it is because it has chosen to provide "unusual public services"22 which make it more attractive than another. Thus an innovation in one suburb, such as a better school or library or park system, will give it an advantage that will cause other suburbs to attempt to replicate those features. As we shall see in the following section, if there is a system of competing suburbs then such competition may in fact lead to efficient local government gains which far outweigh any local consumer loss.

A Model for Analyzing Growth Control

We have thus far focused on reasons why a suburb might choose to impose growth controls. The inquiry now shifts to an examination of how suburbs which choose to impose growth controls go about doing so. This examination begins with a look at the individ-

20 See K. Lancaster, supra note 7, at 197.
22 See Ellickson, supra note 1, at 430.
ual suburb. The individual model is then expanded in an effort to
describe the behavior of many small suburbs operating in a metro-
opolitan region. Finally, the impact of the ad valorem property tax
is evaluated. The conclusion is that a system of competing suburbs,
each with an unrestricted ability to impose growth controls of va-
rying types and degrees, results in an economically efficient alloca-
tion of resources in the production of residential housing units, al-
though judicial intervention invalidating growth controls may
occasionaely be justified on distributional grounds.

The Individual Suburb

If we are to understand how the individual suburb imposes
growth controls, we must, of necessity, examine the tools and
methods available to it. Three types of growth controls will be con-
sidered: regulation, subsidies and charges. In addition, there is
given a brief description of how each type of growth control oper-
ates and an evaluation of its effectiveness for coping with the
problems it is designed to solve.

We must also consider the parameters within which the individ-
ual suburb can impose its controls. In this connection, the problem
of distinguishing “subsidies” from “compensation” will be ex-
plored. It will be argued that compensation for a “taking” in the
fifth amendment sense is justified only where the governmental ac-
tion is totally unexpected, that is, where the risk of the govern-
mental action was not capitalized into the price which the land-
owner paid for his property. If, however, the risk was capitalized,
any governmental payment is, in effect, a subsidy: a payment so
that the landowner will not use his land in a particular way. This
“subsidy” should be explicitly recognized as such and evaluated in
that light, not hidden under the guise of “compensation.”

Methods of Competition: Types of Growth Control

In any given city council vote, it is impossible to tell exactly
what the underlying reason for the growth control measure enacted
actually is.23 This is not merely because of the difficult problem of

23 A similar problem has been noted by the United States Supreme Court in recent cases
dealing with the concepts of “racially disproportionate impact” and “racially discriminatory
purpose.” See Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); Wash-
ington v. Davis, 426 U.S. 229 (1976). See generally Note, Constitutional Law—Equal Pro-
proof but also because the decision is made in a situation of high uncertainty. The residents who are complaining about increasing taxes may in fact not know either whether there is an increasing marginal cost for the new residents or whether their suburb is unique or whether there is a much higher demand for Cadillac rather than Chevrolet suburbs within the region. In this situation of uncertainty, all that is clear is that there will be many instances where the new entrant to the community imposes more of a burden on the community than his property taxing capacity will produce in benefits. This external harm will not be reflected in the price of producing his housing unit and the suburb will inefficiently produce too much of the housing.

The community has basically three choices available to it to deal with these external effects of the new housing production: regulation, subsidies and charges. Regulation attempts to match the number of entrants to the capacity of the suburb to absorb them. An example of this would be a Petaluma-style\textsuperscript{24} zoning system which limits the number of units produced per year. A subsidy consists of a payment to the local housing producers not to impose the external harm. For example, the community might purchase half the land owned by a local builder to be used for open space instead of housing production. A third approach is to impose a charge upon the local producers equal to the external cost which the new entrant imposes. An example of this approach would be an exaction of the same open space land from the builder.

\textit{Regulation: A Series of Problems.}\textsuperscript{25} Regulation has serious drawbacks. First, it may prevent the local housing producers in a community from taking advantage of their own efficiencies. For instance, if a suburb imposed a sewer hookup limit, it would reduce the production of the builder who installed a double pipe system, one for rainwater and one for sewerage, as much as one who used a single pipe system and dumped the entire amount into the city treatment plant. Under an incentive system, the builder would be charged only for the amount of increased sewerage that his development produced. Therefore, regulation usually does not produce the least-cost solution. Likewise, regulation does not encourage the

\textsuperscript{24} This refers to the zoning-growth control system established by the city of Petaluma, California, the constitutionality of which was upheld by the Court of Appeals for the Ninth Circuit in Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).

\textsuperscript{25} For a discussion of these approaches as applied to air pollution problems, see R. Stewart & J. Krier, \textit{Environmental Law and Policy} 555-617 (2d ed. 1978).
developers to develop innovative solutions for particular external harms. For instance, if the problem is congestion of the downtown shopping area streets, the best solution might be a system of jitney buses coming in from the outlying developments. A regulation which simply limits the number of new units which can be produced in no way encourages individuals to develop that best solution.

A second set of criticisms of regulation stems from its potential for delay and uncertainty. Euclidian zoning, for example, appears to lay out rigid zones in which certain land uses are permitted within the zone. In practice, however, the system represents an ongoing administrative process of upzoning, downzoning and variance. The landowner thus does not know at any given time what land use will actually be allowed and he is always seeking a more profitable use. The ongoing transaction between the government and the landowner uses up a great deal of costly legal and administrative resources.

Another problem with regulation is its inability to make the costs of the new entrant explicit. A land use regulation that mandates only one-bedroom apartments in multiunit buildings or one single-family house per five-acre lot may have the effect of decreasing the number of children in the municipality or the number of entrants, but it does not let the voting public or the housing consumer know the extra cost that each new entrant imposes on the community. Builders frequently say that land use controls increase their housing unit costs by ten, twenty or thirty percent but these claims are most often discounted as self-serving excuses for current high new house prices. A subsidy or a charge per new entrant or per new square foot of residence constructed makes the added costs of the new entrant explicit and subject to public debate.

Finally, regulation is ill-suited for making some of the fine tuning adjustments that are necessary when new entrants impose high costs on particular members of the community. For instance, if a builder wants to put up a small multiunit structure at a point well within the built-up section of town, this will impose a set of additional costs on the residents already there. A strict regulatory system can only grant or deny permission to construct the structure, thus in no way can it compensate the established residents for the

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additional costs. A system of charges, on the other hand, could exact a payment from the developer and use those funds to provide additional compensating services for that neighborhood.

**Subsidies: Paying the Producers to Exclude New Entrants.** A second approach is to pay the landowners/housing producers not to bring new residents into the community. This can be done, for instance, by buying up vacant land and putting in municipal open space preserves. Such subsidies are frequently called a "compensatory payment," but as we shall see in the next subsection, The Regional Analysis: An Efficiency Criterion, in a land market which expects government to deal with external impacts, subsidy is a more accurate description of such a scheme.

A system of subsidies would have some obvious advantages. It would be more efficient than regulation in that it would allow the municipality to purchase the least well located, and thus the cheapest, land for housing development. It would also allow the local government to fine tune the harm done to the area. In addition, it could be accomplished quickly with the only significant transaction costs being the bargaining between the landowners and the municipality over price. Finally, its most obvious and highly touted advantage is that it would make the cost of the new entrants explicit and it would discourage the local government from inflating that cost beyond its actual impact upon the community because the municipality would have to pay for the subsidy out of scarce tax monies.

Paying the house builders not to harm the community does, however, have some serious drawbacks. First, unless all of the land in the community is purchased, the problems of regulation of the remaining open land will still exist. The new entrants can just as easily come into the community and live in high-rise multiunit buildings on only a few acres of land. It is also possible that the already built-up land could be redeveloped with a higher density.

Second, the purported strength of the approach in discouraging overvaluation of the harm of new entrants is also its greatest liability, for in an era of tax limitations there is a tendency on the part of municipalities to make short-term savings even if the approach will in the long run result in larger costs for the community.27 The

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27 While a system of subsidies financed by local taxes is a theoretical possibility, the current political atmosphere throughout the country makes it no more than an academician's pipe dream. For instance, in California after Proposition 13, it is legally impossible for local governments to increase the local property tax to pay for a subsidy system. An increase in other types of taxes requires "a two-thirds vote of the qualified electors" of the locality. Cal.
local politician dealing with a one-tax-year municipal budget and a city election every two or four years may well ignore future municipal costs. The tendency of a subsidy is to undervalue the true negative impact of new entrants because the persons who must pay them (i.e., the present residents) make up only a portion of all those who will derive utility from the land use (namely the present and all future residents). Although residents of today may be interested in maximizing future land value they may not be willing to make sufficient present payments to that end. Once it is realized that some land use and environmental costs are irreversible, it can be seen that the subsidy system might result in permanent harm to future residents.

Also, the subsidy or incentive system would result in an increased demand for the community’s land because the municipality would now be in the market looking for land. Thus a system of buying such land would tend to distort the price of the remaining land. Carried to its logical conclusion, one sees landowners going into the business of not developing land by drawing up elaborate subdivision plans with the expectation that the community will step in and purchase the land before construction commences.28

The costs of this program would be borne by the local taxpayers with the payments being made to the landowners/housing producers. Rather than allowing the local social costs of the new entrants to be internalized by the housing producers and their consumers, the subsidy system would leave the costs of the houses that are produced unchanged. Further, the housing producers would use the local taxpayers’ money to go elsewhere and produce more housing at a subsidized cost. The result would be that more housing would be produced than would be the case if the market were allowed to function. While subsidies could theoretically lower the number of new entrants (assuming the regulatory system does not respond to the new pressure) the community would fill to its optimum much more rapidly than would a community that had each housing unit pay its full share of increased costs. Rather than a series of subtle adjustments, there would be the rapid filling up of these crowded suburbs and then the jump to the more empty ones. Such growth would make the provision of services quite difficult in the short term and could lead to major short-term costs (i.e., storm sewer runoff or school crowding) even if the community did in the

long term reach its optimum size.

Charges: Making the New Entrant Pay for the Costs He Imposes. There is a vast array of mechanisms available to the municipality to charge the new entrant. These include benefit charges, special assessments and exactions. Each new entrant imposes costs on the community. Some of these costs occur close to his residence and have some relationship to his enjoyment of his home, such as the added costs of the larger pipe to handle his sewage or the local playground for the entrant's child. Other costs occur at points further removed from his residence but are equally important. These may be capital outlays, such as the need to buy more parking space at the local beach, or they may be ongoing labor costs that were not required previously, such as the salary of a full-time, rather than a volunteer, fire department. Legal writers and some state judges have attempted to distinguish between those two types of costs, treating charges related to one or the other differently. However, it would appear that such a distinction is inconsequential once the differing abilities of various suburbs to absorb new entrants is appreciated.

The use of charges is the best mechanism to deal with the harms generated by the new entrant's arrival. As with subsidies, the scheme is administratively efficient when compared to prohibitory case-by-case regulations. These charges act as prices for growth in the various suburbs. These prices in turn convey information about each suburb's relative efficiency in absorbing new entrants. Housing consumers are then in a position to adjust to the prices as they see fit. If the older community which has already built the fire hall and the school can supply housing more cheaply, in the form of an old house that needs repair, than can the new commuter suburb, then the house purchaser will locate there. If the developer can afford to develop apartments in the middle of the city areas already serviced or in the farther removed vacant suburb, then he will choose to do so. The range of prices varies among the many suburbs in a metropolitan area, and individual suburbs will vary the charges depending upon the particular problems of a given locale. A rocky hillside area will require a higher storm drain exaction than will the flatland. These charges will thus result in least-cost approaches to the problem of housing production.

As the municipality changes over time, it would be in a position to change its fees accordingly. If a municipality reaches a point

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29 Ellickson, supra note 1, at 475, makes this distinction.
where a large capital outlay is called for, it can change its entry price. Similarly, as it reaches its optimum, it can raise its price accordingly.

Problems of Transitional Equity: Takings

We now have an understanding of both why a suburb would want to control growth and the mechanisms that are available to accomplish those aims. We have labeled those cases where the government will choose to pay a landowner in order to change the allocation of his resources as situations of subsidy. The final point we must consider is whether there are other grounds for interfering with the distribution of wealth which results from the government's action.

Irrespective of whether government uses prohibitory regulation, subsidies or charges, if it begins to influence private behavior, this will change the profitability of the private activity. To the extent that these changes in government intervention are unexpected, they will visit upon the private parties a wealth redistribution, either positive or negative. A subsidy not to produce a certain harm in a community or the upzoning of a corner lot to commercial uses will give the producer an unexpected windfall, just as an unexpected charge on downzoning will create an unexpected loss. It is the distribution of these losses which forms the problem upon which judges and legal commentators have expended vast energies, for this is, of course, the fifth amendment's requirement that private property shall not "be taken for public use, without just compensation."  

The doctrine requires either invalidation of government action or compensation for landowners in some but not all cases of loss.  

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30 U.S. Const. amend. V. For a general overview, see Greenawalt, United States of America, in EXPROPRIATION IN THE AMERICAS (A. Lowenfeld ed. 1971).

The judiciary and the United States Supreme Court have found it impossible to establish a “‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”

When invoked, the doctrine is justified on two quite separate grounds. First, it is based on the fairness ground that uncompensated takings victimize a few for the benefit of the public. Second, it is justified on the ground that compensation leads to more efficient or responsible public decisionmaking. The following discussion shows that in the context of suburban controls the fairness question is the only logical grounding for the compensation requirement and that fairness requires protection in only a limited set of circumstances.

The Efficient or Responsible Public Decisionmaking Rationale. One rationale for requiring payments to the landowner is that this will deter the “legislature from enacting inefficient programs.” By having to make a payment, the public officials may be induced to “weigh more accurately the costs and benefits of alternative measures.”

The difficulty with this justification is the same one we have seen with regard to subsidies generally. First, while this type of payment may deter the local government from overvaluing the harm to the community occasioned by growth, it may just as easily cause the local decisionmakers to undervalue that harm. They may look at their short-term fiscal problems or the upcoming election rather than the long-term costs to the community and decide not to make purchases. Again, the present taxpayers only represent a portion of all those future residents who will derive utility from the land use configuration, and irreversible environmental harms may result. Second, for efficient local decisionmaking, the question is not whether the local government actually pays the landowner the amount required to make him change his allocation decisions or even the amount of unexpected, unrisked losses actually visited upon him, but rather whether the government has taken into account these factors when they made their cost benefit calculus of the desirability of the change. As long as

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33 See generally B. Siegan, Land Use Without Zoning (1972); Dunham, A Legal and Economic Basis for City Planning, 58 COLUM. L. REV. 650 (1958); Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 693-99 (1973). For other authorities, see id. at 682 n.2.
34 Ellickson, supra note 1, at 420.
35 Id.
the overall gains flowing from the government action exceed the losses occasioned by it, it will be a social benefit irrespective of whether the gains are shared among winners and losers. The productive efficiency\(^36\) will be the same whether those payments are made or not, so long as the amounts are visible. In the setting of local government where the private landowners hold the major housing resource and tend to have a vast array of legal and political capabilities, it would seem that such private evaluations would be extremely visible.

There is, however, another set of reasons for requiring either invalidation or compensation, and that is the unfairness of victimizing certain landowners for the common good.

*The Fairness Rationale.*\(^37\) The Constitution contains a variety of doctrines which are designed to insure that government, acting for the common good, does not unreasonably intrude into the rights of individuals. The equal protection clause, the due process clause and the taking clause all are designed to insure that groups of people in roughly the same situation will be treated similarly and that basic freedoms protecting human integrity are not interfered with. The citizen is given different protection depending upon the character of the right invaded. In some situations (such as right to procreation or right to citizenship), the rights are so fundamental that the legal system will not allow the government to invade them except in cases of compelling need. In other situations they may be invaded only if the government pays the injured person his subjective value of that right. In still other situations they may be invaded only if the objective or market value of the right is paid.

The taking doctrine applies primarily to situations where a traditional property interest has been invaded. By the wording of the clause itself, "just compensation" is made a substitute for the right involved. The difficult problem is to distinguish when there has been an unexpected loss of a property right occasioned by the government action, from a loss in property value where the landowner priced in the risk of such government action, purchased that


risk in the land marketplace, and had no legitimate expectation of any one governmental outcome. While one can think of examples of either situation (e.g., the purchaser of a house would not expect to have to share his bed with the local postman, but the purchaser of the local trucking company might well expect regulatory policy to change), it is important to examine the suburban land market to see what would constitute an unfair victimizing of landowners.

To understand this, it is necessary to look at the types of losses which occur in the growth control setting and then to explore how these may either be surprises or priced-in risks. We begin by considering how owners of vacant land price their investment. Rural land susceptible to development derives market value above that from agricultural use in direct proportion to its potential for urban development. That locational advantage is due to the positive external effect of the first builders of the city (both public and private) who build their homes, put in their streets and schools, and develop their businesses. The increase in market value of this potential development land is due not to productive investment, such as when an owner of capital goods innovates and invests time and energy in making an asset more productive, but rather is due to the increased expectation that the parcel will have a higher value in urban use than in rural use. No inefficiencies or disincentives automatically result when development is denied. What is important to observe about the increase in market value due to developmental potential is that the expectations are not formed in a vacuum but, in fact, include expectations concerning government action that influence that potential. The land market investor pays a sum which will be higher or lower depending upon the certainty of expectation.

Assume that the landowners purchase their land in a world where there is a large sign reading, “Buy land here; all landowners please pay price for land on basis that government will allow you to develop as you please. No government jackpots allowed.” In such a world, the market value for undeveloped land would include a full capitalization of this certainty of expectation plus a price

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38 In a world of sensitive ecological values and rapidly changing costs of local services, the ability to develop land, as opposed to the ability to use it in the present or natural state, may be the type of resource which Professor Michelman refers to when he says that compensation is not required if a “tacit understanding has arisen, that society reserves the right to preempt the exploitation of a certain narrowly described class of resources at any time, and that no one is to form any inconsistent expectations about the future use and control of those resources.” Michelman, supra note 36, at 1240. See id., at 1208-13.
reflecting whatever other uncertainties there may be concerning the bank rate, the national economy, the local economy, etc. Now imagine a second world where the sign reads, “Buy land here; all landowners please pay price on basis that government will allow you some reasonable return and a few of you will hit the jackpot.” Again, the landowner would price in this expectation. Presumably, he would pay less in such a world for his property than he would if he had the very high degree of certainty of yield that he had in the first world, but this would of course depend on how big the jackpot was. Finally, let us move to a third world where the sign reads, “Land Lottery—buy ticket here (losing ticket holders receive nothing).” Again, the land buyer would price in his expected windfall should he win, and the cost of the ticket would be considerably less than would the price for the identical land in the first example. So long as the land buyer knows the rules of the game when he buys, it is fair that he keeps his gains if he wins or that he not receive any money for losing. Such an extra payment would be a subsidy rather than restitution or compensation; though if such windfalls were common, land prices would rise to the level of the second situation to take them into account.

We can now understand that the fairness question of whether to tax gains or compensate losses only arises when a government action represents a completely unforeseen risk not reflected in the marketplace. If the land market capitalizes complete certainty of government action and the government then surprises all investors, it would seem fair for the government which caused these unexpected windfall gains and losses to reverse this capricious redistribution. In such a situation of complete certainty, the measure of damages would be equal to the reduction in market value of the land. However, in a land market where it is known that the government may have to act to deal with the increasing marginal costs of new entrants or produce a new product, or even attempt to be a

39 “Since I got exactly what I meant to buy, it perhaps can be said that society has effected no redistribution so far as I am concerned, any more than it does when it refuses to refund the price of my losing sweepstakes ticket.” Michelman, supra note 36, at 1238.

40 Note the most extreme example of the use of the police power by a local government in Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). There the Supreme Court of Wisconsin upheld wetlands regulations which restricted use to natural use because, in part, the owners should not have had any expectations of being able to fill land to build their cottage within state shorelands subject to the public trust doctrine. “The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.” Id. at 17, 201 N.W.2d at 768.
monopolist, the decrease in market value will simply represent the bargained-for risk and no damages are required on fairness grounds. One can even imagine a situation where the government's action is a surprise beyond even that foreseeable range of risk. In such a situation it would be fair to award damages, but only to the extent the value of the parcel is reduced below what a "losing" parcel would have been worth after the government acted within the foreseeable range of risk.

Thus the individual who must decide these damages, for example a judge who is looking at a downzoning, must make an empirical judgment concerning the nature of the land market in the suburb and the range of priced-in risks of government behavior. It is not surprising that in American suburbs over the last twenty years judges have come to the conclusion that land market investors know about the threat of government action and are in need of compensation in only the most unusual of circumstances.\textsuperscript{41}

\textit{The Regional Analysis: An Efficiency Criterion}

The previous subsection has explored why a suburb might want to control its growth, the tools available to it and the transitional equity problems present when it changes its package of controls. The problem now is to expand the model so that it will tell us what the impact of the suburbs' actions in concert will be throughout the metropolitan region.

\textbf{The Mechanics of Regional Competition}

One can start from the premise that housing consumers purchase a housing bundle that includes a variety of ingredients. These include not only the number of bedrooms or size of the yard, but also the locational advantages of the site. These locational advantages include both saved transportation costs to and from the workplace and shopping areas, and the particular group of external costs and benefits peculiar to the site.\textsuperscript{42} Since individuals will make a tradeoff between savings in location costs and transportation costs to the city center, one finds a metropolitan area arranged and expanding in generally a circular manner. For the individual hous-


\textsuperscript{42} See note 11 supra.
ing consumer this means that he will pay more per square foot for the more accessible sites. This results generally in a higher price for residential space on a square foot basis in the more central areas as compared to the outlying areas. Graphically this would look like Figure I, which shows the Residential Land Value (expressed in dollar rent per square foot) as a function of distance from the city center.

![Figure I: Residential Rent Gradient](image)

The group of households that want lower density (more space) will be encouraged to take advantage of the lower location rent of more removed sites. Aside from very peculiar circumstances of some people with a high preference for avoiding transportation costs, those people who value large quantities of residential space will tend to reside in the areas where there are large location savings. One sees that suburban areas will naturally tend to attract high income households where transportation costs are far outweighed by residential space consumption preferences. Alonso and Muth use this general framework to explain the empirical reality of the aggregated distribution of residential densities with its declining land prices away from the city center and the related tendency of higher income families to live further from the center, that is, to
live in the suburbs.43

The suburban housing market will tend to be dominated by a group of consumers who place a higher value on residential space than on avoiding transportation costs. If we are looking at the suburban housing market as a whole, the possible consumers are, because of the high transportation costs to the suburbs, those who value space—the single-family home with attached yard being the archetypal residence. The central city areas will tend to have low-income residents who would have to spend larger proportions of their income on transportation if they lived in the suburbs. Instead of paying these transportation costs, they crowd into very small spaces and pay very high rents on a square foot basis. Still, these rents are, as a proportion of income, less than the transportation costs of coming into the city from the suburbs. The first radial of suburbs would tend to contain the middle-income groups who can pay more for transport (but a smaller proportion of their income). The outermost concentric zone would tend to have the highest income group who can afford high transportation costs and who want residential space which will be much cheaper on a square foot basis than the downtown land. Again this can be shown graphically, drawing upon Harris and Ullman's concentric zone concept as shown in Figure II.

Assume that in our metropolitan area there are fifty suburban municipalities ranging from middle-income out to high-income suburbs. Housing in these suburbs comes either from an upgrading of older housing stock or from the building of new units on converted rural land. As these suburbs use up their supply of rural land, new suburbs will be formed on the fringe to supply more land for conversion. Thus, for the metropolitan area as a whole, we can assume quite an elastic supply of new land. This seems logical so
long as the technology of transportation continues to improve or workplaces tend to spread out from the central cities (again in a radial manner), and the governments willingly provide services. By analogy to the theory of the firm, each suburb can be seen as a production unit of suburban housing with more units entering the market as other units reach their maximum size or capacity for production.

If the external impacts of growth in such a world are momentarily ignored, the suburb has only two reasons for intervening: to produce a different product, or to extract monopoly profits by artificially limiting supply. The worry is, of course, that it will attempt the latter, but as we noted, it is difficult to determine its motive. Even if monopoly is the motivation, it is, as we shall see, not necessarily correct to conclude that such monopoly behavior represents a social loss.

Let us examine what will happen if all of these suburbs, in any given concentric ring, are completely fungible, and one of them attempts to cap housing production or impose excessive charges. In such a situation, the housing consumer will simply switch to another suburb that is not attempting such a tactic. In the case of perfect competition, there will be no possibility of exacting any consumer surplus out of these suburban house buyers. There will, however, be the possibility of exacting some of the producers’ surplus because the landowner in one suburb cannot move to another suburb with his land. This will not affect the efficiency of the housing production for the suburb or the region. It does affect those landowners who might have been hoping for a little profit. But as we saw, if they knew of the risk, there is no fairness reason for compensating them.

Second, let us examine what would happen if all suburbs were taken over by one cartel of landowners who could limit all production and all access to the creation of new suburbs. In such a situation there could be monopoly profits and fewer houses produced. However, since we are looking at an entire metropolitan group of suburbs, such an eventuality is quite remote in the American metropolitan region with its myriad local governments. It would be extremely unlikely that the entire metropolitan unit would come

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45 For an attempt to empirically validate such regionwide monopoly, see Hamilton, Zoning and the Exercise of Monopoly Power, 5 J. Urb. Econ. 116 (1978).
under one monopolizing group of voters. Even Professor Ellickson acknowledges that "each metropolitan area is likely to contain some true 'tight little islands' that are permanently and steadfastly exclusionary . . . . Its central city and some of its larger and less elite suburbs, however, are usually vulnerable to developer influence, and many of its middle-class suburbs may occasionally be manipulable." There are a variety of reasons why this would seem to be true. The technology of transportation is improving, so new potential suburbs will continue to open up. The new spread of jobs to the suburbs should further increase the creation of new housing producing suburbs.

The problem then is the situation in which some of the suburbs have something unique about them and some of them on occasion attempt to exploit this uniqueness to increase their "profits" in the form of exactions or increased amenities. Typical of these suburbs would be those that have an outstanding library or an excellent school system.

In such a situation, the individual suburban government might find itself in the position of being able to influence the price of housing produced within its borders. Since its output decisions have an influence on price, we can say that such a suburb has local market power. We know that if we were looking at only one market, price would exceed marginal cost, leading to an inefficient use of resources. However, here we are looking at fifty-plus suburbs, and we can see that there will be possible costs, but these may not be social costs if they result in other efficiencies. The unique suburb will produce less housing than it would under competitive situations, and there will be a local cost equivalent to the amount of consumers' surplus that is spent on the higher priced housing within that suburb. But the impact does not stop there.

Three things will occur within the regional suburban housing market. First, consumers will have to substitute less desirable housing in other non-unique suburbs. These other suburbs will fill the shortfall in housing units. Second, seeing the potential for monopoly profits, other suburbs will attempt to duplicate these unique circumstances. Third, more suburbs may come into existence to provide either more housing or uniqueness. That is, the suburb down the ring somewhere will build its own superlative library or its own sailing park in an attempt to raise its housing prices. Since entry to the provision of suburban housing is not re-

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46 Ellickson, supra note 1, at 409.
strained, there will come a point at which a long-run equilibrium results from the entry of so many competing suburbs that no further opportunities for making a supranormal profit remain. For all suburbs that engage in this competition, the average total cost of housing will be somewhat higher than it need be if there were perfect competition, but that cost will reflect the cost of exploiting the uniqueness of these suburbs.\footnote{The issue then is whether the benefits of such differentiation to those new entrants or to the community outweigh the costs.}

To answer that question we have to explore this notion of a series of producers having a degree of control over the price of their product but subject to competition from more or less imperfect substitutes. The forces at work in such a market are called by economists “monopolistic competition.”\footnote{The important factor in such a situation is the character of the uniqueness which the suburb is exploiting. Such uniqueness has been defined by Ellickson as “unique topographic or cultural features, that offer unusual public services, or that have special locational advantages.”\footnote{What is important to observe about this definition is that, with the exception of location, each of these examples of a competitive advantage is exploited by extra productive effort on the part of the municipality rather than any capture of limited resources. Locational advantage is, however, different, for it is not within the productive control of the municipality. However, if we agree that it is politically impossible for a suburb to take over an entire concentric ring of a metropolitan area then this type of uniqueness exploitation will not occur, and the specific location within a band will not give the suburb exploitable uniqueness.}}

For the most part, the other “unique” community aspects are ones that the suburb itself creates through either its regulatory, tax or expenditure powers. For instance, there will be a number of communities at various distances from the city center with a variety of things that make them geographically special (lake views or beaches, etc.). Such communities will exploit these resources through their public decisions concerning how to use them (e.g., deciding that the canal front property should be in residential, not industrial, use). Similarly, cultural features or public services such

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\footnote{See generally J. DUE & R. CLOWER, INTERMEDIATE ECONOMIC ANALYSIS 218-39 (4th ed. 1961).}

\footnote{See generally E. CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION (3d ed. 1938).}

\footnote{Ellickson, supra note 1, at 430.}
as a good school system or the finest library in the world or the best park in the city are all unique features which are developed by the municipality itself. This type of product differentiation does not cause allocative inefficiency in the long run but is rather a way to make a better product. It is in fact the transformation of the housing package itself. The question to explore is whether government efficiency can be created by allowing suburbs to exploit these differences, for if efficiency is possible, then such differentiation of suburbs should be encouraged.

The Introduction of Externalities and Public Goods

To determine whether there is a good reason to allow such competition among suburbs, one must look to the public goods that these suburbs provide and the externalities they seek to control. The setting of standards for negative externalities and the amounts publicly paid for positive externalities or public goods is extremely complicated, and since I have promised to provide a modest model, I will fall back on some very well worn paths, principally those of Professors Tiebout and Buchanan. We know from the discussion in this article's first section, Economic Reasons for Growth Control, that the suburb is in a quandary. When the scattered group of citizens first incorporate, its average cost in providing various services is quite high on a per resident basis (e.g., the first resident would have to pay the entire cost of the first lifeguard's salary). The marginal costs will go down for a time as the suburb grows and begins to have some economies of scale (e.g., buying swimsuits for twenty lifeguards is cheaper than buying one suit). However, we know that at some point the individual suburb is going to have decreasing marginal benefits from growth. Thus, its old normal regulatory or tax rules may become increasingly costly.

In most situations where government is taxing and dispensing public goods, there is no way of measuring the public's valuing of them aside from votes. However, for our suburban housing market this is not one government, but rather fifty-plus suburbs each of which sets its own package of public goods which includes outright public expenditures, and also sets the balance between an individual suburban member's desires to maximize his own share of the

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goods while having those goods delivered at the lowest per capita average cost. That is, the suburbs resemble a market where public goods are “privatized” on a regional basis. The citizens in these suburbs have two ways of registering their preferences on these matters. They can vote for the local city council or they can choose a different suburb.

Tiebout has constructed a model based on this simple fact, showing that there is indeed a very good reason for allowing suburbs to differentiate themselves and provide different bundles of public goods. Tiebout makes seven assumptions for his model: (1) consumer-voters are fully mobile; (2) they have full knowledge of municipal packages; (3) there are large numbers of municipalities; (4) there are no employment restrictions; (5) public goods packages exhibit no external economies or diseconomies between communities; (6) every community has an optimum size; and (7) communities below the optimum size will attract new residents to lower average costs, and communities above the optimum size will seek to reduce the number of residents, and those at optimum size will stay the same.51 Tiebout concludes from his model that housing consumers will tend to force the local governments toward optimum public goods packages by voicing and voting their wishes for efficient combinations of city size and public goods scale at the local level, and on the regional level by moving to and voting in suburbs that have preferred packages.

The optimum package of public goods for some suburbs may be few members and very low provision of public expenditures. The high-income suburb may function best for its members where most services are private (e.g., private schools and garbage pickup) and there are few members partaking in the relatively high cost amenities (e.g., a beach with many lifeguards or gardens with many gardeners).52 Tiebout concludes that an integration of municipal governments would thus lead to a less responsive vehicle for establishing public goods levels. By analogy, any rules that engendered homogeneity of suburban public goods packages would similarly be unjustified on economic grounds. A series of suburbs in which some can set lids on their size while others grow, or where some have very high costs for amenities while others have low, is thus much more desirable from the vantage point of the allocation

51 Tiebout, supra note 50, at 419-20.
52 This type of situation is analogous to the one discussed earlier, notes 10-12 & accompanying text supra, where suburb residents’ preferences differ substantially from general societal preferences.
of government expenditures or the setting of congestion cost levels than is a series of suburbs growing as they have grown before with a uniform level of expansion. The granting of this power to exploit uniqueness does in fact promote efficiency in both the long and the short run.\textsuperscript{53}

There are two important points to make about this model. First, in order to insure that this system functions effectively, local decisionmakers, house builders and house buyers who make their preferences known all must have as close to perfect information as possible. The information requirement can be met through a decisionmaking system which brings forward all available information and allows all potential consumers (i.e., housing residents who can vote or move) to participate to the extent their wealth lets them. Thus, one could devise rules that would make sure that all potential consumers could avail themselves of real estate brokerage services, or rules which guarantee open hearings and reasoned deliberation when the municipality changes its control package.

Second, people can only participate in this system to the extent their wealth allows. This fact will result in a series of efficient suburbs, but it will also mean that poor people will "prefer"\textsuperscript{54} to live in the center city in overcrowded conditions because of the low transportation costs.

\textit{The Impact of the Property Tax: The Case for Intervention on Distributional Grounds}

We now have a model which explains some of the relevant factors in the suburban housing market. We saw earlier that unless all suburbs are somehow taken over by one centralized monopolist, there are no efficiency problems with letting individual unique suburbs attempt to exert market power by differentiating themselves through their regulation, tax measures or establishment of local packages of public goods, so long as the cost of that exploitation serves some social purpose.

We also considered why it might in fact be advantageous for municipalities to engage in such differentiation since it would lead to a region-wide improvement in the valuing of public goods (in this


\textsuperscript{54} Obviously, poor people's preferences for suburban space are limited by their lack of wealth.
case, congestion cost valuing and public expenditure valuing). This part of the model showed that allowing variations in municipal packages of control and tax, and radical rearrangements in those packages to meet increasing marginal costs of new entrants would be much preferable (on efficiency grounds only) to forcing the suburbs to any standardized packages, such as leaving them with their present set of controls and taxes. While there may be some distributional problems with surprising the "unlucky" landowners, there do not appear to be any efficiency problems.

We now have one final factor which we can add into this set of hypotheses: the impact of an ad valorem property tax. Up to this point we have ignored the fact that these suburbs employ a property tax based on land wealth and distribute the proceeds on an equal basis to all local residents by providing police and fire protection, and education. The question now is how does our model react to the addition of this important factor?

Let us examine one of our suburbs located at some distance from the city center. We know that there will be only a certain group of potential consumers who value residential space higher than transport costs and whose transport costs make up a small enough portion of their income to allow them to live there. Assume that we have a suburb that has homeowners whose homes range from $75,000 to $100,000 in market value. To the extent that property tax assessments are a valid indication of these values, then the homeowner with a $100,000 house will pay more money into the suburban coffers than will the person with the $75,000 house. If all these revenues are spread equally among the population of the suburb (i.e., in the form of equally accessible public goods like

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55 Because of Proposition 13 and the Serrano decision, much of the following analysis may not apply to California. Proposition 13, the 1978 amendment to the California Constitution, Cal. Const. art. 13A, put a limit on the rate of tax that any municipality may apply to local property. This would appear to limit the ability of the municipalities to charge varying tax prices for different packages of public services. However, the California municipalities have been very inventive in their use of benefit or user charges, or taxes, which may allow for differential prices between municipalities. Secondly, the California Supreme Court decision in Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971) (reserving and remanding); 18 Cal.3d 728, 135 Cal. Rptr. 601, 487 P.2d 929 (1976) (appeal from the decision on remand), further complicates matters by mandating some uniformity of per pupil expenditure in the public schools, thus limiting the local school board (which sometimes follow local government boundaries) in the discretion they have to vary public education packages.

parks, streets and schools), the tax will effect a redistribution of wealth from the owners of the more expensive to the owners of the less expensive homes.

Let us now see what happens when our suburb lets in ten new families whose income allows them to live there (in this case those that can afford $75,000 or $100,000 houses). If the prices of the ten new houses are spread out between $75,000 and $100,000 in the same way as the existing housing stock, then the proportional tax burden on the established residents is unchanged. Note, however, what happens if all of the ten units are of the $75,000 character. There will be ten more family consumers of public goods, but only a $750,000 increase in the tax base. Thus, the existing owners of $100,000 units will either have to accept a slightly lower output of services or agree to raise the local tax rate which will take more from the $100,000 unit owner than from the $75,000 unit owners. The reverse would of course happen if the community built ten of the $100,000 units adding $1,000,000 to the tax base and only ten new families. We see then that the property tax encourages all suburbs to set the per unit value of new units at or above the average value of the existing housing stock.

The next question is whether, on a regional basis, the suburbs can in fact get away with pricing the new unit value above the existing average value. It would seem that they can exclude the less than average priced structure, but would have difficulty in pushing the average cost of the new units much above the built stock average. This is because every housing consumer wants to cash in on the "free ride" afforded by higher priced housing in the neighborhood. In our example, if the suburb set all ten units at $100,000, the prospective buyers would rather go to the "fancier suburb" next door where the house unit prices are in the range of $100,000 to $150,000. The end result then would be a tendency toward stratification of suburbs by house value.

Once we see that the property tax will act as a price for public services and that any variation in property valuation will result in redistributions between relatively rich and relatively poor suburban residents, a great deal of insight is gained concerning exclusionary policies embodied in suburbs' regulatory and tax provisions. In such a world there will be suburbs that cater to various

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income households and that eliminate the possibility of redistribution of income inside the local suburban community. This does not suggest that there will be any efficiency problems with this mass of suburbs catering to a series of income related tastes. On the contrary, the suburbs will be quite efficient. The only possible efficiency relevance of this model is that this one criterion, keeping a uniform price on public services within the suburb (through the mechanism of uniformly priced houses), may overwhelm other variables and distort the decisionmaking of the municipality.

The distribution problem is of substantial significance. Income redistribution from the rich homeowner to the poorer homeowner or tenant is accomplished not only by the actual expenditure on public goods, but also by a series of transfers that are difficult to monetize, such as being able to go to school with children whose parents are very good at making a school district spend their money effectively. The lower income groups who could afford the added transportation costs will be unable to find a place in the suburbs where they might have some wealth redistributed to them through the mechanism of the property tax. Similarly, the high income groups will be able to insulate their major form of equity (their houses) from such redistribution. They will be able to live in efficient local jurisdictions and avoid wealth transfers effected through the local public sector. Thus, the combination of a series of suburban governments and the property tax creates a situation where suburbs are virtually prohibited from redistributing income. This may or may not be a good thing, depending on one's normative preferences for the level of government which is best able to accomplish wealth redistribution.

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This will be true so long as the property tax is a local property tax; that is, as long as the tax revenue collected in one community is spent for the benefit of that community. Some of the literature dealing with the California school finance case of Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971) (reversing and remanding); 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 (1976) (appeal from the decision on remand), and its progeny has suggested the possibility of a statewide property tax apportioned to local governments on a per capita or other relevant basis. See, e.g., Wise, School Finance Equalization Lawsuits: A Model Legislative Response, 2 Yale Rev. L. & Soc. Act. 123 (1971). If this type of property tax system were adopted, it would naturally lead to wealth redistribution since each individual would receive the same amount of money (allocated to his municipal government) regardless of how much property tax he had paid. See generally Comment, The Evolution of Equal Protection—Education, Municipal Services, and Wealth, 7 Harv. C.R.-C.L. L. Rev. 103 (1972).
The focus on the regional housing market when coupled with the property tax impact brings out a secondary distributional impact. Not only does the suburban resident of one of the outer concentric rings insulate himself from negative wealth distributions, but he also often manages to get a positive wealth distribution from the taxpayers in the center city. This is because he can commute into the central city and demand high levels of services from the central city, thus raising the costs of that city's services. He then flees back to the suburb, avoiding any property taxes which go towards these expenditures. These costs may be offset to some degree by other tax mechanisms (such as sales taxes or employment taxes) and by the distribution of non-residential property tax base (e.g., business structures), but the general picture is one of higher income suburban residents receiving a wealth transfer from lower income central city residents. This may or may not be a good thing, but it certainly is relevant when considering a system of giving some of these lower income residents positive wealth transfers by letting them live in the suburbs.

**JUDICIAL REVIEW OF GROWTH CONTROLS**

Our purpose in designing the model outlined above was to help us better understand the production of housing in an urban regional market and, more specifically, the justifications for and the effect of various types of growth controls imposed by suburban municipalities. Equipped with this understanding and based on the conclusions drawn from the model, we may now proceed to a discussion of the judicial review of growth controls.

We turn then to the courts, which are called upon to determine whether a given system of growth controls is justified. We begin with a critique of the "trust-busting" philosophy of Professor Robert Ellickson to which we have referred occasionally in the course of this article. We will then discuss proposals which support the present judicial approach to the issue of growth controls.

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60 Whether sales and employment taxes aid in wealth redistribution or rather, compound existing inequalities is dependent on whether most commercial and business establishments are located in high- or low-income municipalities. For a discussion of this problem as it relates to the sales tax, see Hagman, *The Use of Boundary Lines to Discriminate in the Provision of Services by Race*, 54 U. DET. J. URB. L. 849, 882-83 (1977).

The Trustbuster's Fallacy: A Critique of the Recent Call for State Constitutional Activism

At the beginning of this article, it was pointed out that Professor Ellickson has called for a judicial reversal of the present presumption of the validity of municipal land use policies.\textsuperscript{62} It is now appropriate, in the context of the model we have developed, to examine briefly the effect of using his suggested legal rules. It should be kept in mind that he would like to turn his suggested principles into a constitutional mandate for state courts to actively pursue. His proposed legal rules are summarized as follows:

1. A suburb must be entitled to force restrictions (sometimes cushioned by compensation) on landowners.
2. Injunctive relief is appropriate against a municipal program motivated by discrimination against ethnic or ideological minorities.
3. When a government prohibits subnormal land uses, a landowner should be required to prove that the prohibition is grossly inefficient in order to recover for any resulting diminution in the value of his land.
4. When a suburban restriction that dictates above-normal landowner conduct substantially reduces the value of a person's land, that person should receive compensation unless the suburb can affirmatively prove that its restriction is both fair to that landowner and efficient.
5. [D]evelopment charges designed to raise general revenue or to "internalize" the congestion costs of growth should be prohibited.
6. [D]evelopment charges levied on homebuilders to finance a specific service should be permitted if the charges help equalize the discounted net benefits each dwelling unit receives from that service over time. [D]evelopment charges even greater in amount should be permissible if the municipality can prove that they will both promote efficiency and enhance the long-term self-interest of those interested in housing construction.
7. A landowner's compensation is determined by how much the restriction reduces the market value of his land. [T]aking into account the valid development charges and uncompensated use restrictions that the suburb might have enacted.
8. Consumers should be entitled to recover (usually by class action) any damages they have suffered as a result of a housing

\textsuperscript{62} See notes 4-5 & accompanying text supra.
price increase attributable to a suburb's policies . . . [unless] the suburb demonstrates that its growth controls are not only efficient but also fair to them.63

While rules one through three merely follow present doctrine, the cumulative impact of rules four through eight is to place the suburb in a very different position from the one it presently enjoys. Our model and economic analysis show that these suggested novel rules both ignore capitalized expectations in the land market and miss the welfare gains that are attainable through the differentiation of suburbs. These two fundamental errors can be shown on a rule-by-rule basis.

Rule four would force the municipality either to not attempt to change its control package or force it to make an elaborate and expensive defense of the “efficiency” of its change. As we know, the suburb as it matures will reach a point where the marginal cost of new entrants will begin to increase dramatically. To force the municipality either to abandon any attempt to deal with the new entrants or to increase dramatically the economic, legal and administrative costs of imposing those costs would have disastrous consequences.64 The municipality would continue to accept a stream of new entrants based on the now outdated “normal” set of controls while its real costs increased with each new resident. Growth would occur in these higher cost suburbs rather than the least cost suburbs further removed from the city center and comparatively sparsely settled. Thus, all housing consumers as well as all present residents would lose because the costs of providing the package would, over the long run, be higher than necessary and the ability of the suburbs to change the product to reflect current demand would be similarly decreased.65 Most importantly, the suburb that desires to establish a great library or public marina and then to take advantage of that produced uniqueness would be prohibited from doing so.

Rule five would have similar consequences. As our analysis has shown, the new entrants bring a variety of costs to the suburb, some of which occur in close proximity to their houses, while others are felt throughout the community. If one is interested in the efficient production of housing packages throughout the region,

63 Ellickson, supra note 1, at 468-69.
65 The raising of local taxes to pay for such a compensatory scheme is a political if not legal impossibility. See note 27 supra.
one should steer development to the least-cost housing producer suburbs. To do this, one must “internalize” the congestion costs of the new entrants in order to place a price on development in that community. Thus this rule is clearly not efficient and its only possible justification is the equity ground of avoiding wealth distributions from unrepresented outsiders to overrepresented insiders. This justification seems spurious since if there is in fact a competitive group of suburbs, the insiders will not be able to set the price of entry any higher than the actual costs of that entry. In those admittedly few situations where monopoly power is present, the rule would still not seem to be justified unless it could be shown that the efficiency of the entire regional system of housing provision and the efficiency of local government are outweighed by this one local monopoly. Presumably, such cases would be so rare that no general rule should be formulated around them.

Rule six does at least allow the costing of the harm the new entrants occasion in close proximity to their dwelling, but its restriction concerning the equalization of net benefits would again dramatically decrease the efficiency of the housing delivery. As our analysis showed, the equal treatment norm only requires that all newcomers be treated the same throughout the region, not that newcomers and oldtimers within one suburb be treated similarly over time. The costs of the first entrant are in fact lower than the costs of the last entrant to an overcrowded suburb. Efficiency would again point towards pricing the harm each new entrant occasions in order to steer that new development to the least-cost provider at any point in time.

Rule seven is clearly erroneous except in those situations where the land market investor makes his decision in a situation of complete certainty of expectation of government land policy. Since this situation does not appear to have existed anywhere in the United States during the last twenty-five years, the rule would seem to be of little value.

Rule eight would again deter municipalities from making needed changes in their growth control packages and would thus decrease the efficiency of the overall system. Even if one did want to compensate the consumers on equity grounds in situations of monopoly, the correct formula for damages would be the amount the consumers pay in higher housing costs minus the amount they save by having both a more efficient system of local government and a more diverse selection of housing package products. Presumably either rule seven or eight would be impossible to apply in actuality.
because of the tremendous problems of proof in the setting of a multiplicity of impacts on housing costs and local government efficiency.66

Some Conclusions and Proposals

By combining the model's conclusions with a set of normative judgments which seem to have reasonable acceptance in present judicial thinking, we can gain a measure of insight into the present legal approach to suburban growth control. The model itself leads one to a series of conclusions concerning both the efficiency and the distributional impacts of the controls. It shows that the suburbs' use of their tax and police powers can only lead to inefficiency in two situations: (1) cases of pure monopoly with no new suburban housing producers being allowed entry; and (2) situations in which the suburbs cannot compete with each other in setting optimum bundles of public goods and externalities packages. It does show how the general efficiency of this quasi-market can be helped through the provision of information for decisionmakers, market mobility for consumers and open information processes for investors. Turning to the distributive impact, it shows that there will be two important sets of people whose interests should be considered. First, there is the landowner who may be affected by the use of those powers in a way that was not included as a priced-in risk of the investment over time. The second type of person is the potential resident who could afford the transportation costs to the suburb but who is precluded from receiving positive wealth redistributions because of the use of controls to keep new structure prices at average-built stock prices.

One can then combine these conclusions with a set of value choices which, in this author's opinion, reflect current judicial thinking. These choices concerning distributional justice and the judicial role are as follows:

(1) Individuals should receive compensation for losses occasioned by unpriced risks except in situations where the individual would agree that a policy of refusing compensation in such instances would promote his welfare in the long run.67

(2) Non-arbitrary wealth redistribution from higher income to

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66 The class action system Ellickson proposes may be procedurally defective and unrealistic. See Willemsen & Phillips, supra note 12, at 138-40.

67 See Michelman, supra note 36.
lower income people has positive value.

(3) Seen in the context of the progressivity of our national income tax and the present level of class, income and racial residential segregation, local governments are good vehicles for redistributing wealth, particularly non-monetized public goods. 68

(4) The courts are not a competent institution to make and monitor massive structural political reorganizations. 69

(5) Courts are a good institution for keeping local political institutions within their own procedural rules of operation. 70

(6) In situations where political minorities working within the political process are precluded from receiving wealth redistributions, the courts can provide certain limited amounts of such redistributions so long as they do not make too large a tradeoff at the expense of efficiency. 71

(7) The state courts are better situated to deal with local distribution problems than are the federal courts. 72

The conclusions drawn from the model and the normative value choices lead to a generalized set of legal policy guidelines which in turn can be distilled further into legal rules which bear a striking similarity to the present judicial approach.

A Set of Policy Guidelines

The policy guidelines that would follow are:

(1) In a metropolitan region with many suburbs, there are no efficiency grounds for interfering with an individual suburb's use of its powers so long as all households/consumers can participate in the quasi-market and all decisionmaking is based on adequate information.


69 Both courts and commentators have reached similar conclusions. The Petaluma court, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976), noted: "Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and appraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation. The reasonableness, not the wisdom of the Petaluma Plan is at issue in this suit." Id. at 906 (footnote omitted). See also Rose, supra note 1, at 17-21.


Irrespective of whether the suburbs set normal, below-normal or above-normal regulatory standards or charges, or even change those standards or charges, there will be no long term allocative inefficiency resulting from this action. Such actions should be allowed because in the quasi-market setting the series of competing suburbs will reach a long term equilibrium with resulting optimum packages of standards, public goods and sizes of housing producing communities. Less than optimum allocations could occur only in two situations where the pricing mechanism for the whole system was interfered with. First, this could occur when the entire metropolitan area was monopolized by existing residents and there was a limit on entry of new suburbs, and a lack of transportation improvements. The second situation would be one where there was an artificial restriction on the suburbs' powers to change their tax and regulatory packages.

(2) There are efficiency reasons for insuring that all potential households/consumers can participate in the quasi-market and that all public and private decisionmaking be based on as accurate information as possible.

The quasi-market will only function efficiently when all potential consumers can register their preferences by either voting or by moving. The decisionmaking of the consumers, the public decisionmakers and the private housing providers can only reflect the true demand and the true costs where information is as perfect as possible. Participation in the market and information in the marketplace can be assured by a variety of institutional rules. These rules would allow participation (i.e., irrespective of race, sex, nationality or other irrelevant variables) and encourage information flows to consumers (e.g., freedom of information, environmental impact assessments) and public decisionmakers (e.g., notice and due process requirements). The rules would also provide information for the private market housing producers (i.e., rules as to the time and degree of certainty of reliance on government action).

(3) There are distributional grounds for protecting "unlucky

73 On the importance of adequate information and procedures as a standard for judicial review, see Henke, Judicial Review of Local Administrative Decisions in California, 10 U.S.F.L. Rev. 361 (1976).

74 Note here that the market analogue depends upon the private housing producer to actually construct the housing. As long as that private producer knows the amount of risk in any of his investment decisions he can capitalize that risk into his price setting. For the efficient working of the market he just needs a rule, any rule, upon which to make his calculations. Thus, it is irrelevant whether the rule sets an early or late point in the development process where he can rely with certainty on the profits from his investment.
landowners,” but only to the extent of the reduction in value of their parcel below what a “losing” parcel would have been worth under the expected state of risk of government action. The compensatory remedy could either be in the form of money damages or in the form of the right to use the land for the “losing” parcel use.

The landowner who is taken completely by surprise by government action and who has not capitalized such a risk in his land market behavior should be protected on fairness grounds. In most cases it is irrelevant to a landowner whether this protection takes the form of some lessening of the standard (but not to the point of the winning standard) or a cash payment. However, there may be situations where the landowner has a high subjective value in his own use of the parcel which can only be protected through the lessening of the standard.

(4) Because of the combination of the property tax and suburbs’ powers there are distributional grounds for higher levels of government to mandate some percentage of lower-than-average-property-value new structures within all suburban jurisdictions. This forced share, however, should never be large enough to substantially impair the efficient operation of the quasi-market among suburbs.

This conclusion is based on the judgment that local governments are good vehicles for income redistribution and that high-income households should not be able to insulate themselves from transfers while enjoying the enhanced efficiency of the system. There cannot be too large a number of these new entrants because each tends to destroy the efficient operations of the quasi-market.

Before honing these policy judgments into legal rules, it is significant to observe that they can be carried out by institutions of government other than the courts. The state governments that have established the suburban entities, given them their powers and allowed their proliferation, have usually left them free to use their powers without state level administrative review of their individual proposals. While leaving the procedural supervision of the suburbs’ functioning to the courts, they have increased information availability by requiring environmental assessments and various administrative procedures. In order to decrease the impact of unexpected controls on landowners, the states have experimented with compensatory devices such as providing funds for open space acquisition and property tax advantages for various land uses such as agriculture. Concerning the problems of below-average-structure-value households, a number of states, such as Massachusetts with
its "anti-snob" zoning legislation, have made substantial innovations. If one were a policy advisor to state governments, the policy guidelines would point to the following advice: States should not mandate regional metropolitan government or abolish the suburban entities. States should explore the possibility of mandating some forced share plans to further local wealth redistribution, but not to such an extent as to destroy the efficiency of the whole system.

A System of Legal Rules

The legal rules which can be distilled from the general policy conclusions are strikingly similar to the present set of doctrines that are currently being followed by both state and federal courts. They are:

(1) There is a general presumption of the validity of a suburb’s use of its police and tax power.

The judiciary has been very deferential to local governments and quite tolerant of a vast array of mechanisms which have allowed new and different uses of the police and tax power. One can point to a variety of examples of this deference. The federal courts and in particular the Supreme Court have been loathe to review local actions on any grounds, much less efficiency grounds, and have been erecting standing obstacles to considerations of such review. A wide variety of mechanisms for flexibility, such as variances, special exceptions, floating zones and PUDS have been approved by the state courts. Similarly, the courts have allowed the suburbs to move from the control of externalities as defined in the traditional nuisance manner to more esoteric preservation.

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79 E.g., In re O’Hara’s Appeal, 389 Pa. 35, 131 A.2d 587 (1957).


suburbs came to discover their marginal costs of growth, the courts have legitimized regulatory schemes to control the speed of growth as well as schemes to pass on the cost of public services to new entrants. Finally, the courts' reluctance to grant standing to neighboring cities and potential housing consumers reflects a growing judicial reticence to supervise the general use of control powers.

This deference seems to be a sound institutional role for the courts once it is realized that judicial interference with the workings of the quasi-market between suburbs could lead to an overall inefficiency of public goods packaging within the entire metropolitan region. The courts' substitution of their own standards for an individual suburb's could not approximate the valuing of the public goods and externalities that local voters could exert either with their votes or their feet. The imposition of uniform standards for the entire set of suburbs (i.e., at previous normal levels) would lead to regional inefficiency.

(2) The presumption of validity can be rebutted where it can be proved that either some people have been denied access to the community on grounds other than their purchasing power (e.g., a denial of equal protection based on race) or that the process of decisionmaking has been biased or based on inadequate information (e.g., a denial of procedural due process).

The courts have been very active in insuring that the exercise of government powers by the municipality does not exclude citizens on the basis of racial classifications. If a substantial proportion of those who would register their preferences with their votes or by moving between jurisdictions are excluded from participation in the quasi-market, then the resulting decisions will be inefficient. Judicial intervention need not be justified on the distribution ground that these groups deserve more of the wealth in the community but on the efficiency grounds that their consumer prefer-

Metromedia, Inc. v. City of San Diego, 23 Cal. 3d 762, 54 Cal. Rptr. 453, 592 P.2d 728 (1979) (billboards); Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970) (architectural review).

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E.g., U.S. Steel v. Save Sanekey, Inc., 303 So. 2d 9 (Fla. 1974). See also note 76 supra.

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E.g., Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), aff'd en banc, 461 F.2d 1171 (5th Cir. 1972).
ences are not being taken into account.\textsuperscript{86}

The judiciary, particularly the state judiciary,\textsuperscript{87} has traditionally been concerned with the procedural fairness of individualized land use decisions. One can see this concern with the method of decisionmaking being carried forward in a number of new areas. Recent decisions have begun to require procedural fairness not only in the traditional administrative setting of a variance tribunal but more recently within the legislative halls themselves.\textsuperscript{88} Courts have not only held the various administrative and legislative bodies to their own rules of procedures, such as the number of hearings and adequacy of notice, but have also put in place stricter standards to insure the appearance of fairness.\textsuperscript{89}

Since the efficient functioning of the set of suburban governments depends upon the local legislators responding to the valuing of size, cost and service level by the local residents, these judicial interventions seem justified. The procedural protections and the intervention to deal with arbitrary decisions which do not reflect all relevant information and deliberation are a manner of insuring the reasoned valuing of local preferences.

(3) Landowners should be protected from "takings" to the extent of the reduction in value of their parcel below what a "losing" parcel would have been worth under the expected state of risk of government policy. The remedy available to landowners can be either damages or an injunction to allow use of the parcel not at its highest and best use but at the least beneficial use risked.

The courts have never set a single standard to deal with the takings problem;\textsuperscript{90} that is, when is the individual being asked to make too great a sacrifice for the common good? Our examination of the landowner's problem has shown that there are three crucial determinations to be made. First, what was the extent of risk of government policy that was capitalized into the land market price? This

\textsuperscript{86} See United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

\textsuperscript{87} See note 72 supra.


\textsuperscript{89} See, e.g., Chrobuck v. Snohomish County, 78 Wash. 858, 480 P.2d 489 (1971).

\textsuperscript{90} See D. GODSCHALK, D. BROWER, L. McBENNET & A. VESTAL, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT (1977); notes 30-32 & accompanying text supra.
shows whether the owner has suffered any unpriced risk that might need compensation. Second, one has to make a normative determination whether such losses require protection. Third, there is the institutional determination as to which unit of government should provide such compensation and how it should be established.

The variety of judicial doctrines which can be invoked (harms and benefits, physical invasion, diminution in value) all allow the particular judge to make his own conclusion on each of the three determinations.\textsuperscript{91} In different jurisdictions there are different methods used which reflect the local judiciaries' determination of the existing state of expectations upon the part of landowners. In some jurisdictions the judges feel that the landowner functions without any certainty of expectation as to the government's guarantee of potential urban use.\textsuperscript{92} In these jurisdictions, it takes something akin to physical invasion to amount to a constitutional taking. In other jurisdictions the judges feel there is a very high degree of certainty of government behavior and one sees the use of injunctions to protect such landowners from any surprise at all.\textsuperscript{93} In most jurisdictions, however, the judiciary is unclear about the capitalized expectation of government behavior in the land market place as well as about the solution of the distribution problem between this group and the rest of the citizens.\textsuperscript{94} The trouble with the doctrine is that judges have difficulty knowing what was or was not priced into the expectations which set market value, and have no normative consensus about when compensation is or is not required. Thus the "doctrinal schizophrenia"\textsuperscript{95} will no doubt be with us for a good long time, and our model does not particularly help

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\textsuperscript{91} See generally B. Ackerman, Private Property and the Constitution (1977).
\textsuperscript{92} See HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237 (1975); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). See also Hagman, The Taking Issue: The HFH et al. Round, 28 no. 2 LAND USE & ZONING DIG. 5 (1976).
\textsuperscript{93} E.g., Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954).
\textsuperscript{94} There have been numerous articles on the subject of what is a taking, but the area is still as murky as it was twenty years ago. See F. Bosselman, D. Callies & J. Banta, The Taking Issue—An Analysis of the Constitutional Limits of Land Use Control (1973); D. Hagman, Windfalls for Wipeouts: Land Value Capture and Compensation (1978); Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U.L. Rev. 165 (1974); Dunham, A Legal and Economic Base for City Planning, 58 Colum. L. Rev. 650 (1958); Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63; Michelman, supra note 36; Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149 (1971); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964); Van Alstyne, Statutory Modifications of Inverse Condemnation: The Scope of the Legislative Power, 19 Stan. L. Rev. 727 (1967).
\textsuperscript{95} Costonis, supra note 37, at 1047.
the judges in distinguishing when a "taking" has occurred. What it does, however, is to give some guidance to the judges once they have made the first two decisions (that there was an unpriced loss and that it should be protected). That is, the model shows that the correct compensation should only be the loss of value below the priced-in risk. If a judge determines the government policy was outside the boundaries of the capitalized risk he can protect the owner with damages representing the unpriced risk or an injunction for some minimal use within the risk. However, unless he thinks there was absolute certainty in the land market he would never grant an injunction at full market expectation (which rewards the owner for a risk he took and lost) or damages at the previous market price (which is the value before the risk was run).

(4) The presumption of validity can be rebutted where it can be proved that the suburb's program does not serve the regional welfare of lower income people. The proper remedy for the affected group is injunctive relief.

For the last two decades the courts have been grappling with the suburb's use of growth controls to create unified income and minimum price, residential-structure housing communities. The various state courts have taken very different approaches to these "exclusionary" controls. While some jurisdictions have not interfered at all, others, particularly Pennsylvania, New Jersey and Michigan, have intervened with regard to a variety of subject matters. These include invalidating or reducing large minimum lot size requirements and forcing provisions for mobile homes. Courts have also required the provision of apartment houses in communities without some substantial apartment development and on some occasions have struck down minimum floor space require-

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" There are a great many articles on the subject of exclusionary growth controls. For a complete bibliography, see 22 SYRACUSE L. REV. 627 (1971). For an analysis of the use of constitutional doctrine for redistributive purposes, see Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969).


Courts have intervened in a variety of instances where the suburb's use of its powers seems to be specifically designed to preclude one particular low-income project. Finally, the most important development has been recent judicial intervention to force local suburbs to take into account the regional welfare when establishing an amount of low-income, low price housing.

The exclusionary cases have not been dealt with in any uniform manner. Our model gives a clear picture of the reasons for this pattern of judicial behavior. The combination of a property tax, which finances local services that are distributed equally to all residents, with the suburb’s power to tax and regulate, produces a series of mono-income residential structures in each suburb. This system is efficient, but it precludes a wealth transfer between the suburbanite and any new resident who would live in a lower valued structure. Further, it produces a pattern of metropolitan urban living with a series of rigid regulatory and tax barriers separating rich from poor, and in the context of the current distribution of wealth, white from black, Asian or Chicano. Whether this is good or bad, and whether the courts ought to do anything about it depends on normative value judgments concerning the distribution of wealth, the character of a just society and the role the judiciary ought to play in establishing that society. Those judges in jurisdictions which do not intervene conclude that either local governments are not good vehicles for wealth distribution or that their judicial role prevents them from making choices they wish the state legislature would make. Those judges in jurisdictions that do force some level of lesser value structures make opposite judgments; that redistribution is necessary and they are the best situated governmental entity to make them.

These redistributions can only be accomplished by granting some group of lower income people access to the suburb, and thus the remedy must be an injunction rather than mere damages. The result of this is that even the most activist judge tends to be somewhat apprehensive about making decisions that will not only have distributive impacts of a regional importance but will also affect

the efficiency of the functioning of the entire set of suburbs. A murky set of doctrines allows the activist judge to limit his intervention to those situations where there are clear distributional inequities and only small efficiency impacts on the entire system. So long as he mandates a small percentage of lower-than-average-property-value dwellings within all suburbs, this should not seriously impair the efficient functioning of the quasi-market.

CONCLUSION

The courts are playing a crucial role in the public dialogue concerning suburban growth controls. It has been the purpose of this article to develop an appropriate economic model of the suburbs' functioning. This will allow the judiciary and its advisors to predict the efficiency impact of the various programs and to pinpoint the distributional problems with which they must grapple.

To construct this model, an analogy has been drawn between a private market and the quasi-market which exists in our metropolitan areas where households/consumers can choose among externality levels and public service bundles offered by the various suburbs.104 The model has shown that there are two very different and independent problems with which judicial doctrines must deal. The first is the efficiency of the entire system to meet the preferences of the household/consumer. The market analogue, like other markets, has shown itself to be quite efficient at meeting the demands of those people who have enough purchasing power to be in the market.105 The second is the distribution problem presented by those people who do not have enough wealth to participate.106 The quasi-market, like other markets, does not do a good job of redistributing wealth to those who cannot afford to utilize the market.

This distinction is a crucial one, for it indicates that it is logical for the courts to leave the quasi-market to function as it may, with local suburbs setting public goods levels and externality levels as they choose. Aside from ensuring the effective functioning of the market by, for instance, making sure that adequate information is provided, the present hands-off policy encourages efficient use of suburban resources. On the other hand, if social norms indicate that the existing distribution of wealth is inequitable, it is also

104 See notes 6-12 & accompanying text supra.
105 See notes 42-54 & accompanying text supra.
106 See notes 55-60 & accompanying text supra.
consistent for the courts to intervene in order to redistribute some of the suburban wealth to lower income households/consumers who cannot take advantage of this efficient regional system.